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

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[2] Died October 18, 1920.

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CASES REPORTED

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ARRANGED UNDER THEIR RESPECTIVE CIRCUITS

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SECOND CIRCUIT

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FIFTH CIRCUIT

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SEVENTH CIRCUIT.

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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

PENNSYLVANIA CO. FOR INS. ON LIVES AND GRANTING ANNUITIES, v. PHILADELPHIA CO. et al.

GATES et al. v. SAME.

(Circuit Court of Appeals, Third Circuit, May 25, 1920. Rehearing Denied August 14, 1920.)

Nos. 2551, 2552.

1. **Appeal and error ⇐80(6)—Order directing receiver to pay out part of fund is appealable.**
   Order directing receiver to pay out part of the fund in his hands to a claimant is a final determination as to that part of the fund, from which an appeal may be taken by creditors interested in the fund.
2. **Appeal and error ⇐150(6)—Interest of creditors, interveners below, sufficient to sustain appeal.**
   Creditors of an insolvent corporation, who were permitted to intervene below to oppose the payment to another of a fund in which they claimed an interest, have sufficient interest to enable them to maintain an appeal from the order for payment of the fund as against a motion to dismiss.
3. **Receivers ⇐155—Operating revenue payable for maintenance of the system, including rentals to subsidiaries.**
   The revenue from fares collected from a street railway system in the hands of the receiver of the holding corporation is payable for expenses of maintaining the system as a unit, including the payment of rentals to subsidiary corporations necessary to prevent foreclosure of mortgages on the property of such corporation.
4. **Receivers ⇐152—Operating revenues above current expenses are for creditors in order of priority.**
   The excess of operating revenues over current expenses of operating a street railway system in the hands of receivers constitute a fund in execution in the court for the benefit of creditors in the order of their priority, determined under the same rules as if the fund were derived from execution.
5. **Receivers ⇐150—Bondholders have interest in receivership funds before default in payment on bonds sufficient to oppose payments thereof.**
   The holders of bonds secured by mortgage on property of subsidiary corporations have an interest in the fund in the hands of the receiver of

the holding corporation, from which alone the subsidiary corporations derive their revenue, sufficient to entitle them to oppose the payment of such funds to other creditors, even though there has, as ordered, been no default in payment of interest on the bonds held by them.

6. **Receivers ⟸150—Bondholders of subsidiary company have interest in receivership funds of leased company sufficient to entitle them to oppose payment thereof.**

Holders of bonds of a subsidiary company are entitled to oppose the unwarranted payment of funds received from operating revenue by the receiver of the holding corporation, notwithstanding the rule that a mortgagee out of possession is not entitled to rents and profits, since the mortgagee is entitled to avail himself of any security which the mortgagor holds against a third person.

7. **Subrogation ⟸28—Guarantor of subsidiary companies' bonds has no right to reimbursement by the receiver for advances before paying entire debt.**

A guarantor of the bonds of subsidiary street railways companies, which had under its guaranty advanced sums to pay the interest on the bonds, is not entitled to repayment of a part of the sums advanced, from the receiver of a holding corporation, under any theory, legal or equitable, before it becomes entitled to subrogation to the rights of the subsidiary corporation by paying the entire obligation.

Buffington, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Separate interventions by the Pennsylvania Company for Insurance on Lives and Granting Annuities, trustee, and by Thomas S. Gates and others as a committee for bondholders, against the Philadelphia Company and others, in receivership proceedings against the Pittsburgh Railways Company, to oppose payment of a fund to the Philadelphia Company. From an order directing the payment, the named interveners separately appeal. Motions to dismiss appeals denied, and orders reversed.

Thomas Patterson, of Pittsburgh, Pa., George Wharton Pepper, of Philadelphia, Pa., and Watson & Freeman, of Pittsburgh, Pa., for appellants.

George B. Gordon and Edwin W. Smith, both of Pittsburgh, Pa., for appellees.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

WOOLLEY, Circuit Judge. The matter which these appeals bring here for review grew out of the highly complicated relations of the many corporations comprising the street railway system of Pittsburgh, and concerns but one of many rulings which the District Court has been called upon to make in the difficult operation of that system by receivers. We have recently had occasion to state with care the structure of the system and the relation its parts bear one to another. Allen v. Philadelphia Co. (C. C. A.) 265 Fed. 817. We shall, therefore, do no more in this opinion than give in outline so much of its organization as will bring to view the question before us and disclose the reasons for our decision.

Pittsburgh Railways Company controlled through stock ownership, leases and operating contracts, sundry street railway corporations, which in turn controlled through similar means other railway corporations, and they in turn still others, numbering in all about sixty, through whose lines, on being connected, it operated six hundred miles of street railways in the City of Pittsburgh and in forty other municipalities in the Pittsburgh district. The leases or operating contracts, extending from the most distant subsidiaries to and through the intermediary ones and centering ultimately in the Pittsburgh Railways Company, usually provided—as a part of the rentals—for the payment of money sufficient to meet interest obligations on the bonds of the underlying companies. Such rentals were the only source of income of the subsidiaries and to them alone they looked for money with which to take up their interest coupons. Their bond issues were many, differing greatly in amount, character, priorities and relative rank. To insure the flotation or to strengthen the security of about half of these bonds, Philadelphia Company, a corporation engaged in operating public utilities of different kinds, owning all the stock of Pittsburgh Railways Company, became guarantor for the payment of their interest and principal, leaving the other half without the security of its guaranty.

Among the bonds thus guaranteed were, for instance, issues of three companies subsidiary to Pittsburgh Railways Company, namely; Allegheny, Bellevue & Perrysville Railways Company, Morningside Electric Street Railways Company and Mt. Washington Street Railway Company. The Pennsylvania Company for Insurance on Lives and Granting Annuities, one of the appellants here, is trustee under mortgages made to secure these issues. Of bond issues of underlying companies not so guaranteed, Thomas S. Gates and his associates, the other appellants, comprising a bondholders' committee, hold bonds of forty or more of the underlying companies in an amount of many million dollars.

In 1918, being unable to meet its current obligations, receivers were appointed for the Pittsburgh Railways Company on a general creditors' bill. Manifestly, it was to the interest of everyone—the public, Philadelphia Company, Pittsburgh Railways Company, the underlying companies and holders of their bonds as well—that the many lines of railways brought together and welded into one great system under the name of Pittsburgh Railways Company should not be broken up. With this constantly in view, the court has guided the operation of the properties by the receivers under adverse war conditions and has disposed of the inadequate revenues coming into their hands in a manner to prevent foreclosure and consequent disintegration. It directed payment of rentals to certain subsidiaries whose primary or senior liens held such advantageous positions as to invite foreclosure, thereby forestalling foreclosure and disruption; leaving secondary, subordinate, or junior liens of these and other corporations unsatisfied, in the belief, doubtless, that their disadvantageous positions were in themselves security against foreclosure. The court, however, went still further in its plan to distribute income in a manner to pre-

vent foreclosure, and availed itself of the guarantees of the Philadelphia Company as an asset of the situation. When the decreasing income would admit of nothing else, it authorized distribution only to those underlying primary and senior liens which did not have the Philadelphia Company's guaranty, leaving the holders of guaranteed bonds to look for payment of interest to their surety, although some of these bonds were of equal rank with the others.

To meet its obligations of guaranty, the Philadelphia Company, when confronted by impending default of underlying companies in the payment of interest on their bonds, advanced, not to Pittsburgh Railways Company, but to the underlying companies themselves, various sums of money amounting in all to $1,217,602. With the sums so advanced from time to time, the underlying companies paid the interest coupons of their bond obligations.

In the course of its administration, the revenues of the receivership increased, due largely to an increase of fare. Thereupon Philadelphia Company petitioned the court to direct the receivers to reimburse it for all moneys it had thus advanced. The petition was resisted by the receivers, by the City of Pittsburgh—because of the railway companies' franchise obligations—by a trustee of mortgages issued to secure bonds which were guaranteed, and by a bondholders' committee holding bonds in the main not guaranteed, the latter two being the appellants in this proceeding. The court, pursuing its policy of protecting senior liens as a means of holding together the railway system for the good of all, denied the petition of Philadelphia Company in so far as it asked for reimbursement of moneys paid by it on its liability as guarantor of subordinate or junior liens, but granted its petition in so far as it asked for reimbursement for moneys paid by it as guarantor of first and primary liens, up to the first of October, 1919, amounting in the aggregate to $495,145, and entered an order accordingly. From this order, these appeals have been taken.

The appellants are met on the threshold by a motion of the appellees to dismiss the appeals on two grounds: First, that the order appealed from is not final; and, second, that the Pennsylvania Company for Insurance on Lives and Granting Annuities, Trustee, is a mortgagee out of possession with nothing due, and that the bondholders' committee could in no event receive the money, and, that, as both are without interest in the fund, both are without right to maintain these appeals.

[1] In denying this motion, it is sufficient to say, very briefly, that the order appealed from directs the payment of the fund to one determined to be entitled to it. It is both a disposition of the fund and a determination of the rights of everyone claiming it. On performance, the money would pass beyond the control of the court forever. As nothing remains to be done, except to pay over the money, it is a final determination of the particular matter, and is, therefore, a final decree and appealable, although the receivership, having to do with innumerable unrelated matters, shall still continue. Ruggles v. Patton, 143 Fed. 312, 74 C. C. A. 450; Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157.

[2] The appellants' right of appeal depends upon their interest in the fund, and upon their interest in the fund depended their right to intervene and be heard in the court below. They did intervene and they were heard. The appellants' claimed interest in the fund was there in collision with the appellees' claimed right to the fund and was considered and disposed of by the court, as shown by its opinion and order. Therefore, we regard the appellants' interest as a matter more properly to be considered on review of the whole controversy brought here on appeal than on motion to dismiss the appeal.

What interest, if any, did the appellants, in their different capacities of trustee under mortgages and holders of bonds of various issues of underlying companies, have in the fund which entitled them to be heard with reference to its disbursement?

This question involves two others: First, the character of the fund; and, second, the relation which these claimants bear to it.

[3] We think the fund may be properly described as operating revenue. It represents the accumulation of car fares collected by the receivers of Pittsburgh Railways Company from the many railway lines of subsidiaries in their possession and operation. It is applicable as well to the cost of maintaining as to the cost of operating these lines in one system. The cost of maintaining the system involves incontestably the payment of rentals to subsidiaries in order to enable them to meet their interest obligations, but for which foreclosure and the system's disruption would inevitably follow.

[4] If the fund had arisen in the same way at a time when the Pittsburgh Railways Company was not in the hands of receivers, and if that company had signified its intention to respond to a like demand of the Philadelphia Company for reimbursement for like advances, it may be that trustees of trust mortgages and bondholders would be without interest in the fund capable of assertion and therefore without right to oppose such disbursement. But the situation here is different. We are not concerned with a solvent debtor disposing of its assets in a manner that would neither disturb its solvency nor deplete the security of its creditors. We are concerned with an insolvent debtor, in the hands of receivers, collecting revenues indiscriminately from the operation of various street railway lines in its possession—properties pledged to secure creditors —and after placing the revenues in a receivership fund, proposing to pay a part of it to one, who, if a creditor at all, is not a creditor of the rank of others. These many railway lines gathered together in one great system have been taken in equitable execution by receivers on a general creditors bill. The properties thus being in execution, it is clear that the revenues arising from them are equally in execution, and after payment of current expenses, are held for the benefit of all creditors according to their rank and priority, determinable in the same manner as if execution at law had been levied. Thomas v. Cincinnati, etc., Ry. Co. (C. C.) 91 Fed. 202, 204; Haehnlen v. Drayton, 192 Fed. (C. C. A. 3d) 300, 112 C. C. A. 558.

[5] Among these creditors are the intervenors below and appellants on these appeals. Being creditors they bear to the fund the rela-

tion of execution creditors to property levied upon, and, accordingly, have an interest in the fund, both present and prospective. They, of course, have no present interest in the fund in the sense of a present right to demand and receive it, when, in fact, there has occurred no default in interest payments due them. But, as the revenues of the receivers were gathered from the pledged properties, taken and held in equitable execution, and as such revenues are liable prospectively for the payment of interest debts when they become due, the trustee of trust mortgages and holders of bonds have a present interest in a transaction that tends unlawfully to divert these revenues and thereby to diminish the debtor's capacity to meet its prospective obligations.

[6] The appellees' claim that the appellant mortgagee trustee and bondholders have no interest in the fund because they are in the position of a mortgagee out of possession, and are not, accordingly, entitled to the rents and profits of the mortgaged premises, does not dispose of the question of the appellants' interest in the fund; because there enters here another principle, that one who has assumed the payment of a mortgage debt is in equity liable to the mortgagee for any deficiency, upon the equitable doctrine that a creditor (the mortgagee) is entitled to avail himself of any security which his debtor (the mortgagor) holds against a third person (in this case Pittsburgh Railways Company) for the payment of the debt. Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; Union Mut. Life Insurance Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650. This principle of equity is applicable to the undertaking of Pittsburgh Railways Company under its operating contracts with its subsidiaries to pay rentals covering interest on their mortgages issued to secure bonds, and makes Pittsburgh Railways Company, so long as these contracts are in force, ultimately liable in equity to the trustees of the mortgages and to bondholders for any deficiency remaining after the mortgagors' default. To protect the enforcement of this right by preserving from depletion a fund against which it might prospectively be asserted, we think the appellants had as intervenors below an interest which entitled them to be heard, and on an adverse ruling, an interest which entitles them to bring and maintain these appeals. Being of this opinion, the next question is:

[7] What legal or equitable right had the Philadelphia Company to the fund?

This is the main question in the case, because it is to be noted that the appellants challenge the court's order directing payment of the fund to the Philadelphia Company, not as an abuse of its discretion in the administration of the receivership, but as erroneous because opposed by law and equity.

The only possible right of the Philadelphia Company to reimbursement by the receivers of Pittsburgh Railways Company arises from its undertakings of guaranty and its part performance. By force of these undertakings, Philadelphia Company advanced money, not to Pittsburgh Railways Company, nor to its receivers, but directly to the underlying companies with which it had contracted. It then came

to the receivers of the Pittsburgh Railways Company and asked them for reimbursement for advances thus made to these subsidiaries. On what ground? If the Philadelphia Company made these advances voluntarily, it cannot, upon obvious principles, come to the receivers as a volunteer and make a valid claim for reimbursement. There is, moreover, a doubt whether the Philadelphia Company is even a general creditor of the Pittsburgh Railways Company or of its receivers, entitling it to demand reimbursement; for there is no evidence that either the Pittsburgh Railways Company or the receivers contracted with the Philadelphia Company to make the advances or to reimburse it for them. The contrary is indicated by the resistance the receivers made to its petition for reimbursement. Nor did the Philadelphia Company come into court in the character of a lien creditor; for its demand to be reimbursed for advances was not based either on assignments by the subsidiaries of their claims against the Pittsburgh Railways Company or on its possession of the interest coupons taken up with its money. Nor can it claim reimbursement on the ground that these advances constitute an operative expense of the receivership, because it made them, not to the receivers in aid of their operation, but to subsidiaries not themselves in the hands of receivers. Nor were they made at the instance of the receivers, but by compulsion of its own contracts of guaranty. While no doubt the advances enured greatly to the benefit of the receivership and aided materially the purpose of the court to hold the system together, they did not constitute an expense of operation either incurred by or imposed upon the receivers. True, if the Philadelphia Company had not made the advances, the receivers would have had to pay the rentals or suffer the danger of foreclosure and disruption of the system. But the situation contained the element of the Philadelphia Company's guarantees. These compelled the Philadelphia Company to make advances or default on its own contracts. Once having made the advances as guarantor, the Philadelphia Company had open to it two remedies for reimbursement; one as a general creditor against the subsidiaries whose bonds it had guaranteed and whose debts it had in part paid; the other against the receivers of Pittsburgh Railways Company when it had reached a position in which it could invoke the doctrine of subrogation.

As the Philadelphia Company is not here seeking reimbursement from the debtor subsidiaries, our only concern is whether it is entitled to reimbursement by way of subrogation from the receivers of Pittsburgh Railways Company under its contracts with the debtor subsidiaries. At the hearing below, counsel for those opposing the petition insistently urged that the Philadelphia Company could not prevail on this ground as it had not paid in full the debts it had guaranteed, and, therefore, was not in position to succeed to and assert creditors' rights. Of the same opinion evidently was the learned trial judge, for in resting his order on other grounds, he said that the principle of subrogation "ought not to control in the case." Of the same opinion probably were counsel for the Philadelphia Company, for when they came into this court, they did not, either in their brief

or at the oral argument, discuss the question at all, but sought to sustain the order on the ground of its justice and equity. From the position taken by the court below, and from the line of argument pursued by appellees' counsel, as well as from the undisputed fact that the Philadelphia Company had performed its guarantees only in part, we do not find it necessary to discuss what seems to be without exception the settled law that payment of the whole debt for which a surety is liable is essential to subrogation. Columbia Finance & Trust Co. v. Kentucky Union Ry. Co., 60 Fed. 794, 796, 9 C. C. A. 264; Kortlander v. Elston, 52 Fed. 180, 2 C. C. A. 657; Musgrave v. Dickson, 172 Pa. 629, 632, 33 Atl. 705, 51 Am. St. Rep. 765; Morrison v. Citizens' National Bank, 65 N. H. 253, 20 Atl. 300, 9 L. R. A. 282, 23 Am. St. Rep. 39; Brandt on Suretyship, § 338; 25 R. C. L. 1318, 1319.

From this analysis of the case, we are at a loss to find by what right, legal or equitable, the Philadelphia Company can validly assert a claim for reimbursement from the receivers of Pittsburgh Railways Company for moneys it was by its own contracts required to advance to that company's subsidiaries. We realize the underlying purpose of the court's order, which was to prevent dismemberment of the system and consequent disadvantages, amounting perhaps to disaster, to many of its creditors, but we do not see just how the court's order reimbursing the Philadelphia Company for moneys which by its obligations of guaranty it was bound to advance the subsidiaries, tended to prevent dismemberment of the system; nor how an order refusing reimbursement would tend to bring it about.

We are loath to disturb any of the rulings which the District Court has been called upon to make in its admirable administraton of this most difficult receivership, yet we cannot avoid finding that in the order appealed from the court fell into error. While we are constrained to reverse the order, we limit our decree strictly to the matter before us and neither express nor intimate an opinion as to the manner in which the District Court shall dispose of this or any other fund in the hands of its receivers.

The order below is reversed.

BUFFINGTON, Circuit Judge, dissents.

AGASSIZ v. TREFRY et al.

(Circuit Court of Appeals, First Circuit. June 15, 1920.)

No. 1451.

Taxation ⟸93(1)—Acts insufficient to effect change of domicile for purpose of taxation.

Complainant, domiciled in Massachusetts, where he owned two residences, occupied by himself and family alternately in summer and winter, and who also owned an undivided interest, with his brothers, in the former home of his deceased father in Newport, R. I., where he and family occasionally spent a few weeks in summer, by announcing his intention to

change his domicile to Rhode Island, removing his securities there, going there on tax day in Massachusetts each year, and voting and paying his personal taxes there, but without any actual change of residence, his houses in Massachusetts being kept open and occupied as before, and his family being in Newport but three weeks in the ensuing two years, *held* not to have effected a bona fide change of domicile, which exempted him from income tax in Massachusetts.

Aldrich, District Judge, dissenting.

Appeal from the District Court of the United States for the District of Massachusetts; George W. Anderson, Judge.

Suit in equity by Rodolphe L. Agassiz against William D. T. Trefry and others. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 260 Fed. 226.

Stoughton Bell, of Boston, Mass. (Julian Codman, Coleman Silbert, and Putnam, Putnam & Bell, all of Boston, on the brief), for appellant.

William Harold Hitchcock, of Boston, Mass. (J. Weston Allen, of Boston, Mass., on the brief), for appellees.

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

BINGHAM, Circuit Judge. This is an appeal from a decree of the District Court for Massachusetts dismissing a bill in equity brought to restrain the tax commissioner of Massachusetts from collecting an income tax assessed against the appellant for the year 1917 under the Massachusetts Income Tax Law. St. 1916, c. 269.

The question in controversy is one of domicile. If the appellant was domiciled in Massachusetts any time between January 1 and June 30, 1917, he was subject to the tax. He claims that he was then domiciled in Newport, R. I. In the court below it was ruled and found that in 1917 he was domiciled in Hamilton, Mass. The question on this appeal is largely one of fact, namely, whether, on the evidence, the conclusion reached was right.

It is conceded that the appellant was domiciled in Hamilton down to the fall of 1914 or the spring of 1915. The question, therefore, reduces itself to this: Whether he took such a course of action and with such an intent as to change his domicile to Newport in the fall of 1914 or the spring of 1915. His domicile in Hamilton is presumed to continue until he acquired a new one; and he could acquire a new one in Newport only by actual residence there, coupled with the bona fide intention of abandoning his domicile in Hamilton and making Newport his permanent abiding place. As the appellant asserts that this change took place, he has the burden of establishing it.

The appellant's father was for many years a resident of Cambridge, Mass., but in 1896 or 1897 he became a resident of Newport, having acquired about the year 1872 a very substantial estate there as a summer home. He died in 1910, leaving a large estate, part of which consisted of the Newport house. He left three sons, whom he appointed trustees of his estate. The appellant's two brothers have

long been domiciled in Newport. One is a bachelor; the other is married, but has no children. The Newport house, subject to a contingent interest in Harvard College, passed under the father's will to the three sons. After the father's death in 1910, and prior to the appellant's alleged change of domicile in 1914 or 1915, the brothers, or some of their families, spent a part of each summer or fall at the Newport house, the place being opened by the bachelor brother and his servants; and the brothers, since the father's death, have shared the expense of running the place. There is no evidence in the case from which it can be found that after 1896 or 1897, when the father took up his domicile in Newport, the father's domicile was that of the appellant.

The appellant and his family spent a large part of the summers of 1910 and 1911 in the Newport house. Since then neither he nor his family have spent a summer there. For many years he has owned an estate in Hamilton, assessed for $35,000 to $45,000, and also a house in Boston, assessed for $60,000 to $70,000. His family, now consisting of a wife and an unmarried daughter, have habitually spent their winters in Boston and summers in Hamilton. In November, 1914, acting under the advice of counsel, the appellant wrote the assessors of Newport, notifying them that from and after that date he should claim his residence in Newport, and on March 16, 1915, he wrote the board of assessors at Hamilton that he had become a citizen of the city of Newport, where in the future he should pay his poll and personal taxes. Since 1915 he has described himself as of Newport. Down to that time he had paid taxes on his Hamilton real estate and on his personal property, including securities, in that town. The taxes paid there varied from $2,000 to $3,000 a year and the rate was from $10 to $12 on a thousand. In the spring of 1915 he registered as a voter in Newport and has since voted there. He bought a piece of real estate in Rhode Island, paying therefor something less than $1,000, to entitle him to certain voting privileges, and has since been taxed there for it. At or about this time he engaged a safety deposit vault in Providence, and moved his securities there. He opened an account in the Newport Trust Company, where he kept funds sufficient to meet his Newport expenses. In 1915, and since then, he has paid taxes in Newport on the third of his father's estate represented by him as trustee, and on his one-third interest in the furniture, boats, and carriages at the Newport house, which was assessed to him individually; but the taxes, if any, which he has paid on his securities since 1915, are negligible. He has also paid his federal income tax in the Rhode Island district.

In 1915 he occupied the Newport house three weeks in September, and was personally in Newport, though not at the Newport house, on the 1st of April, the Massachusetts tax day. During that year the Hamilton house was kept open from the latter part of May to the latter part of November, where his family and servants were practically all that time. His Boston house was kept open about six months during the winter, where his family resided, and where he stayed when he could and his business permitted.

In 1916 the appellant was in Newport April 1, over tax day, but neither he nor his family were at the Newport house that year. The house at Hamilton, however, was open and occupied by his family from the last of May until the 3d of September, and his Boston house was open and occupied that winter substantially the same as in the winter of 1915.

In 1917 the appellant was at the Newport house for about a week in August, and Mrs. Agassiz was there for a few days in September. He was also in Newport over April 1, the tax day in Massachusetts. That year the Hamilton house was open and occupied by the family from May 16 to September 12, and the Boston house in the winter as before.

In 1918 the appellant was in Newport over tax day, April 1, but not at the house. His family was not there at all. The Hamilton house was occupied by the family from May 4 until the 3d of September, and the Boston house was open and occupied as usual during the winter.

The appellant has large business interests in Boston, New York, and Michigan, in all of which places he spends a good deal of time each year.

After giving due consideration to all the evidence in the case, of which that above narrated constitutes the substantial part, we are unable to find that the appellant had a real abiding place in Newport, or that he intended in good faith to make it his permanent home. The evidence shows that he did not change in any degree his mode of living; that, on the contrary, he spent less time in Newport after the spring of 1915 than he did prior thereto and subsequent to his father's death; and that what was true of himself was equally true of his family. Judged by the conduct and mode of living of himself and family, Hamilton continued to be the place where he resided and maintained his home, while his trips to the Newport house were casual, of brief duration, and at such times and under such circumstances as to lend little, if any, weight to the idea that Newport was his permanent residence and intended to be such.

Being of the opinion that the appellant has failed to establish the facts essential to a change of domicile, we think the decree of the court below should be affirmed.

The decree of the District Court is affirmed, with costs to the appellees.

ALDRICH, District Judge (dissenting). Contrary to the majority opinion, I am drawn to the conclusion that Mr. Agassiz should be treated as having abandoned his Massachusetts domicile and as having established one in Newport, R. I.

This case involves a situation in which the man had several residences, as he properly might have. He had diversified business associations and interests. He had business offices in different places, including Boston, New York, and Michigan, where business with which he was connected was transacted. During the World War he was in the government service—on the copper committee which handled

copper for the government and the Allies—and this kept him much away from all his residences for a considerable part of the time during the period in question. He had a house on Commonwealth avenue in Boston, and abided there more than anywhere else; but there is no suggestion that Boston was his domicile.

Under such circumstances, while the purpose to change a domicile must be in good faith, and reinforced by some substantial acts, the question of domicile is, after all, in a considerable measure, within the control of the individual.

The purpose must, of course, be genuine, and not for evading taxes, and not with any wrongful intent in respect to obligations to governments or communities.

I give very little thought to refinements in arguments as to shades of differences between a wish and an intent, because Massachusetts does not question the purpose, or the general good faith, of Mr. Agassiz. Its sole ground for attempting to collect the tax in question is that the acts were not sufficient to amount to an abandonment of domicile.

I assume that, in order to throw up one domicile and to establish another, the purpose and the good faith must be supplemented by substantial acts and substantial changes, and in view of the purpose here, and the unquestioned good faith, I think there were sufficient substantial acts.

There was notice to the Massachusetts authorities, in 1915, as to what the man proposed to do, and it is apparent that he wished to do what he proposed.

Since he gave his notice to the Hamilton authorities, in 1915, the Hamilton authorities acquiesced in the proposed abandonment of domicile, or, as Judge Anderson finds, the Hamilton, Mass., authorities accepted the notice as sufficient, and assessed no personal tax against Mr. Agassiz until 1918, when the Massachusetts commissioner undertook to collect the state income tax for 1916 and 1917, or for 1917 and 1918, the record is not quite clear about the years, but that is of no particular consequence upon the main question.

There was full and adequate notice of the proposed change to the Rhode Island authorities in 1914. Mr. Agassiz moved his securities from his Massachusetts vaults to those of Rhode Island and retained no vaults in Massachusetts. He opened and continued a bank account in Newport, he has exercised the right of suffrage and has voted in Newport since the spring of 1915, and since then, for four years, he has made his federal income tax returns in Rhode Island, and paid his personal taxes in Newport.

By reason of his change the Newport assessors increased the assessment upon his interest in the father's trust estate, and he has paid that tax. He was in Newport and Rhode Island to a considerable extent, and it does not weaken his right to say that he was there with the idea of effectuating his purpose.

The place where he sought to establish his domicile was the place of his father's domicile; it was the place of his youth, and of his young manhood, or, in Mr. Agassiz's own words, "I was brought up

in Newport, that is, always from a small boy," and with it, in a large sense, were associated the traditions and the fame of his distinguished father, and, under the circumstances, his purpose to return would seem, not only natural and reasonable, but laudable.

The purpose to return to the father's last domicile being genuine, and the purpose being effectuated by substantial changes in property conditions, like transferring property from one jurisdiction to another, and by a change of voting place, and by some abiding, the question of domicile does not necessarily depend upon any given length of actual abiding.

As a man's life advances, he may change his view as to where he wants the domicile of his later life—of his declining years. He may prefer the last ancestral home and domicile, in which he has retained his legal interest, to that of the scenes of the country home and the polo fields of the younger years. He may have very strong convictions about it, and, if he has, the law of domicile is not so rigid, or so arbitrary, as to require him to pull up all his stakes in the one field and to put them all down in another.

The fact that Mr. Agassiz sought the advice of counsel as to what to do is not to be taken against him. It would be quite the natural thing for a man who is not a lawyer, a man with official duties, a man of large business affairs, with business offices and business connections in different states and cities, with different residences and abiding places, to seek the advice of a lawyer, with the view of ascertaining what was necessary to accomplish, in a legitimate way, the purpose which he had in mind.

It is apparent that Mr. Agassiz had strong convictions about the question of domicile, and a careful reading of his testimony shows that his purpose was prompted by a deep, abiding, and commendable sentiment. There is nothing in the testimony to justify any question, or any hesitancy, about the good faith of his purpose.

The presumption as to an old domicile—whether it is a presumption of law or of fact—is of very little weight. It is quite fictional, and, when mingled with substantial acts, based upon unquestioned good faith, and a commendable purpose, it readily yields whatever weight it has to the rightful circumstances of a given case. The same is true of the suggested rule of burden of proof, which at the most is a mere shadow, whose actual weight, if any, no one has ever discovered.

In view of the purpose in this case, I think the domiciliary law is not so absolute as to require a critical analysis, or a critical minimization of the acts, the changes, and the counting of days and months of abiding in this place and that.

This is not a tricky case, like one to avoid military or other government obligations. There is no general question of public policy involved in a domiciliary situation with the characteristics present here. There are no unyielding vested public or private rights.

In the fair sense, no community, no municipality, and no government would be wronged by the change of domicile sought; therefore

I think Mr. Agassiz should have his domicile where he wants to have it. I think the purpose and the very substantial acts justify such a conclusion.

HAGEMEYER TRADING CO. v. ST. PAUL FIRE & MARINE INS. CO. THOMSEN et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

Nos. 198, 199.

1. **Insurance ⟸416—Marine insurer of cargo of prize cannot defend against loss on ground of negligence of prize crew.**
   Where an insurer of cargo against fire, after knowledge that the ship had been captured as a prize of war, renewed the insurance for an additional premium, it cannot defend against a loss by fire on the ground of negligence of the prize crew.

2. **Insurance ⟸413—Fire held proximate cause of loss of cargo, although, after being given up, vessel was sunk.**
   Fire originating in the coal bunkers of a prize vessel, which despite all efforts to stop it progressed until in the judgment of the commanding officer the vessel could not be saved, *held* the proximate cause of the loss of cargo, within the terms of an insurance policy, although the ship was then taken into shallow water and sunk.

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

Separate suits in admiralty by the Hagemeyer Trading Company and by Hugo A. Thomsen and another against the St. Paul Fire & Marine Insurance Company and on separate policies of marine insurance. Decrees for libelants, and respondent appeals. Affirmed.

Certiorari denied 253 U. S. ——, 40 Sup. Ct. 588, 64 L. Ed. ——.

Harrington, Bigham & Englar, of New York City (D. Roger Englar and Oscar R. Houston, both of New York City, of counsel), for appellant.

Burlingham, Veeder, Masten & Fearey, of New York City (Van Vechten Veeder and Ray Rood Allen, both of New York City, of counsel), for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The Santa Catharina left New York on July 25, 1914, bound for Rio de Janeiro. She carried cargoes which were insured by the appellant. She was a German steamship. Before reaching her port in South America, the recent war between Great Britain and Germany broke out on August 11th, she was seized as a prize by his majesty's ship Glasgow in latitude 18° 30′ and longitude west 38° 24′. The marine risks expressly assumed by the underwriter were against fire. The policies contained the usual clause, excepting loss or expenses arising from capture, seizure, restraint, detention, or destruction, or the consequences thereof; also from all consequences of riots, insurrections, hostilities, or warlike operations. The circumstances concerning the seizure of the vessel and the sub-

sequent burning of the same are set forth in the proof, pursuant to a stipulation, by submitting copies of the affidavits of British naval officers, which affidavits were used in the British prize court on the trial of the claim by a shipper for compensation from the British government on the ground that the loss of its cargo was occasioned by the negligence of the captors.

After being captured, a prize crew was placed on board. She was not taken to any port, but remained anchored at a spot on the South American coast outside of territorial waters and in the near vicinity of a rendezvous of British ships of war and their colliers, store ships, and prizes. The prize crew was composed of men taken from the Glasgow, with a lieutenant of the British navy, a petty officer, an able seaman, and two stokers. The lieutenant's affidavit says that his attention as called to the high temperature of the coal on board, especially in the thwartship bunker, which appeared to have had water poured on it by the German crew. He ventilated the coal by taking off the hatches, closed the apertures below to prevent air passing through the coal, and watered it as much as possible. On September 30, he got up steam in one boiler and pumped water on the coal, and on October 1, Admiral Grant, of the British navy, who had taken charge of the ships at the rendezvous, came aboard and gave directions that the heated coal, which was principally on the starboard side of the bunker, should be removed from that on the port side, which was not heated, and this was done. The lieutenant says it was not possible to jettison the coal, and this, because there was too much coal in the bunker for jettisoning with the crew and appliances which were available. On October 4, the thwartship bunker was flooded to a depth of about two feet, and on the following day it was observed that the coal was completely submerged with water.

On the 10th of October, pursuant to orders of Admiral Grant, the prize crew was taken off and put on the Glasgow, for the reason that the Glasgow had received orders to leave and join the squadron at once at some distant place. On the afternoon of the 10th, the captain of the British admiralty coming from a merchant ship, Orama, which arrived at the rendezvous that afternoon, was given charge of the Santa Catharina and other ships there. He was informed of the condition of the Santa Catharina and told that the prize crew would be taken off; also that there was no imminent danger to the Santa Catharina, and therefore he proceeded with coaling his own vessel. Before leaving the ship, the lieutenant in charge of the prize crew drew the fires of the boiler which was used for pumping. No one was on board that night. The Orama anchored about one mile from the Santa Catharina and continued coaling until the 11th. The weather was bad, a high wind blowing, and there was considerable sea running. At about 1 p. m. on the 11th of October, smoke was seen coming from the Santa Catharina. A captain of the admiralty, with some 16 men, put out in a cutter to her, and they took with them all the fire-extinguishing apparatus which was available. They got on board the Santa Catharina and opened her fiddly door; volumes of smoke

emerged; flames were then seen in the stoke hole. It was found that the coal in the thwartship bunker and the iron work of the alley extending into the bunkers was red hot. The watertight door in the alleyway was closed, leaving only room enough to attach a hose to the seacock in the engine room. Water was poured into the bunkers with buckets, for there were no hand pumps, and the ventilators were plugged. The cutter came alongside and pumped water into the bunkers. This was done with considerable difficulty, because of the heavy sea. The fire spread rapidly, and the captain said it was inevitable that the ship would be destroyed by fire. Fearing that she would attract enemy attention, he decided that the burning ship should be scuttled. He accordingly ordered that she be towed out of the fairway into shallow water and sunk. This was done after many difficulties were overcome. She was sunk that evening outside of territorial waters.

After the capture, and before the fire and final destruction of the vessel, the underwriters entered into an extension agreement, and this for an additional premium of two cents a day. They insured the cargo:

"In case the steamer which the merchandise hereby insured is laden shall put into any port owing to hostilities, or in case the said merchandise is detained at any port or place owing to the same cause, it is agreed without prejudice to the rights under existing insurance, but subject to the terms thereof, that the same shall be held covered at an equitable premium to be charged by this company when particulars are known, afloat or ashore, or by any steamer or steamers until delivered at original point of destination, or in case the goods are not forwarded to destination, until the shipper or consignee can take delivery at the port or place where the original voyage or transit is abandoned, against the same risks only as are covered by the original insurance, and excluding expense of damage due to deterioration, delay, or handling."

A recovery was allowed in each case, because it was held that the proximate cause of the loss of the cargo was the fire, a risk expressly assumed by the underwriters.

[1] The contention here by the appellant is that the proximate cause of the loss was a war peril, excluded from the policy by express provision. It is contended by the appellant that the negligent management or care of the vessel by the British prize crew, and the removal of the crew, was the proximate cause of the loss, and to this is added the other event; that is, the scuttling of the ship to avoid, as Capt. Seagrave said, the attraction of the Germans. But it was known to the appellant that the British had captured the ship, and with full knowledge of this it entered into an extension agreement, assuming the risk while the vessel was in the exclusive charge of the prize crew. The defense of negligence, therefore, because of the management of the ship by the British, is unsound; the risk insured against was fire, and concededly the ship caught fire, and this extended to such a degree that it eventually involved the entire ship, until it appeared to the captain in charge that it was hopeless to save her. Negligence on the part of the captors of the ship is no defense under the circumstances here disclosed, assuming that negligence on the part of

the British crew was proven, or could be fairly inferred from the conduct of the British officers. Certainly mere errors of judgment under these circumstances, fraught with serious dangers, could not be said to be an intervening cause which would relieve the insurance company against its positive engagement against loss by fire. Muller v. Globe Ins., etc., Co., 246 Fed. 759, 159 C. C. A. 61; Singleton v. Insurance Co., 132 N. Y. 303, 30 N. E. 839.

If a cause is approximate in its efficiency, it can be said to be truly proximate. If the efficiency can be said to have been preserved, although other causes may have sprung up, which have not destroyed or impaired the same efficient cause, a result may follow in which that cause still remains the real efficient cause, and to which the event can be ascribed. This court said in Muller v. Globe, etc., Co., supra:

"If there is an unbroken connection between act and injury, the act causes the injury; an intervening act is not the proximate cause of injury, unless it is efficient to break the causal connection."

[2] Under the facts above recited, it is apparent that fire was raging on October 11 and was never extinguished. The origin of the fire was known as coal burning in the bunkers. The fire continued. There was no new or independent cause to break the connection between the fire and the loss. It is true that the captain ordered the ship scuttled and sank her after a deliberate effort, but when this was determined upon it was then hopeless to save the ship, and before this was determined upon every effort, using every appliance at the command of the British seaman, was applied in the effort to save her. There was nothing that intervened which caused the loss, as there was nothing that could intervene at the time that would save the vessel. Comm. Union Assur. Co. v. Pacific Union Club, 169 Fed. 776, 95 C. C. A. 242; Brown v. St. Nicholas Ins. Co., 61 N. Y. 332. The same cause producing the same effect may be proximate or remote as a contract of the parties seems to place it in light or shadow. Bird v. St. Paul F. & M. Ins. Co., 224 N. Y. 47, 120 N. E. 86. That cause is to be held predominant which the parties think of as predominant when making the contract. It was said in Bird v. Insurance Co., supra:

"Fire must reach the thing insured, or come within such proximity to it that damage, direct or indirect, is within the compass of reasonable probability. Then only is it the proximate cause, because then only may we suppose that it was within the contemplation of the contract. In last analysis, therefore, it is something in the minds of men, in the will of the contracting parties, and not merely in the physical bond of union between events, which solves, at least for the jurist, this problem of causation."

This case comes within that category of questions of proximate cause which are considered questions of fact—usually determined by a jury. Here the court below resolved the question of fact, in a court of admiralty, in favor of the libelants. We agree with the conclusion, which the District Judge reached, that the proximate cause of the destruction of the cargo was the fire.

The decrees are affirmed.

MOSSEW v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 19, 1920.)

No. 204.

1. **War ⟸4—Charging unreasonable price for sugar not criminal offense under Lever Act.**
An indictment charging the making of an unjust and unreasonable charge for sugar sold at retail *held* not to charge a criminal offense, under Food Conservation Act Aug. 10, 1917, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), which, while making certain acts unlawful, prescribes no penalty for its violation, nor is any prescribed elsewhere in the act.

2. **Criminal law ⟸979(1)—Judgment entered without jurisdiction void.**
A judgment convicting a defendant of a crime for which there is no statutory authority, although entered on a plea of guilty, and the fine imposed has been paid, is void.

3. **Criminal law ⟸89—Federal courts have no common-law criminal jurisdiction.**
The federal courts have no criminal jurisdiction, except of offenses created by act of Congress, and for which the punishment is also prescribed by statute.

4. **Criminal law ⟸998—Void judgment may be canceled after term.**
A void judgment may lawfully be canceled on motion after notice, even after expiration of the term at which it was entered.

5. **Criminal law ⟸1—"Crime" defined.**
A "crime" is a wrong which the government notices as injurious to the public, and punishes in what is called a criminal proceeding.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Crime.]

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

Criminal prosecution by the United States against Joseph Mossew. Judgment of conviction (261 Fed. 999), and defendant brings error. Reversed.

The defendant stands convicted, by a plea of guilty, to an indictment presented by the grand jury charging him, in three counts, with an alleged offense of selling sugar at an unfair, unjust, and unreasonable rate or charge. Defendant sued out this writ of error.

Mangan & Mangan, of Binghamton, N. Y., for plaintiff in error.
D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] This indictment was presented by the grand jury on the 10th day of June, 1919. The first count of the indictment charges that the plaintiff in error, within the jurisdiction of the District Court, was engaged as a retail grocer, doing business in the city of Binghamton, state and Northern district of New York, and was there handling and selling certain necessities of life, including granulated sugar;

"That at all the said times herein mentioned the fair, just, reasonable, and controlling rate, charge, and price in handling and dealing in granulated

sugar to the retail trade in said city of Binghamton was and is from 10 to 11 cents per pound, which said fair, just, and reasonable rate and charge in handling and dealing in granulated sugar to the retail trade had theretofore been fixed according to law by the proclamation of the President of the United States and the rules and regulations promulgated by the President of the United States and the United States Food Administrator, pursuant to the provisions of the National Defense Act approved August 10, 1917, and the amendments thereto.

"That on the 8th day of July, 1919, the said defendant, in the said city of Binghamton, did unlawfully, knowingly, and feloniously, for the purpose of gain and profit, handle, sell, and distribute to one Margaret Donovan three pounds of granulated sugar, for which said defendant did then and there exact from and charge to the said Margaret Donovan 15 cents per pound for the said sugar, which said rate and charge was then and there unfair, unjust, and unreasonable in handling and dealing in said granulated sugar, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

The second count of the indictment alleges that in violation of the National Defense Act (chapter 53, 40 Stat. 276, approved August 10, 1917 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛e–3115⅛r]), the plaintiff in error dealt in sugar as follows:

"That at all the said times herein mentioned the fair, just, reasonable, and controlling rate, charge, and price in handling and dealing in granulated sugar to the retail trade in the said city of Binghamton was and is from 10 to 11 cents per pound, which said fair, just, and reasonable rate and charge in handling and dealing in granulated sugar to the retail trade in said city had theretofore been fixed according to law by the proclamation of the President of the United States and the rules and regulations promulgated by the President of the United States and the Food Administrator, pursuant to the provisions of the National Defense Act approved August 10, 1917, and the amendments thereto.

"That on the 9th day of July, 1919, the said defendant in the said city of Binghamton did unlawfully, knowingly, and feloniously, for the purpose of gaining profit, handle, sell, and distribute to one John Nealon, ten pounds of granulated sugar, for which said defendant did then and there exact from and charge to said John Nealon, 15 cents per pound for said sugar, which said rate and charge was then and there unfair, unjust, and unreasonable in handling and dealing in said granulated sugar, contrary to the form of statute in such case made and provided and against the peace and dignity of the United States."

The third count of the indictment alleges as follows:

"That at all the said times herein mentioned the fair, just, reasonable, and controlling rate, charge, and price in handling and dealing in granulated sugar to the retail trade in the said city of Binghamton was and is from 10 to 11 cents per pound, which said fair, just, and reasonable rate and charge in handling and dealing in granulated sugar to the retail trade had theretofore been fixed according to law by the certain proclamation of the President of the United States and the rules and regulations promulgated by the President and the United States Food Administrator, pursuant to the provisions of the National Defense Act approved August 10, 1917, and the amendments thereto.

"That on the 29th day of July, 1919, the said defendant in the said city of Binghamton did unlawfully, knowingly, and feloniously, for the purpose of gaining profit, handle, sell, and distribute to one Albert F. Deuren a large quantity of granulated sugar, for which the said defendant did then and there exact from and charge to the said Albert F. Deuren the sum of 15 cents per pound, which said rate and charge was then and there unfair, unjust, and unreasonable in handling and dealing in said granulated sugar, contrary to the

form of statute in such case made and provided and against the peace and dignity of the United States."

This indictment is intended to be an accusation against the plaintiff in error for a violation of an act of Congress passed August 10, 1917, relating to conservation of supply and control of disposition of necessities. It is intended to guard against waste and a monopolizing or hoarding of necessities—to guard against unfair and unjust practices. It is also aimed at unjust and unreasonable charges in regard to such necessities. Among other things, the act provides (section 4 [section 3115⅛ff]):

"It is hereby made unlawful for any person to willfully destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture or distribution; to hoard, as defined in section 6, of this act, any necessaries; * * * to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person * * * to exact excessive prices for any necessaries; or to aid or abet the doing of any act made unlawful by this section."

Section 5 of the act (section 3115⅛g) provides for licensing dealers, and imposes a penalty for violation of this section. It provides that its provisions shall not apply to retail dealers. Section 6 (section 3115⅛gg) defines hoarding, and provides a penalty for violation of its provisions; but charging an excessive or unreasonable price is not within the definition of hoarding. Section 9 (section 3115⅛i) provides a penalty for conspiracy in regard to necessities.

On August 12, 1919, the plaintiff in error pleaded not guilty, but thereafter withdrew this plea and pleaded guilty. He was sentenced to pay a fine of $200 on the first count of the indictment, $200 on the second count, and $100 on the third count. The fine was paid the same day.

Section 4 declares it unlawful to make any unjust or unreasonable rate or charge in handling or dealing in necessaries, but there is no provision for punishment of this particular act thus made unlawful. As to other offenses which are denounced by the act, for the doing of which acts the section makes it unlawful, a penalty is prescribed; but nowhere in the act is a penalty prescribed for doing any of the acts made unlawful by this section, and there is no general provision in the act announcing a penalty or prescribing punishment for a violation of these provisions, where no specific penalty or punishment is provided. It further appears that this alleged indictment charges certain acts as unlawful, that is to say, making an unreasonable and unjust charge for sugar; but no penalty or punishment for a violation of the statute is prescribed by a valid statute.

[2] We are of the opinion that no crime is charged in this indictment. Therefore the conviction, even though upon plaintiff in error's plea of guilty, is void. Payment of the fine cannot be deemed to be a voluntary contribution to the government, and has been held not to be a bar in a suit to recover. U. S. v. Rothstein, 187 Fed. 269, 109 C. C.

A. 521; Durr v. Howard, 6 Ark. 461; Devlin v. United States, 12 Ct. Cl. 266.

When the application was made to the District Judge below to set aside and vacate the conviction, the term of court at which he pleaded guilty had expired. The District Court held that it could not set aside or alter its final judgment after the expiration of the term at which the judgment was entered. The plaintiff in error has properly selected his remedy by suing out this writ of error.

In Bronson v. Schulton, 104 U. S. 415, 26 L. Ed. 797, the court said:

"It is a general rule of law that all the judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered; and this is placed upon the ground that the case has passed beyond the control of the court."

In Suydam v. Williamson, 20 How. 433, 15 L. Ed. 978, it was said:

"The rule is that, whenever the error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions or in any other manner."

[3] In Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648, it was said:

Congress "must first make an act a crime, affix a punishment to it, and prescribe what courts have jurisdiction of such an indictment, before any federal tribunal can determine the guilt or innocence of the supposed offender." Citing U. S. v. Hudson et al., 7 Cranch, 32, 3 L. Ed. 259.

And in the same case it was further said (100 U. S. at page 279 [25 L. Ed. 648]):

"Since that decision the law has been considered as settled that the Circuit Courts have no jurisdiction to try and sentence an offender, unless it appears that the offense charged is defined by an act of Congress, and that the act defining the offense, or some other act, prescribes the punishment to be imposed, and specifies the court that shall have jurisdiction of the offense."

In United States v. Hudson et al., 7 Cranch, 32, 3 L. Ed. 259, it was said:

"The only question which this case presents is whether the Circuit Courts of the United States can exercise a common-law jurisdiction in criminal cases. * * * The only ground on which it has ever been contended that this jurisdiction could be maintained is that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation necessarily results to it. * * * If it may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must

first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense. Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. But jurisdiction of crimes against the state is not among those powers; * * * but all exercise of criminal jurisdiction in common-law cases we are of opinion is not within their implied powers."

[5] By failure to provide a penalty for an infraction of this statute, or to prescribe a punishment, the statute does not denounce the unlawful act as criminal. It is neither a misdemeanor nor a felony. A crime is:

"A wrong which the government notices as injurious to the public and punishes in what is called a criminal proceeding in its own name." 1 Bishop's Criminal Law, § 43.

[4] Although no demurrer was interposed or exception taken which then raised the question of the sufficiency of the indictment in the District Court, assignments of error have been filed which present to us the sufficiency of the indictment on this writ of error. We think that the indictment is insufficient to charge a crime, and is therefore void. The payment of the fine after this conviction was void. It was held in United States v. Rothstein, 187 Fed. 269, 109 C. C. A. 521, where a plea of nolo contendere was entered, and a fine imposed and paid, and subsequently the statute under which the fine was paid was declared unconstitutional, that the defendant therein named may petition successfully to refund his fine paid, when the indictment was subsequently dismissed. A void judgment may lawfully be canceled on motion after notice, even after the expiration of the term on which it is entered. Ex parte Crenshaw, 15 Pet. 119, 10 L. Ed. 682.

We think the writ of error should be sustained, and the judgment reversed.

BOLAND v. BALLAINE.

(Circuit Court of Appeals, Ninth Circuit. June 7, 1920.)

No. 3421.

1. **Malicious prosecution ⟸71(3)—Malice question for jury.**
   In an action for malicious prosecution, malice is a question of fact for the jury, and is inferable from the fact of want of probable cause.

2. **Malicious prosecution ⟸60(1)—Evidence to rebut inference of malice erroneously excluded.**
   Where plaintiff in an action for malicious prosecution of a civil action was permitted, over objection, to testify to matters occurring after such action was commenced, for the purpose of showing that its further prosecution was without justification and malicious, it was error to exclude testimony of defendant tending to rebut such inference, on the ground that it related to matters occurring after such suit was commenced.

3. **Malicious prosecution ⟸66—Measure of damages for loss of sales of property defined.**
   In an action for malicious prosecution of a civil action, the pendency of which, as claimed, prevented plaintiff from selling lots in a town site, he is not permitted to show generally depreciation in value of the lots

between the time of commencement of the action and its termination, but is confined to actual damages sustained through loss of particular sales due to the clouding of his title.

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 J. E. Ballaine against W. J. Boland and others. Judgment for plaintiff, and defendant Boland brings error. Reversed.

See, also, 259 Fed. 183, 170 C. C. A. 251.

This is an action sounding in damages, instituted by the defendant in error against plaintiff in error and W. E. Stavert and F. C. Jemmett to recover for the alleged malicious prosecution of a civil action entitled: "In the District Court in and for the Territory of Alaska, Third Division. Alaska Northern Railway Company, a Corporation, Plaintiff, v. Alaska Central Railway Company, a Corporation, Tanana Construction Company, a Corporation, John E. Ballaine, Frank L. Ballaine, et al., Defendants." Stavert and Jemmett were not served, and the action proceeded against Boland singly. The Alaska Central Railway Company had previously, and during the year 1909, defaulted. A foreclosure was had of its bonds, and its property was sold to F. C. Jemmett, trustee for the Sovereign Bank of Canada and other bondholders. Subsequently the Alaska Northern Railway Company was organized, and the assets of the Alaska Central were transferred and assigned to it by Jemmett, trustee. The stocks and bonds of the Alaska Northern were turned over to the defendants in the present action as a committee representing several banks in the Dominion of Canada, the owners of the stocks and bonds of the Alaska Central. These stocks and bonds were afterwards sold by the committee to the general government, but there were reserved from the transfer 320 acres of land known as the Poland homestead. Plaintiff and Frank L. Ballaine, his brother, claimed to be the owners of a tract of land on which the town site of Seward is located, which town was designated by the President as the terminus of a system of railways to be constructed by the government.

In view of this state of facts, it is alleged, in effect, that the defendants and others who claim to be the owners of the Poland tract, conspiring together for the purpose of defrauding and injuring plaintiff and preventing him from selling his lots in the town of Seward, instituted in the name of the Alaska Northern Railway Company a false, fictitious, and malicious suit against plaintiff, and falsely and maliciously alleged in said suit that the railway company was the owner of all the property of plaintiff in the Seward town site, and filed a notice of lis pendens, thereby clouding plaintiff's title and preventing him from selling his property and placing the same upon the market. The suit, after trial, terminated in plaintiff's favor.

By its fifteenth paragraph the complaint alleged: "That at the time of the commencement of said action by said defendants this plaintiff notified said defendants of the loss and damages this plaintiff would sustain by reason of said action, and filing said lis pendens, and repeatedly offered to show conclusive record evidence that said action was groundless, without merit, and the allegations of said complaint were false, and said defendants ignored such statements and refused to dismiss said action." General damages are demanded.

The answer controverts the material allegations of the complaint, and sets up that the action was brought in the utmost good faith and upon the advice of counsel that complainant had good cause for prosecuting the same.

There was a motion for a directed verdict on the part of defendant Boland at the close of plaintiff's case, which was denied. The motion was renewed at the close of the entire testimony, and this was also denied. The ruling of the court in each instance is assigned as error. Other assignments of error follow.

Bronson, Robinson & Jones, of Seattle, Wash., for plaintiff in error.

Carroll B. Graves and Lyons & Orton, all of Seattle, Wash., for defendant in error.

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

WOLVERTON, District Judge (after stating the facts as above). Without attempting to detail the testimony bearing upon the subject, suffice it to say that we are of the opinion that the District Court was right in submitting the cause to the jury.

[1] As to want of probable cause, there was the testimony of Haight, which has a special bearing upon the subject; but more particularly, the testimony of Ballaine touching his request and demand of defendant, plaintiff in error here, that defendant dismiss the suit after it had been begun, and cease to continue its prosecution against him. Malice is a question of fact for the jury, and is inferable from the fact of want of probable cause. 26 Cyc. 22, 23.

There was evidence submitted for the purpose of showing that defendant acted upon the advice of counsel in bringing the action. If such were the case—if the defendant acted on such advice, and proceeded under an honest belief that his cause was meritorious, and was thus induced and led to institute it—he would not be liable. But that was a question for the jury to determine (Steward v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116), and, as the instructions of the court are not here, we must assume that the jury was properly advised upon the subject.

Preliminary to what is to follow, it should be stated that the theory of the suit complained against was that plaintiff, Ballaine, being an officer of the Alaska Central, procured for himself, but in the name of his brother, Frank L. Ballaine, title to the land, by diverting funds under his control belonging to said railway company to pay for it, namely, $3,000, to pay for soldier's additional homestead scrip with which to obtain patent to the land, and an additional $4,000 to secure the relinquishment of one Mary Lowell, who at the time occupied and claimed the land as her homestead, in fraud of the rights of the railway company, and that the Ballaines were holding the title constructively as trustees for the railway company. One Keeler, who was the disbursing officer of the railway company, is said to have paid the $4,000 over to Mary Lowell for her relinquishment.

[2] At the trial, Ballaine, the plaintiff, defendant in error here, as a witness in his own behalf, in answer to the question, "Between the commencement of that Alaska Northern suit and the time of its trial, had you ever any talk with Mr. Boland, or either of the other defendants, or any of them?" was permitted to testify, over objections, as follows:

"Several different places. I wired him immediately on my notice that this suit had been filed. I wired Mr. Boland and Mr. Jemmett, offering to open my books and have the books of the bank and the railway company opened to their inspection, to prove the falsity of all their charges. That was within a day or two after the announcement in the Times that the suit had been filed. The first time I met Mr. Boland in person after the filing of the suit, as I recall it, was in New York, in about July—no, about August, some time in August—when we took the deposition of Mr. Keeler, who had been the disbursing agent for the Shedds, and the treasurer of the Tanana Construction Company when I owned the controlling interest in the construction company,

and I there renewed my offer to Mr. Boland to open my books, and have the books of the companies and the books of the banks opened to his inspection, or the inspection of anybody whom he might appoint, to prove the entire falsity of all their charges, and they are complete, and Mr. Boland was present as the representative of the plaintiff, the Alaska Northern, at the taking of the deposition of Mr. Keeler in New York, when Mr. Keeler explained in detail the matter of the payment of this $4,000, which was subsequently submitted to the court in Seward. Then subsequently, in about the fore part of October of the same year—oh, no, in the latter part of September of the same year—Mr. Boland arrived in Seattle, en route to Valdez and Seward, to attend the trial of this case. We then took the depositions of bankers here in Seattle, who had kept the accounts of the Alaska Central, and the Tanana Construction Company, and my personal accounts. During the taking of the depositions the bank books were all open to the inspection of Mr. Boland. I invited him to call for anything he wished to call for, but reserved nothing. I offered to produce every document that he required, to prove the falsity, and that invitation was never acted upon by him at any time. * * * In the taking of the depositions here in Seattle, for the banks, and in the taking of Mr. Keeler's deposition, the bank books were opened, showing the transfer to my personal account, to the account of the Tanana Construction Company, of this $4,000."

Boland, testifying in his own behalf respecting the matters concerning which Ballaine had testified, related that he was shown a prospectus representing that the town site of Seward, or the terminus, would be opened up for the benefit of the railway companies, and as their property; that it was a printed folder, issued by the officers of the defendant construction company or the railway company, which Ballaine afterwards admitted by his evidence he caused to be issued. Witness was then asked, "Did Mr. Ballaine admit that he caused that prospectus to be issued?" But over objection he was not allowed to answer, because the incident transpired subsequent to the time when the suit came on for trial. After stating that he met Keeler at the Waldorf-Astoria, and that Keeler then told him he paid the money because he understood the town site was the property of the Alaska Central, the witness, over the objection of counsel, was not permitted to explain what Keeler said, and that his evidence was in contradiction of his statement, for the reason that the statement was not made before the suit was brought. In view of the fact that Ballaine had testified fully as to matters that came to his knowledge after the suit was instituted, which was permitted as showing reason why Boland should have discontinued the suit, Boland should have been permitted to rebut such testimony, although the rebuttal had relation to conversations and alleged admissions made after the suit came on for trial. This was prejudicial error.

[3] As it relates to the question of damages, plaintiff was permitted, over objections, to give his estimate of the values of the lots and blocks owned by him in Seward prior to the institution of the suit of which he complains, and then, also over objection, he was permitted to contrast those values with values after the suit and time for appeal had terminated, and was of the opinion that the latter values sustained a relation to the former of about 50 per cent. It is objected that this inquiry was speculative and visionary, and does not constitute a proper basis upon which to predicate the measure of damages applicable.

In this we concur. There seems to be a dearth of authority upon the particular question. In 26 Cyc. 14, the law is thus stated:

"Where there has been an arrest of the person, or seizure of property, in or in connection with a civil action, where the damage is exceptional, peculiar, or particularized and actual, malicious prosecution lies, according to the prevailing American rule, if the other essentials of the wrong be made out."

The effect of the suit complained of, it is alleged, was to cloud plaintiff's title, and inferentially to disparage sales. But it is not claimed, nor could it be, that the plaintiff was prevented from selling all his lots and blocks in the town of Seward. So that plaintiff's testimony that the property had declined in value 50 per cent. gave a false basis for determining the damages he had sustained by reason of the prosecution of the suit. Indeed, the basis was so vague and speculative that no certain or proper deductions as to damages could be made. We are impressed that plaintiff is confined to the establishment of actual damages sustained, which must be shown by loss of particular sales that eventuated by reason of the clouding of his title. He is not permitted to show generally that his property depreciated in value between the time of the commencement of the suit and the lapse of the time for appeal, and it was error to allow this testimony to go to the jury.

For this and the preceding error, the judgment of the court below will be reversed, and the cause remanded, for such other and further proceeding as may seem appropriate.

ALASKA FISH SALTING & BY-PRODUCTS CO. v. McMILLAN.

(Circuit Court of Appeals, Ninth Circuit. June 7, 1920.)

No. 3324.

1. **Master and servant ⟸286(22)—Negligence in failing to provide safe place question for jury.**
   Where a workman was injured by the catching in his clothing of a set screw projecting from a revolving shaft over which he was required to reach to move a lever in performance of his duty, in a place not well lighted, whether it was negligence, and a violation of the master's absolute duty to furnish a reasonably safe place for employés to work, to leave the set screw projecting and unguarded, *held* a question for the jury.

2. **Master and servant ⟸288(5)—Assumption of risk held question for jury.**
   Whether an employé had knowledge of a projecting set screw on a revolving shaft, by which he was injured, or the light was sufficient to render the danger therefrom obvious, *held* properly submitted to the jury, where the evidence on both questions was conflicting.

3. **Trial ⟸139(1)—Evidence must be clear to warrant directed verdict.**
   To warrant a directed verdict, the case on the evidence must be clear and indisputable, and about which there could reasonably be but one opinion.

In Error to the District Court of the United States for the District of Alaska; Robert W. Jennings, Judge.

Action by David McMillan against the Alaska Fish Salting & By-Products Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff in error was defendant below, and is prosecuting this writ to reverse a judgment, entered against it and in favor of defendant in error, recovered on account of personal injuries sustained by reason of alleged negligence. For convenience, reference will be made to the parties as plaintiff and defendant.

Defendant is the owner of a factory for producing fertilizer from fish, and plaintiff was an employé, performing his work under a superintendent in charge of the operation of the factory. At the time of the accident, plaintiff was attempting, by means of a lever, to shift a gate used for the purpose of controlling the conveyance of the material in course of manufacture, and while in the act his clothing was caught by a set screw in a revolving shaft, and he was thrown around the shaft and injured. The shaft made about 11 revolutions per minute, and was situated about 3 feet above the platform upon which plaintiff was standing, and required to stand, and the lever was a foot or more above and somewhat beyond the shaft. On one end of the shaft was affixed an octagonal sieve, or, as it is called, a squirrel cage, through which the dry material was conducted, and on the other end was a collar at the bearing, which was attached and held in place by a set screw or set screws, one or two of them, as to which the evidence is not in accord. The distance between the sieve and the collar was about 3 feet. The set screw protruded above the shaft, the latter being $1^{11}/_{16}$ inches in diameter. This machinery was located in the second story, or what is called the loft, of the building.

For cause of action it is charged that defendant carelessly and negligently omitted to imbed the set screw or set screws, as the case may be, in the shaft, or in any wise properly to guard or shield them against the contact of workmen when shifting or operating the gate. It is further alleged that the place was poorly lighted, so that workmen were unable readily to observe the condition of the shaft and the presence of the set screws, or to discover the danger present in operating the gate.

The plaintiff was chief engineer about the factory, sometimes designated as chief mechanic, and took care of the machinery of the plant. He did blacksmithing and work of that kind, and directed the installing of the machinery about the mill, and, among other things, the installing of the shaft in question, together with the squirrel cage and chutes, and the gate for controlling the conveyance of the material in course of manufacture; also performed other work in the operation of the mill under the direction of the superintendent, and, among his duties, he was required to shift the gate when occasion demanded. Previously the gate was shifted by means of a wire attachment, which extended to the lower floor, and was operated from there. The wire had become broken, and, without it, it was necessary to ascend to the loft and shift the gate by reaching across the shaft and drawing the lever by hand.

There was a motion for a nonsuit at the close of plaintiff's case, and a motion for an instructed verdict for defendant at the close of the entire evidence, both of which were denied. Error is assigned respecting the action of the court in both respects.

H. L. Faulkner, of Juneau, Alaska, and Frank P. Deering and James Walter Scott, both of San Francisco, Cal., for plaintiff in error.

John R. Winn and Henry Roden, both of Juneau, Alaska, for defendant in error.

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

WOLVERTON, District Judge (after stating the facts as above). We pass by the motion for a nonsuit, because in the light of the tes-

timony subsequently adduced in behalf of the defendant the question pertaining to its denial has been waived.

Counsel for defendant base their contention that the court should have sustained their motion for a directed verdict, as we read their brief, upon two propositions: First, that it was not negligence on the part of the employer to maintain shafting upon which there were unguarded projecting set screws; and, second, that if the unguarded set screws constituted a menace, it was an obvious one, and plaintiff assumed the risk of danger to his person in working about it, or in proximity to it.

[1] The principle of law that it is the duty of the employer to furnish his workmen with a safe place in which to do their work is so well established that it needs no citation of authority to support it. It is just as well established that his duty in this respect is nondelegable; that is to say, he cannot shift the obligation and responsibility to another, and whatever is done by another in that behalf is done as vice principal, and is to be deemed the act of the principal. The duty is therefore absolute.

Now, we may inquire whether the place in which the plaintiff was required to work was in legal contemplation a safe place. It was safe, in view of the issues here made, unless the presence of the set screws in the shaft and the alleged insufficient lighting rendered it unsafe. Under some conditions, that may be readily conceived, the shaft while in motion would have been an exceedingly dangerous instrumentality for one even to approach. Suppose the set screws had protruded several inches, no doubt they would have constituted à dire menace to any one working about the shaft. Miller v. Inman, 40 Or. 161, 66 Pac. 713, is a case of marked analogy, and it was there held that a bolt extending from a pulley from 1½ inches to 1¾ inches beyond the nut rendered the space beneath the shaft an unsafe place in which to require the workman to do his work.

Seeing that these set screws were in the shaft, and that they protruded and were in proximity to the place to be occupied by the workman in operating the lever for opening and closing the gate, and that it was the duty of the workman to reach above and over the shaft to the lever, we are of the opinion that the case presented was one for the jury, and not for the court, to determine whether or not the set screws ought to have been safeguarded in some reasonable way to prevent their contact with the workman, and whether or not in the end the place was a safe one in which to require the workman to perform his work. This disposes of the first question presented.

[2] The second question pertains to contributory negligence and assumption of risk, and is resolvable really into that of assumption of risk only, in view of the circumstances and conditions attending the putting of the shaft and its appliances in place, and the construction of the machinery about it, including the chutes or conductors, and the gate and its appliances for operating it. It is hardly necessary to state the rule of assumption of risk, but it may be done for the sake of clarity:

"A servant is understood to assume the ordinary risks incident to the particular service in which he voluntarily engages, to the extent those risks are known to him at the time of his employment, or should be readily discernible to a person of his age and capacity in the exercise of ordinary care and prudence. Where the employment is obviously dangerous and hazardous, and conducted in a way fully known to the servant at the outset, he assumes the risk incident to the conduct in that way or manner, although a safer method was known or could have been adopted."

And as to risks arising subsequent to employment the rule is:

"If he [the employé] voluntarily continues, however, without complaint or objection, after knowledge or notice of their existence, under conditions by which he is chargeable with an appreciation of the danger, and where ordinary prudence would require of him a different course, he is held also to take upon himself the responsibility entailed by the risk he continues to incur; and this applies to perils engendered by defects in appliances due to the master's fault." Stager v. Troy Laundry Co., 38 Or. 480, 485, 63 Pac. 645, 646 (53 L. R. A. 459); Shearman & Redfield on Negligence (5th Ed.) §§ 185, 209, 209a.

The rule is thus concretely stated in Leary v. Boston & Albany Railroad, 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733:

"The servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and, while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions."

See, also, Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537.

The evidence of John Ritchye, a witness for defendant, would tend to show that the plaintiff was foreman in the factory. Such was probably not the case, as Kuettner was superintendent, and the factory was being operated under his supervision. What the witness really meant, probably, is that plaintiff was foreman, or, as otherwise expressed, the chief mechanic, in installing the machinery at the time that the appliances were put in which gave rise to this controversy. At the time this machinery was put in, the construction was under the general supervision of a man by the name of Funk, who was also superintendent of the plant. Plaintiff, as a witness in his own behalf, relates that he was chief engineer of the plant and had charge of the machinery, "everything down below"; that the machinery was installed under the directions of Funk, and that witness carried out his orders in that respect, and was there and familiar with the machinery when it was installed; that he made the sieve, and hoisted it up, and put it in place; that the carpenters prepared the framework to set the shaft in, and that he does not know whether he was there when the shaft was put in place; that he might have been there, off and on, but he was attending to other business, putting in another shaft to run that.

"We didn't consider that anything of importance," he says, "and I was working on this other work, making bolts, and one thing and another—I don't know what I was doing—I was working different places around."

Witness further testified that it was one of his duties, and that he was so directed by the superintendent, to go up and shift the gate

when necessary, and that he continued to watch that until he was injured.

Ritchye testified that he and his carpenter built the framework in which the shaft bearing the sieve was set. Then this inquiry followed:

"Q. Did McMillan go up there and boss you carpenters, too? A. No, sir. Q. Didn't give you any orders about your work, did he? A. He didn't give us any particular orders about the carpenter work. Q. You know McMillan never did give you any orders, did he? A. He told us where he wanted the machinery installed, and of course I built the framework according to that. Q. He told you where the machinery was going to be installed, and you went ahead and built the framework for the machinery? A. Yes, sir."

A. H. Kuettner, who was superintendent at the time the accident happened, but not at the time the machinery was installed, testified that this machinery was set in place by McMillan, Togg, and himself, and that McMillan was present at the time. There was other testimony with respect to the lighting, in which there is a disagreement as to whether the place was well or poorly lighted.

Through a careful consideration of all the testimony in the case it is apparent that there is a controversy in question of fact as to whether the plaintiff was himself negligent respecting the accident that resulted in his injury, or whether he should be held to have assumed the risks attending his employment. As chief engineer about the factory, he directed the construction of the framework and putting it in place. He also constructed the sieve and attached it to the shaft, and the shaft was placed in its bearings also under his direction. But as to whether he was present at the time it was done there is a dispute in the testimony. There is no testimony that he constructed the shaft with the collar attachment, or had anything to do with the arrangement of the set screws, or supervised the work pertaining thereto; and it is only by inference, deducible from the testimony touching his general knowledge of the machinery and its construction, that it may be argued that he had knowledge that the set screws protruded, rather than being imbedded in the shaft, as is often done in careful construction. Whether the menace therefrom was open and obvious to one working about the shaft depends largely upon the question of proper lighting, and as to this, as we have seen, there is a disagreement in the testimony.

[3] In order to warrant a directed verdict, the case on the testimony must be clear and indisputable, and about which there could reasonably be but one opinion. Lincoln v. Power, 151 U. S. 436, 439, 14 Sup. Ct. 387, 38 L. Ed. 224. See, further, as to a directed verdict, Huber v. Miller, 41 Or. 103, 68 Pac. 400, and Stager v. Troy Laundry Co., 41 Or. 141, 68 Pac. 405. From the foregoing, we are led to the conclusion that a directed verdict was properly denied.

There is only the further question here insisted upon respecting the court's instruction touching the measure of damages. The objection is directed to language contained in the instruction, as follows:

"You should allow him all the reasonable and necessary expenses to which he has been put for medical care and treatment."

This was on the ground that there was no testimony adduced during the trial bearing upon the particular subject. After detailing other matters to be considered in fixing the damages, the instruction concludes with the language:

"If you find from the evidence that any of those things exist."

While the language complained against might as well have been omitted by the court, it is clear that its presence did the defendant no harm, and there is therefore no reversible error in the instruction.

Judgment affirmed.

THE BULLEY.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 188.

Towage ⇐11(8)—Tug not liable for stranding of tow, caused by floating ice.

A tug, which left Newtown creek at night, as was customary, with three coal barges in tow, and took the customary course for passing through the Gate, *held* not chargeable with negligence which rendered her liable for injury to her tow, which was forced by an ice field drifting with the flood tide upon Man-of-War reef; there being no indication of unusual danger from the ice, which rendered her leaving the creek improvident, and she having done all within her power to protect her tow after stranding.

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

In Admiralty. Libels by the New York, New Haven & Hartford Railroad Company and by Mesick & Mesick, Incorporated, and others against the steam tug Bulley, Owen McCaffrey's Sons, claimant. Decrees for respondent, and libelants appeal. Affirmed.

Charles M. Sheafe, Jr., of New York City, for appellant New York, N. H. & H. R. Co.

Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellants Mesick & Mesick and others.

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

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The steam tug Bulley left Newtown creek with three coal-laden scows on the 13th of February, 1912, about 8:15 in the evening. The scows were the Ernest E. Wright, owned by the libelant Anthony O'Boyle, the Cullen No. 150, owned by the Cullen Barge Corporation, and the Harry W. Walker, owned by Mesick & Mesick, Incorporated. She was bound for Long Island Sound ports. The three boats were abreast of each other on a hawser; the Wright being the port boat, the Walker the middle boat, and the Cullen the starboard boat. It was a dark night and the tide

strength flood. Although there was a considerable drift of ice in the harbor for some days past, navigation was not hindered or impeded because tugs and scows had navigated the harbor constantly. Weather records were offered and disclosed that ice was first observed that winter on February 6th. On the night in question there was little wind, but what there was blew from the southwest. There was scarcely any ice at the mouth of Newtown creek.

After going out of the mouth of the creek, the tug turned around under a port helm, so that she might get the hawsers and lines in proper shape and get the boats properly made fast, and then passed down by the mouth of the creek in slack water. This was customary on a flood tide. When abreast of the pier below the mouth of Newtown creek, she shifted her course off Twenty-Sixth street, Manhattan. Her passage was uneventful, except for meeting detached pieces of drifting ice, until near the Man-of-War rock. There a large field of drifting ice, bunched together, came up in the flood tide, and came in contact with the bows and port side of the tow, retarding the progress of the tug and tow toward the New York shore. Notwithstanding that all the power of the tug was exerted in pulling the tow away from the flow of heavy ice, the ice, influenced by the flood tide, carried the tow upon the Man-of-War reef. The Wright was damaged, and drifted further up the reef on Blackwell's Island, and stranded. The tug tried unsuccessfully to reach her. She struck her bottom in her attempt to do so. The two remaining scows were carried by the tide, floated from the reef, and were taken in tow by the tug and proceeded on through the Gate. Because of the darkness of the night, it was impossible for those in charge of the navigation of the Bulley to observe accurately the condition of the ice until they were in the midst of it.

The New York, New Haven & Hartford Railroad Company files this libel for damages sustained by the loss of cargo; the libelants Mesick & Mesick, Incorporated, file this libel as owners of the Walker against the tug for damages sustained by it; the Cullen Barge Corporation filed a libel for damages sustained by the Cullen No. 150; and Anthony O'Boyle filed a libel for damages sustained by the Wright. The actions were consolidated and tried as one. They are here treated in one opinion.

The contention of the libelants is that the master of the tug was at fault, because he started from Newtown creek at the strength of flood tide, knowing that ice was likely to be met, and in failing to make allowance in his course in case such ice was met. The appellee contends that there is no evidence to warrant a finding of negligence on the part of the tug in its navigation or meeting the extraordinary conditions of ice which prevailed in the river, and which were unknown to the master of the tug when he left the port. The master of the tug had been towing coal boats from Newtown creek for the past 10 years, and testified that he followed the uniform custom to proceed from Newtown creek during the night. He says it was customary to proceed from the creek, both in the nighttime and daytime. The Bul-

ley had navigated the harbor that day, was through Hell Gate, and had experienced no difficulty on account of the ice. When the master left Newtown creek in the evening, he did not anticipate trouble with the ice. He says the night was dark, and he was unable to observe the exact condition of the ice until they got out into the midst of the stream. The pilot of the tug corroborates the master, and says that the ice in the harbor gave him no apprehension. The engineer of the tug testified that the tow stranded on account of the ice.

The master of the Cullen No. 150 says that the tide and ice sent them on the Man-of-War reef. Brown, the master of the Walker, testified that the broken ice, which was observable to him, would not prevent a steam tug, with two or three barges, going from Newtown creek through the Gate. Brown did say that the tug did not seem to make over to the New York side, where they go as a rule, and "as we were going up close to Man-of-War rock we seemed to be too close to it, and we got up there, to swing around the tide carried the tow up the other way, the tug went up the west side, and the tow swung up the east channel, and the tug went up the west channel."

Brown testified that he told the captain of the tug he "had better hang up here until morning," to which the captain made no reply. The master of the Cullen No. 150 also made the same suggestion. However, the District Judge, who heard the witnesses, either disbelieved this testimony or considered it of little value, when taken in connection with the facts disclosed by other testimony.

A tow master of over 30 years' experience and at least 10 to 12 years in taking coal boats out of Newtown creek, bound for Eastern ports, testified that his tug, on the night of the 13th and the morning of the 14th, came into the harbor. He did not observe ice conditions that would give any trouble, and he said, "You could not tell the condition of the ice until you got into it." And he testified that the method of navigation pursued by the tug after leaving Newtown creek was the one every one towing out of the creek followed.

We find no evidence justifying the claim of negligence in the navigation of the tug in leaving the creek as she did under the conditions which prevailed. She followed the course which prudent navigators followed under similar circumstances. Nor was there any neglect in the navigation of the tug after she met with this field of ice. The ice was not observable when the tug, with her tow, left Newtown creek. Under these facts, we agree with the District Judge that the scows were driven on the reef as a result of the force of the field of ice, which was swept against the tow by the flood tide, and that the result could not be avoided by the exercise of reasonable and proper efforts on the part of the navigator. We recognize the rule that the captain of the tugboat must take note of the barometer, weather indications, and take reasonable precautions to guard against dangers to boats put in his care for towage. The Salutation (D. C.) 239 Fed. 421. But we find here no breach, on the part of the master, of such duty. The ice was not driven with violence against the scows, but was driven with force by the flood tide, and with such strength that the tug, although a

powerful tug, sufficient for any ordinary navigation with a tow such as she had, was unable to withstand the force, so as to guard against being swept on the rocks.

We cannot say that the master of the tugs should have anticipated the tows being caught in the field of ice. There was no breach of duty in the failure to foresee such an occurrence. This, the original injury to the libelants' boats and cargo, was not caused by fault on the part of the tug. After the stranding, we find that the tug did all within her power—all that was reasonable and proper—to protect her tow from the consequences of the accident.

The authorities which we are referred to, and upon which the appellants depend, do not alter these conclusions. In The Zouave, 122 Fed. 890 (a District Court case), two tugs were towing ten boats through Hell Gate. The tugs were held liable for injury caused by striking rocks on the Long Island shore, but this was because the tugs did not take the proper course, which, in the state of the tide was close to the opposite side, and it was further found that the tugs had insufficient power to properly handle a large and unwieldy tow in making the passage. In The Charles B. Sandford, 204 Fed. 77, 122 C. C. A. 391, this court held the tug liable for loss of part of her tow in a storm which was of no unusual or extraordinary character. The liability was imposed upon the ground that the tug had not sufficient power to safely handle, in such bad weather, a tow of nine barges, and it was held that the particular storm was one to be anticipated.

In Price v. The Rambler (D. C.) 66 Fed. 355, damage was caused by the tow being cut by the ice. Fault was found in failing to have a prudent lookout on the bow, which might have avoided collision with the cakes of ice running at such a rate. Liability was attached for negligence of lookout. The fields of ice, under the conditions there prevailing, were both dangerous and well known, or should have been known to competent navigators. The facts were different from those disclosed in the case at bar.

We are of the opinion that no error was committed below, and the decree is affirmed.

UNITED STATES ex rel. DIAMOND v. UHL, Acting Immigration Com'r.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 190.

1. **Habeas corpus ⇐92(1)—Where there is evidence to warrant deportation, court will not weigh it on habeas corpus.**

   Where there was evidence to warrant an alien's deportation under Act Oct. 16, 1918 (Comp. St. Ann. Supp. 1919, §§ 4289¼b[1]–4289¼b[3]), on the ground that he advocated unlawful destruction of property, etc., the order of deportation will not be disturbed on habeas corpus, regardless of the weight of the evidence.

2. **Aliens ⇐54—In deportation proceeding, ordinary rules of evidence do not apply.**

   In a proceeding under Act Oct. 16, 1918 (Comp. St. Ann. Supp. 1919, §§ 4289¼b[1]–4289¼b[3]), for the deportation of an alien on the ground

that he advocated the unlawful destruction of property. the ordinary rules of evidence do not apply, and a hearsay affidavit as to alien's statements was admissible.

3. Aliens ⇐54—Deportation proceedings held not unfair.

Notwithstanding Immigration Law 1917, rule 22, subd. 5, provides that objections and exceptions of counsel shall not be entered in the record and may be presented in an accompanying brief, counsel for an alien, whose deportation was sought under Act Oct. 16, 1918, cannot excuse his failure to request cross-examination of a witness whose affidavit as to the alien's advocacy of unlawful destruction of property was introduced, and where no request for cross-examination was made on hearing or rehearing, the hearing cannot be held unfair because the affiant was not produced.

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

Application by the United States, on relation of Sonia Diamond, next friend of Rocco Di Blasis, for writ of habeas corpus to be directed to Byron H. Uhl, Acting Commissioner of Immigration at the Port of New York. From an order denying the writ, relator appeals. Affirmed.

Charles Recht, of New York City (Elinor Byrns and David Barr, both of New York City, of counsel), for appellant.

Francis G. Caffey, U. S. Atty., of New York City (David V. Cahill, Sp. Asst. U. S. Atty., of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The petitioner applied for a writ of habeas corpus and alleged that he was being unlawfully detained at the immigration station at Ellis Island, N. Y., and was about to be deported to Italy. A hearing was had before the District Court for the Southern District of New York, and the writ of habeas corpus has been dismissed, and the petitioner remanded to the custody of the acting commissioner of immigration at the port of New York.

It appears that the relator is an alien, a native of Italy, born in 1876, and that he came to the United States in 1901, and declared his intention to become a citizen in 1917. It also appears that he was arrested on July 18, 1919, under a warrant of arrest issued by the Department of Labor which charged "that he advocates the assassination of public officials, and that he advocates the unlawful destruction of property." His arrest was followed by hearings, one on July 23, 1919, and another on September 16, 1919, before the United States immigrant inspector. The inspector at the close of the hearings found the following facts:

"(1) That the said Rocco Di Blasis is an alien, namely, a subject of Italy. (2) That he is in the United States in violation of law in that he is an anarchist, that he believes in or advocates the overthrow by force or violence, of the government of the United States, and that he advocates the unlawful destruction of property. It is recommended that the said Rocco Di Blasis be deported."

The report of the hearings and the findings were submitted to the Department of Labor.

The relator being unable to speak and understand the English language satisfactorily, an interpreter in Italian was sworn, who interpreted all questions asked and answers given at the hearings. The relator was informed at the time that the purpose of the hearings was to afford him an opportunity to show cause why he should not be deported to the country whence he came. He was represented throughout the hearings by counsel, and witnesses called by him were heard.

The arrest of the relator was due to a riot in the city of Rome, N. Y., on July 14, 1919. In June and July there was a strike on among the operatives at certain mills in that city. The petitioner was a restaurant keeper, and apparently not connected with any of the mills. He appears, however, to have been active in the strike, and to have taken part in an attack made on one Spargo, the president and manager of one of the mills, who was assaulted and stabbed while in his automobile. The result was that relator was placed under arrest by the state authorities, charged with two offenses, and was released on bail; $3,000 on one charge and $5,000 on the other charge. An affidavit made by Spargo is in the record, which is as follows:

"James A. Spargo, being duly sworn, says that he is president of the Spargo Wire Company, of Rome, N. Y.; that on July 14, 1919, as he was going down East Dominick street, in the city of Rome, N. Y., in his automobile about 8 o'clock in the morning, a large crowd of people led by Rocco Di Blasis attacked deponent, stopping his automobile and breaking same; that the said Rocco Di Blasis jumped on the running board of said car and stabbed deponent on the arm; that after deponent was stabbed he grabbed his gun, but deponent was overpowered, stabbed, bruised, clubbed, and beaten about the head and body and by the crowd led by Di Blasis; that deponent had been told that he was a marked man and would be killed; that deponent has been told that his house would be blown up, and that the houses and plants of the various manufacturers of the city of Rome would be destroyed, and that the manufacturers themselves would be gotten."

This affidavit was read to relator, and he was asked whether it was true. He denied that it was, and denied that he was leading the crowd, but admitted that he was present. The following is an excerpt from the record:

"Q. Were you present? A. I was.

"Q. Tell me what happened. A. I was present and saw Mr. Spargo with a revolver in his hand, and he shot three times; then for don't let somebody killed I jumped upon his automobile; in meantime he started to shoot me; I give him a punch on the arm and let the revolver knock down. I took the revolver in my hands and I give it away to first man, then I come out of automobile. Mr. Spargo claims I had a knife in my hand, but I did not have anything. If I wanted to hurt Mr. Spargo, I could use his gun on him. I think I save his life."

There is in the record an affidavit from a policeman which is as follows:

"Joseph M. Nero, being duly sworn, says that he was on duty as patrolman on East Dominick street, in the city of Rome, N. Y., on the morning of July 14, 1919, at the time of the riot when Spargo was stabbed; that Di Blasis was the leader of the mob, and opened the door of Spargo's automobile, and

jumped in on Spargo; that deponent saw Di Blasis in the car and pulled him out; that the same morning, previous to the Spargo incident, deponent saw Di Blasis in a trolley car putting people off and insisting that no one could ride on the trolley; that deponent argued with Di Blasis that he had no right to put people off the car, but Di Blasis insisted no one should ride; that deponent arrested Di Blasis, and in searching his residence found I. W. W. literature, consisting of paper, 'Il Nuovo Proletario,' pictures of Rosa Luxemburg and Liebknecht, the speech of Debs at Atlanta prison gates, 'La Russia Socialists,' preamble and constitution and due books of the I. W. W., application blanks for membership, etc.; that deponent has been informed and believes that said Di Blasis has been advocating violence during the strike in the city of Rome during the last two months, and advocating destruction of persons and property, and has been the leader of agitation, and has known of said Di Blasis addressing crowds; that deponent found revolver in the kitchen of Di Blasis residence; that Officer Uhl saw Di Blasis at 3 o'clock one morning during the strike with a baseball bat walking the street; that June 30th, during a riot in the city, Di Blasis was urging and inciting the crowd, by hollering, 'Get um!' 'Get um!' A large quantity of literature was found."

The relator's attention was called to this affidavit and he was asked:

"Q. Is any or all of that true? A. Some is all right. I went up to the street car, I was last one to go in and last one to go out; Nero told me I had no right to ask people if they had a book of the Union. I did not force them; I merely asked for their union card."

"Q. Did you lead that crowd? A. No; I was with the people, but I was not leading them.

"Q. Are you a member of the I. W. W.? A. I was a member, but not now. Now I am a member of the A. F. of L."

The following affidavit was also read to the relator, and he was asked whether the statements it contained were true, and he admitted that they were:

"Joseph Rizzuto, being duly sworn, deposes and says: I am a citizen of the United States, over 21 years of age, residing at 219 East Dominick street, Rome, N. Y., and a merchant at the same address. I know Rocco Di Blasis, and about three days before he was arrested, I called Di Blasis to my place and talked to him. I asked him why he got out early in the morning and went with the crowds; that I had heard that he was causing lots of trouble, talking to these people, getting them excited. I told him he had a wife and children and should not do that, that he should attend to his own business, and that if he did not stop, he would be getting into trouble himself. I gave him advice, and told him not to go out, but to stay at home, and take care of his own business, and stop his noise. I told others the same."

An affidavit was presented at the hearing, made by one Capozzoli, which in part is as follows:

"* * * Di Blasis claims to be a member of the I. W. W. and the chief leader of the organization in the city of Rome. Di Blasis has shown deponent a certificate issued to him in 1917, showing him to be a duly credited representative of the I. W. W. organization, and he is the collector of the dues for said organization in the city of Rome. Di Blasis claims that there are 40 or 50 members of his organization in this city, and that, if this strike situation does not break right in the very near future, it may be necessary for him to take control of the situation with the members of his organization. He is the distributor of a semiweekly publication of the I. W. W. organization, and has also distributed pamphlets containing a speech of Debs made at the threshold of Atlanta prison, a copy of which he gave to deponent. Di Blasis claims that he procured an I. W. W. organizer by the name of Valentine or Valenda to speak in Rome on June 29, 1919, for which he paid $26 out of his

own pocket, and which amount he expects to collect from other members of his organization.

"Di Blasis further stated to deponent that he is not a reformatory Socialist, but he is a revolutionary Socialist, and that he cannot become a citizen of the United States, because of the fact that he is a revolutionary Socialist, and not a reformatory Socialist. Di Blasis further stated that he is a Bolsheviki, and that in the event that the strike is not settled that he shall call for aid on his associates and blow up the shops of the manufacturers; that if the manufacturers don't make some concessions, they had better look out, for their lives will be worth nothing.

"Di Blasis further told deponent that Mr. Debs, who is now held in prison at Atlanta, will become President of the United States at the next election, and that it is a great pity that Ettor is confined at the present time, so that he is unable to come here and take care of the situation, and that he (Di Blasis) is a follower and great believer in Ettor."

The relator was asked as to the above affidavit, and answered as follows:

"Q. Is that all true? A. Nothing true.

"Q. Did you and a friend of yours go to Utica to a meeting, and ask the speaker, one Valenti, to come to speak in Rome? A. Yes, sir; but Valenti is a reformatory Socialist, and not a revolutionist.

"Q. Did you collect money from the other members of the I. W. W. to pay the expenses of his coming? A. Not from the I. W. W., for they were not in existence at that time; I collect from all the people.

"Q. As to your stating to Capozzoli, if the strike is not settled you would call your associates and blow up the shops, did you make that statement? A. No; maybe I say to somebody, 'If they don't get eight hours and better pay, the people gone away from Rome, and Rome will be without labor.'

"Q. Have you ever advocated the destruction of property or lives? A. No, sir; I never did. I don't believe in that.

"Q. Do you own property? A. No; I own the furnishings in my pool room and restaurant and my household effects.

"Q. Have you any money? A. No money in bank.

"Q. Anywhere else? A. No; not a cent.

"Q. Do you own any Liberty Bonds? A. No; I only had $4 paid on the Third Liberty Bond.

"Q. Do you own any W. S. S.? A. No; I sell about $6,000 worth of W. S. S."

The relator's counsel asked him whether he believed in and supported the government of the United States. He replied in the affirmative. He was asked whether he desired to become a citizen of the United States, and answered that he did. He stated that he could read and write in Italian and in English.

At the conclusion of the first hearing relator was remanded to the custody of the sheriff of Oneida county, Rome, N. Y. The evidence taken having been submitted to the Department of Labor, the Acting Secretary of Labor issued his warrant directing that the relator be taken into custody and granted a hearing, to enable him to show cause why he should not be deported.

At the second hearing there was considerable testimony as to the radical class literature found in the relator's possession and admittedly distributed by him. The I. W. W. newspaper, Il Nuovo Proletario, was regularly received by him and distributed. The inspector of immigration, in submitting to the department the record of the supplemental hearing, said:

"A study of 'Socialistic Russia' and of the various articles relating to Russian Bolshevism found in the columns of the New Proletariat leaves no doubt that the American I. W. W. approves of the entire program of the Russian radicals; no doubt that it seeks to spread their doctrine and methods throughout this country and thus to accomplish the overthrow of this government. In fact, we are led to believe that the only difference between the American I. W. W. and Russian Bolshevism is geographical.

"Russian Bolshevism and the American I. W. W. alike disbelieve in government as now organized, and seek to overthrow the same by violence to person and property alike. They are anarchy on an enlarged scale. No man can be a good Bolshevist, or a good I. W. W., without being an anarchist, whether he acknowledges it or not.

"In addition to this general approval of Russian anarchy, we find in the New Proletariat of December 7, 1918, page one, third column, next to the last paragraph, specific sanction of a definite manifestation of domestic anarchy of the deadliest kind—the assassination of seven police officers and the wounding of many others at Haymarket Square in Chicago on May 5, 1887, the perpetrators of which are here affectionately referred to as 'our martyrs,' because some of them were convicted and hanged by due process of law.

"The possession and distribution of this anarchistic literature, membership in the I. W. W., which is hand and glove, if not identical, with Russian anarchy, to say nothing of his acts and words, seem to us to justify the finding that Di Blasis is an anarchist."

[1] The testimony in the record certainly does not disclose that the relator is a desirable personage to have within the limits of the United States. But the government has not given authority to the Department of Labor to cause to be deported aliens who may be regarded as undesirable. The act of Congress under which this deportation proceeding is instituted is the Act of October 16, 1918, 40 Stat. part 1, p. 1012 (Comp. St. Ann. Supp. 1919, §§ 4289¼b[1]–4289¼b[3]). Under that act aliens may be taken into custody and deported who advocate or teach the unlawful destruction of property, as may those who advocate or teach the assassination of public officials. Other classes of aliens may also be deported, but with them we are not concerned at this time. The relator is charged in the warrant for his arrest with being unlawfully in the United States, because he advocated the assassination of public officials and the unlawful destruction of property; and the warrant of deportation simply directs the relator's deportation upon the ground that he advocated the unlawful destruction of property. We are therefore alone concerned with the question whether there is evidence in the record from which the Acting Secretary of Labor could find that the relator did advocate the unlawful destruction of property. In his affidavit Capozzoli swears that the relator told him that he and his associates would blow up the shops of the manufacturers if the strike was not settled. That statement is sufficient evidence to sustain the finding. We have nothing to do with its weight.

[2] It is, however, assigned for error:

"That the court erred in holding that the relator was not given a fair hearing because of the admission of certain hearsay affidavits by one Capozzoli without permitting relator to cross-examine affiant."

The ordinary rules of evidence do not apply to such proceedings as those now under consideration. Sibray v. United States, 227 Fed. 1,

7, 141 C. C. A. 555. The hearsay affidavit of Capozzoli was admissible in the proceedings. Choy Gum v. Backus, 223 Fed. 487, 493, 139 C. C. A. 35; Healy v. Backus, 221 Fed. 358, 364, 137 C. C. A. 166.

[3] It is true that there was no cross-examination of Capozzoli and that he was not produced at the hearing. The defendant, however, did not ask to have him produced, and made no demand for his cross-examination, although represented at the hearing by counsel; and no request was made for any extension of time in which to produce testimony in refutation of the statements in Capozzoli's affidavit. The affidavit was, however, presented at the hearing on July 23, 1919. There was a subsequent hearing, as already stated, on September 16, 1919, when witnesses were called on behalf of the relator; but no attempt was made to discredit the statement quoted from the Capozzoli affidavit, beyond the relator's denial of its truth. The affidavit of the immigrant inspector submitted to the department as respects the second hearing on September 16th was in part as follows:

"Pursuant to your instructions of September 13th, and referring to the above-mentioned files I respectfully report that I gave said Rocco Di Blasis a further hearing on September 16th. I allowed him to obtain witnesses, and I also gave the attorney for said alien the privilege of cross-examination of two of the affiants, Mr. Spargo and Mr. Nero. Mr. Capozzoli, who was a private detective hired by the city of Rome, was not in the city, and I was unable to learn where he was at present. Mr. Searle, the alien's attorney, however, made no request to examine him."

We think that, if possible, Capozzoli should have been present for cross-examination, and his absence is certainly regrettable. But we do not believe that the failure to have him present is sufficient ground for setting these proceedings aside, especially in view of the fact that no demand for his presence and cross-examination was made. The relator knew the contents of the affidavit, and was fully apprised of the evidence against him, and was given an opportunity to call witnesses in his defense, and to offer evidence in explanation or rebuttal. If Capozzoli could not be produced on the day set for the hearing, and relator deemed it important to cross-examine him, he should have made his desire known, and requested that he be produced on some subsequent day. The failure to make the request may, we think, be regarded as a waiver of the right. The fact that the rules of the Bureau of Immigration provide in respect to such hearings that "objections and exceptions of counsel shall not be entered on the record, but may be presented by him in accompanying brief,"[1] does not excuse the failure of counsel to insist that a witness whose affidavit is presented shall himself be produced with a view to his cross-examination. We do not agree with counsel that, because of the rule above referred to, the situation as respects the cross-examination "is exactly the same as if the request had been made and denied"; and we do not agree that the court below should have found that the hearing was unfair.

The order is affirmed.

[1] Rule 22, subd. 5b, Immigration Law 1917.

AMERICAN STEEL CO. v. IRVING NAT. BANK.

(Circuit Court of Appeals, Second Circuit. April 6, 1920.)

No. 148.

1. **Banks and banking ⇐191—Bank liable for refusal to honor letter of credit.**
Where defendant bank issued a letter of credit to plaintiff covering the price of merchandise to be shipped by plaintiff to a third party, it is no defense to an action for refusal to honor a draft made by plaintiff pursuant to the letter of credit, attached to the bills of lading, that owing to a recent government regulation the purchaser could not export the merchandise as intended.

2. **Banks and banking ⇐191—Cannot revoke letter of credit acted upon.**
A bank issuing a letter of credit on behalf of a depositor to a third person, who acts on it, cannot justify its refusal to honor its obligation because of contract relations between it and the depositor.

3. **Banks and banking ⇐191—"Letter of credit"; "general letter of credit"; "special letter of credit"; definition of terms.**
A letter requesting one person to make advances to a third person on the credit of the writer is a "letter of credit"; it is general, if directed to the writer's correspondents generally, and special, if addressed to some particular person.

[Ed. Note.—For other definitions, see Words and Phrases, General Letter of Credit; First and Second Series, Letters of Credit; First Series, Special Letter of Credit].

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

Action by the American Steel Company against the Irving National Bank. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff is a corporation organized under the laws of the state of Pennsylvania. The defendant is a banking corporation organized under the laws of the United States, and is a citizen of the state of New York, residing in the Southern district thereof.

Larkin & Perry, of New York City (Albert Stickney and James L. Banks, Jr., both of New York City, of counsel), for plaintiff in error.

Charles Oakes, of New York City, for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. [1] This is an action to recover the sum of $42,336 and interest upon a draft drawn by the plaintiff upon the defendant, and presented to the latter for payment on April 24, 1918. Payment was refused for a reason presently to be stated. The draft was drawn pursuant to a letter of irrevocable export credit issued by defendant and which was in the following form:

"American Steel Company, Park Building, Pittsburgh, Pa.—Gentlemen: You are hereby authorized to draw upon us for account of MacDonnell Chow Corporation at sight to the extent of forty-three thousand two hundred fifty ($43,250.00) covering shipment of tin plates.

"Documents (complete sets unless otherwise stated) comprising bills of lading issued to order, indorsed in blank.
"Invoices.
"Insurance policies covering marine and war risk to be delivered to us against payment.
"Insurance as above.
"Bills of lading issued by forwarding agents will not be accepted, unless specifically authorized herein, and any modifications of the terms of the credit must be in writing, over authorized signatures of this bank.
"Drawings must clearly specify the number of this credit.
"Yours very truly, Irving National Bank of New York,
"Penny, Vice President.
"W. N. Estrom, Manager Foreign Department.
"Entered E. A. R."

The above letter of credit was afterwards amended by a letter, dated July 11, 1917, in which the defendant wrote:

"Please note that we have been informed by the MacDonnell Chow Corporation of this city that the insurance certificates covering marine and war risk will not be required under the above credit.
"All other conditions remain as before."

The complaint alleges that the letter of credit was issued by defendant to plaintiff for a valuable consideration received by defendant, as an inducement to plaintiff to enter into and perform a contract for the sale of tin plate made between plaintiff and the MacDonnell Chow Corporation. The latter is a New York corporation, and the contract between plaintiff and it provided for the sale to it of 3,000 base boxes of sheet tin, 14x20, 224 sheets in a box, of a base weight of 85, and of a weight per box of 170 pounds, at a price per box of $28.90 f. o. b. Pittsburgh district. It also alleges that plaintiff duly sold and shipped to the said MacDonnell Chow Corporation, f. o. b. Pittsburgh district, the merchandise above referred to, and the plaintiff duly presented its draft to the defendant at its New York office in the amount of $42,336, accompanied by bills of lading covering said shipment, issued to order, indorsed in blank, and invoices, all as required by the irrevocable letter of credit. It also alleges that plaintiff has duly performed all the requirements and stipulations of the irrevocable export credit issued by defendant and modified in the form pointed out above.

The defendant in its answer, in addition to a general denial, set up three affirmative defenses. The first defense set forth the terms of the contract between plaintiff and the MacDonnell Chow Corporation, and alleged that the plaintiff failed to make shipment of the merchandise within the time limited by that contract. The second defense alleged that, by reason of federal prohibition of exports from the United States of tin plates, the performance of the contract between the plaintiff and the MacDonnell Chow Corporation became impossible of execution, inasmuch as the MacDonnell Chow Corporation was unable to obtain a license permitting the export of the merchandise within the time required by the contract. The third defense alleged a resale by the plaintiff of tin plates which were the subject of the contract with the MacDonnell Chow Corporation, and claimed an offset by the amount alleged to have been realized on the resale.

[3] Letters of credit have long been known to the commercial law, and the principles which govern them are well established. A letter requesting one person to make advances to a third person on the credit of the writer is a letter of credit. These letters are general or special. They are general, if directed to the writer's correspondents generally. They are special, if, as in the case at bar, they are addressed to some particular person. If the letter is addressed to a particular person, who advances goods or money on it in accordance with its tenor, the letter becomes an available promise in favor of the person making the advance. When acted on, and the advances made in accordance with its terms, a contract is created between the writer of the letter and the party who has acted upon it, upon which an action can be maintained.

The evidence shows that plaintiff delivered the tin plate contracted for to the Waynesburgh & Washington Railroad Company, and that this was within the Pittsburgh district, as the contract required. It also appears that the bills of lading were issued on April 23, 1918. The bills of lading, the invoices, the letter of credit, and the draft were presented to the defendant on the next day, and payment was refused, although the letter of credit, as appears on its face, did not expire until June 13, 1918. The first defense that plaintiff failed to make shipment within the time limited by the contract is without any basis of fact.

[2] The second defense, that the contract became impossible of execution, inasmuch as the MacDonnell Corporation was unable to obtain a license from the United States government permitting the export of the tin plate, is wholly inconsequential. The liability of the bank on the letter of credit as agreed upon between plaintiff and defendant was absolute from the time it was issued, and it was quite immaterial whether the defendant could export the tin or not. The law is that a bank issuing a letter of credit like the one here involved cannot justify its refusal to honor its obligations by reason of the contract relations existing between the bank and its depositor.

In Gelpcke v. Quentell, 74 N. Y. 599, the plaintiffs were bankers in the city of New York, and defendant was a banker at Bremen. The defendant, in December, 1859, opened a credit with the plaintiff in favor of Henry Rodewald & Co. in New Orleans to the amount of $50,000. The plaintiffs on January 17, 1860, wrote Henry Rodewald & Co. that Quentell had opened a credit with them in Rodewald & Co.'s favor "to be used by your drafts sixty days' sight against shipments of consignment to the address" of Quentell, and "that your drafts will meet with prompt protection." On January 18, 1860, Quentell wrote to the plaintiffs, stating that he was obliged to recall the credit extended to Rodewald & Co., but that if, up to the arrival of the letter, acceptances had already been made against the credit, the plaintiffs' drafts for reimbursement would be promptly honored, and asked the plaintiff to communicate to Rodewald & Co. the revocation of the credit. The plaintiffs received the letter of revocation on February 6, 1860, and on the same day wrote Rodewald & Co., notifying them of the revocation. On February 1, 4, and 7 Rodewald & Co. drew

bills upon plaintiffs, who accepted the same on February 8, 10, and 13, and paid them at maturity, notifying defendant. He refused to reimburse plaintiffs. The court held:

"That defendant could not, by his revocation of the credit, escape liability to indemnify plaintiffs against responsibilities which they had incurred, or require them to violate contracts which they had made, in pursuance of the letter of credit before notice of the revocation; that as, in pursuance of defendant's instructions, plaintiffs had given credit to Rodewald & Co., and promised to accept their drafts, which credit was outstanding at the time they received the revocation, it was binding upon them, and they were bound to accept the drafts drawn by Rodewald & Co. before they were notified of the withdrawal of the credit thus given them. * * *"

In Sovereign Bank of Canada v. Bellhouse, Dillon & Co., Ltd., 23 Quebec Official Law Reports (King's Bench) 413, it appears that one Richardson had contracted to buy 36,000 barrels of cement from Bellhouse, Dillon & Co., of London. The latter had contracted to buy the same quantity of the cement from Thomas Bell, Sons & Co., of Antwerp. Richardson induced the Sovereign Bank of Canada to issue a letter of credit in favor of Bellhouse, Dillon & Co. The letter of credit was addressed to the Anglo-Austrian Bank, London, E. C. When Bellhouse, Dillon & Co. began drawing under the letter of credit, the Anglo-Austrian Bank informed them that it had been canceled by Richardson. Thomas Bell, Sons & Co. thereupon canceled their contract with Bellhouse, Dillon & Co., and the latter brought suit against the Sovereign Bank for damages. In the course of the opinion of the court Mr. Justice Carroll said:

"Could this contract be annulled at the demand of Richardson, supposing there is an absolute promise on the part of the bank? We must answer in the negative. Undoubtedly a person who can induce a bank to give him a letter of credit may by his subsequent line of conduct justify the bank in canceling it; but it is not the same when a customer induces a bank to give a letter of credit to a third party. In that case, the customer cannot, by his own will, compel the bank to cancel the letter, because there is no contract between the customer and the bank, but only between the bank and the third party. * * *"

There is but one vital question involved in this case. It is whether the letter of credit already set forth herein is a complete and independent contract between the plaintiff and the defendant. This court is satisfied that it is, and that by it the defendant gave authority to the plaintiff to draw upon it up to the sum of $43,250, and impliedly promised to pay drafts so drawn, when accompanied by certain specific documents, to wit, the invoices and bills of lading, provided the drafts were drawn and presented prior to the expiration of the credit on June 13, 1918.

The defendant in effect seeks to read into the contract a provision that the plaintiff's rights under the letter of credit should be subject to the superior right of the MacDonnell Chow Corporation to modify the contract which the bank had made with the plaintiff. We do not so understand the law.

Judgment reversed.

SWINEHART TIRE & RUBBER CO. v. WILLIAM WHITMAN CO.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1920.)

No. 3373.

1. Sales ⟸99, 174—**Where a buyer defaulted, seller may cancel contract and refuse further deliveries.**
Where the buyer failed to make payments when due under contract for sale, deliveries to extend over a considerable time, and the defaults were substantial, the seller may, there being no modification or agreement for delay in delivery, cancel the contract and refuse further deliveries.

2. Sales ⟸89—**Buyer asserting modification has burden of proof.**
In an action by a seller for amounts claimed due under contract, where the buyer filed a cross-petition asserting damages for nondelivery, the buyer has the burden of proving an alleged modification of contract as to terms of payment and delivery.

3. Sales ⟸89—**Finding of no modification held supported by evidence.**
In an action for amounts due under contract of sale, where the buyer set up the seller's alleged breach in refusing to make further deliveries, verdict for the seller, finding that there was no modification of the terms of the contract as to payment or delivery, *held* warranted.

4. Evidence ⟸71—**Statement received in due course of mail presumed in recipient's possession.**
In an action for sums due under contract of sale, it is presumed that a statement as to the application of payments made by the defendant buyer, received by defendant in due course of mail, was in its possession.

5. Evidence ⟸75—**Failure to produce statement warrants inference that it was of such character as contended by plaintiff.**
Where plaintiff, the seller, mailed defendant a statement as to the application of a payment, the jury is warranted in inferring, as defendant, which presumptively had possession of the statement, failed to produce it, that the statement showed application according to plaintiff's contention; no direction having been given.

6. Pleading ⟸127(2)—**Admissions in answer as to indebtedness construed.**
In action on separate contracts of sale, defendant's admission as to the value of the goods furnished and the amount of interest alleged in the petition was an admission of indebtedness on the various items embraced in the petition, though defendant asserted a payment should have been applied to particular items, for, if so applied, no interest would be due.

7. Sales ⟸359(3)—**Evidence insufficient to show payment.**
In view of the admission in its pleading, and the fact that there was no direction as to application of a payment which, defendant asserted, should have been applied to particular contracts, and it appearing there was no objection to the application made, which plaintiff contended was communicated to defendant, a finding the amounts claimed were due *held* warranted.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by the William Whitman Company against the Swinehart Tire & Rubber Company, which filed a cross-petition. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank H. Pelton, Treadway & Marlatt, and Frank H. Pelton, all of Cleveland, Ohio, for plaintiff in error.

E. A. Foote, of Cleveland, Ohio (Cook, McGowan, Foote, Bushnell & Lamb, of Cleveland, Ohio, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. In December, 1916, and at other dates prior to July 1, 1917, the William Whitman Company entered into six separate contracts with the Swinehart Tire & Rubber Company, by the terms of which contracts it agreed to furnish to the Swinehart Company, in monthly installments, certain quantities and kinds of cotton fabrics to be used in the manufacture of automobile tires. These contracts were substantially identical in terms, except as to the date, the kind and quantities of fabric to be furnished, and the price to be paid therefor. It was specifically provided that payment should be made on the 10th of each month for all deliveries made in the preceding month.

In pursuance of these contracts the William Whitman Company did, upon the order of the Swinehart Tire & Rubber Company, ship from time to time a portion of the fabrics covered by each of these contracts. The Swinehart Tire & Rubber Company made some payments upon account, but in October, 1917, it was indebted to the William Whitman Company for goods furnished under these several contracts in the sum of $40,350.64, all of which was past due. No other goods were delivered by the William Whitman Company under these contracts, and no request for such delivery was made by the Swinehart Tire & Rubber Company until April 20, 1918.

On November 16, 1917, the Swinehart Company paid upon account the sum of $15,000, and on April 20, 1918, it made a further payment of $10,000, and on that date requested the delivery of 10,000 pounds of "combed peeler fabric." The William Whitman Company refused to fill this order or to make any other or further shipments on any of the six contracts. No further payments being made, the William Whitman Company brought action to recover the balance due it for deliveries made under these contracts.

The petition contains six separate causes of action. Each cause of action asks judgment for the unpaid balance of the contract price of goods furnished by it under one of the six separate contracts, with interest thereon from the date the same became due and payable.

To this petition the defendant, the Swinehart Tire & Rubber Company, filed its answer and cross-petition. The cross-petition contains six separate cross-causes of action for damages for breach of contracts by the William Whitman Company in failing, neglecting, and refusing to furnish to it the amount of fabric covered by each and all of these contracts. It is also averred in each of these several cross-causes of action that:

"On October 31, 1917, it was mutually agreed by and between the plaintiff and the defendant that the terms of delivery under said contract should be extended to such time as the defendant should be able to reduce its indebtedness to plaintiff and should notify the plaintiff that it was ready to pay for same on delivery thereof. Defendant did reduce its indebtedness to plaintiff and on April 20, 1918, requested plaintiff to ship under said contract."

The defendant also averred that it had paid in full for all goods specified in plaintiff's first and third causes of action.

The plaintiff, in its answer to this cross-petition, admitted that it had refused to deliver to the defendant, under either of the contracts set forth in the several cross-causes of action of the cross-petition, any goods in excess of the quantities as alleged in the petition and further answering averred that:

"It did not make any further deliveries under any of said contracts because of the breach of each of said contracts by defendant through its failure, though often requested so to do, to pay according to the terms of said contracts for the goods theretofore delivered thereunder, as in the petition alleged."

The plaintiff also denied that it had made any agreement with the defendant extending the terms of the delivery of goods under any of said contracts, and denied each and every other allegation in the several causes of action in the cross-petition contained.

The jury found on the issue joined on the petition for the plaintiff in the amount claimed therein, and on the issue joined on the cross-petition of the defendant the jury found for the plaintiff and judgment was entered accordingly. It is claimed on the part of the plaintiff in error that this judgment is not sustained by any evidence and that it is contrary to law.

[1] It is admitted by the defendant that it failed to pay on the 10th of each month for the goods furnished it by the plaintiff in the preceding month as required by the terms of each of these contracts, and that in October, 1917, it was then indebted to plaintiff in the sum of $40,350.64, all of which was past due. In view of this substantial default in payment, and in the absence of any modification of the original contract or any supplemental agreement between the parties for delay in deliveries and payment, the plaintiff would have the right to cancel and annul these contracts and refuse to make further deliveries thereunder.

[2, 3] The burden was upon the defendant to establish by a preponderance of the evidence that there was such an agreement modifying the terms of the written contract as to delivery and payment, as averred in its cross-petition. The president, secretary, and cashier of the defendant company testified that such an agreement was made on the 31st day of October, 1917, at the factory of the defendant, between Mr. Walsh, representing the defendant, and Mr. Frank C. Chamberlain, representing the plaintiff. Mr. Chamberlain denied that he made any such arrangement or agreement, but, on the contrary, testified that at the time and place named the defendant then agreed with him to pay one-half of the overdue account, at that time amounting to $40,350.64, on or before November 15, 1917, and the balance on or before December 15, 1917.

The plaintiff also introduced in evidence its letter, dated November 16, 1917, directed to Mr. Walsh, president of the defendant company (Plaintiff's Exhibit No. 28), which reads in part as follows:

"Permit us to call your attention to overdue account of $40,350.64, as per statement herewith, and to remind you of your promise to the writer, when he

called at your plant on October 31st, that one-half of the account would be paid by November 15th and the balance by December 15th. We have not received the first payment."

Also a letter, dated November 20, 1917, from the plaintiff to the defendant, acknowledging the receipt of defendant's check for $15,000 (Plaintiff's Exhibit No. 29), of which letter the following paragraph is a part:

"Your remittance of $15,000 did not cover one-half of the overdue account which you agreed to pay by November 15th, and we would therefore request an additional remittance at this time to complete the agreed payment."

It does not appear from the record that defendant replied to either of these letters, or in any way questioned the correctness of the statement therein made. On the contrary, it wrote a letter to the plaintiff, under date of November 16, 1917 (Defendant's Exhibit No. 12), which reads in part as follows:

"We inclose herewith our check on Cleveland, which you can use at par, for fifteen thousand dollars ($15,000). This is substantially the amount we agreed to send at this time, when your representative was here a couple of weeks ago."

In view of the statements contained in these letters in reference to the agreement made between Mr. Walsh and Mr. Chamberlain at the defendant's factory on October 31, 1917, and the positive evidence of Mr. Chamberlain that no other or further agreement was made in reference either to delivery or to payment, this court cannot say that the verdict of the jury upon this issue is not sustained by any evidence.

[4-7] It is further insisted upon the part of the plaintiff in error that it had paid in full the amounts claimed to be due on the first and third causes of action, and therefore it was not in default as to these two contracts at the time plaintiff notified it that it would refuse to ship any goods on any of the six contracts. This contention is based upon the proposition that the plaintiff did not properly apply the payment of $15,000 made November 16, 1917, but, on the contrary, wrongfully and unlawfully applied this payment partly on the August account and partly on the September account, instead of applying it all upon the August account. The defendant, when it made this remittance, did not designate how the same should be applied, but in its letter of November 16, 1917, in which letter the $15,000 check was inclosed, this paragraph appears:

"To assist us in checking out your account, we wish that you would mail an itemized statement, showing all open items, together with payments that have been made on account."

Plaintiff's letter of November 20, 1917, to the defendant, acknowledging the receipt of this $15,000 check, contains the following paragraph:

"Complying with your request, we send you herewith itemized statement, showing all open items, together with payments that have been made on account."

The plaintiff does not deny that it received this statement. On the contrary, Mr. Gardner, cashier of the defendant, testifies:

"I don't recall now if I got that statement back that was addressed to me by the Whitman Company. I think I saw this letter (dated November 20th, marked Plaintiff's Exhibit 29). I cannot say as to whether I turned it over to Mr. Walsh."

This statement was not introduced in evidence. If it differed in any respect from the statements of account contained in plaintiff's petition, it would have tended to prove that the application of this payment of $15,000 to the August and September accounts was not in fact made by the plaintiff at the time it received the check, but after this dispute had arisen, and for the purposes of this litigation.

On the other hand, if this statement then forwarded to the defendant corresponded with the statement in the plaintiff's petition, and the defendant acquiesced therein, it cannot now be heard to complain. It clearly appears from the evidence that this statement reached the defendant in due course of mail. The presumption obtains that it was in the possession of the defendant at the time of the trial of this cause. It was the duty of the defendant to introduce this statement in evidence, or offer some satisfactory reason for its failure to do so; otherwise, the jury had a right to presume that it coincided exactly with the statements of accounts in the plaintiff's petition. The charge of the court clearly states the law applicable to this issue. The uncontradicted evidence that the plaintiff, immediately after the receipt of this check for $15,000, furnished to the defendant an "itemized statement showing all open items," and the failure of the defendant to introduce this statement in evidence, or explain by evidence its inability to do so, fully sustains the verdict of the jury that the application of this payment was made by the plaintiff at the time it received the defendant's check.

The plaintiff also introduced in evidence paragraph 1 of the stipulation and agreement entered into by counsel at the time of the trial of this cause, which paragraph reads as follows:

"That the tire fabric, of the agreed value of $17,520, with the amount of interest as alleged in the petition, was delivered by plaintiff to defendant, and not paid for by defendant."

The petition of plaintiff asks judgment for $1,101.70 on its first cause of action, with interest on that amount from August 10, 1917. On its third cause of action it asks judgment for $198.72, with interest on that amount from August 10, 1917.

The admission of the value of the fabric furnished by plaintiff to defendant, and not paid for by the defendant, "with the amount of interest as alleged in the petition," necessarily admits that the defendant is indebted to plaintiff on these two August amounts, upon which it seeks in its petition to recover interest, for if these two items had been paid, as claimed by the defendant, then, of course, no interest would be due thereon, but whatever interest would be due to plaintiff would be reckoned from a date other than as stated in the petition.

For the reasons stated, the judgment of the District Court is affirmed.

PHILADELPHIA RAPID TRANSIT CO. v. ALCORN.

(Circuit Court of Appeals, Third Circuit. June 30, 1920.)

No. 2544.

1. **Carriers ⇐287(5)—Carrier owes one invited to become passenger the duty of care for his safety.**
   A carrier, who invites passengers to enter its car, owes one so invited two duties: First, to cause the car to remain stationary long enough for her to board it in safety; and, second, if for any reason admission is denied, and the prospective passenger is left in a place of danger, to start the car forward with reference to danger and with due care for safety.
2. **Carriers ⇐247(3), 280(1)—One boarding car which had opened its gates becomes a passenger.**
   Where the carrier stopped its car and opened its doors, inviting passengers to enter, plaintiff, who accepted the invitation by endeavoring to board the car, created the relation of passenger and carrier, and defendant owed her the duty to exercise the highest degree of care which the law exacts of a carrier toward its passengers, without, of course, relieving plaintiff of the duty to exercise due care for her protection.
3. **Carriers ⇐320(9)—Negligence in starting car as to one desiring to become passenger held for jury.**
   In an action for injuries suffered by a prospective passenger when the door of a street car she was attempting to board was closed and the car started, though she was standing close, evidence as to the closing of the door and the catching of plaintiff's person when the car was suddenly started *held* sufficient to take to the jury the question of the carrier's negligence.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by Anna Alcorn against the Philadelphia Rapid Transit Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Harold B. Beitler, of Philadelphia, Pa., for plaintiff in error.

Latimer P. Smith, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

WOOLLEY, Circuit Judge. The plaintiff brought this action to recover damages for personal injuries occasioned by negligence of the defendant. The court refused the defendant's motion for a directed verdict and submitted the case. The jury found for the plaintiff. By this writ the defendant charges error to the court in refusing its motion and in entering judgment on the verdict. The questions raised are these: Do the allegata and probata agree? What was the proximate cause of the injury? Was the defendant negligent? Was the plaintiff negligent? As we regard the case the single question raised by this writ of error is: Whether the facts as established by the finding of the jury prove the cause of action declared on, and, accordingly, sustain the verdict.

The facts of the case as established on the plaintiff's evidence—the defendant having offered none—are briefly these:

Anna Alcorn, an aged woman, was the last one of a number of persons endeavoring to board a pay-as-you-enter car of the defendant street railway company. The others got aboard; but when she was about to step up, the motorman, without looking toward her (though she was in clear view), closed the doors, leaving her standing so close to the car that her dress touched the steps. Without moving her position, she promptly raised her left arm signalling the motorman through the closed glass doors her desire to enter. Immediately upon closing the doors and still without looking toward her and without giving her time to step back, the motorman started the car. The motorman's act of closing the doors, the plaintiff's act of signalling the motorman, and the motorman's last act of starting the car are described as instantaneous. They were, of course, not literally so; but evidently each act followed the other in rapid succession. As the car started ahead, its body or a projecting hand rail struck the elbow of the plaintiff's uplifted arm, causing her to be thrown to the ground and to sustain the injuries of which she complained.

From this brief statement of facts, the relation of the parties and their duty one to the other appear.

[1] The defendant was a common carrier, and on stopping its car and opening its doors it invited the plaintiff to become its passenger. Then there devolved upon the defendant two duties: One, to cause the car to remain stationary long enough for her to board it in safety; and the other (if for any reason it denied her admission and left her in a place of danger into which she had entered upon its invitation), to start the car forward with due regard to the danger of her position and due care for her safety.

[2] Acceptance by the plaintiff of the defendant's invitation to become a passenger, as indicated by her position at the door and her endeavor to board the car, brought her within the protection of the carrier and constituted her its passenger; raising in the defendant that high degree of care which the law exacts of a carrier toward its passengers, without of course relieving her of the care which the law required her to exercise for her own protection.

[3] The law being familiar and the facts established, did the plaintiff show a cause of action by her pleading and sustain it by the evidence?

The plaintiff charged the defendant with several duties: First, to stop the car at a suitable place; second, to keep it stationary long enough for passengers to enter in safety; and, third, to use such care in starting the car that passengers left in close proximity shall not be injured. There can be no question that a carrier owes these duties to its passengers.

For breach of these duties, the plaintiff averred: First, that the defendant did not stop its car long enough for her to enter it in safety; and, second, that it did not use proper care in starting the car, in that it started it suddenly and prematurely, and, therefore, negligently, so as to strike her while she, in the exercise of due care, was attempting to board it.

The defendant's failure to perform its duty to hold the car long enough for the plaintiff to enter did not result in the usual case of injury to a person while boarding a car prematurely started; yet the averment of this duty and its breach have none the less a bearing on the defendant's liability for its subsequent act of suddenly starting the car; for the short stop and premature closing of the doors—a signal that the stop had ended—while not directly inflicting the injury, were acts which indirectly contributed to it by leaving the plaintiff in a place of danger. Thus in putting the plaintiff in a place of danger by invitation to enter the car and by withdrawing the invitation before she could fully comply with it, there devolved upon the carrier in starting the car thereafter the duty to use care toward her in sufficient measure to protect her from the perils of the position in which first it had placed her and then had left her. True, folding doors of a modern street car are provided by carriers for the protection of passengers, and tend greatly to prevent accidents in boarding cars. But the plaintiff here was not injured while boarding the car. She was injured after she had been brought to the car on the carrier's invitation of open doors—a place of safety so long as the car stood still, but a place of danger the instant it started—and after she had been refused admission by the sudden and premature closing of the doors—an act which in itself may have involved negligence. Therefore merely to provide doors and to close them does not constitute the full measure of a carrier's duty to its passengers howsoever positioned. Whether the defendant carrier in this case did exercise such care toward the plaintiff in the position in which it had placed her and had left her, and whether the plaintiff properly cared for herself in the situation, were, it seems to us, questions of fact properly submitted to the jury under appropriate instructions by the trial judge. It further appears that the facts on which the breach of duty was predicated were sufficient to prove the negligence charged and to sustain the verdict rendered.

The judgment below is affirmed.

PITTSBURGH COAL CO. v. BOYD.

(Circuit Court of Appeals, Third Circuit. June 3, 1920.)

No. 2550.

Wharves ⊜20(1)—Liability of owner for negligence in moving sunken boat of another.

Where libelant's houseboat, moored for the winter at defendant's wharf with its consent, but without payment, sank and was drifted by high water to where it endangered boats of defendant, in moving it for their protection defendant *held* bound to exercise ordinary care not to injure it, and liable for its loss solely through the negligent manner in which it was handled and secured afterward.

Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Suit in admiralty by Bert Boyd against the Pittsburgh Coal Company. Decree for libelant, and respondent appeals. Affirmed.

O. K. Price and Don Rose, both of Pittsburgh, Pa., for appellant.
Lowrie C. Barton, of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

HAIGHT, Circuit Judge. Boyd, the appellee, claiming that a houseboat which belonged to him had been wrecked through the negligence of those in charge of the steamboat Active, which was owned by the Pittsburgh Coal Company, the appellant, filed a libel in the court below against the steamboat to recover the damages which he thus sustained, and was awarded the decree from which this appeal is taken.

It appears that some months prior to February, 1917, Boyd, with the consent of the appellant, but without any compensation to the latter, had moored his houseboat at a wharf or landing of the appellant on the Monongahela river, at Monongahela City, Pa. In the latter part of February, due to some cause which the evidence does not disclose, but presumably through no fault attributable to the appellant, the houseboat sank. It remained in that condition until March 9th, when the river had risen to a flood stage, and the houseboat had drifted partially under or very close to one or more of the boats of the appellant, which were moored there. Thereupon one of appellant's superintendents, becoming apprehensive that the houseboat would endanger the safety of some of the appellant's fleet, ordered those in charge of the Active to move the houseboat. As all of the latter, except the upper part of the cabin, was then submerged, a hole was cut in the roof of the cabin, and a line, which was attached to the capstan of the steamboat and passed through a snatchblock, fastened to the shore abutment, was made fast to one of the roof timbers. The engine of the Active was then started, and the houseboat was pulled a short distance up the river and sidewise towards the shore, where it was made fast with a line running from one of the roof timbers of the cabin, through the hole in the roof, to a post on shore, and apparently, although the evidence seems to be conflicting on this point, by a line from one of the hulls of the boat to the abutment. She was left in this position, and a few days thereafter, as the river receded, the cabin collapsed and the boat broke up and became a total loss.

Whether the appellant was a gratuitous bailee of the houseboat, and subject to the general duties and liabilities as such, as libelant contends and as the court below held, or whether, as appellant contends, it owed to the libelant merely the duties which the owner of real property owes to a licensee, seems to us immaterial. The negligence relied upon is not the failure to care for the boat while she was moored at the landing, but in the way in which those in charge of the Active moved and left the houseboat, when she was in a sunken condition and becoming a menace to the safety of appellant's fleet. We have no doubt that appellant was entirely justified in moving the houseboat, and in

adopting for that purpose such means as were reasonably necessary. But we are also entirely satisfied that, under general principles, when the appellant's employés undertook to move it, they were required to use reasonable and due care to avoid, so far as was possible, any unnecessary injury to the houseboat, and that a failure to exercise that degree of care would visit upon the appellant liability for any damages which the houseboat might sustain as a result of such failure. Although the evidence is in several respects conflicting and unsatisfactory, we have no difficulty in finding that the appellant's employés did not exercise the care which they were required to exercise.

We think it needs no argument to demonstrate that it was negligence, in the sense before mentioned, to attach a line to the roof timbers of a flimsy cabin of a sunken houseboat and to shift the position thereof through that means, if it were possible to attach a line to a more substantial part of the boat. As the boat was submerged, it is undoubtedly true that it was not possible, in the beginning of the maneuver, to attach a line to its hull or hulls (the boat had two hulls). But the evidence is that the houseboat then was, and had been for a long time, fastened by a wire cable to one of the abutments leading out from the shore. We also think that the existence of this cable could have been easily ascertained, if the appellant's employés had made even slight efforts to locate it. The boat had been moored by this cable for several months, and it is incredible to believe that the superintendent, who directed the moving of the houseboat, did not know of its existence. The only legitimate inference from the evidence is that, if the houseboat had been moved by means of this wire cable, as could readily have been done, rather than by the line which was attached to the roof of the cabin, and properly made fast thereafter, that the cabin would not have been pulled off of the hulls, or, at any rate, so strained and loosened that it subsequently collapsed.

Not only were the appellant's employés in charge of the steamboat negligent in the respect just discussed, but they also failed, in our judgment, to exercise that degree of care which they were required to in fastening the houseboat. In moving it they had pulled it not only upstream, but in towards the shore, so that it was lying partially on its side. As before stated, they then fastened a line from the roof timbers of the cabin to a post on shore, so that, when the waters of the river receded, an additional strain was put upon the cabin, with the consequent result that shortly thereafter the whole cabin collapsed. The hulls, or one of them, thereafter broke in two, due to the fact that the boat had been left and securely fastened over an uneven part of the shore, and rested thereon when the waters of the river subsided. It is no answer to these acts of negligence to say that the libelant should have done something more than he attempted to do (we do not wish to be understood as indicating that he did not do all that he reasonably could have done) in the way of raising or moving the houseboat between the time that he was first notified that it was sunk and the time when it became necessary for appellant's employés to move it, because the respect in which the appellant was negligent was the manner in which it moved and fastened the houseboat.

Nor do we think that the evidence would justify the finding that, in the short time which intervened between the time when it was first brought to the libelant's attention that the boat had been moved and practically overturned, and the time when she actually broke up, he failed to do anything that he could reasonably have done to have lessened the damage which the boat had already suffered. Although the evidence regarding the value of the vessel and the personal property which was stored therein, and the extent of the damage to the latter, is, as was said by the learned judge of the court below, unsatisfactory, still we think that the sum awarded by him is as just and proper as could be fixed.

The decree below is accordingly affirmed, with costs.

ELROD v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1920.)

No. 3378.

1. **Criminal law ⟸1151—Motion for continuance not reviewed, unless discretion abused.**
A motion for continuance is addressed to the sound discretion of the trial judge, and cannot be reviewed, unless it appears that the discretion was abused.

2. **Criminal law ⟸594(1)—Refusal of continuance for absence of witnesses not abuse of discretion.**
Where a criminal case had been continued one term on defendant's application, and another because no judge could be had at such term, motion for another continuance on the ground of absence of witnesses was not an abuse of discretion, where nearly a year had elapsed since arraignment, and defendant's affidavit merely stated that the witnesses were temporarily absent, etc., for the court was entitled to take into consideration those facts, and that the government witnesses had twice before appeared under subpœna.

3. **Criminal law ⟸1159(2)—Appellate court will not weigh testimony.**
Where there is substantial evidence to sustain a conviction, the appellate court will not weigh the same on writ of error.

4. **Prostitution ⟸5—Evidence in prosecution under White Slave Act sufficient to go to jury.**
In a prosecution under the White Slave Act (Comp. St. §§ 8812–8819), evidence of defendant's excursion with a girl from one state to another, where they engaged in immorality, *held* sufficient to go to the jury, notwithstanding there were no commercial relations between the parties.

In Error to the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

H. W. Elrod was convicted of violation of White Slave Act, and he brings error. Affirmed.

J. C. R. McCall, of Nashville, Tenn. (Tillman & McCall, of Nashville, Tenn., on the brief), for plaintiff in error.

Lee Douglas, U. S. Atty., of Nashville, Tenn.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. This writ is to review a judgment of conviction under an indictment for violation of the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. Stat. § 8812 et seq.]). Plaintiff in error complains, first, that his application for continuance was denied; and, second, that his motion for a directed verdict, on the ground of lack of evidence to support conviction, was overruled.

[1, 2] 1. The motion for continuance was addressed to the sound discretion of the trial judge, and cannot be reviewed, unless it appears that such discretion was abused. Defendant was arraigned under the indictment November 30, 1918, and the cause then placed on the trial docket. It was continued, on his application, to the March term, 1919, when, because no judge could be had at that term, it was again continued until the September term. On October 6th (when the case was about to be reached for trial) another motion to continue was presented, on account of the absence of four witnesses alleged to be material and the illness of a fifth. Defendant's affidavit set out the substance of what was expected to be proven by each witness. There were counter affidavits tending to show that the testimony alleged to be expected from the witnesses would if given, be untrue, that defendant had not been diligent in attempting to obtain their presence, and that the application to postpone was for the mere purpose of delay, and not in the interest of justice. It appeared that the government's witnesses were present, and had appeared under subpœna twice before. It did not appear when defendant's absent witnesses could be produced, unless by the statement that they "live in Nashville, and are, as he is informed, only temporarily away, but he does not know at what time they will return." Nearly a year had already elapsed since arraignment. The court had the right to take all these circumstances into account, and is presumed to have done so. No abuse of discretion is apparent.

[3, 4] 2. The motion to direct verdict: Defendant was charged (a) with transporting a certain girl in interstate commerce from Nashville, Tenn., to Louisville, Ky., for the purpose of unlawful sexual relations between them; and (b) with such transportation with the intent and purpose to induce, entice, and compel her to engage in such relations.

The only question before us is whether there was substantial evidence tending to sustain the conviction. We cannot weigh the testimony. Burton v. United States, 202 U. S. 344, 373, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; Kelly v. United States (C. C. A. 6) 258 Fed. 392, 406, 407, and citations in note 3, p. 406, 169 C. C. A. 408; West v. United States (C. C. A. 6) 258 Fed. 413, 421, 169 C. C. A. 429; Hays v. United States (C. C. A. 8) 231 Fed. 106, 108, 145 C. C. A. 294. It is undisputed that this girl, who it appears had previously been seduced by defendant, on a Saturday night accompanied him on a trip by rail from Nashville, Tenn., to Louisville, Ky.; that the parties there registered at a hotel as husband and wife, and occupied a room together during Sunday and Monday, where they had sexual relations, that they returned to Nashville by rail Monday night, and that defendant paid all the expenses of the round trip, at least

as between himself and the girl. The only serious contention made here is that there was no substantial evidence that the trip to Louisville was had for the unlawful purpose charged—it being urged that it was made solely for the business purpose of selling a consignment of tobacco previously shipped to Louisville; that the girl was taken along as a clerk to "follow up" the sales and without any purpose of unlawful relation, and that the relations had were merely incidental to the trip, due largely to the fact that the girl herself was responsible for their rooming together by registering as defendant's wife.

While there was testimony tending to support this contention, the jury was not bound to believe it. The record, taken together, would sustain a conclusion that the trip was not necessary for selling the tobacco; that the consignee had not been informed that defendant would be present at the sale; that the sale had not been arranged for the Monday in question; that defendant did not stay at Louisville for the sale at a later day, nor was he or any representative of his firm present thereat. There was also testimony that the girl had had no experience in "following up" sales, and tending to show that a given man in the firm's employ had usually done that work, and would have been the natural one to go, if any one. There was also other testimony tending to show that the transportation was for the unlawful purpose charged, including the fact that the trip was made Saturday night with the design of spending Sunday in Louisville, asserted misconduct of defendant while on the night train for Louisville, the further asserted fact that defendant at Louisville informed the girl he could get but one room, and a certain letter, written her before the trip was made, which letter the jury would be warranted in believing was written through defendant's procurement. Whether or not defendant had a business engagement at Louisville, he violated the act if he took the girl there for the unlawful purpose alleged, and even though she were thought to be a willing participant in that purpose, and notwithstanding the relations between them were not commercial in character. Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917E, 502, Ann. Cas. 1917B, 1168; Hays v. United States, supra.. There is sufficient evidence of unlawful purpose to support the verdict. Blackstock v. United States (C. C. A. 8) 261 Fed. 150.

The judgment of the District Court is accordingly affirmed.

JACKSON v. 36 BLOCKS OF MARBLE AND 663 BAGS OF MOSAIC CUBES.

Appeal of UNIVERSAL TRANSP. CO., Inc.

(Circuit Court of Appeals, Second Circuit. February 24, 1920.)

No. 166.

1. **Shipping ⊜27—Pending freight an incident of the ship.**
   Pending freight is considered an incident of the ship, as between buyer and seller.
2. **Shipping ⊜27—Owner taking possession from charterer entitled to pending freight.**
   Where the owner of a ship under charter, with option to purchase in the charterer, during a voyage wrongfully withdrew the ship from the charter, and on arrival at destination took possession and discharged her and charterer, without attempting to regain possession brought suit for breach of contract, the owner *held* entitled, as an incident of the ship, to pending freight, which was not due until delivery of the cargo.

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

Suit in admiralty by Carl D. Jackson against 36 Blocks of Marble and 663 Bags of Mosaic Cubes, part of the cargo of the steamship Ada; the Universal Transportation Company and Rederiaktiebolaget Amie, claimants. From an order directing payment of freight to the Amie, the Universal Transportation Company appeals. Affirmed.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter, John M. Woolsey, and Jay T. Cooper, all of New York City, of counsel), for appellant.

Engel Bros., of New York City (J. B. Engel, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. A libel was filed by this libelant, trading under the name of C. D. Jackson & Co., against 36 blocks of marble and 663 bags of mosaic cubes, a part of the cargo on the steamship Ada. The Universal Transportation Company, Incorporated, intervened and filed a claim to the freight money. The Ada was owned by the Rederiaktiebolaget Amie Company, a Swedish corporation, and on the 10th of December, 1915, was chartered by a written agreement to the appellant, the Universal Transportation Company, Incorporated. The charterer agreed to pay for hire $165,000 in installments, and the agreement provided for an option of purchase. The Ada, under this charter, became engaged in the charterer's employ, and the cargo in question was received on February 19, 1916, for transportation from Leghorn, Italy, to New York, at the agreed freight of $1,520. While the cargo was on board, and the Ada was on her voyage to New York, the Rederiaktiebolaget Amie Company gave notice to the Universal Transportation Company, Incorporated, that the Ada was withdrawn from the service of the Universal Transportation Company, Incorporated. It appears that previous to this the Universal

Transportation Company, Incorporated, had exercised its option to purchase the Ada and tendered her purchase price. This was refused by the Rederiaktiebolaget Amie Company. It has since been determined that the withdrawal of the vessel from the possession of the Universal Transportation Company, Incorporated, was wrongful. In an action for damages for breach of the contract, a recovery was had by the Amie Company. Rederiaktiebolaget Amie v. Universal Transp. Co., 250 Fed. 400, 162 C. C. A. 470. The freight money, amounting to $1,520, was deposited with the registry of the District Court under an order of May 4, 1916, and the marble and mosaic cubes were released to the libelant. On the 29th of October, 1918, the appellee, Amie Company, moved for payment of the freight money to it, and by an order of the District Court on the 26th of February, 1919, it was ordered and decreed that such moneys be paid to the appellee, the Amie Company. The Universal Transportation Company, Incorporated, feeling aggrieved, has appealed.

[1, 2] Pending freight is considered an incident of the ship. Merchants' Bank Co. v. Cargo of the Afton, 134 Fed. 727, 67 C. C. A. 618; Kimball v. Farmers' & Mechanics' N. Bank, 138 N. Y. 500, 34 N. E. 337, 20 L. R. A. 497. This also is the rule in England. Case against Davidson, 5 M. & S. 79. After the Amie Company, as owner of the vessel, entered into a contract giving the option to the appellant, the Universal Company, for the sale of the ship, the option was exercised and failure to make the sale breached the contract. The purchase price was payable in installments and the purchaser, pending such payment, was entitled to the use of the vessel. If default of any payment was made, the owner, under the contract, had the right of immediately withdrawing the vessel from such service. It is not questioned, but that the Universal Company actually took possession of the vessel and loaded her with cargo, and she was proceeding to the port of New York, when there was a lawful exercise of the option to purchase. It was after this, as this court has found, the Amie Company wrongfully withdrew the vessel from such service. The freight in question was payable at destination under the bill of lading. The ship arrived in New York on April 22, 1916, two weeks after her withdrawal. The Amie Company took possession of her, proceeded to dock and discharge her, and refused to deliver the cargo of marble and cubes in question until the freight was paid. This gave rise to the payment of money in court and the release of the marble and cubes to the libelant.

By the terms of the contract of sale and pending the payment for her, the Universal Company was the conditional vendee. It could exercise the rights of the owner. The Amie Company occupied the position of the original vendor out of possession. It was only after the Amie Company, making the claim that the Universal Company had defaulted in the payment of the purchase price, gave notice of the contract of sale, that the rights of the Universal Company thereunder were ended. The parties then treated the contract as ended. The freight was unearned until unloaded from the vessel or the voyage completed. Miston v. Lord, 17 Fed. Cas. 490, No. 9,655. The parties then pro-

ceeded as if for a breach of contract, resorting to an action at common law for failure to carry out the terms of the contract for the purchase of the ship. The appellant did not endeavor by legal action to regain possession of the ship by means of possessory action, or by an action for specific performance of the contract. By proceeding as it did, it surrendered and abandoned the vessel to the appellee, depending upon its remedy for breach of contract of sale. It thus considered the contract ended by the breach, and we think there was a forfeiture of the right to receive or collect pending freight (The James Martin [D. C.] 88 Fed. 649), since the freight was an incident of the ship.

The appellant has succeeded in its action against the Amie Company, and in that action it could have recovered all the damages which it has sustained, including loss of freight. But, apart from this, we think that the charter party was terminated when the contract was breached, and, indeed, the freight money did not accrue until the voyage was ended. This interpretation is justified by the actions of the parties, both in their conduct in the management of the ship and the legal proceedings instituted thereafter for breach of the contract.

The judgment is affirmed.

SILVERTHORNE et al. v. McFARLAND et al.

(Circuit Court of Appeals, Fourth Circuit. April 6, 1920.)

No. 1762.

Evidence ⊜442(6)—Incomplete written contract may be supplemented by parol.

Where the only writings evidencing a contract for sale of lumber from mills were orders made by purchasers, one stating "as per agreement," parol evidence as to the terms and conditions of the contract *held* admissible, in an action for its breach.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Action by James B. McFarland and others against Mary H. Silverthorne and A. E. Silverthorne, partners doing business as the Martins Mill Company. Judgment for plaintiffs, and defendants bring error. Reversed.

William T. Aycock, of Columbia, S. C. (Weston & Aycock, of Columbia, S. C., on the brief), for plaintiffs in error.

J. N. Nathans, of Charleston, S. C. (Nathans & Sinkler, of Charleston, S. C., on the brief), for defendants in error.

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

KNAPP, Circuit Judge. Plaintiffs in error, defendants below, are manufacturers of lumber at Martins, S. C., under the trade name of Martins Mill Company. Defendants in error, plaintiffs below, are

lumber dealers at Philadelphia. The suit is for breach of contract for failure to deliver a quantity of lumber sold by defendants to plaintiffs in the winter and spring of 1917. The complaint sets out four causes of action, based upon four contracts or four orders for lumber at various dates stated, but as all of them involve the same dispute they may be treated as a single transaction. The answer admits the making of the contract, but alleges that it was subject to certain conditions, among others, that it was not to be binding in case defendants were unable to get cars, or unable to prepare the lumber by reason of labor troubles or labor shortage. Testimony offered by them as to these conditions was excluded by the trial court, on the ground that the entire contract was in writing, and the correctness of that ruling is the only question which needs to be discussed.

The contract was entered into on the 8th of February, 1917, when Mr. Addison, one of the plaintiffs, had an interview at Martins with the defendant A. E. Silverthorne. On the same day, as appears, Addison wrote and left with Silverthorne this letter, addressed to Martins Mill Co. and signed by him for his firm:

"Gents: We are entering your order as per agreement for following: [Here follows a description of the lumber ordered.]"

This letter is simply what it purports to be, an order for certain lumber. It specifies the sizes and lengths, all "rough K. D. Box," number of cars and price of each size, dates of delivery f. o. b. Philadelphia, and nothing else; and this is all that appears in the shipping instructions sent from Philadelphia two days later. The kind of lumber, whether pine or other wood, is not stated, nor are the terms of payment. The subsequent orders, however, state in most instances that the lumber was to be pine and the terms "usual."

Was the contract between the parties so fully expressed in writing as to require exclusion of the testimony offered by defendants? We are of opinion that this question should be answered in the negative. The writing relied upon by plaintiffs is not in the ordinary form of a contract, and does not in terms purport to embrace the entire agreement. It is merely, as just stated, an order for specified lumber; and it begins with the very significant phrase, "as per agreement." On the face of it this phrase implies a prior agreement in pursuance of which, or in performance of which, the particular order was given. We think it fairly inferable that this letter or order was not understood to include all the terms and conditions of the contract, and this view is confirmed by certain statements that appear in the subsequent correspondence. Some question seems to have arisen almost at once as to the terms of payment, and plaintiffs' note of February 17th, replying to a letter of defendants on that subject, says they will change the orders to read in accordance with the terms named by defendants, and they add:

"The error was made, lacking advices from our Mr. Addison as to how he had purchased the stock."

Again, under date of March 23d, the plaintiffs write a letter in which they say:

"While we are endeavoring to secure permits for this stock, yet you will note on the order that you are permitted to ship same by the B. & O., in which case we will absorb the 2-cent arbitrary, so that we are complying with your condition that shipments must be open as soon as you have the stock ready."

This also seems to support the contention that the contract was in fact made upon certain conditions, which were not disclosed in the letter above quoted. In short, we are constrained to hold that the facts of record bring the case within the rule that, where the parties to a contract have not put all its provisions into writing, evidence of a separate oral agreement is admissible as to terms or conditions, not inconsistent with those expressed, on which the document is silent, especially where, as here, the court may infer from the circumstances of the case that the parties did not intend the writing to show the entire undertaking. Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 517, 12 Sup. Ct. 46, 35 L. Ed. 837. An illustration of the principle directly applicable to the instant case is found in Burke v. Dulaney, 153 U. S. 228, 233, 14 Sup. Ct. 816, 818 (38 L. Ed. 698) as follows:

"And the evidence offered by the appellant, and excluded by the court, did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not—except in a named contingency—to become a contract, or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing."

Without further citation of authorities, it is enough to say that in our judgment the defendants were entitled to show, if they could, that the contract in question was subject to the conditions alleged by them as to car supply and labor shortage. The judgment will therefore be reversed, and the cause remanded, with instructions to grant a new trial.

Reversed.

BLUE RIDGE KNITTING CO., Inc., v. PAULSON, LINKROUM & CO., Inc.

(Circuit Court of Appeals, Fourth Circuit. April 6, 1920.)

No. 1764.

Sales ⇐72(5)—Seller entitled under contract to replace defective yarn "agreed upon."

A provision of a contract for sale and purchase of yarn, that "complaints as to the quality must be made to us [sellers] in writing within 15 days, * * * we retaining the privilege of replacing within a reasonable time any yarn agreed upon as not complying with this contract," *held* to entitle seller to replace any yarn claimed by purchaser not to comply with the contract for any reason, and an offer by seller to replace it *held* an "agreement" with purchaser's claim.

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

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

Action by Paulson, Linkroum & Co., Incorporated, against the Blue Ridge Knitting Company, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

W. Calvin Chesnut, of Baltimore, Md. (Alexander Armstrong, of Hagerstown, Md., on the brief), for plaintiff in error.

Wallis Giffen and Lee S. Meyer, both of Baltimore, Md. (Frank R. Savidge, of Philadelphia, Pa., on the brief), for defendant in error.

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

KNAPP, Circuit Judge. The parties will be designated as in the court below. In October, 1918, they made a contract whereby plaintiff sold and defendant bought 25,000 pounds of size 12 cones, carded peeler Harriet yarn, to be delivered in weekly shipments. The contract was in writing and contained these provisions, on which the controversy turns:

"Any claim that the quality of goods is not in accordance with the terms of this contract, or any reasonable delay in delivery due to conditions beyond our control, shall not constitute a cause for cancellation of this contract or any part thereof."

"We guarantee the yarn to be equal to the average running quality of the grade sold."

"Complaints as to the quality must be made to us in writing within 15 days from time of the delivery of any yarn, we retaining the privilege of replacing within a reasonable time any yarn agreed upon as not complying with this contract."

The yarn delivered or tendered in due time was rejected by defendant on the ground that it did not conform to contract requirements. The objection first made related mainly to the material used in manufacturing the yarn, but this objection proved to be untenable. Later, and at the trial, it was insisted that a large portion of the yarn was of smaller size than 12, and that its variation in size was greatly in

excess of permissible limits. Without reviewing the testimony on this issue, we shall assume for present purposes that defendant was justified in rejecting the yarn delivered because of its lack of proper uniformity, and because so much of it was not of the size called for by the contract. This brings us at once to the issue of replacement.

Plaintiff contends that it had the right to replace with yarn that would fully conform to the contract any delivered yarn which was not of the kind, quality, and size specified in the contract; that it promptly and repeatedly offered to replace the rejected yarn with other yarn that met all the contract conditions; and that defendant refused to permit such replacement. On this offer and refusal is based its right to recover. If plaintiff had the right of replacement, as the trial court held, it is enough to say here that whether it made a definite and unconditional offer to replace, whether that offer was seasonably made, whether it was withdrawn or kept good, and whether it was refused by defendant, were all questions of fact on which the evidence was conflicting, or at least permitted different inferences to be drawn. As to those questions the verdict of the jury is conclusive.

Defendant's denial of the right of replacement takes a twofold form. It is argued in the first place that the contract allows replacement only of yarn of defective quality, and not yarn of incorrect size; that the yarn in question was shown to be of the quality called for by the contract, even if some of it was not of the contract size, and therefore it was error to hold that plaintiff was entitled to replace for undue variation in size. The sufficient answer to this contention is that it assumes a limitation not found in the contract. True, the first clause above quoted states that a claim of defective quality shall not be cause for cancellation, and the third clause states that complaints as to quality must be made within 15 days; but the latter is followed by the broad provision:

"We retaining the privilege of replacing within a reasonable time any yarn agreed upon as not complying with this contract."

Given its natural meaning, this language plainly permits replacement, not only for defects of quality, but for defects of size as well, or for any other defect of which complaint might be made, and we perceive no reason in the context or otherwise for restricting its application. In short, it seems to us not doubtful that on this point the jury were properly instructed.

The other contention is based on the words "agreed upon" in the reservation of the right of replacement. These words are said to mean, as defendant asked the court to charge, that plaintiff was not entitled to replace, "unless both parties *agreed* that the yarn delivered did not comply with the contract," and, as plaintiff at no time conceded that a good delivery had not been made, it is argued at length that the right to replace did not arise; that is to say, plaintiff had to admit that it was at fault before it could avail itself of the replacement privilege. The short and conclusive answer to this is that the offer to replace, if timely and unqualified, and not withdrawn, was in legal effect an admission by plaintiff that it had delivered yarn which did

not conform to the contract. If such an offer was made and kept good, defendant got thereby the full benefit of a fault confessed. For all practical purposes the minds of the parties met. Defendant "agreed" by rejecting the yarn, and plaintiff "agreed" by offering to replace. The ruling of the trial court on this point was clearly correct.

So construing the contract as respects the right of replacement, we need only repeat that the remaining questions are questions of fact, which were fully and fairly submitted to the jury.

The record discloses no reversible error, and the judgment will therefore be affirmed.

DURST v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1920.)

No. 1783.

Intoxicating liquors ⊂=131—Transfer to different vehicle in passing through prohibition state not an offense.

Where defendant was carrying whisky purchased in another state in an automobile within a prohibition state, intending as he claimed to carry it through into another state, an instruction that, if he transferred any part of it into another car within the state, it constituted a violation of Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), regardless of his intention as to future transportation, *held* erroneous.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Criminal prosecution by the United States against George W. Durst. Judgment of conviction, and defendant brings error. Reversed.

D. S. Henderson, of Aiken, S. C. (Hendersons, of Aiken, S. C., on the brief), for plaintiff in error.

Francis H. Weston, U. S. Atty., of Columbia, S. C. (J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C., on the brief), for the United States.

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

KNAPP, Circuit Judge. Durst was convicted of transporting intoxicating liquor into the state of South Carolina, in violation of the act of March 3, 1917, commonly known as the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a). His defense was that he was taking the liquor to Augusta, Ga., and merely passing through the state of South Carolina. These facts appear:

Durst lived in Augusta. In the latter part of April, 1919, he purchased at Columbia, S. C., a secondhand Buick automobile, bearing a South Carolina tag and number, in which a few days later he went to Baltimore, Md., driving the car himself. In that city he bought some 240 quarts of whisky in bottles, quarts and pints, which he stowed in

the tool box and other parts of the automobile. He left Baltimore on the morning of May 3d, having with him a woman who was not his wife, and arrived late in the evening of the following day at Camden, S. C., where he stopped at a restaurant for supper. He there met, by appointment as the government contends, two men, Deitz and Williams, who had come from Columbia in a Cadillac car, and the party had supper together. Towards midnight they started for Columbia; Williams taking the woman in the Cadillac and going ahead, and Durst following with Deitz in the Buick. It seems that the authorities had been informed of this purchase of whisky by Durst, and that he was carrying it south in a Buick automobile, and accordingly officers were posted along the road a few miles out of Columbia for the purpose of apprehending him. The first car was halted by the officers, but allowed to pass when they found it was a Cadillac. Williams then went on a short distance and stopped, apparently waiting to see what happened to the other car. When Durst came along a few moments later, he was placed under arrest, and his car taken into possession by the officers. On the pretense that something was the matter with the Cadillac, Durst was permitted to go forward to fix it. Instead of doing so, or while pretending to do so, he spoke in whisper to Williams, who at once started off at great speed and was soon out of sight. What became of the Cadillac or its occupants is not disclosed. In the Buick car were found only about 160 quarts of liquor, and Durst made no attempt to account for the other 80 quarts purchased in Baltimore. The government contends that either at Camden, or afterwards on the road, a portion of the liquor was transferred to the Cadillac car, with the view to its disposition by Deitz and Williams in the state of South Carolina, and various circumstances, besides those above recited, are relied upon to sustain the contention.

As we deem it our duty to reverse the judgment on another ground, and as the proofs may not be the same on a second trial, it is unnecessary to say more than that the trial court did not err in refusing to direct a verdict for the defendant. After the jury had been out for an hour and a half without agreeing, they came into court for further instructions, and the following occurred:

"In response to a question of the foreman, the court instructed the jury that, if the defendant broke bulk, or transferred or delivered the liquor, or any part thereof, from one automobile to another at Camden, S. C., that was an infraction of the law, regardless of his intent as to future transportation.

"The defendant's counsel excepted to the foregoing answer of the court to the question of the jury and the exception was noted.

"Immediately after the asking and answering of the foregoing question, the jury returned a verdict of guilty on the first count and not guilty on the second count."

In our opinion the instruction thus given was clearly erroneous, and that it influenced and perhaps controlled the adverse verdict is evident from the record. The law is well settled. Durst had the right to transport his liquor by automobile through the prohibition state of South Carolina. United States v. Gudger, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653. And that right was not lost or impaired by the transfer in that state of some portion of it to another automobile

—assuming that such a transfer was made—if he nevertheless intended in good faith that the whole of it should be carried on into the state of Georgia. Whether or not he had that intention may for present purposes be conceded to have been a question for the jury. On the government's theory, that was the crux of the case. But the jury were told in plain words, and must have understood the learned judge to mean, that the mere act of taking some of the bottles from the Buick car and placing them in the Cadillac, no matter for what reason, and even if with the purpose and intent of aiding and completing the movement to Augusta, constituted of itself a violation of the statute, and made the defendant liable to its penalties. We cannot uphold the ruling. To state the proposition is to reject it; and of the argument advanced in its support it is enough to say, as the Supreme Court said of the government's argument in the Gudger Case:

"In last analysis it but invites, not a construction of the statute as enacted, but an enactment by construction of a new and different statute."

As the error was obviously prejudicial, the defendant is entitled to a new trial.

Reversed.

HANSON v. COLE.*

(Circuit Court of Appeals, Eighth Circuit. May 10, 1920.)

No. 4710.

1. **Appeal and error ⟸977(1)—New trial ⟸6—Ruling on motion for new trial not reviewable.**
   The granting or denial of a motion for a new trial in a federal court rests in the discretion of the trial judge, and his action is not reviewable by the appellate court.

2. **Appeal and error ⟸548(1)—Rulings on admission of evidence not reviewable, in absence of bill of exceptions.**
   Whether error was committed in the admission or exclusion of evidence is conditioned by the state of the evidence that had been introduced, and that was offered at the time the respective rulings were made, and such rulings are not reviewable by the appellate court, in the absence of a duly authenticated and signed bill of exceptions.

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

Action at law by John F. Hanson against John E. Cole. Judgment for defendant, and plaintiff brings error. Affirmed.

John F. Hanson, of Lindsborg, Kan., in pro. per.

Ellis, Cook & Barnett, of Kansas City, Mo., and P. J. Galle, of McPherson, Kan., for defendant in error.

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

SANBORN, Circuit Judge. John F. Hanson brought an action at law against John E. Cole, a partner in the firm of Liggett, Rogers &

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

*Rehearing denied October 25, 1920.

Cole, to recover $5,000, alleged damages, because he and the other members of his firm, after the plaintiff had notified them that he was the owner and entitled to the possession of certain hogs in their possession, and had demanded possession of them, each maliciously and wantonly denied his demand and kept the hogs. In his amended complaint, upon which the case was tried, the plaintiff alleged his ownership and his former actual possession of the hogs, set forth the grounds of his claim of ownership, and averred that the animals were secretly taken from him by unknown persons and delivered to the defendant and his partners. In his answer the defendant denied every allegation in the amended complaint. Upon these pleadings the case was tried to a jury. At the close of the evidence for the plaintiff, the defendant filed a demurrer to the evidence, which, after hearing argument, the court sustained, and thereupon it ordered the case dismissed, at the plaintiff's costs.

In support of the writ of error the plaintiff assigned nine alleged errors: (1–3) That at the trial the court in three instances excluded certain testimony which the plaintiff offered; (4) that it required the plaintiff to answer certain questions on his cross-examination; (5) that it sustained a motion to strike out parts of the plaintiff's first amended petition; (6) that it made an order to the effect that he should secure associate counsel and amend one of his petitions; (7) that it sustained the demurrer to his evidence and dismissed his action; (8) that it overruled his motion for a new trial; and, (9) that it entered judgment for the defendant. Several readings of the pleadings and the motions concerning them leave no doubt that the plaintiff suffered no injury from the orders of the court striking out certain parts of his first amended petition, and that he was in no way prejudiced by the order that he should secure associate counsel and amend his petition.

[1] The granting or denial of a motion for a new trial which the court has jurisdiction to make rests in the discretion of the trial judge and is not reviewable by appeal or writ of error in the federal courts (City of Manning v. German Ins. Co., 107 Fed. 52, 54, 46 C. C. A. 144, 146; Chi., M. & St. P. Ry. v. Heil, 154 Fed. 626, 629, 83 C. C. A. 400, 403), and the specification that the court erred in entering the judgment in favor of the defendant is too general and indefinite to invoke the consideration of an appellate court.

[2] The other alleged errors of which complaint is made challenge alleged rulings of the court during the trial on the admission and exclusion of evidence, and its ruling and order at the close of the plaintiff's evidence, to the effect that he had produced no substantial evidence to sustain his alleged cause of action. But the right answer to the question whether each or any of these rulings was erroneous is conditioned by the state of the evidence that had been introduced and that was offered at the time that the respective rulings were made, and, without an authentic record of those conditions this court may not lawfully review these rulings, because it cannot know what the conditions were when the court below made them. The only way by which such record can be presented to a federal appellate court where, as in this case, the judge who tried the case is qualified to authenticate it, is by a bill of

exceptions certified to be true andd signed by that Judge, and in the absence of such a bill the proceedings at the trial are not open to review or reversal. Revised Stat. § 953, as amended (3 U. S. Comp. Stat. 1916, § 1590); Origet v. United States, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743; Warren v. United States, 183 Fed. 718, 720, 106 C. C. A. 156, 158, 33 L. R. A. (N. S.) 800; Oxford & Coast Line Ry. v. Union Bank, 153 Fed. 723, 82 C. C. A. 609; Knight v. Ill. Cent. Ry. Co., 180 Fed. 368, 371, 103 C. C. A. 514, 517.

The record in this case includes a writing entitled bill of exceptions, but this writing contains no certificate of the trial judge that it is a true or correct statement of the evidence, the rulings or the exceptions at the trial, and it has not been signed by the trial judge. Moreover, there is in the record a certificate, signed by the trial judge, to the effect that the plaintiffs presented this bill of exceptions to him and asked him to certify and sign it, but that he did not do so because it did not set out the testimony, giving the objections and rulings made and the proceedings had in connection with the trial according to the true intendment thereof; that the proceedings at the trial were taken in full by a stenographer, but had not been written out; that he had no access thereto, nor any other means except his memory, to supply omitted features. He then specified in a certificate certain evidence that had been omitted and states some testimony received in the case. The result of a consideration of the unsigned bill of exceptions and the certificate of the judge is that there is no authenticated statement in the record before this court of the evidence received, the evidence rejected, the objections, rulings, or exceptions at the trial, so that none of the questions urged on account of the alleged errors in the proceedings at the trial can be considered or decided by this court, and the judgment below must be affirmed.

It is so ordered.

WHITFIELD, Immigration Officer, v. HANGES et al.

(Circuit Court of Appeals, Eighth Circuit. May 10, 1920.)

No. 4902.

Appeal and error ⇐1097(1)—Decision on former appeal is law of case.

It cannot be assigned as error that a District Court followed the decision and directions of the Circuit Court of Appeals on a former appeal in the same case, nor can questions determined on the former appeal be again reviewed on a second appeal.

Appeal from the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Habeas corpus by George Hanges and others against S. L. Whitfield, Immigration Officer. From a judgment discharging petitioners, respondent appeals. Affirmed.

See, also, 222 Fed. 745, 138 C. C. A. 199.

F. A. O'Connor, U. S. Atty., of Dubuque, Iowa, and Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa, for appellant.

J. E. Williams, of Waterloo, Iowa, for appellees.

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

SANBORN, Circuit Judge. Pursuant to the opinion and direction of this court in Whitfield, Immigration Inspector, v. Hanges et al., 222 Fed. 745, 755, 756, 138 C. C. A. 199, the court below has tried on the merits de novo on evidence introduced before that court the question whether or not the resident aliens, Hanges and others, were guilty of the charges made against them in the warrant for their arrest, found that there was no evidence to support those charges, and has ordered and decreed that the writ of habeas corpus in their behalf be sustained, that each of them be discharged, and that their bail be exonerated. From this order and decree Whitfield has appealed, and he assigns as error that the court below entertained the petition of the aliens and issued the writ of habeas corpus before the Secretary of Labor had issued his final order for their deportation, and that it also held that under the facts and circumstances of this case it had authority to hear and determine whether or not the alien residents were guilty of the charges against them set forth in the warrant for their arrest.

But this court, in this case between the same parties now here, on the same facts relevant to the questions suggested by these specifications of error, decided on the former hearing on the first appeal, after full argument by counsel for the respective parties and mature deliberation, that the facts and circumstances of this case were such that they warranted, and law and justice required, the issue of the writ and the former finding and decision of the court below before the Secretary of Labor issued his final order, and that the court below had the power under the facts and circumstances of this case, and it was its duty, to try and adjudge on its merits de novo, on evidence to be introduced before it, the question whether or not these aliens were guilty of the charges made against them in the warrant for their arrest. Whitfield v. Hanges, 222 Fed. 745, 755, 756, 138 C. C. A. 199. There was therefore no error on the part of the court below in ruling and deciding these issues of law in accordance with the decision of them by this court on the former appeal, because it was its duty to follow that decision as directed by this court, and because that decision constituted the law of the case on the second trial, and neither the trial court nor this court might lawfully review or reverse that decision on a second appeal in the same case on the same facts and between the same parties.

When the questions involved in a case on a second trial have been decided by the appellate court on the same facts on a former appeal between the same parties, that decision is the law of the case on the second trial, and it is not reviewable or reversible at the second trial by the trial court, or by the appellate court which rendered it, on an appeal from the order, judgment, or decree of the trial court on the second trial. Martin v. Hunter, 1 Wheat. 304, 354, 355, 4 L. Ed. 97;

Roberts v. Cooper, 20 How. 467, 481, 15 L. Ed. 969; Corning v. Troy Iron & Nail Factory, 15 How. 451, 465, 14 L. Ed. 768; Coal & Iron Ry. Co. v. Reherd, 226 Fed. 441, 442, 141 C. C. A. 271, 272.

Let the order and decision of the court below be affirmed.

CURTISS AEROPLANE & MOTOR CORPORATION v. UNITED AIRCRAFT ENGINEERING CORPORATION.

(Circuit Court of Appeals, Second Circuit. April 1, 1920.)

No. 143.

1. **Patents ⟸258—Sale by licensed manufacturer not infringement.**
Contracts made during the war by which complainant, a manufacturer of aeroplanes sold to the British government, through the Imperial Munitions Board of Canada, a large number of aeroplanes, engines, and parts, and also its Canadian plant and materials, with license to manufacture under all its Canadian patents, to use any future inventions it might acquire, and an agreement to promote such manufacture, receiving therefor a large consideration and a royalty on engines made, *held* to vest the British government with absolute title to all planes so sold or manufactured, free from the monopoly of any patents owned by complainant, and the sale by such government or by purchasers from it, in the United States, of planes so manufactured or bought, which were left on hand at the close of the war, *held* not an infringement of complainant's United States patents.

2. **Patents ⟸206—Unrestricted grant to manufacture carries right to use and sell articles manufactured.**
Unless a grant by owner of patent transfers right to make, use, and sell, grant creates a license only; but an unrestricted grant by a patentee of the right to manufacture the patented article carries with it the right to use and sell the articles so manufactured.

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

Suit by the Curtiss Aeroplane & Motor Corporation against the United Aircraft Engineering Corporation. Decree for defendant, and complainant appeals. Affirmed.

The plaintiff is a corporation organized under the laws of the state of New York, and has its principal place of business in Buffalo; but it also has a regular and established place of business in New York City, within the Southern district of New York. The defendant is likewise a corporation organized under the laws of New York, and maintains its office in the city of New York.

John C. Kerr and Drury W. Cooper, both of New York City, for appellant.

Arthur Johns, of New York City (Clifford E. Dunn, C. A. L. Massie, and Ralp L. Scott, all of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. [1] This suit is brought under the Patent Laws of the United States for the alleged infringement by defendant of thirteen patents issued by the United States. The patents so said to be infringed are named in the margin.[1] The defendant is charged with selling and offering for sale in the United States aeroplanes manufactured in Canada pursuant to certain agreements between plaintiff and the British government; the Canadian manufacture having been conducted by a corporation created by that government for that purpose. The total number of claims involved is 80. All the patents involved are for improvements in aeroplanes, and are capable of conjoint use, and are so used by plaintiff and defendant.

The bill of complaint alleges that all of the patents referred to were, by instruments in writing duly executed and recorded in the United States Patent Office, assigned to the plaintiff, and that plaintiff is the sole and exclusive owner of each and all of them. It also alleges that defendant has infringed each and all of said patents by offering for sale, selling, and using within the Southern district of New York, as well as elsewhere within the United States, aeroplanes, each of which embodies the improvements claimed in each and all of said patents. It contains the following statement:

"That the plaintiff, Curtiss Aeroplane & Motor Corporation, has developed at large expense, and produced in large quantities, aeroplanes of a distinctive type known throughout the aeroplane industry and among aviators as the Curtiss JN–4 machine; that such machine and the various parts thereof are embodiments of the several inventions of the letters patent heretofore set forth; that the defendant is now selling in the United States aeroplanes known as Canadian Curtiss or Canadian JN–4 machines, which are copies, in form, appearance, and mechanical details, of plaintiff's JN–4 machine, all in violation of plaintiff's rights under such patents and in an unfair and unlawful manner."

The bill prays an injunction and asks for an account of profits and damages resulting from the infringement which it alleges, and that any damages assessed may be tripled. The court below dismissed the bill for lack of merit, with costs to defendant.

The plaintiff, prior to the beginning of the World War, was engaged in the manufacture of aeroplanes, and as a result of the war its business was greatly extended. In 1916 the plaintiff entered into certain contracts with the British government from which it received some $4,000,000. The contract into which the plaintiff entered with the British government is found in two separate documents: First, the agreement of November 20, 1916, with the annexed schedule, which

[1] No. 1,010,842, granted December 5, 1911, to F. W. Baldwin; No. 1,011,106, granted December 5, 1911, to A. G. Bell et al.; No. 1,170,965, granted February 8, 1916, to Glenn H. Curtiss; No. 1,195,142, granted August 15, 1916, to Henry Kleckler; No. 1,246,024, granted November 6, 1917 to Henry Kleckler; No. 1,246,026, granted November 6, 1917, to Henry Kleckler; No. 1,246,028, granted November 6, 1917, to Henry Kleckler; No. 1,290,004, granted December 31, 1918, to P. G. Zimmerman; No. 1,290,005, granted December 31, 1918, to P. G. Zimmerman; No. 1,290,838, granted January 7, 1919, to Henry Kleckler; No. 1,291,678, granted January 14, 1919, to Henry Kleckler; No. 1,294,477, granted February 18, 1919, to Henry Kleckler; No. 1,298,625, granted March 25, 1919, to P. G. Zimmerman.

is a contract of sales; second, the simultaneous agreement of the same date, which is an agreement on the plaintiff's (the seller's) part to promote the manufacture by the British government (the buyer) of the aeroplanes and engines of the type sold. The record contains a third document, dated December 6, 1916. The parties to this document are the Curtiss Aeroplane & Motors, Limited, of the first part, and the Canadian Aeroplanes, Limited, of the second part. The Curtiss Aeroplane & Motors, Limited, is a subsidiary company organized in Canada, in which the plaintiff owned 83 per cent. of the outstanding capital stock; and the Canadian Aeroplane, Limited, is a company which the Imperial Munitions Board had caused to be incorporated to take over the plant of the Curtiss Aeroplanes & Motors, Limited.

The document above referred to as a contract of sales was executed on behalf of his Britannic majesty's government by J. P. Morgan & Co., agents. That document contains the statement that the British government has contracted to purchase from the plaintiff, and the seller has contracted to manufacture and sell to the buyer, at the price, and subject to the terms and conditions specified, the "sellers JN–4A type aeroplane, each equipped with one seller's OX5 type 90 H. P. engine, spare parts for such aeroplanes, blueprints and such aeroplanes, seller's OX5 type 90 H. P. engine, and spare parts for such engines." It also provides for the sale of a specified number of additional engines and of sets of spare parts of such engines.

The second document of those referred to was executed by his Britannic majesty's government, acting by the Imperial Munitions Board of Canada, and it provides in its first clause as follows:

"The seller agrees to cause to be sold and delivered to the buyer within ten (10) days of the date of the fixing of the purchase price therefor, as hereinafter provided, and the buyer agrees to accept and pay for, all of the tools, machinery, drawings, patterns, jigs, etc., of the Canadian company for use in the manufacture of seller's JN–4 aeroplanes, including raw materials and material manufactured and in process of manufacture at said Toronto plants for use in the manufacture of such aeroplanes, the buyer to pay therefor to the Canadian company. * * *"

It provides in its third clause as follows:

"The seller agrees that at the option of the buyer it will grant or cause to be granted to the buyer, as part of the consideration moving from the seller to the buyer for this agreement, the exclusive right and license under any and all Canadian patents and applications for Canadian patents now or at any time hereafter owned by the seller or the Canadian company, and any further inventions now or hereafter owned and controlled by them or either of them embodying changes in or improvements of seller's JN–4 type aeroplanes and of seller's type engines, to manufacture such aeroplanes and /or engines within the Dominion of Canada, for sale to or use by the British government or the government of any of its possessions, but not for manufacture, use, or sale otherwise."

The plaintiff alleges that it was not within the contemplation of the parties to the agreements made between plaintiff and the British government, or within plaintiff's intention or by its permission, that the aeroplanes were to be sold or used by the public, or for other than war purposes, or in the United States. These allegations are denied

absolutely in an affidavit presented by one who was connected with the Imperial Munitions Board of Canada, which made the contracts, and who was the superintendent of aeronautical supplies; this department being a branch of the Air Ministry in Great Britain and responsible only to the government of Great Britain. His affidavit states that in entering into the contracts made with the plaintiff it was understood that the property manufactured or otherwise acquired by the munitions board should become the absolute property of the board, to be disposed of as it should see fit. This was purely a war organization, and as soon as hostilities ceased the board proceeded to sell off everything controlled by it, including lands, buildings, aeroplanes, motor transports, motorboats, and thousands of patented articles of all kinds, including those complained of by the plaintiff.

It is admitted that the JN–4 aeroplanes which are said to infringe were made in Canada for the British government under the agreements to which reference has been made, and that after the war defendant purchased them from the British government, and, as it appears, is now proceeding to sell them in the United States. It is also admitted that the defendant has announced its intention of establishing warehouses at various parts of the United States, and such warehouses have been established already by it in New York and Chicago, in order that it may supply individuals and companies with the spare parts of air planes of all kinds and descriptions and all standard parts which may be used in their manufacture and development, including the supplying of standard air plane parts for the particular Canadian planes herein involved.

The defendant corporation has a capital of $500,000, and as the record shows, it is in the management of men of character and of excellent business standing. The chief engineer of the Curtiss Aeroplane & Motors Limited, of Canada, states in his affidavit that "their staff of engineers is composed of the leading aeronautical engineers of this country." It was organized on November 22, 1918, which was prior to the signing of the armistice, and was established, it is said, with the idea of organizing an aeronautical engineering and consulting corporation of the highest type. At the time of its incorporation there was no intention of purchasing any of the property of the Imperial Munitions Board of Canada. It appears that after the armistice, and when defendant was first approached on the subject of the purchase of some part of the aeroplane equipment of the British government, which was located in Canada, it declared through its president that it was not interested in any extent whatsoever. In January, 1919, the Imperial Munitions Board sold a number of its machines to the Canadian government, and the remainder of its equipment was sold to F. G. Ericson, a citizen of the United States, at the time a resident of Toronto, Canada. They were purchased by Ericson in his own name, but as matter of fact he was acting for defendant. He is a member of the Society of Automotive Engineers and a Fellow of the Aeronautical Society of Great Britain, and had been for nine years engaged in the development of aeronautics. In 1915 he was appointed chief engineer of the Curtiss Aeroplane & Motors, Limited, of Canada,

and when that concern was taken over by the Canadian Aeroplanes, Limited, he became its chief engineer. Before the sale to Ericson was made he informed the director of aviation of the Imperial Munitions Board what disposition he intended to make of the property upon acquiring it, and that he expected to sell a few of the planes in Canada, but that most of them would be sold for commercial purposes in the United States, and that he expected to establish a depot for such sales in or near Baltimore. With this information in its possession the Imperial Munitions Board made the sale, and made it entirely without restriction or condition, and gave Ericson full right to sell and dispose of the property whenever and wherever he might see fit. It may be remarked in passing that the counsel of the munitions board, who is referred to in one of the affidavits "as one of the most prominent attorneys in Canada," furnished that board with an opinion in which he denied the claims set up by the plaintiff as to the rights which the British government had under the agreements already referred to.

The bill charges no infringement by manufacture, nor does it raise the question when assembling ends and manufacturing begins. It deals with nothing but the right to bring into the United States certain JN–4's which the plaintiff gave permission to make, and in the making of which it aided, and for every one of which it has been compensated. The right to bring these machines into the country is the sole question with which the bill deals.

An aeroplane has been said to be the most mobile article manufactured, and it is not confined by geographical boundaries. It is susceptible of use anywhere in the world. As was said at the argument, aeroplanes were used by the British government, not only in England and Canada, but over the battle fields of Belgium and France, in Egypt, Palestine, Mesopotamia, Northern Russia, South Africa, and indeed wherever hostilities existed. In the very nature of things, and from the language used in the agreements, it is evident that the contracting parties contemplated such widespread use. After this country entered the war, the aviation fields in Texas and in other states were placed at the disposal of the British authorities and were actually used by them as training fields for Canadian aviators. It does not appear in this record whether any of these Canadian JN–4 planes were then brought into the United States for use by Canadian aviators on our aviation fields, who were there undergoing training. If, however, such planes were then brought into the United States, and if they contained the plaintiff's manufactured engines, it would be difficult to believe that any one would seriously contend that their introduction involved any violation of the plaintiff's patents.

The plaintiff and the British government alike understood and intended that the aeroplanes to be manufactured by that government as well as those to be supplied to it by the plaintiff were to become the absolute property of the government, and were to be disposed of as the latter should see fit. The express language of the contract is that the aeroplanes and other articles should "become and be the absolute property of the British government."

The plaintiff, in becoming the owner of the patents in suit, acquired the exclusive privilege of making, using, and vending, and of authorizing others to make, use, and vend the subject-matter of the respective inventions without its permission. Bloomer v. McQuewan, 14 How. 539, 549, 14 L. Ed. 532. The exclusive right of an inventor in his invention was not recognized by the common law, which conferred no such monopoly upon him. The right in the United States rests upon article 1, § 8, of the Constitution, which gives to Congress the power to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. While a patent is undoubtedly a monopoly it belongs to a class made legal by the constitutional provision referred to.

It is important to determine what right or rights passed to the British government under the agreements which it entered into with the plaintiff. As we have seen, the owner of a patent has three distinct rights, which he can dispose of either together or singly: (1) The right to make the article. (2) The right to use it. (3) The right to sell it. Waterman v. Mackensie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923. A grant which does not transfer all these rights is a license. So, also, is the right to make, use, and sell the article for specified purpose only. Gamewell Fire-Alarm Telephone Co. v. Brooklyn (C. C.) 14 Fed. 255; Bogart v. Hinds (C. C.) 25 Fed. 484. See 22 Am. & Eng. Encyc. of Law, 430.

That the British government secured the right to manufacture the aeroplanes, and the engines as well, is not open to doubt. In the fourth clause of the agreement of sale the plaintiff bound itself from time to time to furnish the British government all information useful to it "in the building of such aeroplanes and engines, including engineering data, blueprints in detail of such aeroplanes and engines," etc. The sixth clause of that agreement reads as follows:

"The seller agrees that at the request of the buyer from time to time it will send to the plant to be established by the buyer in the Dominion of Canada a competent engineer, familiar wtih the design, construction, and methods of manufacture of such aeroplanes and/or engines, to assist and advise the buyer in the manufacture thereof. Such engineer shall report his observations and recommendations to the general manager of the plant so to be established by the buyer, or any other person designated by it for that purpose, and shall continue in the exclusive employment of the buyer during its pleasure, receiving compensation from the buyer at a rate not to exceed fifty dollars ($50) per week during the time of such continuous and exclusive employment."

And the seventh clause provides that the British government shall pay "on each such engine manufactured" by it a specified sum, adding:

"And such exclusive right and license shall be granted only upon the further condition that the buyer shall pay to the seller," etc.

There is much more in the agreements which proves what the plaintiff's intention was respecting the right of the British government to manufacture, but it is not necessary to set it forth herein. It does not in any way restrict or qualify the right of the British government.

[2] That government plainly acquired the right under its license to make. Did it also have the right to use and to vend? The answer to this question depends upon whether the authorization to make was general and unrestricted or subject to qualification and conditions, as to the disposition of the planes by the British government. The agreements will be searched in vain for any restriction or condition as to the right to use or to vend; and in the absence of such restriction we understand the law to be that the British government obtained a full and unqualified right to use and sell the planes and engines, and that this right passed to all subsequent purchasers, and therefore to this defendant. No American or British decision asserting a contrary doctrine is known to us.

The plaintiff relies on certain cases, but an examination shows that they are plainly distinguishable, and do not support the plaintiff's contention. The cases upon which it relies belong to one or the other of two classes: (1) Those in which there has been a sale of a patented article, or a license to manufacture, but accompanied by explicit and unequivocal restrictions as to the time, or place, or manner of using the article so sold or licensed, or as to the ultimate disposal thereof. Dickerson v. Matheson, 57 Fed. 524, 6 C. C. A. 466; Dickerson v. Tinling, 84 Fed. 192, 28 C. C. A. 139; Dickerson v. Sheldon, 98 Fed. 621, 39 C. C. A. 191. (2) Those in which there has been no participation whatever by the owner of the patent, either as a party or as a privy, in the putting out of the article which is alleged to infringe. Boesch v. Graff, 133 U. S. 697, 10 Sup. Ct. 378, 33 L. Ed. 787; Featherstone v. Ormonde Cycle Co. (C. C.) 53 Fed. 110; Daimler v. Conklin, 170 Fed. 70, 95 C. C. A. 346, 27 L. R. A. (N. S.) 534. And if a patentee retains title to the patented machine, which was not done in this case, he may restrict its manner of use, in the lease or other contract. United States v. United Shoe Machinery Co., 247 U. S. 32, 58, 38 Sup. Ct. 473 (62 L. Ed. 968). In Chaffee v. Boston Belting Co., 22 How. 217, 223 (16 L. Ed. 240), the Supreme Court said:

"When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. * * * By a valid sale and purchase, the patented machine becomes the private individual property of the purchaser, and is no longer protected by the laws of the United States. * * *"

In Bloomer v. Millinger, 1 Wall. 340, 350 (17 L. Ed. 581), the court said:

"Patentees acquire the exclusive right to make and use, and vend to others to be used, their patented inventions for the period of time specified in the patent; but when they have made and vended to others to be used one or more of the things patented, to that extent they have parted with their exclusive right. They are entitled to but one royalty for a patented machine, and consequently, when a patentee has himself constructed the machine and sold it, or authorized another to construct and sell it, or to construct and use and operate it, and the consideration has been paid to him for the right, he has then to that extent parted with his monopoly, and ceased to have any interest whatever in the machine so sold or so authorized to be constructed and operated."

The purchaser of a patented article from a territorial licensee (one whose rights are limited to a restricted territory) may, unless there is a specific agreement to the contrary, use the article so purchased outside of the territory without interference from the patentee. The article is no longer within the monopoly of the patentee, and the purchaser can use it anywhere. This principle was announced in Adams v. Burke, 17 Wall. 453, 456 (21 L. Ed. 700), where it was said:

"It seems to us that, although the right of Lockhart & Seelye to manufacture, to sell and to use these coffin lids was limited to the circle of 10 miles around Boston, that a purchaser from them of a single coffin acquired the right to use that coffin for the purpose for which all coffins are used; that, so far as the use of it was concerned, the patentee had received his consideration, and it was no longer within the monopoly of the patent. It would be to ingraft a limitation upon the right of use not contemplated by the statute, nor within the reason of the contract to say that it could only be used within the 10-mile circle."

And see, to the same effect, Hobbie v. Jennison, 149 U. S. 355, 13 Sup. Ct. 879, 37 L. Ed. 766; Keeler v. Standard Folding Bed, 157 U. S. 660, 15 Sup. Ct. 738, 39 L. Ed. 848. In the case last cited the court said:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. * * * The conclusion reached does not deprive a patentee of his just rights, because no article can be unfettered from the claim of his monopoly without paying its tribute. The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration."

If a patentee or his assignee sells a patented article, that article is freed from the monopoly of any patents which the vendor may possess. If the thing sold contains inventions of several United States patents owned by the vendor, the article is freed from each and all of them; and if the vendor has divided his monopoly into different territorial monopolies, his sale frees the article from them all. If the vendor's patent monopoly consists of foreign and domestic patents, the sale frees the article from the monopoly of both his foreign and his domestic patents, and where there is no restriction in the contract of sale the purchaser acquired the complete title and full right to use and sell the article in any and every country. This doctrine was recognized by Judge Wallace in the Circuit Court for the Southern District of New York in 1885, in Holiday v. Mattheson, 24 Fed. 185. That case raised the question whether the owner of a patent in the United States for an invention, and who had sold the patented article in England without restrictions or conditions, could treat as an infringer one who had purchased the article in England of a vendee of the patentee, and could restrain him from using or selling the article in the United States. In deciding the question adversely Judge Wallace said:

"When the owner sells an article without any reservation respecting its use, or the title which is to pass, the purchaser acquires the whole right of the vendor in the thing sold, the right to use it, to repair it, and to sell it to others; and second purchasers acquire the rights of the seller, and may do with the article whatever the first purchaser could have lawfully done if

he had not parted with it. The presumption arising from such a sale is that the vendor intends to part with all his rights in the thing sold, and that the purchaser is to acquire an unqualified property in it; and it would be inconsistent with the presumed understanding of the parties to permit the vendor to retain the power of restricting the purchaser to using the thing bought in a particular way, or in a particular place, for a limited period of time, or from selling his rights to others. It is quite immaterial whether the thing sold is a patented article or not, or whether the vendor is the owner of a patent which gives him a monopoly of its use and sale. If these circumstances happen to concur, the legal effect of the transaction is not changed, unless by the conditions of the bargain the monopoly right is impressed upon the thing purchased; and if the vendor sells without reservation or restriction, he parts with his monopoly so far as it can in any way qualify the rights of the purchaser."

And see Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. (C. C.) 40 Fed. 580.

Counsel for plaintiff relies strongly upon Société Anonyme des Manufactures de Glaces v. Tilgman's Patent Sand Blast Co., L. R. 25 Ch. Div. 7. That case, however, is readily distinguishable in its facts. There were two patents for the same invention, one Belgian and one British. The two patents were owned by the same concern. A third party had purchased the patented article in Belgium, and had then undertaken to import his purchase into England. The owner of the British patent had not manufactured the article, nor sold it, nor in any way authorized the purchaser to bring it into England, and therefore was not estopped from enforcing his rights against the purchaser. The owner of the patent had granted to the Belgian Société Anonyme a mere ordinary license to operate under the Belgian patent, and the court held that, inasmuch as the relationship was that of ordinary licensor and licensee, the Belgian product was not immune from infringement within Great Britain. In the course of his opinion in that case Cotton, L. J., however, said:

"When an article is sold without any restriction on the buyer, whether it is manufactured under either one or the other patent, that, in my opinion, as against the vendor gives the purchaser an absolute right to deal with that which he so buys in any way he thinks fit, and of course that includes selling in any country where there is a patent in the possession of and owned by the vendor."

The extract quoted fits the facts of this case. The plaintiff herein as the original vendor gave to the British government, as purchaser, an absolute right to deal with that which it purchased in any way it thought fit, and defendant herein derives its right from that government to bring the aeroplanes into the United States in the manner it did, and the plaintiff is without ground of complaint. As the plaintiff has already been paid for these aeroplanes the full price it asked, it is no longer concerned about the price at which the article is sold, or whether the article is kept in Canada, or in Great Britain, or in the United States. We may summarize our conclusions:

It is admitted that, if the aeroplanes which are alleged to infringe had been built in Canada under a limited license, or under a Canadian patent, and then brought into the United States, infringement would have been made out. But that is not this case.

It appears that the aeroplanes complained of were manufactured under a license from the plaintiff and with the latter's active assistance, and that they contain engines furnished by the plaintiff with the intent that they should be so used.

It appears that the plaintiff has been paid a sum in excess of $4,000,000 for the aeroplanes and engines which plaintiff sold or agreed might be manufactured.

It appears that the license under which the aeroplanes were manufactured contained no restriction or limitation as to time, or place, or manner of use of the aeroplanes, nor as to the ultimate disposition which might be made of them, and that they were therefore freed from the monopoly of the plaintiff's patents.

The decree appealed from is in all respects affirmed, with the costs of both courts.

E. H. MUMFORD CO. et al. v. MUMFORD MOLDING MACH. CO.

(Circuit Court of Appeals, Third Circuit. May 7, 1920. Rehearing Denied August 14, 1920.)

No. 2532.

Patents ⇐51(1)—Patent held invalid because of prior use.

Where the application for a patent was not filed until April 6, 1907, proof of prior use of a machine substantially the same as that covered by the patent prior to March 16, 1905, will invalidate the patent, though invention was claimed to have been perfected late in the year 1905.

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

Bill by the E. H. Mumford Company and others against the Mumford Molding Machine Company. From a decree dismissing the bill, complainants appeal. Affirmed.

C. Percy Hutchinson, of Trenton, N. J. (Harvey L. Lechner and Paul Synnestvedt, both of Philadelphia, Pa., of counsel), for appellants.

Wm. Steell Jackson, of Philadelphia, Pa. (Thomas H. Sheridan, of Chicago, Ill., of counsel), for appellee.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

PER CURIAM. In the court below, the patent in suit (No. 932,563, issued to E. H. Mumford on August 31, 1909) was held invalid because of a prior use by the Lunkenheimer Company, of Cincinnati, Ohio, and the appellants' bill was accordingly dismissed. Admittedly, an apparatus or machine which was remodeled and used by the Lunkenheimer Company is substantially the same as that covered by the patent, and if it was used prior to the date of the invention of the latter the patent is invalid. The decisive question on this branch of the case is therefore whether the appellee established, with the requisite

degree of certainty, the fact that the Lunkenheimer apparatus was used prior to the date of Mumford's invention.

We have carefully examined and considered all of the testimony bearing on this question, and have reached the conclusion that the prior use has been established beyond what seems to us any reasonable doubt. We think it would serve no useful purpose to review and analyze the evidence. If it be assumed that the appellant has succeeded in showing that the date of the Mumford invention was as early as October, 1905, although the application was not filed until April 6, 1907, and that the appellee has not established that the Lunkenheimer use began in the early part of 1904, as its evidence tends to prove, still we are satisfied that the Lunkenheimer apparatus was designed and used at least prior to March 16, 1905.

Accordingly the decree of the court below must be affirmed, with costs.

LOOSE et al. v. BELLOWS FALLS PULP PLASTER CO. et al.

(Circuit Court of Appeals, Second Circuit. March 31, 1920.)

No. 165.

1. **Discovery ⟸8—Equity has no jurisdiction to grant discovery to ascertain damages in aid of legal demand.**
   Equity is without jurisdiction of an action to recover royalties under a contract granting an exclusive territorial right or license under a patent because discovery is sought for the sole purpose of ascertaining the amount of royalty due; such evidence being available in a law action under Rev. St. § 724 (Comp. St. § 1469).
2. **Patents ⟸218(1)—Royalty under license limited to patented product.**
   Under a contract granting a right or license to manufacture under a patent, and by which the grantee agrees to pay a royalty, such royalty is limited to the product which comes within the scope of the patent.
3. **Patents ⟸218(4)—Assignee of license contract not liable thereon for royalties.**
   That the right to manufacture a patented article under a license contract was transferred to a corporation does not render the corporation liable for royalties under the contract, in the absence of proof that it assumed such liability.

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

Suit by Maximus E. Loose and Thomas E. Baird against the Bellows Falls Pulp Plaster Company and G. Frank Hendee. Decree for complainants, and defendants appeal. Reversed and remanded, with directions.

Suit began against the corporate defendant, and three individuals, of whom one was never served, and one died before decree. The action was not revived against the decedent's estate, and decree passed only against the corporation and Hendee. The latter was jointly interested with the other individual defendants in the business producing this litigation; but, as decree passed against him alone, it is convenient to speak of him as doing the things which in fact all three did.

Plaintiffs owned the patent of Coale, No. 635,996, dated October 31, 1899,

for "wall plaster," whereof the single claim is: "A composition of matter comprising calcined plaster, cement, clay, lime, fiber, and stucco retarder in the proportions substantially as described."

In 1903 two written agreements were made between plaintiffs and the three men we refer to as Hendee. They are of the same date, and plainly constitute but parts of the same transaction. One paper recites that Hendee "is desirous of obtaining an interest in said invention and letters patent in and for the territory hereinafter described," wherefore, in consideration of $3,000 and "other valuable considerations," plaintiffs "grant, sell, assign, and set over [to Hendee] said letters patent No. 635,996 as secured by said letters patent within and for the state of Vermont [and four counties of New Hampshire] only; the same to be held and enjoyed [by Hendee and assigns] within and to the said specific and assigned territory to the full term" of the patent.

The other and cotemporaneous paper recites that to Hendee was "this day" conveyed all plaintiffs' rights in the patent, "in and for" the described territory, wherefore Hendee agrees to pay plaintiff 50 cents per ton "on each and every ton of plaster wherein wood pulp or wood fiber is used, made and sold by them or their successors or assigns within said territory during the life of the patent." Hendee also agreed to furnish a monthly statement of the plaster made and sold by his party, "or by their successors and assigns, containing wood pulp or fiber during the preceding month," and to pay "the royalty" of 50 cents per ton on the quantity thus "made and sold." The Hendee party also agreed to erect a mill and begin manufacture "under said patent" within six months, and further covenanted that no plaster made and sold by them or their assigns should be called "elastic pulp plaster," except such as should "strictly conform to the formula and materials used under said patent."

As was contemplated by all parties when this bargain was made, Hendee et al. organized the corporate defendant, became its principal shareholders and officers, and caused the corporation to make and sell the Coale patented compound under the name "elastic pulp plaster." The royalties were paid by the corporation for some two years, when defendants complained that plaintiffs were not protecting them from infringing competition within their own territory. They (apparently for this reason) refused or neglected to pay further royalties, and somewhat later, but a year or more before subpœna issued herein, made and sold as "elastic pulp plaster" a substance containing wood fiber, but wholly omitting the cement specified in the Coale patent, and greatly varying the proportions of other ingredients.

The bill herein, filed in 1908, sets forth the substance of the foregoing facts, and prays for a discovery of the records of the corporate defendant to ascertain the quantity of plaster containing wood pulp made and sold by it within the territory allotted to Hendee; also for an accounting as to the same, and a decree at the rate of 50 cents a ton against all the defendants for the royalties so shown to be due and unpaid.

The record contains no evidence showing or tending to show that the defendants' new formula product infringed the Coale patent; the court below held that since what the corporate defendant made under such new formula contained wood fiber, and was sold under the name "elastic pulp plaster," all the defendants were estopped from "defending on the ground that it was manufactured under a different formula." The final decree accordingly is a money judgment for $35,092.90, representing, with interest, 50 cents for every ton of "elastic pulp plaster" made and sold by the corporation, since royalties ceased to be paid.

Marvelle C. Webber, of Rutland, Vt., and Alexander Dunnett, of St. Johnsbury, Vt., for appellants.

Geo. A. Weston, of Bellows Falls, Vt., and John G. Sargent, William W. Stickney, and Homer L. Skeels, all of Ludlow, Vt., for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). By the conveyance to Hendee et al. plaintiffs doubtless intended to give them an "exclusive right" in the Coale patent to a "specified part of the United States." R. S. § 4898 (Comp. St. § 9444). The intent was to make them grantees and not assignees or licensees. Robinson, Pat. § 763; Pope, etc., Co. v. Gormully, etc., Co., 144 U. S. 248, 12 Sup. Ct. 641, 36 L. Ed. 423.

It may be assumed, but need not be decided, that the grant was not reduced to a license by the reservations of a royalty or otherwise. Cf. Sechler, etc., v. Deere, etc., Co., 113 Fed. 285, 51 C. C. A. 242. If this suit were for infringement, the distinction would be of importance; but in respect of estoppels and methods of procedure there is no difference between the attempted collection of royalties from a licensee and grantee. Robinson, Pat. §§ 794, 820.

[1] By timely motion and assignment of error appellants present the question whether equity has jurisdiction over this suit; and we must find that such jurisdiction does not exist. Plaintiffs seek merely to recover money computable with certainty as soon as the number of tons of plaster is ascertained; yet, as the pleading shows, it is thought that, by asking discovery, jurisdiction will be exercised to take an account.

Chancery grants discovery when the law affords no adequate remedy to extract from a defendant facts in his exclusive possession which are a part of or constitute the cause of action. But mere difficulty of proving his case will not confer on a plaintiff the right to file a bill. United States v. Bitter Root Co., 200 U. S. 472, 26 Sup. Ct. 318, 50 L. Ed. 550. Equity will not aid law to ascertain damages by entertaining a bill for discovery. Munger v. Firestone, etc., Co., 261 Fed. 921, — C. C. A. —. A fortiori will it not retain a bill when the discovery desired has no other purpose than the liquidation of damages. Such is the present case; for there is no mutuality in the account. The cause of action rests on unquestionable written documents, and the only purpose of a bill in equity rather than a declaration at law is to avoid the trouble of proving before a jury, by the use probably of R. S. § 724 (Comp. St. § 1469), the number of tons made and sold by defendant.

The method of recovering royalties being the same here as it would be if defendants were licensees, it is settled that a bill merely to get unpaid royalties will not lie. Keyes v. Eureka, etc., Co., 158 U. S. 150, 15 Sup. Ct. 772, 39 L. Ed. 929; Heckscher v. Pennsylvania, etc., Co. (D. C.) 205 Fed. 377, and cases cited.

[2] As plaintiffs' claim may still be urged at law, we consider the question of damages. From the tenor of all the written documents it is plain that what Hendee et al. agreed to do was to make plaster under Coale's patent, and royalty was to be paid on that kind of plaster. It may be true that any plaster containing wood fiber is Coale's plaster, "substantially as described"; but the fact was controverted, and there is no proof of it. Even less is there any proof that all plaster

to which the descriptive phrase "elastic pulp" is appropriate was within Coale's range of equivalents.

This action is not to recover royalty on plaster marketed under a particular name, but to recover the sum agreed to be paid on plaster of a particular kind, viz. Coale's kind. A licensee or grantee, paying royalties, pays on what he has agreed to make; he is estopped to impeach the patent under which he operates, and the patent is entitled to a generous construction as against him, but that is all. Eclipse, etc., Co. v. Farrow, 199 U. S. 581, 26 Sup. Ct. 150, 50 L. Ed. 317; Western, etc., Co. v. Robertson, 142 Fed. 471, 73 C. C. A. 587; Walker, Pat. § 507.

[3] We further hold that no ground has been shown for the recovery of royalties from the corporate defendant. From the course of business it was inferred below that Hendee had assigned to the corporation the contract with the plaintiffs. As to this we express no opinion, but, assuming it as true, there is no evidence that on receiving such assignment the corporation assumed the obligation of Hendee et al. to pay royalties. It is only by virtue of such assumption that liability arises on the contract, and this action is on the contract, for no defendant is sought to be held in tort. Cf. Goodyear, etc., Co. v. Dancel, 119 Fed. 695, 56 C. C. A. 300, and cases cited.

The decree appealed from is reversed, and the cause remanded, with directions to dismiss the bill as to Bellows Falls Pulp Plaster Company and to transfer the original bill as against Hendee to the law side of the court, there to be proceeded with, with such alteration in the pleadings as shall be essential. As equity never had jurisdiction, the supplemental bill falls, and is directed to be dismissed without prejudice.

Appellants are granted the costs of this appeal; the corporate defendant will recover its costs of action on taking dismissal of bill.

WINDOW GLASS MACH. CO. et al. v. SMETHPORT WINDOW GLASS CO.

(District Court, W. D. Pennsylvania. May Term, 1917.)

No. 132.

1. Patents ⇐328—**For covering receptacle in glass-drawing apparatus held valid and infringed.**
Lubbers patents, Nos. 702,013, claims 1, 12, 17, 702,014, claims 1, 12, and 702,015, claims 1, 2, 5, 6, covering the construction of the receptacle for molten glass in apparatus for drawing glass cylinders, *held* valid and infringed by the construction of defendant's tank.

2. Patents ⇐328—**For covering air control in drawing glass cylinders held valid and infringed.**
Lubbers patents, Nos. 702,013, claims 4, 5, 702,014, claims 5, 6, 702,016, claim 2, 702,017, claim 7, 886,618, claims 1, 22–25, and 1,020,920, claims 3, 6, 7, 8, covering automatic regulation of the rate of air supply during the drawing of glass cylinders *held* valid and infringed.

3. Patents ⇐328—**For covering variable speed of drawing of glass cylinders held valid and infringed.**
Chambers patent, No. 762,880, claims 1, 2, and Lubbers, No. 822,678, claims 1–3, 5–8, covering the idea of gradually increasing the speed of the draw during the operation of drawing glass cylinders, *held* valid and infringed.

4. Patents ⇐328—**914,588, claims 5–7, and 926,501, covering adjustment for surface tension in drawing glass cylinders, held valid and infringed.**
Lubbers Patents, Nos. 914,588, claims 5–7, and 926,501, covering means for adjusting the point of drawing glass cylinders from the receptacle to compensate for variation of surface tension, *held* valid notwithstanding claimed anticipation, and infringed.

5. Patents ⇐112(3)—**Prima facie valid.**
Patent is prima facie evidence of its validity, and to overcome this presumption the burden rests on him who asserts want of novelty to prove it by clear and convincing evidence.

6. Patents ⇐72—**Process patent can be anticipated only by another process.**
A process patent can only be anticipated by a similar process, not by a prior apparatus similar to that used by patentee to effectuate his process.

7. Patents ⇐328—**For covering apparatus for taking down drawn glass cylinders, held valid and infringed.**
Patents Nos. 702,014, claims 8, 9, 890,306, claims 1–5, 1,073,613, claims 1–7, 13, 20–22, 1,102,803, claims 1, 4–6, and 1,176,505, all claims, except 6 and 7, covering the method and apparatus for taking down drawn glass cylinders after the drawing operation is completed, *held* valid and infringed.

8. Patents ⇐328—**For covering spring horse for drawing glass cylinders held valid and infringed.**
The Hitner patent, No. 821,361, and the Bridge patent, No. 1,006,995, claims 1, 2, 4, covering the spring horse with adjustable arms and apparatus for topping and capping drawn glass cylinders thereon, *held* valid and infringed.

9. Patents ⇐328—**841,011, claims 3–5, covering inclosure for drawn glass cylinders, held valid, but not infringed.**
Hart patent, No. 841,011, claims 3–5, for drawing glass cylinders within an inclosure, surrounding it with practically confined atmosphere, *held* valid, but not infringed, by a plate for another purpose which protected the cylinder from draft only from one direction.

In Equity. Suit for infringement of patents by the Window Glass Machine Company and another against the Smethport Window Glass Company. Decree ordered for complainants.

Bakewell & Byrnes, of Pittsburgh, Pa., for plaintiffs.
Marshall A. Christy, of Pittsburgh, Pa., Hood & Schley, of Indianapolis, Ind., and F. D. Gallup, of Smethport, Pa., for defendant.

THOMSON, District Judge. The burden resting on the court in this case, growing out of the numerous patents involved and the very voluminous records, has been greatly lightened by the decision of the Circuit Court of Appeals (261 Fed. 362) in the appeal from a decree of this court, in the case of these plaintiffs against the Consolidated Window Glass Company and others, as many of the patents there in suit, are involved here. In my opinion in the Consolidated Case, I gave a general description of the process of drawing glass cylinders by machinery from a receptacle of molten glass; the numerous and perplexing problems involved in the process; the large amount of money expended, and tireless experimental work required, extending over many years, before the art had reached that stage of advancement which made it commercially successful. These matters need not be repeated in this opinion. I there found that John H. Lubbers and his associates worked out the basic problems involved in the drawing of glass cylinders by machinery; that others before him had discovered important principles, and made ingenious experimental efforts in the field, but that to his genius and labors belongs the credit of creating this art and giving it life, resulting in the establishment of a great and useful industry.

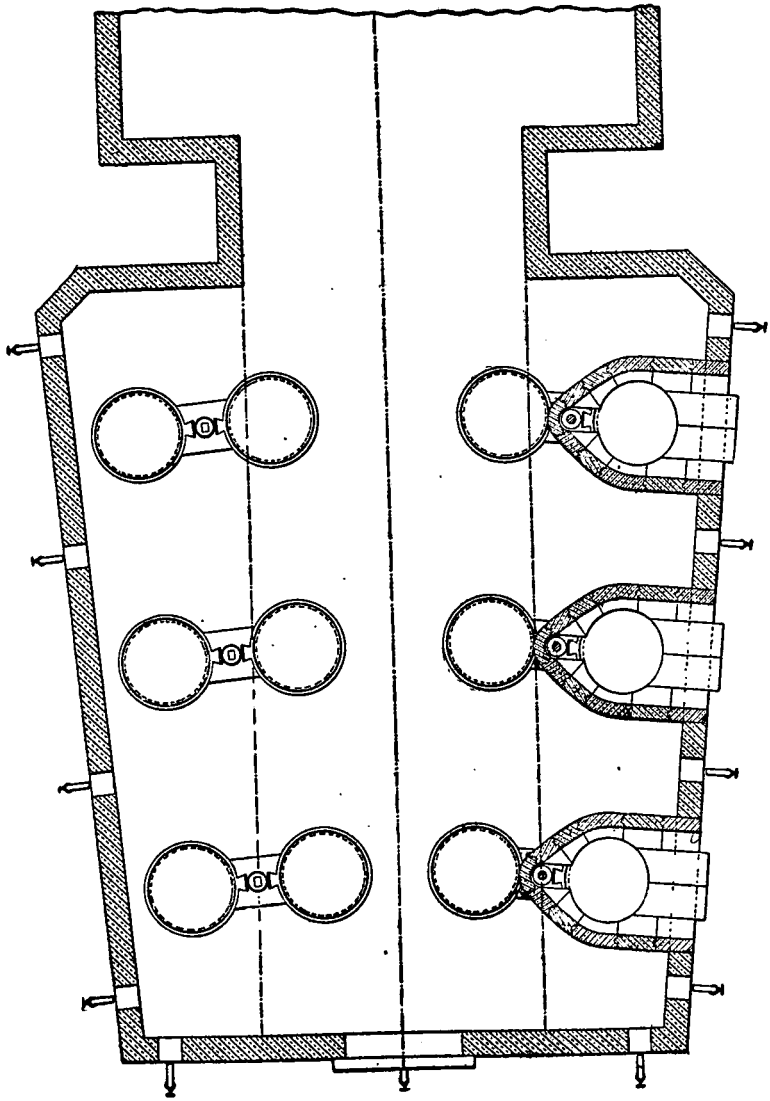
Of the 18 patents in suit, 12 were in litigation in the Consolidated Case, namely: Lubbers patents, Nos. 702,013, 702,014, 702,015, 702,016, 702,017, 822,678, 886,618, 914,588, and 1,020,920; Chambers patent No. 762,880; Hitner patent, No. 821,361; and Bridge patent, No. 1,006,995. The claims of the several patents there in suit were sustained by the Circuit Court of Appeals, except Lubbers apparatus and method patents, Nos. 702,016 and 702,017, covering what is known as "pop valves" intended to allow the air to escape from the cylinder when the pressure rose above a determined limit. But, in addition, certain patents not involved in the Consolidated Case are in suit in this case, raising additional questions of validity and infringement. The validity of the respective claims in the various patents involved in the Consolidated Case having thus been established, the inquiry, so far as the same questions are raised here, has been very greatly narrowed.

In determining the question of validity and infringement, the claims can best be considered in groups as they relate to a particular process or patent:

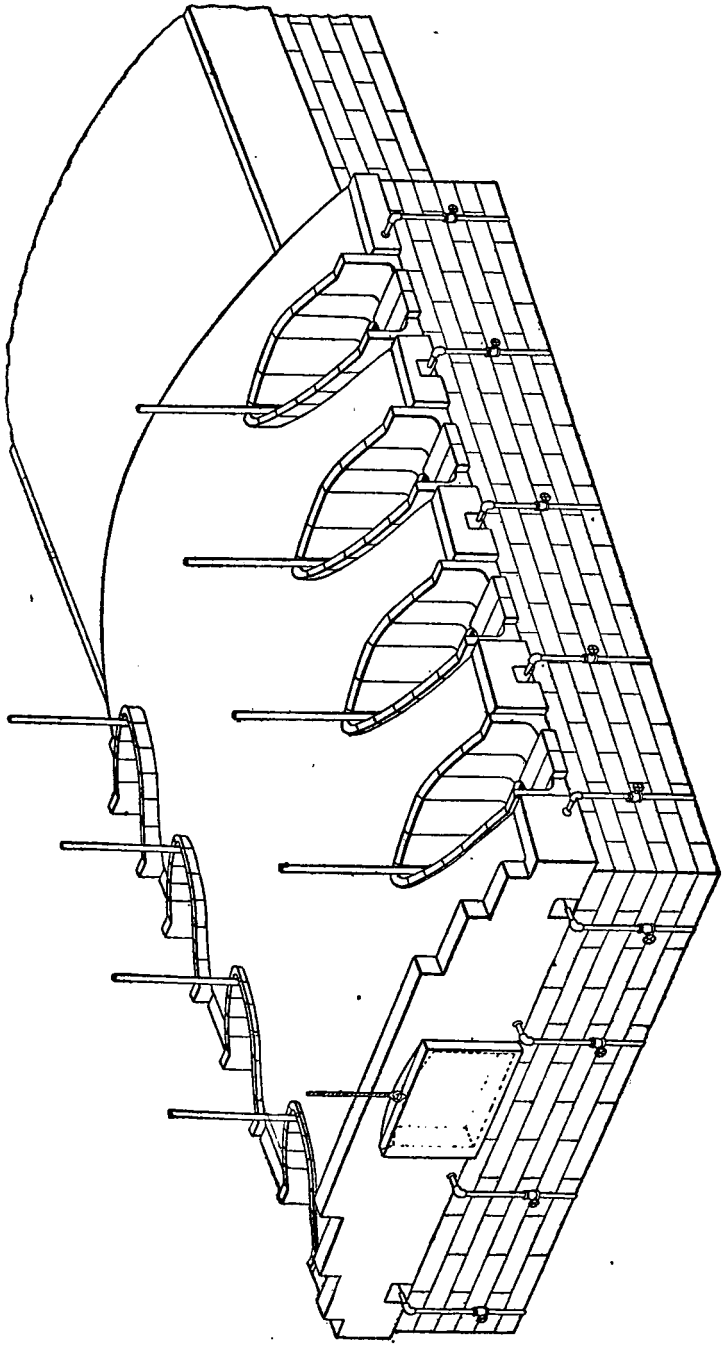
[1] First, as to bath problems, patents, and claims: This group involves claims 1, 12, and 17 of patent No. 702,013, claims 1 and 12 of 702,014, and claims 1, 2, 5, and 6 of patent 702,015.

A description of the defendant's apparatus and practice was furnished by the defendant and offered in evidence by the plaintiffs. Plaintiffs' Exhibit No. 9, and one of plaintiffs' illustrative drawings, which are attached hereto, show the form of construction of the defendant's plant.

Plaintiffs' Exhibit No. 9, Perspective View of Defendant's Tank.



Illustrative Drawing of Defendant's Tank.



The melting end is somewhat narrower than the drawing end. Defendant, about 1913, rebuilt and widened the working end of its furnace to the present form; that is, with the side walls converging toward the front. In the arch adjacent to each side wall are four drawing openings, each being defined by depending mantel blocks with in-turned lower ends or toes, between which and the floating rings there is a gap of about one-half inch. This forms a substantially circular drawing opening, closely adjacent to the surface of the glass. These depending blocks are each supported by vertically adjustable hangers from a frame, which is itself vertically adjustable from a stationary frame. A floating clay block called the ring spider, has vertical slots, which receive lugs in the sides of the floating rings, and the latter, by rotation of the spider, are brought alternately from the furnace into alignment with the drawing opening. The spider is engaged by the lower end of a vertical shaft driven in either direction, the action of which is controlled by a lever at the blower's stand. While the drawing portions of the tank have the full depth of glass throughout, a reference to the drawings attached shows that the widening of the working end of the furnace brings the drawing stations outside of the tank proper; that is, to one side of the main flow of the hot currents of glass in the tank.

I think the clear purpose of this construction is, not only to get the drawing stations to one side of the main flow of hot currents, but is also an endeavor to equalize the temperature conditions throughout the length of the drawing end of the tank; the extensions being widest at the end nearest the main body of the tank, and gradually narrowing toward the nose end, where the heat decreases. The evidence shows that the mantel blocks or shades are provided for the express purpose of cutting off the heat of the furnace from the drawing point. Du Cheamp, who designed and installed defendant's apparatus, testifies that these mantel blocks, together with the floating ring, shield off the heat of the furnace sufficiently to allow the glass to set as the cylinder is drawn, and that this could not be satisfactorily done in the furnace as constructed, if the mantel blocks were removed.

It appears that defendant first started with a tank having the projecting doghouse form, or forehearth. Later this extension was pushed back into the tank in such a manner as to give a sheltered portion along the breast wall of the tank. To the drawing stations the glass flows continuously from the main body of the tank; the roof of the side portion is lower; by its position it is measurably protected from the main flow of hot currents, and is sheltered by depending shades, which coact with the floating rings, shutting off the intense heat of the furnace. This condition, in my opinion, is the fundamental equivalent of the Lubbers forehearth.

The validity of Lubbers patents Nos. 702,013, 702,014, and 702,-015, having been upheld by the Circuit Court of Appeals in the Consolidated Case, I see nothing in any additional defense here urged to affect that finding. I find infringement of each of the forehearth drawing claims in suit in these three patents. Comparing defendant's apparatus with claim 1 of patent No. 702,013, we have a receptacle for molten glass, means for heating that portion of the body of the glass from

which the cylinder is drawn (burners projecting through the breast wall), a shield arranged to cut off the heat from the exterior of the cylinder adjacent to the drawing point, a bait having a fluid supply pipe connected thereto, and the connections for raising and lowering the bait.

These elements are combined substantially, and for the same purposes, as in patent No. 702,013. Defendant's apparatus has all the elements of claims 12 and 17 of this patent—the forehearth extensions, the drawing apparatus, means for heating the glass in such extensions, and the shielding means of claim 12. It has all the elements of the method claims of patent No. 702,014. Compared with claim 1, it draws a cylinder from a bath of molten glass, heats that portion of the body of the glass from which the cylinder is drawn, shields the cylinder from the heat, and supplies air to the interior of the cylinder during the drawing operation. It infringes claim 12 of this patent, as it draws a hollow article from a bath of molten glass, severs the lower end of the article from the bath by admitting heat currents to the lower portion, moves the article to one side, and severs its upper end from the drawing device. Defendant's cylinder is taken down with the drawing device attached, by a downward and lateral motion, and then severs the cap portion and bait from the cylinder.

Each of claims 1, 2, 5, and 6 of patent No. 702,015 are infringed. As in claim 1, there is a ring arranged to float upon the glass bath and a shield device arranged to form a sealing joint, with the ring above the level of the bath. It has also the depending shield of claim 2, as its mantel block depends from the overhead supports. Claim 5 is infringed, because its floating ring has holding devices for retaining it in position, the dovetailed engagement of its lug with the spider, and the shield and drawing apparatus are arranged to operate within the shield. Claim 6 is broader still, as it simply specifies that the shielding device and floating ring are arranged to coact. As in the Consolidated Case, I think the slight gap, perhaps half an inch, between the toes of the mantel blocks and the floating ring, is not material, as there is the clearest kind of co-operation between the parts, and in both the same result is sought and obtained.

Lubbers was careful not to be limited to any particular form of shield, as he states in the specifications of patent No. 702,013:

> "I use the word 'shield' in the broad sense, to include any device for preventing the access of heat to the article being drawn."

The prior art relied upon against the forehearth patents and claims was considered and passed upon in the Consolidated Case, and I find nothing to alter my views therein expressed. I see little relevancy in the Danner patent, set up in this case. It relates to a different art, that of spinning a small glass tube horizontally from the point of a cone revolving at a high rate of speed. Nor do I deem relevant the evidence offered that some measure of success has been recently achieved in sheet drawing. It appears that this process has not as yet reached a very successful solution, and the improvement which has made this partial success possible was discovered long after the sheet-drawing patents, set up by the defendant, were issued.

[2] *Air Control*—Patent No. 702,013, claims 4 and 5; patent No. 702,014, claims 5 and 6:

Claims 4 and 5 of the first patent were not involved in the Consolidated Case, as there defendants did not use any means for automatic air control; a blower's hand valve being employed. They were involved, however, in the Okmulgee suit, and there held valid. The prior art does not disclose the automatic regulation of the air, as called for in claim 4, nor the connection of the controlling valve with a moving element for automatically actuating the valve during the draw, as called for by claim 5. The gradual increase of the air supply as the cylinder lengthens is an absolutely essential condition; and to do this automatically, to so proportion the movement of the valve with that of the drawing apparatus that the amount of air admitted at any given moment of the draw would depend upon the length of the cylinder then drawn, and so adjusted that any variation in speed would produce a corresponding variation in the air admitted, was certainly a novel and important inventive conception.

Claim 5 of patent No. 702,014 was involved in the Consolidated Case, and while this court did not sustain it, its validity was upheld by the Circuit Court of Appeals, which finding is controlling in this action.

While claim 6 was not involved in that case, it includes the automatic regulation of the rate of air supply, and is valid for the reasons applicable to claims 4 and 5 of patent No. 702,013.

Patent No. 702,016, claim 2; patent No. 702,017, claim 7:

As held by this court in the Consolidated Case, these claims were intended to cover only valve openings, were never put into practical use, and are inoperative. In this conclusion the appellate court concurred, and I so hold here.

Patent No. 886,618, claims 1 and 22 to 25, inclusive; patent No. 1,020,920, claims 3, 6, 7, and 8:

These are corresponding apparatus and process patents, covering the constantly open vent, as distinguished from the type of vent holes shown in the two previous patents. I held in the Consolidated Case that these claims covered a novel and very valuable invention, unknown to the prior art, which largely solved the mystery of the breathing or pulsating of the cylinder. This conclusion, to which I adhere, was concurred in by the appellate court.

I find that the foregoing claims of the above-named air control patents, which I have held valid, are infringed by the defendant. The latter not only increases the rate of air supply as the cylinder is drawn, but does so automatically by a graduating valve actuated by a connection with a moving part of the drawing apparatus. The vent is practically the plaintiffs' form of vent, in substantially the same location. It is manipulated by hand, being kept closed during the forming of the neck and cap, and open during the drawing of the cylinder, permitting the escape of air necessary to maintain the pressure sufficiently constant to prevent extreme pulsations.

[3] *Speed of Draw Patents and Claims*—Patent No. 762,880, claims 1 and 2; patent No. 822,678, claims 1, 2, 3, 5, 6, 7, and 8:

In the first of these patents, claim 1 covers the idea of gradually increasing the speed of the draw through the drawing operation;

claim 2 being generally similar, but limited to automatically increasing the speed. In the Consolidated Case, I held these claims invalid, in view of the prior art; but on appeal their validity was sustained by the Circuit Court of Appeals, and in harmony with that opinion I hold them valid here.

Patent No. 822,678 is known as the three-speed patent, as opposed to the gradual increase of speed described in the Chambers patent. This patent describes three distinct speeds, or classes of speed, during the draw; that is, a slow speed for forming the neck and cap, a higher speed for drawing the cylinder body, and a still higher speed to thin the glass for cutting off. These claims were sustained by the Consolidated Case, both in this court and in the appellate court, and there is nothing in the record of the present case to alter that conclusion. The claims are therefore sustained.

I also find infringement of the claims of these patents by the defendant. Plaintiff's testimony shows that in defendant's operation the neck and cap are drawn at a relatively low speed; that after the cap is formed the speed is increased, and again increased at intervals during the drawing of the body of the cylinder. This increasing speed is effected by hand-operated rheostats in the machines as now operated. At one time the defendant used a conical winding drum for hoisting the cable, giving the automatic increase of speed. The testimony shows that some of the defendant's winding drums were short, so that during the operation the cable wound back upon itself, giving a gradual speed increase.

[4] *Surface Tension Patents and Claims*—Patent No. 914,588, claims 5, 6, and 7; patent No. 926,501, all claims:

The three claims in the first of these patents were involved in the Consolidated Case, and were sustained by this court and the Circuit Court of Appeals. The essential novel step is adjusting the point of draw to compensate for the varying surface tension. Theoretically the temperature of the glass is uniform throughout the draw, but practically it is not. The result was the drawing of thick and thin glass, and the movement of the cylinder laterally across the bath. Lubbers solved this difficulty by initially adjusting the bait to one side of the bath, in the opposite direction from that in which the cylinder was traveling, thus neutralizing the traveling tendency and compensating for the varying heat conditions. The only specific means disclosed for such adjustment is slotted connections between the bait supports and the cage. This construction required that adjustments be made between draws.

Patent No. 926,501, not heretofore before the court, provides means whereby the adjustments can be made during the progress of the draw. Both the process and apparatus claims of the patent involve this feature. The evidence shows that there is an advantage in being able to make the adjustment during the draw, and the patent exhibits means for such adjustment by adjusting the bait through connections actuated from the drawing floor, or by adjusting the pot within the kiln.

The first four claims are process claims. Claim 1 covers, broadly, the step of adjusting the surface tension of the molten glass, from which the article is drawn, during the progress of the draw. Claim

2 specifies, in addition, that this is done "by adjusting the relative position of the glass containing vessel and the drawing bait." While differing in wording, claims 3 and 4 cover substantially the same step. The remaining are apparatus claims. Claim 5, for instance, covers a glass holding receptacle and drawing device, the parts being mounted for lateral adjustment, relative to each other, together with means to effect an adjustment without stopping the drawing motion. The other claims are generally similar, all being limited to means for adjustment during the drawing operation, wherein they differ from the prior Lubbers patent, No. 914,588.

As to patent No. 914,588, I see no reason to alter the conclusion reached in the Consolidated Case, as there appears in the prior art no anticipation of the invention, and I believe it to be a very valuable contribution to the art.

As against patent No. 926,501, it is claimed by defendant that the invention is that of Wadsworth, and not of Lubbers. The testimony on this matter is somewhat confusing and unsatisfactory. The substance of Mr. Wadsworth's testimony is that in January or February, 1906, he made certain sketches, which he produces, showing a construction in which either the entire kiln in which the pot was mounted, or its upper portion, could be moved in either one of two directions; that one or two of these machines were installed in the summer or fall of 1906, in the factory of the American Window Glass Company at New Castle, which factory was then being used for experimental purposes; that the installation was there used for two or three months, and the plant was no longer used; that later he designed eight machines, which were installed in Monongahela City, which he believes was in 1906; that later drawings were prepared for an application for patent, but no application was ever filed. The plaintiffs offered testimony that these machines were installed in the spring of 1907.

The following considerations lead me to the conclusion that the patent is valid:

[5] (1) The patent is prima facie evidence of its validity. The authorities hold that, to overcome this presumption, the burden of proving want of novelty rests upon him who asserts it, and every reasonable doubt should be resolved against him. The evidence must be exceptionally clear and convincing; as many authorities have said, it must be full, unequivocal, and convincing. Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821.

(2) The use at New Castle could hardly be set up as a public use, occurring more than two years before the application of this patent, because it was simply experimental; the plant during that period being used exclusively for experimental purposes. It would appear that the installation in Monongahela City was in 1907, within the two-year period.

(3) The specifications of patent No. 941,588 state:

"It will be understood that the relative adjustment between the bait and the pot may be obtained, either by adjusting the pot laterally in different positions or by adjusting the bait carrier."

To carry out the invention of this patent, if the pot, instead of the bait, is adjusted, means must of course be provided for adjusting it

in both directions. This patent, therefore, contains a disclosure of the broad idea of adjusting the pot in both directions, and Mr. Wadsworth, it is conceded, participated in the preparation of the application for this patent, in which that idea is disclosed.

(4) It is not claimed by Mr. Wadsworth that he invented surface tension adjustment broadly, and he admits that the idea of adjusting the bait off center in both directions was known to him before he made the sketches of the movable kiln.

(5) Whatever Mr. Wadsworth may have invented relating to the movable kiln, it was merely the idea of moving the entire kiln, or the upper portion thereof, instead of moving the pot within the kiln.

(6) There is no proof that the movable kiln was actually and successfully used for the purpose of making off-center adjustments during the draw. I do not understand Mr. Wadsworth as claiming to be the inventor of the idea of adjustment during the draw. There is no evidence that his apparatus was ever so used for any such purpose prior to the filing date of the Lubbers patent, No. 926,501.

[6] (7) Even if the defense could prevail as to the apparatus claims, it would fail as to the process claims, as a process patent can only be anticipated by a similar process.

(8) I do not find anticipation in the Guianotte or Healey patents, cited against the two surface tension patents in suit, under the evidence in the case. The former has relation to the drawing of sheets, where the problems of surface tension do not arise; while in Healy the pot is mounted on a turntable, the drawing apparatus being mounted on a frame, which in turn is mounted on a track, and there is no arrangement for moving the pot closer to the frame on the track, nor for carrying the blowing apparatus nearer to the pot. Mr. Wadsworth, on page 185 of the record, states:

"I do not want to be understood as implying Healey contemplated those movements. On the contrary, I did understand from the Healey specification, that he used these movements to center the line of draw on the pot, and not to throw it off center."

Owing to the unsatisfactory character of the evidence offered as to prior use, and for the reasons above set forth, I find the claims of this patent, No. 926,501, valid.

The defendant's apparatus appears to infringe the claims of both the surface tension patents. While defendant's testimony shows that the instructions were to nominally keep the pipe centered over the pot, this refers to normal conditions, and surface tension adjustments are to meet conditions which are not normal. The defendant's construction permits of adjustment, either between draws or during a draw. The floating rings are carried by the rotating spider, which is under control of the blower, who can, at any time, either between or during draws, shift the ring from which the draw is being made, to change the drawing point with respect to the inner walls of the ring. In the same manner, the workman in the Consolidated Case adjusted the rings with a hand implement.

It is not controverted that the pivoted elevator guide frame gives adjustment from front to back. It is true that one of the purposes

of this swinging guide frame is to enable the cylinder to swing forward away from the drawing station, preparatory to taking down. But the evidence shows that it is also used for the purpose of surface tension adjustments.

[7] *Take-Down Patents and Claims*—Patent No. 702,014, claims 8 and 9; patent No. 1,073,613, claims 1 to 7 inclusive, and claims 13, 20, 21, and 22; patent No. 890,306, claims 1 to 5, inclusive; patent No. 1,176,505, all claims, except 6 and 7; patent No. 1,102,803, claims 1, 4, 5, and 6:

Patent No. 702,014, claims 8 and 9:

In the Consolidated Case, these claims were held valid and infringed. Claim 8 is as follows:

"The method of forming hollow glass articles, consisting of lowering a hollow bait into a bath of molten glass, drawing a hollow article from the bath, supplying a gaseous fluid to the interior of the article during drawing, severing the lower end of the article from the bath, moving the drawing device, with the hollow bait and article suspended therefrom, to one side of the bath, lowering the article into horizontal position while attached to the drawing device, and then severing the article from the bait, substantially as described."

Claim 9 adds the features of forming the neck and cap, and then expanding the size of the cylinder in successive steps. The novel feature of these claims consists in detaching the blowpipe from the lifting frame, and the simultaneous swinging out and lowering of the cylinder with the pipe attached thereto.

There appears no description in the prior art of any method of taking down a cylinder drawn from a molten bath. The Coburn patent, for drawing sheets, cited by the defendant, appears to have little or no relevancy. Wherever the prior art describes taking down a glass cylinder, it is stated that the cylinder is cut from the bait before taking down. The Lubbers method, at first thought, would appear impracticable. Certainly it is far from obvious that a large, fragile cylinder, with its well-known strains, could be successfully lowered into a horizontal position while still attached to the heavy blowpipe. The conception was new, and a valuable addition to the art. The claims appear, also, to be infringed. The defendant "moves the drawing device, with the hollow bait and article suspended therefrom, to one side of the bath," before lowering as recited in claims 8 and 9. In the Consolidated Case, the movement to one side was a part of the lowering movement. In this, the steps are separate, although there is the same additional lateral movement during the taking down as in the Consolidated Case.

Maynard patent No. 1,073,613, claims 1 to 7 inclusive, and 13, 20, 21, and 22:

In the Okmulgee Case, these claims were adjudged valid and infringed. They were all in suit in the Brookville Case, except claim 13. It appears that this was the first mechanical take-down devised in the art. As an example, claim 2 reads as follows:

"In glass-drawing apparatus, a glass-holding receptacle, mechanism arranged to draw glass intermittently therefrom, and having a removable bait, a track or support extending to a point adjacent to the drawing path, and a

take-down device movable on said support and arranged to engage the glass article below the bait."

This broad claim includes the following elements: First, a glass drawing pot or receptacle; second, mechanism arranged to draw the glass intermittently therefrom and having a removable bait; third, a track or support extending to a point adjacent to the drawing path; fourth, a take-down device movable on this track or support and arranged to engage the cylinder below the bait. The novelty of this combination consists in the latter combined elements, including the track or support extending to the drawing path, and the take-down device movable on the track and carrying the article as a part of it.

Before this invention, the cylinder was lowered by hand, involving heavy physical labor in carrying the entire cylinder and bait, with much attendant risk to the workmen in case the cylinder should break. Claim 3 includes in combination, in a glass-drawing apparatus, a pot or receptacle, glass-drawing mechanism, a horse to receive the glass article, "and a take-down apparatus movable between the drawing apparatus and the horse." Claim 4 also includes the fact that the take-down apparatus is arranged to tilt the glass and deposit it on the horse.

Numerous patents are cited by the defendant by way of anticipation. The Pease patent, No. 463,644, shows no take-down apparatus, but a mere trolley to carry the drawn article to one side. No arrangement is shown for taking the article down. The Shaffer patent provides for laying the cylinder on a horizontal tray. There is no take-down, as the article is not suspended in the air. In the Colburn patents, there is a trolley for carrying the suspended sheet while hanging down, but no take-down apparatus. The same is true of the Guianotte patent. The Forster patent does not show the combinations of the Maynard claims. There is no horse, or horizontal support, separate from the frame, and the frame is not a "take-down apparatus movable between the drawing apparatus and the horse." The Forster frame is to swing the cylinder away from the drawing mechanism and then bring it to a position where the men can take it out of the frame, and there is no co-operation between his frame and the cage or lowering device for the cylinder.

As to claims 2, 5, 6, 7, and 22, which include the track extending between the drawing apparatus and the horse, this element is entirely lacking in the Forster patent.

On behalf of the defendant, there is an effort to prove priority of invention by R. L. Frink. In this, I think, it has failed. From all the testimony I find that Maynard was the first to conceive the idea, the first to make drawings and a model, and the first to construct or reduce the invention to practice by filing his application. The authorities hold that the filing of an allowable application is a *constructive* reduction to practice, equivalent in law to an *actual* reduction to practice. This shifts upon the defendant the burden of proving, by specific evidence, priority of conception or invention by Frink, and I do not think it has met this burden. Nor do I think the defendant has established the inoperativeness of the Maynard device, in view of

the testimony and illustrations and models given by Mr. Maynard before the court in the Brookville Case.

On the whole, I sustain the validity of the claims in suit. I also find infringement by the defendant of all the claims in suit, except claim 22. Taking claim 2 as an example, defendant has the same glass-holding receptacle; that is, a pot. It has mechanism arranged to draw glass intermittently therefrom, and it uses a removable bait, which may be taken off the cage. It is hung on forks, as Maynard shows. It has a track or support, consisting of the overhead cable, which extends to a point adjacent to the drawing path. It has a take-down device movable on this cable, consisting of the trolley and gripper or hoop suspended therefrom, which is engaged with the lower portion of the cylinder, and is therefore "arranged to engage the glass article below the bait." The elements recited appear to be the same, co-operating in the same general way to attain the same result.

Claim 3 is broader than claim 2, as the track is not included. It includes, however, in addition to the pot and drawing mechanism, two additional features, the horse or support and the take-down apparatus, movable between the drawing apparatus and the horse, which defendant has. Claim 4 has, additionally, that the take-down apparatus tilts the glass during the operation. This tilting takes place in defendant's system. Claim 5 appears clearly infringed. As to claims 6 and 7, the testimony shows that defendant's overhead cable does not and cannot extend in a straight line. Any such cable between two fixed points will certainly hang down in its middle portion, and therefore defendant's track is downwardly inclined, as it leads away from the drawing position. The evidence is that, in the defendant's take-down operation, one man is used to prevent the cylinder running down the incline too fast, as the trolley moves toward the central portion of the overhead cable track. Claim 13 is infringed, as defendant has a bait and bait tube, a track, and a carriage with means (the loop) for supporting the cylinder, and means for simultaneously moving the bait and carriage during the lowering of the cage. Defendant's device appears to have all the elements of claims 20 and 21, including grippers to engage the article, these grippers being of any desired shape or form, in the defendant's case, a loop. Claim 22 calls for a connection between the carriage and the drawing device. This is for the purpose of having the carriage move at the same rate of speed as the drawing device, operating simultaneously with it. I do not find any such connection in defendant's construction, and conclude that this claim is not infringed.

Schmertz patent No. 890,306, claims 1 to 5, inclusive:

Maynard invented his take-down device in 1904, filing his application in 1905. Schmertz, one of plaintiffs' superintendents, made an improvement on the Maynard take-down, filing his application on March 20, 1906. This was a highly practicable and valuable device, and has been continuously used by the plaintiffs from the time of its invention. The special improvement over Maynard is in the use of a flexible overhead track, as distinguished from Maynard's rigid track. Schmertz was the first to conceive that the use of a flexible cable, sup-

porting the cable trolley, would accommodate itself to the movements of the cylinder, greatly reducing breakage. The file history shows that five of the six claims were rejected on the Brooks patent for a hay carrier. The claims were then amended to include in the combination the vertically movable bait cage of the drawing apparatus, creating thus a direct co-operation between the bait carrier and the take-down device on the cage. As so amended, the claims were allowed.

As against this patent there appears no prior art. The use of the flexible track cable, to support the take-down, was new. There was some effort made to show that Schmertz was not the inventor, but such claim is not supported by the weight of the evidence. It appears, from the early experiments of Lubbers in Allegheny in 1895 to the date of the Schmertz invention, plaintiffs in all their factories took their cylinders down by hand, according to the method claims 8 and 9 of patent No. 702,014. Frink and Maynard were working on the problem, but it appears that up to the time of the Schmertz invention no mechanical take-down was put into actual operation. Schmertz improved on Maynard, embodying with the idea of a taking-down carriage movable on the track, extending back from the drawing machine, a flexible cable in place of the rigid track, which would let the cylinder down gently, and thus reduce breakage. Though subsequent to Maynard, by this improvement he first reduced a take-down to actual practice, and with slight improvements it has become the plaintiffs' standard take-down. Maynard appears to be the first to have conceived any form of take-down; Schmertz the first to conceive and construct a commercial form of take-down embracing the broad principles of Maynard, to which he added the valuable improvement of the flexible track.

In this patent two methods of controlling the take-down cable are disclosed. In one, the take-down cable is attached to a lever which can be moved to vary the length of the cable between its supporting points. In the other, the cable is shortened by winding drums. It appears that the idea of the winding drum originated with Hunt. This, however, was but a detail of the improvement, and does not deprive the inventor of the perfected improvement. As in Maynard's system, after the take-down cradle or arm is applied to the lower part of the cylinder, the latter is moved out, and then the drawing cage is lowered. As the cage lowers, the trolley is moved out on the track; the bait end being supported and guided by one or more men. To lower the cylinder on the horse, Schmertz preferred to slack away on the overhead cable, allowing the gripper to lower the cylinder on the horse. This slacking away may be carried out by the winding drum, controlled by an electric motor, or can be controlled by the swinging lever.

The first four claims are limited to this idea of slacking away the track cable to lower. For instance, claim 4 recites, as the last element, "mechanism for slacking away the cable between the fixed points." Claim 5 is broader, reading as follows:

"5. The combination, with glass-drawing apparatus having a vertically movable bait cage, an operating station, a cable having a taking down device, and mechanism at the station arranged to control the bait cage and the cable take-down device, substantially as described."

The overhead track is the cable, and the take-down device is the trolley movable on the carrier, and carrying the cradle or gripper. The mechanism at the station, arranged to control the bait cage and the cable take-down device, may either be the control which the blower has over the bait cage by the hoisting mechanism, or, as in the case of the present defendant, the motor which controls the trolley on which the cable is wound.

I find infringement of the five claims in suit. Defendant's take-down co-operates with the drawing apparatus, and comprises a cable extending between fixed points, a gripping device mounted on the cable, which is the loop surrounding the end of the cylinder, and the mechanism for changing the length of the cable between the fixed points; that is, the winding drum and its motor. It has also the cable fastened at one end at a fixed point and extending over a pulley to a movable member, and a gripping device mounted on the cable between the fixed points, as in claim 2. Claim 3 is generally similar to claim 2, and its elements are present in defendant's apparatus. The latter comprises also the flexible cable, the gripping device on the cable, and the mechanism for slacking away the cable between the fixed points, as called for by claim 4. It infringes claim 5, which is broader than the other claims, as it has mechanism at the station arranged to control both the bait cage and the cable take-down device. The word "gripper" is a broad term to cover any device engaging or supporting the cylinder. In the patent of Maynard, it consisted of curved forks. In defendant's apparatus, it is a flexible band surrounding the cylinder.

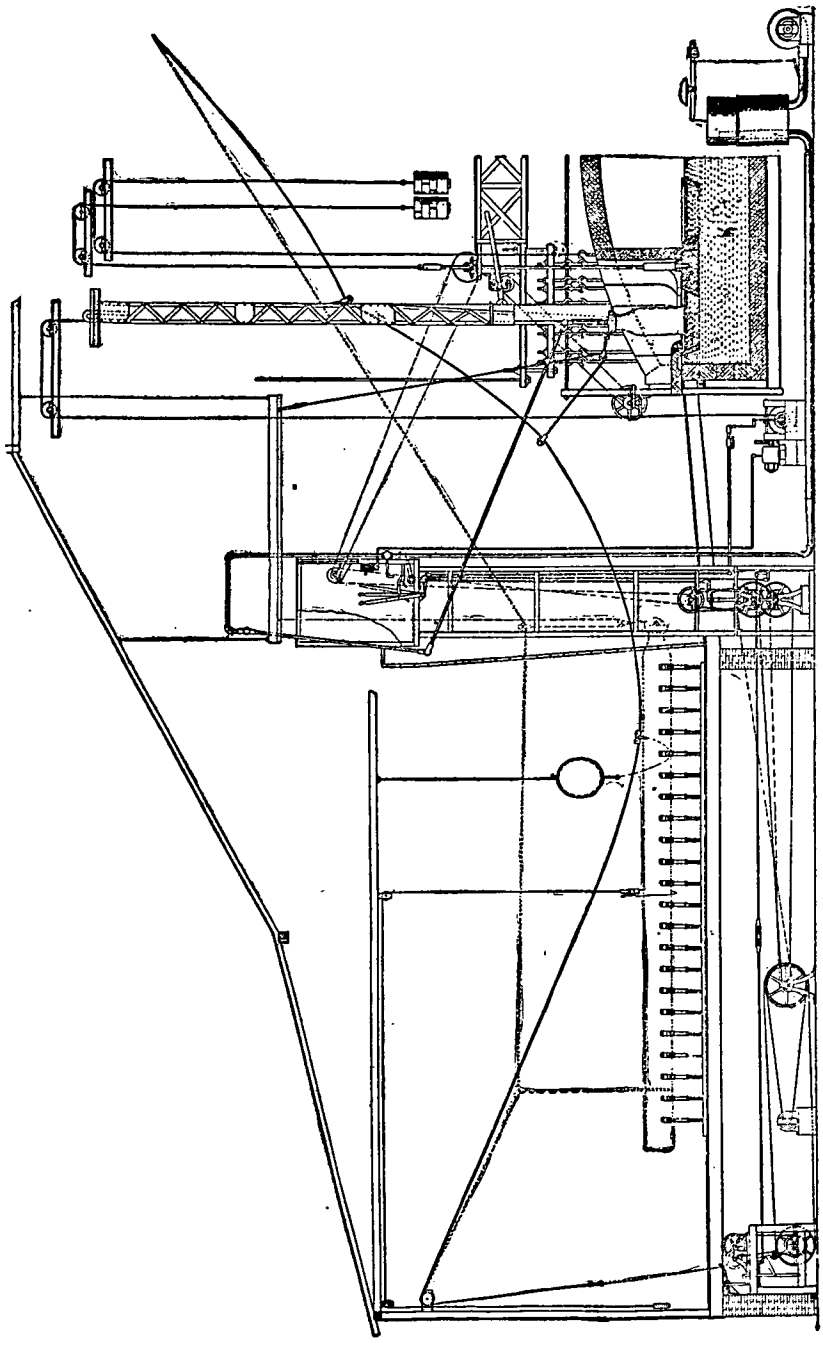
Wells patent No. 1,176,505, claims 1, 2, 3, 4, and 5:

This patent appears for the first time in the litigation over machine-drawn glass cylinders. I do not find any successful citation against it from the prior art. Some evidence was offered as to its inoperativeness, chiefly on the ground that the cable, *2*, as shown in the drawings, is not long enough to let the blowpipe down to the fully horizontal position. The exact length of the cable might depend on a number of things, among others, the height of the draw when installed for practical operation. But it is not the function of patent specifications to correctly show exact proportions. The testimony of Clark is that he installed the Wells take-down in most of the factories abroad, and that with slight adjustment in the length of the cable the drawings of the patent show a completely operative device. In the Schmertz take-down, a practically successful apparatus, as the cylinder approaches the horizontal position, it then required that workmen should take hold of the blowpipe and lift it out of its supports on the drawing cage, guiding this end down onto the horse. Wells does this automatically, stating in his specification as follows:

"The object of the invention is to automatically detach the blowpipe from the elevator cage at the desired moment, and to relieve the workmen from supporting the neck or blowpipe end of the heavy cylinder during lowering onto the horse."

The take-down cable is provided with an extension over guiding pulleys, and provided with a counterweight at its free end. An auxiliary trolley travels on this extension, which has a connection to be

Plaintiffs' Exhibit No. 11, Defendant's Apparatus.



snapped into an eye on the blowpipe. During the draw this auxiliary trolley is engaged with the blowpipe, and carried upward with the lengthening cylinder, and comes into action automatically when the operation of taking down the cylinder commences. When this trolley gets near the point where the guide ropes are provided, the weight of the cylinder acts to pull the blowpipe off the forks on the cage. The weight of the cylinder is then supported wholly by this additional trolley; the operator simply guiding it during the further lowering. This device is in use in the plaintiffs' factories.

Claim 1 covers take-down apparatus having a supporting device for supporting the blowpipe end of the cylinder, after the blowpipe is disengaged from the drawing cage. This is the auxiliary trolley referred to. The claim also covers, in combination therewith, another separate supporting device, which engages the lower portion of the cylinder after the drawing operation is completed. This is the gripper of the Schmertz take-down. Claim 2 is a little more specific than claim 1, specifying that the first-named supporting device is a "traveling carriage." Claim 3 includes the fact that the auxiliary trolley is "arranged to travel upwardly with the cylinder on the flexible connection during the drawing, and to support the blowpipe end of the cylinder during the take-down operation." Claim 4 specifies that the traveling connection has "means for supporting and guiding the blowpipe end of the cylinder," together with guide means "on which it may be moved upwardly with the cylinder during the drawing operation." Claim 5 is still more specific in providing that there is a traveling carrier for supporting the blowpipe end of the cylinder, "having means for engagement with and adapted to be carried by the blowpipe, or bait, to which the cylinder is attached."

I find these claims to be infringed by the defendant's apparatus. The cut attached to this opinion shows the auxiliary trolley arranged to travel on the upwardly extending portion of the main take-down cable and having a connection which is arranged to hook into the bait. The defendant, instead of using a counterweight, provides this auxiliary trolley with another guiding rope extending to an overhead support. As stated on page 5 of the description of defendant's apparatus forming part of plaintiffs' Exhibit No. 4, this bait supporting hook is attached to the bait after the bait has risen four or five feet from the bath, and then rises freely with the bait to its upper limit. The description also states that, as the cylinder comes down, the bait supporting cable—

"has been sufficiently doubled upon itself to cause the bait hook to take the weight of the bait and of the cylinder, and the cylinder moves outwardly toward and above the horse and is deposited upon the horse."

It thus appears that defendant's auxiliary trolley operates in the same way to effect the automatic detachment of the bait from the drawing cage, and is also attached to the bait and is carried upwardly therewith, as in the Wells patent. The slightly different arrangement of the auxiliary rope I do not deem material. The counterweight is included in claim 6, and for that reason that claim is not infringed. The

defendant does not employ the elastic element *14* in the auxiliary trolley connection, and for that reason does not infringe claim 7.

Roadman & Dravo patent, No. 1,102,803, claims 1, 4, 5, and 6:

This is a patent for a mechanical device relating to an improved construction of a take-down sling for use in connection with the Schwartz and Wells take-down apparatus. Schwartz grasped the cylinder with a device shaped like ice tongs, which were used for a considerable time. This patentee sought to provide a more convenient device in the nature of a hook or strap, having a separable connection at its ends, and adapted to be passed around the lower end of the cylinder, and having a flexible connection, such as a chain, leading to the trolley which travels on the main take-down cable. If the patent is valid, there is infringement. The real question is whether the improvement is the result of mere mechanical skill, or involves the higher quality of invention. This is in harmony with the view as expressed by defendant's counsel in their brief, wherein they say:

"If this patent is valid, it has been infringed by the defendant."

Defendant has set up some patents from the prior art against this patent. Patent No. 368,136 is for a cable hanger for supporting aerial cables, such as telephone cables, showing a slotted strap or band having means for connection with a suspended hook. There is no separability, except such as might be afforded by unbending the metal connection of the parts. The device lacks rigidity in the longitudinal direction, which feature is in all the claims in suit, and the device I think would be useless for handling glass cylinders. The Valles patent seems to entirely lack the essential features of the claims of the Roadman & Dravo patent. The Nate patent is for a cable hanger, consisting of a hook block, to which are attached two wires adapted to be passed around and support the cable. It would be valueless for the purposes for which the patent in suit is used. The Reese patent is a supporting device for metal dipping ladle, consisting of a rigid sleeve, which is secured between collars on the handles of the dipping ladle. Its ends are not separable, and it has no nonmetallic lining. Douchamp alleged the use of a supporting hook or strap by the defendant company in the fall of 1908, when that company first commenced to draw cylinders. But Roadman testifies that his invention was made and in actual use at Monongahela in April, 1908, and that these loops were made at Monongahela City and sent to the different factories of the defendant in the latter part of April or the beginning of May, 1908. Holliday testifies that he first saw this device at Bellevernon in 1908, and that after seeing that loop he made a similar one for use at Arnold, which he says was exactly the same as the ones he saw at Bellevernon in May, 1908. It would therefore appear that Roadman and Dravo had their device in actual use some time before the date alleged by Douchamp.

The United States Patent Office, presumably after careful consideration, issued this patent, thereby declaring that invention was involved in the production of a structure defined by the claims of the patent. The structure is simple, but it appears to be new and useful,

and so well adapted for the purpose that it has come into general use by the plaintiffs. I am not prepared to say that it is the result of mere mechanical skill. It seems to involve invention. The claims are therefore held valid and infringed.

[8] Bridge patent, No. 1,006,995, claims 1, 2, and 4:

The Bridge patent is for a spring horse upon which the cylinder is lowered for capping off into roller lengths. This patent was before the court in the Consolidated Case, and the claims held valid and infringed. This finding, although contested, was sustained by the Circuit Court of Appeals. The defense relied on is two years' public use. The evidence here is not materially different from the evidence in that case, and I am not convinced that the court erred in sustaining the validity of the patent. The essential feature of the patent lies in providing pairs of arms so arranged that, after severing, each roller length will be supported on at least two arms. Each arm is separately spring-mounted, having an independent yielding movement to accommodate any irregularities in the cylinder. The defendant's horse is substantially the same as that of the patent, having the series of supports arranged in pairs, each being independent, and so held that it yields independently to accommodate the particular shape of that portion of the cylinder with which it contacts. Claims 1, 2, and 4 are therefore held valid and infringed.

Hitner patent, No. 821,361, all claims:

In the Consolidated Case, the court sustained the defense of two years' public use, holding the patent invalid. This finding was reversed by the appellate court, which held the patent valid and infringed. In accordance with that opinion, I find the claims of this patent valid. By the Hitner device, when the cylinder is lowered upon the horse, it is cut into roller lengths by an electrically heated wire. This is a hand tool, with a small metal wire of high electrical resistance, sufficiently long to encircle the cylinder. There is a switch on the handle, by means of which the current can be turned on or off. The operator loops the wire around the cylinder, its free end being pressed around a roller held by the finger of the operator. The current, when applied, quickly heats the encircling wire, and a narrow ring of glass is expanded by the heat, and, when tapped by a cold steel tool, the glass parts on the line of the wire. The patent being valid, there seems to be no doubt that defendant's device embodies every element of these claims, accomplishing the same result in substantially the same way. The claims of the patent are therefore found valid and infringed.

[9] Hart patent No. 841,011:

This patent is involved in the Brookville suit, on which there is, as yet, no decision. The claims relate to drawing a cylinder upwardly within an inclosure which surrounds it with a practically confined atmosphere. The idea is to shut off drafts of air, and thus prevent breakage. The only relevant claims are 3, 4, and 5 of this patent. These claims are as follows:

"3. The method of forming hollow glass articles, consisting in drawing the article upwardly within an inclosure arranged to surround the articles with a practically confined atmosphere throughout their length, and supplying air to the interior of the articles during drawing, substantially as described.

"4. The method of forming hollow glass articles, consisting in drawing them forwardly within an inclosed atmosphere extending substantially the full length of the articles, and thereby protecting them from external influences, substantially as described.

"5. The method of forming hollow articles, consisting in drawing the article upwardly within a partial inclosure extending substantially the full length of the articles, and arranged to surround the same by a quiescent atmosphere, allowing access to the drawing during drawing, and then removing the article laterally from the inclosure, substantially as described."

The defendant refers, with much show of reason, to the use of the shields in the drawing of window glass, to Lubbers patent No. 762,274, dated August 2, 1904. This patent shows a chamber placed above the drawing bath and extending the full length of the sheet being drawn, which completely envelopes the sheet, and which communicates with an inclosed annealing chamber into which the sheet is carried laterally from the enclosing chamber. Thus Lubbers had the full conception of the matter of protecting from drafts during the drawing of the sheet in the earliest patent application which he filed. When Lubbers had found that when he drew sheets they must be drawn up within a surrounding chamber, as otherwise they would crack or break, it would seem exceedingly doubtful whether the idea of *partially* inclosing a window glass cylinder while being drawn, to prevent breaking, could involve invention. But the patent being prima facie evidence of invention, and the problem of cylinder and sheet drawing being different in many particulars, I am not prepared to find that these claims are invalid for want of invention; but I do not find infringement by the defendant, under the evidence offered in the case.

Defendant's drawing frame does not extend substantially throughout the length of the cylinder, as called for by each of the claims 3, 4, and 5 in issue. That each of these claims must be limited to a structure conforming to those requirements is evidenced by the file wrapper of the application for the Hart patent. Claim 3 of the original claims called for "drawing the article upwardly within an inclosure"; claim 4, "drawing them forwardly within an inclosed atmosphere"; claim 5 "drawing the article upwardly within a partial inclosure." After numerous rejections of the application by the Patent Office, an amendment was made, wherein there were inserted into these claims the following limitations: Into claim 3 the phrase, "arranged to surround the articles with a practically stagnant atmosphere throughout their length;" into claim 4, "extending substantially the full length of the article;" and into claim 5, "extending substantially the full length of the article and arranged to surround the same by a quiescent atmosphere." It is, of course, true that, these limitations having been inserted into the three claims by the plaintiffs in order to secure the patent, they cannot now be construed in disregard of those limitations.

I shall not stop to review at length the conflicting testimony bearing upon the character of the defendant's shield. After hearing the testimony, and reviewing it for the purpose of this opinion, I am satisfied that defendant's arrangement is as follows: To the back of its drawing frame is fixed an iron plate, terminating at its lower edge about

4 feet above the surface of the glass bath and in height about 14 feet. But the real purpose of this shield is to prevent broken glass from falling into the bath in case the cylinder should break, or should break away from the bait, when the lower end of the drawing frame is swung over the breast wall of the furnace preliminary to taking down the cylinder. To aid in performing this function, the lower portion of this back plate is somewhat rounded on its opposite edges, to form a kind of chute; that this plate is at the back of the cylinder, and that the cylinder is uninclosed on its opposite sides. The testimony of several witnesses is to the effect that, when standing on one side of the cylinder being drawn, the entire cylinder can be seen. Defendant's structure does not have, as in claim 3, an inclosure arranged to surround the articles with a practically confined atmosphere throughout their length; nor, as in claim 4, an inclosed atmosphere extending substantially the full length of the articles; nor, as in claim 5, is the article drawn upwardly within a partial inclosure extending substantially the full length of the articles, arranged to surround the same by a quiescent atmosphere. From the whole testimony, I think the plaintiff has failed to sustain the burden of proof of infringement which rests upon it; but, on the contrary, that the weight of the evidence establishes that the patent has not been infringed.

A decree may be drawn in accordance with this opinion.

In re CONDEMNATIONS FOR IMPROVEMENT OF ROUGE RIVER.

(District Court, E. D. Michigan, S. D. May 21, 1920.)

Nos. 6157, 6212, 6213.

1. **Eminent domain ⇐74—Actual payment of compensation in advance of taking not required.**
   While private property cannot be taken, even under the right of eminent domain, unless necessary for public use, and then only if just compensation be paid therefor, yet it is not necessary, in the absence of express constitutional or statutory requirement to that effect, that such compensation be paid before the actual taking of the property, provided that reasonably certain, prompt, and adequate provision for the payment of just compensation be made, or the public faith and purse be pledged for such payment.

2. **Eminent domain ⇐66—Whether use is public use is judicial question.**
   Whether the use for which property is sought to be taken is a public use is a judicial question.

3. **Eminent domain ⇐24—Necessary use of property by United States for improvement of navigability of river is public use.**
   The use of property by the United States, when necessary for the purpose of improving the navigability of a navigable river within its jurisdiction, is a public use, for which it is entitled to take such property by the power of eminent domain.

4. **Eminent domain ⇐14—That public use will benefit some more than others is immaterial.**
   The mere fact that the taking of property for a public use will result in greater benefit to some persons than to others, or that private individuals

contribute to the expense of such taking, does not affect the character of such use, or render it any the less public, within the meaning and scope of the law of eminent domain.

5. **Eminent domain ⟸67—Necessity of taking is legislative question.**
If the use for which any particular property is sought to be taken is a public use, the question whether such property is necessary for such use is a legislative question, and the determination thereof by the proper legislative body cannot be questioned in condemnation proceedings.

6. **Constitutional law ⟸281—Eminent domain ⟸167(2)—Hearing on necessity of taking not essential to due process of law.**
A hearing on the necessity of taking property for a public use is not essential to due process of law in the sense of the Fourteenth Amendment.

7. **Constitutional law ⟸62—Eminent domain ⟸68—Power to determine necessity of taking may be delegated to executive officer; exercise of delegated power not reviewable.**
The power to determine the question of the necessity of taking property for a public use may be delegated by Congress to executive officers of the government. The finding by such officers on this question, made in the exercise of such delegated power, is not subject to review by the courts.

8. **Eminent domain ⟸6—Statute authorizing condemnation by government not unconstitutional, because compensation is paid by others.**
Act May 16, 1906, as amended by Act June 29, 1906 (Comp. St. § 9881), providing that, whenever any person, company, or corporation shall undertake to secure any land needed for river or harbor improvement for the purpose of conveying the same to the United States free of cost, and shall be unable for any reason to obtain the same by purchase, the Secretary of War may in his discretion cause proceedings to be instituted in the name of the United States for its condemnation, the expenses and award to be paid by such person, company, or corporation *held* not unconstitutional, as delegating the power of eminent domain to private parties; the land being acquired by the government, and it being immaterial and no concern of the owners what arrangement it may have with others for payment of the compensation.

9. **Eminent domain ⟸75—Petition for condemnation by United States, offering security for payment of compensation, sufficient.**
Petition by the United States for condemnation of land for a river improvement, which offers to give such security for the payment of the compensation awarded as shall be required by the court, *held* sufficient under Act July 18, 1918, § 5 (Comp. St. Ann. Supp. 1919, § 9878a).

10. **Eminent domain ⟸68—Determination of necessity under power delegated by Congress conclusive.**
Under Act May 16, 1906, as amended by Act June 29, 1906 (Comp. St. § 9881), vesting in the Secretary of War discretion to institute proceedings to condemn land for a river or harbor improvement, such discretion includes power to determine the necessity for taking the land, and his decision thereon is conclusive, and not affected by a state statute requiring such question to be determined by a jury.

11. **Eminent domain ⟸167(1)—Conformity provision as to suits by United States relates to procedure only.**
The provision of Act April 24, 1888 (Comp. St. § 9878), requiring proceedings by the Secretary of War for condemnation of land for river or harbor improvement to be prosecuted in accordance with the laws of the state, relates to procedure, and not to matters of substance.

12. **Eminent domain ⟸170—Inability to purchase not condition precedent to condemnation proceedings by United States.**
In proceedings by the United States for condemnation of land for a public use inability to acquire title by purchase is not a jurisdictional condition precedent, unless expressly made so by statute.

In Equity. In the matter of petitions by the United States for condemnation of private property for the Improvement of Rouge River, a public use. On motions to dismiss. Denied.

Alfred J. Murphy and Howell Van Auken, Sp. Assts. Atty. Gen., for petitioner.

A. C. Angell, Stevenson, Carpenter, Butzel & Backus, Campbell, Bulkley & Ledyard, Miller, Canfield, Paddock & Perry, Keena, Lightner, Oxtoby & Hanley, Corliss, Leete & Moody, Wilkinson & Hinkley, Routier & Nichols and Dohany & Hersch, all of Detroit, Mich., for respondents.

TUTTLE, District Judge. These are condemnation proceedings brought by the Secretary of War in the name of the United States, to take by right of eminent domain, certain lands owned by the respondents, for the purpose of improving the Rouge river, a navigable waterway located within this District and in the state of Michigan. The proceedings are based upon and involve the construction and validity of the Act of Congress of May 16, 1906, c. 2465, 34 Statutes at Large, 196 as amended by Act of June 29, 1906, c. 3628, 34 Statutes at Large, 632, being section 9881 of West's United States Compiled Statutes of 1918. This statute provides as follows:

"Whenever any person, company, or corporation, municipal or private, shall undertake to secure any land or easement therein needed in connection with a work of river and harbor improvement duly authorized by Congress, for the purpose of conveying the same to the United States free of cost, or for the purpose of constructing, maintaining, and operating locks, dry docks, or other works to be conveyed to the United States free of cost, and of constructing, maintaining and operating dams for use in connection therewith, and shall be unable for any reason to obtain the same by purchase and acquire a valid title thereto, the Secretary of War may, in his discretion, cause proceedings to be instituted in the name of the United States for the acquirement by condemnation of said land or easement, and it shall be the duty of the Attorney General of the United States to institute and conduct such proceedings upon the request of the Secretary of War: Provided, that all expenses of said proceedings and any award that may be made thereunder shall be paid by the said person, company, or corporation, to secure which payment the Secretary of War may require the said person, company, or corporation to execute a proper bond in such amount as he may deem necessary before said proceedings are commenced."

By motions to dismiss and by answers various respondents have raised objections to the sufficiency of the petitions for condemnation, as matter of law, and to the legality of the proceedings and the constitutionality of the statute just quoted. The several defenses thus presented, formerly presentable by demurrer, or plea, have been argued in accordance with equity rule 29, and are now before the court for disposition.

The facts, as disclosed by the allegations in the pleadings and by the documents referred to therein, are, in substance and so far as the material circumstances are concerned, as follows: The Rivers and Harbors Act of July 27, 1916, chapter 260, 39 Statutes at Large, 409, directed the War Department to make a preliminary examination of the said Rouge river with a view to the possible improvement thereof.

In accordance with said act, on December 12, 1916, the district engineer officer of the United States army transmitted to the chief of engineers, through the division engineer, a report of the result of such preliminary examination. In this report, after referring to certain improvements previously made by the government in said river, the district officer proceeds with certain statements and recommendations, the substance of which may be gathered from the following quotations therefrom:

"The demand for further improvement of the Rouge river is due primarily to the location of a large industrial plant by the Ford Motor Company near the head of the present improved portion of the river. The construction of this plant has already been started, and when completed it will occupy a frontage on the Rouge of about 3,000 feet, immediately below Maples Road, and will give employment to about 15,000 people. There will be two blast furnaces requiring for full operation a supply of iron ore at the rate of about 6,000 tons per day during the navigation season, and having an output of about 1,000 tons of metal per day. It is contemplated to provide two more furnaces whenever they become necessary. In addition to the iron ore, which is to be brought in exclusively by water, the Ford Motor Company expects to ship about 50 per cent. of the factory product by water. For the economic handling of iron ore, it is desirable that the channel be sufficient for boats of 600 feet length, 65 feet beam, and 20 feet draft. * * * The Rouge river is used as part of the harbor front of the city of Detroit, and the freight handled by vessels making landings in the Rouge might very properly be grouped with other commercial statistics of water-borne commerce of the city of Detroit. * * * If the Ford Motor Company completes the two projected furnaces and operates them at full capacity, the ore required will amount to about 1,300,000 tons per year. The company has in view an ultimate furnace capacity of twice the initial, and expects to ship out by water about one-half of the output of the factory. Hence it seems that it may reasonably be expected that the Ford Motor Company's plant alone will add at least 1,300,000 tons to the annual freight movement upon the Rouge, and that before many years the in and out bound tonnage from this factory will be much in excess of this figure. The industries already making use of the river may be expected to increase their annual tonnage of water-borne freight. The rapid industrial growth of Detroit will, undoubtedly, not only result in a considerable growth in the business of those now owning docks on the Rouge, but will cause new industries to be established along that stream, provided the facilities for navigation in the Rouge are satisfactory for a heavy freight movement. It is believed that, within a few years after the completion of a channel suitable for the largest lake carriers, the total annual freight movement upon the Rouge will considerably exceed 3,000,000 tons, and that there will be a continual growth thereafter. * * *

"As previously stated, an improvement sufficient for the demands of commerce would practically convert the river into an artificial slip, following the general alignment of the natural river bed. No through commerce upon the Rouge river would result, but the harbor frontage of the city of Detroit would be increased, and the establishment of industries within reach of navigable water would be facilitated, with the resulting tendency toward increasing the total tonnage of freight moved upon the Great Lakes. The construction of the slip would be in the interest of practically all owners of land bordering it, and such owners would be more benefited than would other citizens of Detroit, but the increase in the freight traffic of the city expected to follow the completion of the improvement would be of general benefit. It has not been the practice of the government to assist in the construction of private slips, but it is believed that the conversion of the Rouge river into a slip will be of sufficient general benefit to cause it to be considered differently from other dock improvements. It is understood that in the past it has been considered proper to add to the harbor frontage of important cities at the expense of the general government, as, for example, in the case of the improvement of

Harlem River and of some of the streams passing through important lake cities. My conclusion is that the general and the private benefit are so intermingled that the cost of the improvement ought to be divided between the United States and the locality, and that the proper basis for dividing the cost will be for the United States to undertake the actual work of the improvement and for the local interests to donate the necessary land and to assume the burden of ascertaining and settling claims for damages as well as the cost for making alterations in bridges when these cannot be required to be made at the expense of the owners.

"There is strong reason for believing that the improvement would result in a large increase in the freight movement upon the Rouge river; but until the cost of the improvement is ascertained it is impracticable to do more than make a rough comparison between the benefit to be expected and the cost of the work. * * * I do not believe there is much doubt that the project could not be considered one worthy of being undertaken by the general government, if the entire cost of the work is to be borne by the United States; but with the assumed distribution of costs, as mentioned above, there seems to be sufficient reason for considering the improvement to be worthy to the extent of authorizing the preparation of an estimate of cost."

In transmitting the report of the district engineer just mentioned, the division engineer expressed disagreement with the opinion of the district engineer concerning the division of the cost of improvement of the Rouge river, on the ground that such improvement would be "primarily in the interest of the Ford Motor Company," and he recommended that, therefore, all of such costs should be borne by the "local interests" thus to be benefited. This recommendation, however, as will be hereinafter noted, was not adopted or approved by the superior cfficers of the division engineer.

Afterwards, on January 10, 1917, the Board of Engineers for Rivers and Harbors recommended to the chief of engineers that a survey be made in connection with the proposed improvement. On February 8, 1917, the district engineer officer who made the preliminary examination and report already referred to, submitted to the chief of engineers, through the division engineer his "Survey Report upon Rouge River, Michigan." This report contains the following language:

"I stated in the preliminary report that this improvement, in my opinion, has both a public and private character; that the general and private benefits are so intermingled that the cost of the improvement ought to be divided between the United States and the locality; and that the proper basis for dividing the cost will be for the United States to excavate and maintain the channel and for the local interests to donate the necessary land and assume the burden of ascertaining and settling claims for incidental damages as well as the cost of making the alterations in bridges when these cannot be required to be made at the expenses of the owners. * * * A number of riparian owners who were present at the public hearing held on November 16, 1916, stated that the portions of their lands necessary for the improvement would be donated. Some owners undoubtedly will not donate the land, and it may be necessary for the United States to enter condemnation proceedings to obtain it. However, all costs connected with the condemnation proceedings and with the payment of the awards for the land should be provided for by the local interests. * * *

"It is believed that the presentation in the preliminary report shows that the proposed improvement will add a considerable wharf frontage to the city of Detroit, and that there will result a considerable increase in the commerce of the port. I may add that the improvement seems almost essential for the economical operation of the furnaces to be erected by the Ford Motor Com-

pany. In view of the importance of the improvement in developing the commerce of the city of Detroit, I recommend that the Rouge river be improved by the plan heretofore described and designated as plan A, and that the necessary money be appropriated under the condition that none of it shall be expended for other than survey work until the local interests have given satisfactory guaranties of the assumption of costs by them for rights of way, alterations of bridges and incidental damages. It is further recommended that a proviso be incorporated in the appropriation act that, in the event the right to use the cut-off canal cannot be obtained, at the discretion of the Secretary of War the improvement may be carried on in accordance with plan B."

In transmitting, on February 10, 1917, to the chief of engineers the survey report just mentioned, the division engineer reiterated his former statement that the proposed improvement would be "primarily in the interest of one company." This time however, he added the statement that he concurred in the opinion of the district officer as to the conditions of co-operation. In forwarding the last-mentioned report of the district engineer officer to the chief of engineers, the Board of Engineers for Rivers and Harbors, on February 13, 1917, submitted its own report, in substance as follows:

"The present demand for improvement is due primarily to the location of a large industrial plant by the Ford Motor Company near the head of the present project and just below Maples Road. It is expected that this plant will require about 6,000 tons of iron ore per day during the navigation season. For the economical handling of ore the channel should be of sufficient capacity to accommodate vessels of 600 feet length and 20 feet draft. There are other interests below the Ford property that would be benefited and these would be adequately served by such a channel. * * * Consideration has been given to plans of improvement both by the canal (plan A) and by the lower river (plan B). * * * The commerce of the Rouge river has increased from 234,861 tons in 1906 to 1,651,823 tons in 1915, consisting of 515,535 tons of iron ore, 686,092 tons of sand and gravel, and 450,196 tons of other commodities not enumerated. It is thought that the greater part of this commerce pertains to the lower section of the river. The district officer states that if the Ford Company completes and operates its initial plant as contemplated, 1,300,000 tons of freight annually may be expected to result from this source alone, and that this may be greatly increased in the future.

"The district officer regards this improvement as affording both public and private benefits, and he is of opinion that the proper basis for dividing the cost will be for the United States to excavate and maintain the channel and for local interests to donate the land, assume the cost of bridge alterations and of all damages, direct or indirect, that may result from the improvement on this basis, and recommends plan A, subject to the condition that no funds shall be expended for other than survey work until local interests shall give satisfactory guaranties of their assumption of costs for rights of way, alterations of bridges, and incidental damages, and to the further condition that in the event the right to use the cut-off canal cannot be obtained, the improvement may, in the discretion of the Secretary of War, be carried on in accordance with plan B. The division engineer regards this improvement as primarily in the interests of one company and not worthy of being undertaken by the United States, except as provided by the present project, amplified by deepening the present channel above the Wabash Railroad bridge to 16 feet for a bottom width of 100 feet.

"There is now a commerce of considerable magnitude on the Rouge river, and it is obvious that a much greater tonnage will result if the proposed development at the head of the present improvement is carried into effect. Moreover, it is reasonable to expect that other industries will make increased use of the improved channel. The board does not regard plan B as advisable, as the channel thus afforded would not be suited to large lake freighters and

would be a source of trouble in the future. Plan A is the one that should be adopted, as the cost of the improvement would not be justified for the less suitable waterway. The board is of opinion that it is advisable for the United States to undertake the further improvement of Rouge river, as proposed by the district officer in accordance with plan A, at an estimated cost of $490,000 and $5,000 annually for maintenance, following generally the lines shown on the map but subject to such minor modifications as may be found advantageous in the prosecution of the work, and subject to the conditions of local co-operation proposed by the district officer, and to the further condition that local interests shall provide a suitable turning basin free for public use at the upper end of the improvement."

On February 15, 1917, the chief of engineers sent to the Secretary of War a letter, in which he submitted for transmission to Congress the aforesaid reports, reviewed the various statements and recommendation thereof, and concluded as follows:

"After due consideration of the above-mentioned reports, I concur in the views of the district officer and the Board of Engineers for Rivers and Harbors, and therefore report that the further improvement by the United States of Rouge river, Michigan, is deemed advisable to the extent of providing a channel 200 feet wide and 21 feet deep in accordance with plan A, at an estimated cost of $490,000 for first construction and $5,000 annually for maintenance, following generally the lines shown on the accompanying map, but subject to such minor modifications as may be found advantageous in the prosecution proposed by the district officer, and to the further condition that local interests shall provide a suitable turning basin free for public use at the upper end of the improvement."

On February 15, 1917, the letter just quoted was transmitted to Congress by the Secretary of War, with a letter reading as follows:

"I have the honor to transmit herewith a letter from the chief of engineers, United States Army, of this date, together with copies of reports from Lieut. Col. H. Burgess, Corps of Engineers, dated December 12, 1916, with map, and February 8, 1917, on a preliminary examination and survey, respectively, of Rouge river, Michigan, made by him in compliance with the provisions of the River and Harbor Act, approved July 27, 1916."

On February 16, 1917, the letter last mentioned was referred by Congress to the committee on rivers and harbors and ordered printed, with illustrations. Thereafter said letter and the accompanying letter and reports mentioned therein were printed in a 21 page pamphlet entitled, "House of Representatives, Document No. 2063," with the following caption:

"Letter from the Secretary of War, Transmitting, with a Letter from the Chief of Engineers, Reports on Preliminary Examination and Survey of Rouge River, Michigan."

Thereafter, in the Rivers and Harbors Act approved August 8, 1917 (40 Stat. 250, 258, c. 49) Congress provided, among other things, that—

"The following sums of money * * * are hereby, appropriated, out of any money in the treasury not otherwise appropriated, to be immediately available, and to be expended under the direction of the Secretary of War and the supervision of the chief of engineers, for the construction, completion, repair and preservation of the public works hereinafter named: * * * For improvement of Rouge river, Michigan, in accordance with the report submitted in House Document numbered 2063, Sixty-Fourth Congress, second session, and subject to the conditions set forth in said document, $490,000: Pro-

vided, that the Secretary of War may, in his discretion, substitute plan B for plan A."

On May 23, 1919, Newton D. Baker, Secretary of War, made and signed the following finding, a copy of which is attached to each petition herein:

"The Congress of the United States, by an act entitled 'An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors and for other purposes,' approved August 8, 1917, having made an appropriation for a public work as therein stated, namely, for the improvement of the Rouge river, Michigan, under the direction of the Secretary of War and in accordance with the report submitted in House Document 2063, Sixty-Fourth Congress, Second Session; and it appearing to the satisfaction of the said Secretary of War of the United States that the lands privately owned, among others, in the county of Wayne, Michigan, described in the schedules hereto attached, are located within the lines of said improvement and are necessary for such improvement; and it appearing that the several owners thereof have refused to donate said lands, and that the other local interests mentioned in said House Document, undertaking to secure the necessary lands and rights of way for such improvements, have been unable for good and sufficient reasons to obtain the same by purchase as required for said work, and that said local interests have offered to give suitable bond to the United States of America, for the benefit of whom it may concern, to secure payment of the expense of condemnation proceedings on behalf of the United States of America to acquire title to the rights aforesaid in said lands, and to pay any awards that may be made in such proceedings: Therefore, in consideration of the foregoing, it is hereby found and determined by the undersigned Secretary of War of the United States that it is necessary for the public benefit and for the prosecution, completion, operation, and use of said public improvement in accordance with plan A, described in said House Document No. 2063, that the United States of America acquire and obtain a perpetual right of way over, along and upon each parcel of the lands described in said schedules hereto attached, together with the right to make such improvement, excavate a channel therefor, and to remove, carry away and dispose of so much earth and materials therefrom as may be necessary in such work.

"It is further hereby found and determined that the owners respectively, of said several parcels refuse to donate said lands or rights of way therein, for such improvement, and that the other local interests described in said report, as being required to donate the necessary land for said improvement, have been unable, for good and sufficient reasons, to obtain the same by purchase or the rights therein, as required for the construction, completion and operation of said public work; that the bond tendered by said local interests, under the provisions of the Act of June 29, 1906, being chapter 3628, 34 Statutes at Large, page 632, for the commencement of condemnation proceedings as aforesaid, is sufficient in amount and as to the sureties thereto: Therefore, the undersigned, Secretary of War of the United States, hereby respectfully requests the Attorney General of the United States to institute and conduct the necessary proceedings in the United States District Court for the Eastern District of Michigan, Southern Division, in the name and on behalf of the United States of America, to acquire by condemnation the rights and easements in said lands as above described, needed for said public work."

After referring to the foregoing facts and proceedings, each petition prays that the owners and other persons having interests in the lands thus sought to be taken be made respondents herein; that a jury be summoned and impaneled to ascertain and determine the just compensation to be made respectively to said respondents; that judgment be given in favor of the United States, condemning a perpetual right of way over the said lands for the United States to construct and main-

tain said public work, "and to excavate, remove and dispose of so much earth and other materials within the lines of said improvement as may be necessary for the construction and maintenance thereof"; and—

"that on filing this petition an order may be entered hereon, by this court, providing for the taking of immediate possession of each and all of said lands by petitioner for such improvement and fixing the amount and form of certain and adequate security to be given on behalf of the United States, as petitioner herein, for the payment of such just compensation as may be awarded to the party or parties entitled thereto on account of the taking of the rights of way and otherwise hereinbefore mentioned as required for said improvement, which certain and adequate security, petitioner hereby offers to give as may be, by the court, directed."

Respondents insist that the petitions should be dismissed for the following reasons: That the use for which the taking of the lands is sought is a private and not a public use; that the necessity for taking such lands has not been judicially determined in accordance with the laws of Michigan governing the taking of private property by right of eminent domain; that no provision for the payment of just compensation for such lands has been made; and that it has not been shown that the "local interests" involved have been unable to purchase the lands thus sought to be taken. There are so many phases and aspects of the objections thus broadly stated, and these are so closely interwoven, that it seems advisable to consider them together in discussing, as a whole, the questions involved and the legal rules and principles applicable.

[1] While private property cannot be taken, even under the right of eminent domain, unless necessary for public use, and then only if just compensation be paid therefor, yet it is not necessary, in the absence of express constitutional or statutory requirements to that effect, that such compensation be paid before the actual taking of the property, provided that reasonably certain, prompt, and adequate provision for the payment of just compensation be made, or the public faith and purse be pledged for such payment. Cherokee Nation v. Southern Kansas Railway Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; Sweet v. Rechel, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188; Adirondack Railway Co. v. People, 176 U. S. 335, 20 Sup. Ct. 460, 44 L. Ed. 492; Crozier v. Krupp, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771; Bragg v. Weaver, 251 U. S. 57, 40 Sup. Ct. 63, 64 L. Ed. ——.

[2] It is well settled that the question whether the use for which property is sought to be taken is a public use is a judicial question. Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Hairston v. Danville & Western Railway Co., 208 U. S. 598, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008; Sears v. Akron, 246 U. S. 242, 38 Sup. Ct. 245, 62 L. Ed. 688.

[3] It is also established that the use of property by the United States, when necessary for the purpose of improving the navigability of navigable rivers within its jurisdiction, is a public use for which it is entitled to take such property by the power of eminent domain.

Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co., 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004; Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063. It is not disputed that the use for which this land is sought to be taken is the improvement of the navigability of the Rouge river, which is a navigable stream, or that the result of such use will not be the improvement of such navigability.

[4] The mere fact that the taking of property for a public use will result in greater benefit to some persons than to others, or that private individuals contribute to the expense of such taking, does not affect the character of such use, or render it any the less public, within the meaning and scope of the law of eminent domain. Fallbrook Irrigation District v. Bradley, supra; Hairston v. Danville & Western Railway Co., supra; Union Lime Co. v. Chicago & Northwestern Railway Co., 233 U. S. 211, 34 Sup. Ct. 522, 58 L. Ed. 924.

[5] If the use for which any particular property is sought to be taken is a public use, the question whether such property is necessary for such use is a legislative question, and the determination thereof by the proper legislative body cannot be questioned in condemnation proceedings brought for the taking thereof. Shoemaker v. United States, supra; Monongahela Navigation Co. v. United States, supra; Chappell v. United States, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510; United States v. Gettysburg Electric Railway Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576; A. Backus, Jr., & Sons v. Fort St. Union Depot Co., 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853; Adirondack Railway Co. v. People, supra; Sears v. Akron, supra; Bragg v. Weaver, supra.

[6] A hearing on the question of necessity is not essential to due process of law in the sense of the Fourteenth Amendment. Bragg v. Weaver, supra.

[7] The power to determine the question of such necessity may be delegated by Congress to executive officials of the Government, and the finding by such officials on this question, made in the exercise of such delegated power, is not subject to review by the courts. Chappell v. United States, supra; Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Bragg v. Weaver, supra.

[8] Applying these principles to the present case, the proposed use is a public use, and Congress has, by the Rivers and Harbors Appropriation Act already mentioned, authorized the improvement of the navigability of this stream, "in accordance with the report submitted in House Document No. 2063," hereinbefore reviewed, "and subject to the conditions set forth in said document." One of these conditions was the assumption, by the local interests concerned, of "all costs connected with the improvement other than those for excavation and maintenance of channel" (Id. p. 18), including the donation of the "necessary land" (Id. p. 19), and the payment of any "incidental damage" (Id. p. 20).

It appears that the properly authorized officer of the government, the Secretary of War, has found, as a fact, that it is necessary to take, for the public use mentioned, the lands involved in these proceedings. If, therefore, the "local interests" referred to are "unable," within the meaning of the statute involved, to purchase the land thus needed, for the purpose of conveying it to the United States, as thus required, it seems clear that the present situation is exactly what was contemplated by Congress in enacting the statute in question.

Bearing in mind the presumption of constitutionality attending this statute, and in view of its evident meaning and purpose, I am satisfied that it does not delegate to private parties the right of eminent domain. It merely provides that when, as here, the government desires to take private land necessary for a public use mentioned in the statute, but wishes to have such land donated by private interests, willing, but unable, to do so, because unable to purchase and acquire a valid title thereto, in that event the United States government, instead of receiving the land itself from such person, company, or corporation, as it would have the right to do (Act April 24, 1888, c. 194, 25 Statutes at Large 94 [section 9878, West's U. S. Compiled Statutes of 1918]), may, under the circumstances mentioned, accept, from the private interests concerned, reimbursement of the expense of acquiring such land by condemnation; that is, payment of the just compensation which must be made therefor, when, and as, duly determined in condemnation proceedings properly brought in the name of, and by, the government against the owners of the land so needed. The government, not the private interest, condemns and takes the land. The only connection with the matter which such private interest has is its arrangement with the government to save the latter harmless from the cost of such taking.

[9] The mere commencement of these condemnation proceedings is not, of course, the taking of any property, and the actual payment of compensation, therefore, need not precede or accompany the filing of the petitions herein (Cherokee Nation v. Southern Kansas R. R. Co., supra; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270), although by instituting such proceedings the government has pledged its faith, and has absolutely obligated itself, to make just compensation at the proper time; that is, upon the actual taking of the property sought, in the same manner, and to the same extent, as if it were proceeding without reference to the statute in question.

Moreover, by the Act of July 18, 1918, c. 155, § 5, 40 Statutes at Large, 911 (section 9878a West's 1919 Supplement to U. S. Compiled Statutes), Congress has provided as follows:

"Whenever the Secretary of War, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or rights of way needed for a work of river and harbor improvement duly authorized by Congress, the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights of way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress:

Provided, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted. The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. In every case the proceedings in condemnation shall be diligently prosecuted on the part of the United States in order that such compensation may be promptly ascertained and paid."

Pursuant to this statute, petitioner prays in its petition that—

"On filing this petition, an order may be entered therein, by this court, providing for the taking of immediate possession of each and all of said lands by petitioner, for such improvement, and fixing the amount and form of certain and adequate security to be given on behalf of the United States, as petitioner herein, for the payment of such just compensation as may be awarded to the party or parties entitled thereto on account of the taking of the rights of way and otherwise hereinbefore mentioned as required for said improvement, which certain and adequate security, petitioner hereby offers to give as may be, by the court, directed."

I find no variance or inconsistency between the promise (not only implied from its action in commencing those proceedings, but also expressly made in its petitions therein) by the government to make the necessary compensation for this land, and the conditional form of the resolution of Congress authorizing the work for which such land is sought. On the one hand, as between the owners of the land and the government, the latter is exercising its right, under the power of eminent domain, to take certain land necessary for a public use, and is offering to pay just compensation therefor when taken, which is all that said owners are entitled to demand, having no right to inquire as to the manner in which, or the source from which, the government may obtain the means of making such compensation. On the other hand, as between the "local interests" and the government, the latter has the right to require, as a condition precedent to the exercise of its power of eminent domain, an undertaking and guaranty that the former will pay any awards made in these condemnation proceedings for the land so taken. While the government has refused, except as against the owners of this land, to bear the expense of taking such land, and has announced that any such expense must be borne by the local interests concerned, it has not refused to take said land if it be donated for the purpose of carrying out the improvement desired, or if, what amounts to essentially the same thing, the cost of obtaining said land be donated; nor has it refused to pay, or cause to be paid, to the owners thereof, the just compensation to which they are entitled if their land be so taken. The only difference, in regard to the payment of compensation, between this case and any other case of condemnation, is that here the government is fortunate enough to have a private source from which to obtain the money to be paid as just compensation for this land, while ordinarily it would have been compelled to draw such money from the public treasury, without any reimbursement therefor.

But this is a matter which neither affects nor concerns the owners of such land, who receive their just compensation for land needed by the government for a public use, and who, therefore, cannot complain that they have been, or will be, deprived of any legal rights.

It must be inferred that, in authorizing this public improvement on the terms and conditions specified, Congress contemplated the possible necessity of resorting to the condemnation machinery provided by this statute, in order to obtain this land. Indeed, this is made clear by the fact that the report which set forth the conditions adopted by Congress in authorizing such improvement contains the following language:

"Some owners undoubtedly will not donate the land, and it may be necessary for the United States to enter condemnation proceedings to obtain it. However, all costs connected with the condemnation proceedings and with the payment of the awards for the land should be provided for by the local interests."

I am satisfied that the United States government is not attempting to take any of this land without payment of just compensation therefor, but is merely availing itself of the benefit afforded by the statute in question, by insisting that the expense of making such compensation shall be borne by the "local interests" mentioned.

[10, 11] The objection that this property cannot be taken in these proceedings, because the necessity of such taking is not to be determined by a jury, in accordance with the constitutional and statutory provisions of the state of Michigan governing such proceedings is without merit. As has been already pointed out, the question as to the necessity for the taking of private property by the United States for a public use is a legislative question, and the decision of Congress or of the executive official to whom the making of such decision has been delegated by Congress is final, and cannot be questioned in this proceeding. It is true that the Act of Congress of April 24, 1888, c. 194, 25 Statutes at Large 94 (section 9878. West's U. S. Compiled Statutes of 1918), provides that—

"The Secretary of War may 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, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; 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."

This statute, however, subjects such proceedings to the state laws only in respect to matters of procedure and not to matters of substance. Kanakanui v. United States, 244 Fed. 923, 157 C. C. A. 273. The right to determine the necessity of the taking of property for public use, under the power of eminent domain, is necessarily incident to the sovereign power of the United States government to determine for itself whether it needs any particular property for such use. This right and power cannot be limited or affected by the laws of a state

unless Congress so provides, and no federal legislation to that effect has been enacted.

[12] One further question remains to be considered. It is urged by respondents that the question whether the local interests involved have been unable to purchase and obtain a valid title to the lands sought is a judicial question, which must be determined in this proceeding, while petitioner contends that the decision of that question rests with the Secretary of War as a preliminary phase of the discretionary power, with which he is vested, to cause these proceedings to be instituted in the name of the United States. While the question thus raised is not free from doubt, after careful consideration thereof, I have reached the conclusion that the contention of respondents cannot be sustained. The argument that the fact of inability to purchase is a jurisdictional condition, which, like other facts on which the jurisdiction of the court depends, is one of the issues in the case and must be determined herein, seems on first impression to have force. Further reflection, however, appears to reveal the unsoundness of the argument.

The duties and powers of the Secretary of War in connection with proceedings of this kind are confined to determining whether particular lands are needed in connection with any certain work of river and harbor improvement duly authorized by Congress, and, if such lands be so needed, to deciding whether condemnation proceedings are to be instituted in the name of the United States for the acquirement of such lands. In determining whether he will cause such proceedings to be instituted, the Secretary of War, acting within the exercise of "his discretion," must necessarily decide some questions, at least to his own satisfaction. When he has requested the Attorney General to institute and conduct such proceedings, it becomes the duty of the latter officer to comply with such request, and when the proceedings have been commenced questions arising thereafter, such as those concerning the nature of the use for which the land is sought, the amount of compensation to be made to the owners of such lands, the practice to be followed, and kindred questions, are to be determined in the condemnation proceedings. With none of these last-mentioned questions has the Secretary of War any official concern or connection. The duties imposed, and the powers conferred, upon him are ultimately to decide whether he will cause condemnation proceedings to be instituted. In making this decision, he must first determine the necessity for the taking. His determination as to the necessity of such taking is final, and not reviewable by the courts. I cannot avoid the conclusion that the question whether the local interests have been unable to acquire the lands involved, as well as the necessity for using such lands, really enters into and becomes a part of the broad question of the necessity for instituting condemnation proceedings, which the Secretary of War, not the court, must decide. It is a familiar rule that a statute which, either expressly or by necessary implication, gives a discretionary power to any public official, to be exercised by him upon his opinion concerning certain facts, constitutes him the sole and exclusive judge of the existence of such facts. Martin v.

Mott, 12 Wheat. 19, 6 L. Ed. 537; Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476; Mullan v. United States, 140 U. S. 240, 11 Sup. Ct. 788, 35 L. Ed. 489.

The present case is not to be confused with one in which a quasi public corporation or agency is seeking to exercise the qualified power of eminent domain conferred upon it by a state or by the national government. In such a case, the condemning party possesses only the power expressly bestowed upon it, and must, before it is entitled to exercise such power, prove, as a material issue, any facts on the existence or performance of which its power of eminent domain depends. One of the most common of such requirements is the duty imposed upon the condemning party to attempt the purchase of the land desired before proceeding to take it, and when such an attempt is made a condition to the power of condemnation, of course the performance of such condition is a jurisdictional fact, and must appear as a basis for the right to take under such qualified power of eminent domain. Here, however, no such situation is presented. The private party whose inability to purchase is mentioned in the statute has no power to institute or maintain condemnation proceedings. Such inability is not made a condition to any suggested right of such party to take property by power of eminent domain. It is the United States government which is given the authority to condemn or to bring the proceedings under this statute. Now, the power of eminent domain possessed, and thus sought to be exercised, by the United States, is a power which inherently belongs to it as a sovereign nation. It is of the broadest character and scope, and not limited by any conditions requiring negotiation, unless Congress has so provided. We are not dealing with a condition which exists, if not removed, but with a condition which does not exist, unless created by this statute. In the former case, indefinite language would not remove; in the latter case, indefinite language does not create. In other words, when, as here, the United States is the condemning party, its power to take property is not qualified by a condition precedent, such as the duty to first exhaust its efforts to purchase such property unless such condition be affirmatively shown to have been expressly imposed upon its right to exercise that power. I do not discover any language in this statute to indicate an intent on the part of Congress to create such a jurisdictional condition for the determination of the court.

The Secretary of War is the representative of the government, whose duty it is to determine whether such proceedings are to be instituted. The inability of the local interests to obtain by purchase the land sought to be donated to the Government is one of the facts to be considered by the Secretary of War in determining whether he will, as Congress has provided that he may, "in his discretion," cause such proceedings to be instituted in the name of the United States for the acquirement of such land. I am of the opinion that this is a fact the existence of which must of necessity be decided by the Secretary of War in accordance with his own judgment. It results that all of the legal objections raised as to the sufficiency of the petitions

herein, and as to the constitutionality of the statute involved, must be overruled, and the motions denied.

The most comprehensive and closely applicable Michigan statute relating to the practice in such a case appears to be Act 149 of the Michigan Public Acts of 1911 (section 353 et seq., Michigan Compiled Laws of 1915), and that statute should govern the procedure in these proceedings, in so far as it is not inconsistent with the views here expressed. An order will be entered, overruling all objections urged, and denying the motions made by respondents.

THE KLATAWA.

(District Court, W. D. Washington, N. D. May 8, 1920.)

No. 4909.

1. **Collision ⇐86—Vessels entering or leaving "narrow channel" to keep to starboard side.**

A vessel entering a narrow channel should approach and enter on the starboard side, leaving ample room for outcoming vessels to pass port to port, and vessels coming out should keep to the starboard side until well clear of the entrance; a "narrow channel" being defined as a body of water navigated up and down in opposite directions, which does not include harbor waters, with piers on each side, where the necessities of commerce require navigation in every conceivable direction.

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

2. **Collision ⇐102—Mutual fault of power boats meeting in narrow channel.**

The power launches Klatawa and Diamond K, the former entering and the latter passing out from a narrow channel, both *held* in fault for a collision; the Klatawa for not giving a timely signal and for giving a starboard passing signal, and the Diamond K for being on the wrong side of the channel.

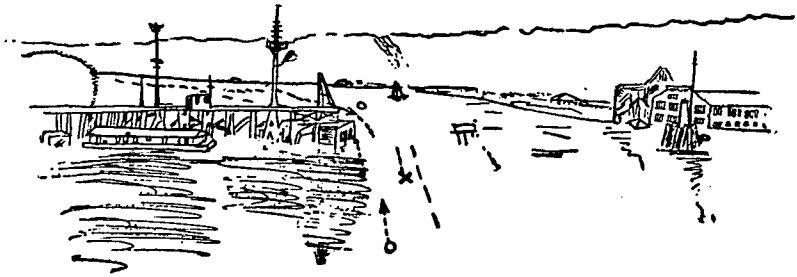
In Admiralty. Suit for collision by Louis Birch, owner of the launch Diamond K, against the launch Klatawa, with cross-libel. Decree dividing damages.

Byers & Byers, of Seattle, Wash., for libelant.
James T. Lawler, of Seattle, Wash., for respondent.

NETERER, District Judge. On October 26, 1919, the Diamond K and the launch Klatawa collided in the narrow channel leading from Lake Union to Union Bay. The libelant, as owner, charges the Klatawa with negligence and seeks damages. The owner of the Klatawa, by cross-libel, charges negligence and prays damages.

The Diamond K is a one-man boat, and had no lookout. The Klatawa is a larger boat, and had a lookout. The water in which the vessels collided is a narrow channel, and from the University grounds, from which point the libelant's vessel was approaching, has considerable curvature. The channel is of sufficient width for vessels to freely pass, by each keeping in the fairway. In the channel on the starboard of the Diamond K was a pontoon. The testimony does not

disclose the extent or exact location. The Diamond K, on leaving the University grounds, sounded one blast, and took a course at full speed, which is about 6½ miles per hour. Libelant's vessel was going in a westerly direction. At the entrance of the channel, on the south side, are some piles standing in the water the remains of an approach to a bridge, which had extended across the channel, but which is now removed. (See diagram appended).



The Klatawa, approaching the channel, "hugged" the south shore, and entered the channel near the piling of the old bridge, at a speed of about 4 or 4½ miles per hour. Before entering the channel, the Klatawa blew one blast, ported her helm, rounded the curve and the piles at the end of the old bridge approach, and while in this maneuver saw the Diamond K approaching about two points to starboard. She completed the maneuver, and the vessels were nearly end on, and about 70 feet apart. The Klatawa gave one blast and reversed. The Diamond K starboarded her helm, gave one blast, reversed, and ported her helm, and the vessels collided. The master of the Diamond K testifies that he was "going down possibly mid-channel." I am, however, satisfied that he was on his port side of the channel. The cross on the diagram, supra, marks about the point of collision.

A narrow channel is defined as a body of water navigated up and down in opposite directions, and does not include harbor waters, with piers on each side, where the necessities of commerce require navigation in every conceivable direction. The No. 4, 161 Fed. 847, 88 C. C. A. 665; The Rules of the Road at Sea (La Boyteaux) p. 166. Inland rule 25, international rule 25, and pilot rule 10, each provide:

"That in narrow channels every steam vessel shall, when it is safe and practicable, keep to the side of the fairway or midchannel which lies to the starboard side of such vessel."

[1] "When safe and practicable" is intended to cover the reasonable necessities of practical navigation. The Three Brothers, 170 Fed. 48, 95 C. C. A. 322. A vessel intending to enter a narrow channel should so maneuver on approaching the entrance as to leave ample room for outcoming vessels to pass port to port, approaching the channel from the side she must keep after entering; and a vessel leaving a narrow channel should pass out, keeping to its starboard side of the channel, until she is well clear of the entrance, and should not change

her course to port until she is well clear of vessels passing in. The rules of the Road at Sea, supra.

The libelant strenuously insists that the Klatawa was the burdened vessel, and attempted to cross the bow of the Diamond K, whereas she was compelled to keep out of the way, and cites article 19, which provides:

"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other."

[2] The vessels, as they were approaching, the Diamond K about to leave the channel, the Klatawa entering the channel, the duty of each was to keep in the fairway. The Klatawa was on her starboard side of the channel, and was proceeding with due caution, except that she did not give a timely blast on approaching the channel. The Diamond K moved at full speed in her port side of the channel, and did not take the proper precaution against colliding with vessels entering the channel in the fairway. Rule 19 has no application here under the circumstances disclosed. The Klatawa was negligent in not giving a timely blast on approaching the channel, and in giving a starboard passing signal. There is no testimony to show that the channel on the starboard side of the Diamond K was obstructed to the point of her course in this channel. The Klatawa, under the circumstances disclosed, taking into consideration the curvature of the channel, was not the burdened vessel, and the Diamond K cannot justify, under the rule of "keeping her course and speed," not being in her fairway. She must, at her peril, proceed with due caution.

I think both vessels are at fault, and the damages should be divided. Each party has grossly overestimated his damage. I think $2,250 to libelant and $250 to respondent will compensate each. The libelant is accordingly awarded a decree for $1,000. The sinking of the Diamond K, on removal from her moorings after the collision, was not the fault of the respondent, and no award is made for expense in raising her. Neither party to recover costs.

THE ADMIRAL WATSON.

(District Court, W. D. Washington, N. D. May 21, 1920).

No 4511.

1. Collision ⇐102—Mutual faults of vessels meeting in narrow channel.

A collision in a narrow channel between the steamer Admiral Watson and the power boat Helgeland, meeting, *held* due to faults of both vessels; the Watson for being on the wrong side of the channel, for failing to hear and answer the signal of the Helgeland when half a mile or more distant, or to keep an efficient lookout, and the Helgeland, although the privileged vessel, for failing to stop and give alarm signals, when the course of the Watson became uncertain and collision was imminent.

2. Collision ⇐11—Privileged vessel required to take precautions.

The fact that a vessel is privileged and entitled to hold her course does not excuse her from adopting such precautions as may be required by statute and necessary to prevent a collision.

In Admiralty. Suit for collision by Conrad Anderson and others, owners of the fishing boat Helgeland against the steamer Admiral Watson. Decree for libelants for half damages.

Winter S. Martin, of Seattle, Wash., for libelants, cited the following cases:

The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771; Britannia v. Cleugh, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660; The Isaac Newton, 59 U. S. (18 How.) 581, 15 L. Ed. 492; The Thielbek, 241 Fed. 209, 154 C. C. A. 129; The Putney Bridge (D. C.) 219 Fed. 1014; The Comport, 260 Fed. 151, — C. C. A. —; The Haida, 191 Fed. (D. C.) 623; Id., 196 Fed. 1005, 115 C. C. A. 376; The De Veaux Powell, 165 Fed. 634, 92 C. C. A. 54; Lie v. San Fran. & P. S. S. Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726; The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148; The Suffolk, 258 Fed. 219, 169 C. C. A. 287; Carroll v. City of New York, 249 Fed. 453, 161 C. C. A. 411; The Hokendaqua, 251 Fed. 562, 163 C. C. A. 556; The Nereus (D. C.) 23 Fed. 448; The Admiral (D. C.) 39 Fed. 574; Atlas Transp. Co. v. Lee Line Strs., 235 Fed. 492, 149 C. C. A. 38; Spencer on Collisions, § 71, and cases cited on page 49; Stadacona, 242 Fed. 624, 155 C. C. A. 314; The Victoria, 168 U. S. 410–422, 18 Sup. Ct. 149, 42 L. Ed. 519; The Chicago, 125 Fed. 712, 60 C. C. A. 480; The Lansdowne (D. C.) 105 Fed. 436; The Saratoga (D. C.) 180 Fed. 620; Commonwealth & Dominion Line v. Seaboard Transp. Co. (D. C.) 258 Fed. 707; Marsden on Collisions (7th Ed.) p. 456; Chamberlain v. Ward, 21 How. 548, 16 L. Ed. 211; The Powhatan (D. C.) 248 Fed. 786; Marmet Coal, etc., Co. v. Feiger-Austin Dredging Co., 259 Fed. 435, 170 C. C. A. 411; The Madison, 250 Fed. 850, 163 C. C. A. 164; Jones v. Boice, 1 Stark. 493.

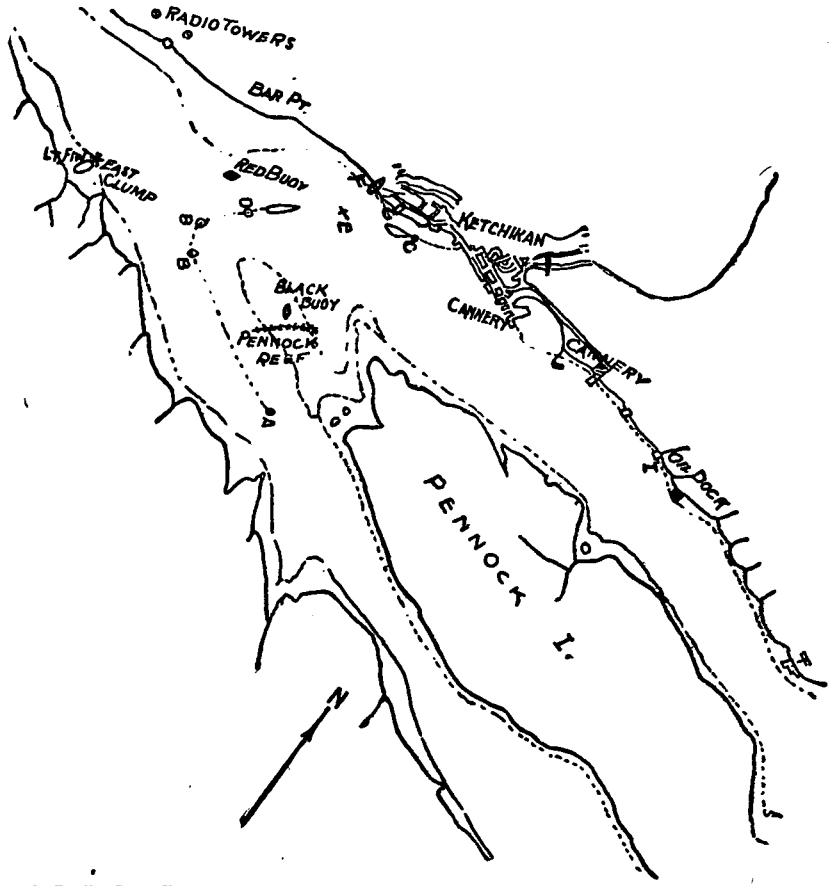
Grosscup & Morrow, of Tacoma, Wash., and Jones, Ridell & Brackett, of Seattle, Wash., for claimant, cited the following cases:

The Albatross (D. C.) 184 Fed. 363; The Arthur M. Palmer (D. C.) 115 Fed. 417; The Edwin J. Berwind, 144 Fed. 664, 75 C. C. A. 466; The Robert Dollar, 160 Fed. 876, 88 C. C. A. 58; The Trader (D. C.) 129 Fed. 462; The Joseph M. Clark (D. C.) 119 Fed. 462; The Straits of Dover, 120 Fed. 900, 58 C. C. A. 86; The Taurus (D. C.) 156 Fed. 838; Beatty v. Hanna, 122 U. S. 97, 7 Sup. Ct. 1158, 30 L. Ed. 1095; The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126.

NETERER, District Judge. On the evening of October 20, 1918, the steamship Admiral Watson and the fishing boat Helgeland collided in Alaskan waters near Ketchikan. Each vessel disclaims fault. It is stipulated that responsibility for the collision shall be determined, and that the amount of the damage, if any, shall be later ascertained.

[1] The issue now is: Was either of the vessels solely at fault, or were the vessels mutually at fault? At the time named, the Watson approached Ketchikan by the passage south of Pennock Island. In making the turn to starboard, bound for the Oil Dock I, she was proceeding at full speed under port helm. The Helgeland, leaving the

Northland Dock, was making a course towards East Clump light, and observed the Watson clearing the westerly end of Pennock Island, A on the appended diagram.



A–B–B–D. Course of Watson.
C. Helgeland when one blast was given.
D. Watson when blast by Helgeland was given.
E. Point of collision.
F. Helgeland beached after collision.
G. Government dock.
I. Oil dock.

The Watson was continuing her course towards Ketchikan, A, B, B, D. The Helgeland blew one blast of her whistle at C, and changed her course to the right of the red buoy. The Watson, at this time, was at D, taking a course towards the Government Dock, G. The Watson did not answer the blast of the Helgeland. Both vessels continued on their course and speed until a collision was imminent, when the Watson blew two whistles, which the Helgeland answered by two

whistles, the Watson slightly starboarding her helm, and the Helgeland porting her helm, and the Watson ran into the Helgeland. When the Helgeland blew one blast, the vessels were from one-half to two-thirds of a mile apart. If two-thirds of a mile, it would, at the speed each was going, take 2 minutes and 25 seconds to bring them together. If one-half mile, 1 minute and 49 seconds. Both vessels were near the shore, to the starboard side of the Helgeland and the port side of the Watson. The pilot of the Watson estimated the distance "300 or 400 feet, or less," and in answer to the question, "Did the Watson change her course after blowing her two whistles?" replied:

"Changed her course a little to port. I could not afford to do it too much, for fear of running the ship ashore."

He also said that the Helgeland had the right of way, and that she came under the starboard right-hand rule, and that there was plenty of sea room for him to pass the Helgeland on his port side. While the captain says that a lookout was maintained, no report was made by the lookout, nor is there testimony that the lookout was on duty. Other witnesses on the Watson saw the Helgeland approaching in ample time for the Watson to have gotten out of the way. The pilot of the Helgeland says he had the right of way, and expected the Watson to change, but that she came "straight on, on our port side, two or three points on our port bow," and said he was sure that the Waston would port her helm. When asked why, he said, "We were so close to shore," and, on further inquiry as to why he kept his course and speed, said:

"I never thought she would cross a man's bow so close to shore, when she was so close to shore herself."

And, when asked why he did not give a danger signal, said:

"I had no business to do it, because we had the right of way by law. We had the right of way by law, and that is why I thought she would swing any moment, because she did not have to swing very far to clear her stern—swing very little to starboard to clear her stern."

When asked if he did not know the rule requiring the danger signal when in doubt as to the other's intention, he said, "He didn't comply with the law, either."

The Watson contends that it did not hear the blast of the Helgeland, and that it did not discover the Helgeland until it was within 400 or 500 feet, and immediately sounded two blasts and got permission from the Helgeland to cross her bow; but the Helgeland, contrary to its consent, ported its helm, and the collision followed.

I am satisfied from the evidence that the Watson did not sound a blast until the collision was imminent, and that the pilot of the Helgeland, through the imminence of the peril and confusion, gave the two blasts, and without any intention of giving up the right of way, and, whatever the conduct of the Helgeland when the blasts were given, the collision would have followed notwithstanding.

Direct and positive proof that a whistle was sounded may not be swept aside and disregarded, because others failed to hear it. Per-

sons charged with duty cannot excuse consequences of inattention by saying they did not hear what they should have heard, or failed to see what they should have seen, if their attention had been centered on duty. There is no question but all of the lights of the Helgeland were lighted; the dynamo performing its normal functions, the electric masthead and sidelights were normal. The masthead light was, perhaps, confused by the officers of the Watson with the lights on shore from the town of Ketchikan, and blended with the lights on the Ketchikan shore; but the night was clear, and the lights were observed by others in ample time to afford a safe passing, and the failure to observe these lights by the officers in charge of the Watson must be attributable to the insufficiency of the ship's lookout. The Stimson (D. C.) 257 Fed. 762; Id., 262 Fed. 245, — C. C. A. —. The failure to see the lights earlier was a clear omission of duty.

The Helgeland is a gasoline power vessel, 87 feet in length, 18-foot beam, two masts, schooner rigged, and equipped with 125 horse power, 56 net tons, documented and licensed at Seattle. The Admiral Watson is 250 feet long, 38-foot beam, 2,009 gross tonnage, 1,237 net tonnage.

The waters in which these vessels collided is a narrow channel. The Klatawa (filed May 8, 1920) 266 Fed. 120. The international, inland, and pilot rules provide:

"That in narrow channels, every steam vessel shall, when it is safe and practicable, keep to the side of the fairway or midchannel which lies to the starboard side of such vessel."

"When safe and practicable" is intended to cover the reasonable necessities of practical navigation. Vessels entering a narrow channel should so maneuver on approaching the entrance as to leave ample room for the outcoming vessel to pass port to port, approaching the channel from the side she must keep after entering. The Klatawa, supra. The Watson was not in her fairway. She was far to her port side of the channel, and she was clearly in the wrong. The Helgeland was the privileged vessel. It was duty of the Watson to keep in her fairway.

Under all of the circumstances, was the Helgeland justified in continuing in her course and speed after failing to get a response to her blast, and observing the approach of the Watson, being in doubt as to what the Watson would do? Pilot rule No. 1, art. 18, provides:

"If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less then four, of the steam whistle, the danger signal."

[2] The fact that a vessel is privileged, and entitled to hold her course, does not excuse her from adopting such precautions as may be required by statute, and necessary to prevent a collision. In The New York, 175 U. S. 187, at page 205, 20 Sup. Ct. 67, at page 74 (44 L. Ed. 126), the Supreme Court said:

"But the fact that a steamer is entitled to hold her course does not excuse her from inattention to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision,

In case there be a distinct indication that the obligated steamer is about to fail in her duty, as was said in the case of The Sunnyside, 91 U. S. 208, 222: 'Cases arising in navigation, where stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters.' See, also, The Delaware, 161 U. S. 459; The Maria Martin, 12 Wall. 31, 47."

The master of the Helgeland must have known if he continued in his course a collision was inevitable. He did not give a danger signal, or stop her engines, or reverse. The Supreme Court in The New York, supra, 175 U. S. 207, 20 Sup. Ct. 75, 44 L. Ed. 126, said:

"The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect."

From what has been said it is apparent that the Watson was grossly at fault. She was not in her fairway. She failed to answer the signal. She did not maintain a proper lookout. But her unlawful and negligent conduct did not justify the Helgeland to continue in a course the inevitable result of which was collision in violation of her statutory duty, when the course of the approaching vessel was uncertain or in doubt, and her first signal unanswered. The Wakena (D. C.) 262 Fed. 989. The primary purpose of rules of navigation, as said by the Supreme Court, is not to fix arbitrary rights of the road to vessels, but rather for the safety of life and property.

The facts in this case, in some respects, are similar to the facts in The Hokendaqua, 251 Fed. 562, 163 C. C. A. 556, and Commonwealth & Dominion Line v. Seaboard Transp. Co. (D. C.) 258 Fed. 707; and the conclusion herein is not controverted by The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, or Lie v. S. F. & P. S. S. Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726, cited by libelant, or by any authoritative case.

A decree may be entered for half damages against the Watson and costs.

LANGENBERG HAT CO. et al. v. UNITED CLOTH HAT AND CAP MAKERS OF NORTH AMERICA et al.

(District Court, E. D. Missouri, E. D. June 11, 1920.)

No. 5152.

Injunction ⇐101(3)—Conspiracy by striking employés to commit unlawful acts.

Mass picketing by a combination of striking employés and others, for the purpose of forcing employers to adopt the policy of closed shop, accompanied by threats, abuse, domiciliary visits, and physical assaults on employés and potential employés, *held* unlawful, and enjoined.

In Equity. Suit by the Langenberg Hat Company and others against the United Cloth Hat and Cap Makers of North America and others. Decree for complainants.

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

Walter H. Saunders, of St. Louis, Mo., for plaintiffs.

C. J. Anderson and Bass & Bass, all of St. Louis, Mo., for defendants.

FARIS, District Judge. At a session of court held in St. Louis, Mo., within the district aforesaid, on Monday, June 7, 1920, the court delivered the following oral opinion:

I have had under advisement for some weeks the case of Langenberg Hat Company et al., Plaintiffs, v. United Cloth Hat and Cap Makers of North America et al., Defendants, No. 5152, in Equity. As far as the court is concerned, I have been in a condition of mind that would have enabled me to decide this case long since, but counsel for defendants took leave to file a brief four or five weeks ago, and up to this time I have never seen that brief. It may be a very good brief, but, not having seen it, I, of course, have been unable to read it. I cannot hold the matter up any longer. If counsel take leave to file memoranda of their views, it ought to be done in a speedy way, having reference to all the facts and circumstances.

Upon the trial of this case one plaintiff, Gram Headwear Manufacturing Company, had not suffered any such interference by means of pickets, or by means of any unpeaceful or unlawful acts on the part of any pickets, to warrant any holding in their favor upon that view. I was of the opinion, when the case of plaintiffs had been completed, that for this I ought to dismiss as to the Gram Headwear Manufacturing Company, and I at that time entered an order of dismissal. That order I think I shall set aside. I am setting it aside because repeatedly the United States Supreme Court has held that it is not necessary, in a conspiracy to violate the Sherman Act, the Anti-Trust Act of 1890 (Comp. St. §§ 8820–8823, 8827–8830), that there should be any overt act. Of course, picketing, in prohibited numbers, or picketing in an unpeaceful and unlawful way, would merely constitute overt acts.

A conspiracy was proved in this case without any question. Therefore I set aside the order heretofore made in this case, dismissing the Gram Headwear Manufacturing Company as a plaintiff, and reinstate it as such, for the reasons that I have given. It did not occur to me at the time that the decisions which I now have in mind affected the situation as to the Gram Headwear Manufacturing Company, notwithstanding the fact that I had only a week before gone over those very decisions with great care. I merely overlooked the application of them.

I think upon the merits that no necessity exists for any lengthy dissertation upon the law which applies to the facts adduced in evidence. Lately, this court, in the case of Kinloch Telephone Co. et al. v. Local Union No. 2 of International Brotherhood of Electrical Workers, 265 Fed. 312, took occasion to discuss some of the things which cannot lawfully be done by striking employés as well as many of the things which those employés may lawfully do. In that case I took occasion to lay down a test of what is lawful and what is peaceful,

by stating that to my mind the plain and simple language of the Clayton Act (38 Stat. 730) itself discloses what is lawful and what is peaceful; conversely, "he who runs may read" what is unlawful and what is unpeaceful.

The test which I stated in that case, and which I now repeat (and that test is almost in the language of the Clayton Act itself) could be put in the form of a question: Would any ordinary citizen be permitted to do the acts complained of in this case, if no strike, or labor dispute, existed? If he could do those things, absent a strike, then, of course, he could do them, present a strike; in other words, if any ordinary citizen, when no strike exists, can do a given act against the rights, person, peace, or property of another, and not commit thereby a breach of the peace, or an act of lawlessness, then the striking employé can do the same act when there is a strike existing.

Injunction, when brought by an employer against an employé reaches only such acts as fall without the pale of the test which I have stated above. In the face of so simple a rule, it is almost incomprehensible why men and women, possessing the capacity to reason from cause to effect, can so blind themselves with their own self-interests as to contend, in case of a strike, for the alleged right to outrageously violate the peace, person, property, and rights of others with whom their interests may for the time clash.

It is with regret that I say that it almost seems to be a renaissance, or harking back to the ancient rule, which has been tersely expressed in the maxim that "Might makes right." This rule antedated law; it is wholly subversive of law, and such a rule as this cannot exist in a country ruled by law. No government by law can exist in a country, or under conditions, wherein men cleave to the rule that "he can take who has the power and he can keep who can."

In this country a man or woman has the right to work for whom he or she pleases, for what wages and under what conditions he or she sees fit, to quit with or without cause, or with or without any sufficient cause (absent a contract for a fixed term, and then subject only to a civil action for damages), whenever he or she wants to quit. Any other rule would be peonage.

Conversely—and this seems sometimes to be forgotten—this rule ought to appeal to all law-abiding, fair-minded, and right-thinking men and women, that it necessarily follows that an employer ought to have the right to employ such persons, for such wages, and under such conditions as the employer sees fit, to discharge such employé with or without cause, or with or without sufficient cause, at any time the employer sees fit; again, of course, absent a contract for a fixed term, and then subject only to an action for damages as for a breach of such contract, and, of course, likewise subject to a compliance with such state or federal statutes touching employers and employés, and touching conditions under which employés may work in a factory, as the Congress or Legislature may have seen fit to pass.

So much is said without reference, of course, to the privilege, now solemnly accorded to employés by law, to combine peacefully and

lawfully for the purpose of producing an amelioration and betterment of conditions of labor, or to the laws which I have just mentioned having reference to the same subjects. Whether persons, or combinations of persons, not themselves employés, but who are trying to compel the employer (as the evidence conclusively shows in this case) to unionize, or form a "closed shop," of his business, may not by peaceful means and lawful persuation bring about, or seek to bring about, such unionization, or such "closed shop," I need not stop to again consider; for, as I stated in the beginning, I went to some extent into that phase of the situation in the recent case of Kinloch Telephone Co. et al. v. Local Union No. 2.

I am unable to find that such peaceful means and lawful persuasions are among the facts in this case. Upon this phase I am constrained to adhere to what I said in the Kinloch Case touching the law, and to agree with what is said upon the same point in the cases of Kroger Grocery & Baking Co. v. Retail Clerks, etc. (D. C.) 250 Fed. 890, and Stephens v. Telephone Co. (D. C.) 240 Fed. 759. I repeat that the questions of peacefulness and lawfulness are not, as matters of fact, in issue here. I say this because the evidence utterly eliminates those questions from the discussion. I fully agree with the conclusions of fact on this particular point which were reached by my learned predecessor, who heard this case upon the application for a temporary injunction herein.

This case, by the great weight of the evidence, shows an outrageous condition of mass picketing, under a situation and condition which no stretch of the imagination can denominate as either peaceful or lawful. There were numerous instances of threats, abuse, and abusive language, of domiciliary visits and physical assaults upon and directed at employés and potential employés; that is, those who desired to become such. These I need not detail; suffice it to say that the record in this case simply reeks with things of this sort. I can hardly conceive of a more outrageous situation, in this behalf, than that which has been presented by the evidence adduced in this case.

The cases which I have cited, and many others with which the books are fairly filled, hold that the Clayton Act does not justify the doing of the things which the record in this case shows were done. Not alone were these unlawful and unpeaceful acts committed by defendants, or some of them, and those acting in concert and combination with them, before the issuance of the injunction in this case, but afterwards, while it was in force, in utter contempt of its prohibitions.

There are certain defendants, sued in their individual capacities, who were not served in this case, and who did not appear at all, by answer or otherwise. Against these, so far as concerns suing them in their individual personal capacities, I do not think the order that I shall make in this case ought to go. Whether they are not reached as members of the union, which I think ought to be enjoined, I need not here stop to consider; but I feel sure that I ought not to enjoin them in their personal and individual capacities.

Without further comment, I am of opinion that the temporary in-

junction in this case should be made perpetual. Let a decree be drawn accordingly.

As to the matter of an inquiry concerning the damages sustained by the plaintiffs by reason of defendants' unlawful acts, that will be referred to a master in chancery to be hereafter appointed, for his examination and report to this court.

The decree of a perpetual injunction will issue against all the defendants, except such as I have noted on this slip, which I hand to the clerk, and a decree as stated may be entered accordingly.

FRIEDE v. AZOVSKO DONSKOI KOMMERCHESKE BANK et al.

(District Court, S. D. New York. April 30, 1920.)

1. Attachment ⇐107—Allegation of amount due sufficient.

In an action by one joint adventurer to recover money due to him and associates, in which the associates refused to join and were made defendants, in compliance with Code Civ. Proc. N. Y. § 448, statements in the complaint and affidavit of the amount due plaintiff and his associates *held* sufficient to authorize a foreign attachment, under Code Civ. Proc. N. Y. §§ 635, 636.

2. Attachment ⇐232—Failure to serve other defendants not ground for dissolution.

Service on the principal defendant and the only one against which judgment was asked *held* sufficient to authorize an attachment against the property of such defendant, although other defendants had not at the time been served.

At Law. Action by M. Sergey Friede against the Azovsko Donskoi Kommercheske Bank, otherwise known as Banque de Commerce d L'Azof Den, and others. On motion to vacate warrant of attachment. Denied.

Shearman & Sterling, of New York City (Carl A. Mead and Chester B. McLaughlin, Jr., both of New York City, of counsel), for the motion.

Louis Marshall and Samuel M. Levy, both of New York City, opposed.

MAYER, District Judge. The bank, appearing specially, has moved to vacate a warrant of attachment on various grounds, to be referred to infra.

The action was brought in the New York Supreme Court to recover from the bank the sum of $727,923.99, with interest from July 10, 1919, on an account stated. Without going into details, it appears from the complaint that Friede and Berlin and Stifter, the two last constituting the firm of Mavorikij Nelken (hereinafter called Nelken), were joint venturers by virtue of an agreement which is annexed to and made part of the complaint. The joint venture had to do with contracts with the Russian war department for the sale of merchandise of American origin.

In order to pay for the supplies in American dollars, it was necessary, owing to the exchange situation, to make certain financial arrangements with the Russian government and with defendant bank, the details of which need not be here set forth. It is alleged upon information and belief that on July 2, 1917, the bank rendered to the joint venturers in Petrograd a statement of the account between it and the venturers, showing that the bank had in its possession a balance of $727,923.99 over and above all obligations due the bank from the joint venturers, which sum, it is alleged, was the absolute property of the venturers. It is alleged that this sum has not been paid; that the plaintiff demanded payment to himself and Nelken in Paris on July 10, 1919, but that the bank refused payment. It is further alleged that the plaintiff requested defendants Berlin and Stifter to join as coplaintiffs in this action, but that they refused so to do, and that the plaintiff and the defendants Berlin and Stifter are justly entitled to recover from the bank the said sum of $727,923.99, with interest from July 10, 1919. The complaint demands judgment against the bank in favor of the plaintiff for this sum. No judgment is demanded against the defendants Berlin and Stifter, and the warrant does not authorize the sheriff to attach their property.

From the affidavit on behalf of the defendant bank upon this motion, it appears that the defendants Berlin and Stifter are Russian citizens or subjects, and are not in this country, and that they have not appeared in the action, nor have they been served personally with the summons herein. An attachment was procured against the bank on the ground that it was a foreign corporation, and assets belonging to it were taken into his possession by the sheriff of New York County, to whom the warrant of attachment was issued. This action was removed to this court at the instance of the bank, on the ground of diversity of citizenship. No answers or other pleadings have been interposed by the defendants.

It is urged (1) that the moving papers fail to show that plaintiff is entitled to recover the amount claimed; (2) that Berlin and Stifter are necessary and indispensable parties, who must be served within or submit to the jurisdiction of the court, else a judgment will not be binding upon them; and (3) as a consequence that the action must fail, and that the warrant of attachment must be vacated.

[1] 1. Defendants Berlin and Stifter having refused to join with plaintiff as parties plaintiff, the plaintiff made them parties defendant, by virtue of section 448 of the New York Code of Civil Procedure, which reads:

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, except as otherwise expressly prescribed in this act. But if the consent of any one, who ought to be joined as a plaintiff, cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. * * *"

Section 635 of the New York Code provides:

"A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified

in the next section, where the action is to recover a sum of money only, as damages for one or more of the following causes:

"1. Breach of contract, express or implied, other than a contract to marry. * * *"

Section 636 of the New York Code provides:

"To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the judge granting the same, as follows:

"1. That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him. * * *"

Because there is no allegation in the affidavits, upon which the present warrant was issued, that plaintiff alone is entitled to recover any sum from the bank, and because plaintiff's affidavit (paragraph 15) contains only the following:

"This plaintiff and defendants Berlin and Stifter are justly entitled to recover from the said defendant * * * bank the sum of $727,923.99, * * * over and above all counterclaims known to him"

—it is contended that this allegation wholly fails to comply with the requirements of section 636 of the Code of Civil Procedure. But it is plain that plaintiff could not make any other allegation.

Under section 448, the Code practice requires that a member of a firm or a joint venturer must join as a party defendant a partner or joint venturer whose consent to join as a plaintiff cannot be obtained, and this provision would be useless and absurd, if in seeking to recover for a debt of any kind, owing to the partnership or joint venture, a plaintiff were compelled to assert an untruth, namely, that he alone is entitled to recover, when in fact the joint venturers are entitled to recover, and when he is suing, in effect, on behalf of the partnership or joint venture, as the case may be. Indeed, it is settled practice that the courts, especially when jurisdictional questions arise, will align the parties as plaintiffs or defendants, wherever they justly belong. Hamer v. New York Railways Co., 244 U. S. 266, 37 Sup. Ct. 511, 61 L. Ed. 1125.

It is further contended that the allegation in paragraph 16 of plaintiff's affidavit:

"That the plaintiff in this action has, on account of the defendant's default as set out herein, sustained damages in the sum of $727,923.99, with interest thereon from the 10th day of July, 1919"

—is a mere conclusion of law, and cannot be considered by the court, unless the evidentiary facts supporting the conclusion are set forth. It is urged that no such facts are set forth in the moving papers, but, on the contrary, that it affirmatively appears from the moving papers that this conclusion cannot be true, because it affirmatively appears that the plaintiff has no possible claim to more than one-half of the sum of $727,923.99, and that, owing to the deductions which must be made for expenses and for previous payments, which had been made to the plaintiff out of the net profits, there is nothing before the court to show that the plaintiff is entitled to recover anything.

The answer is that the complaint proceeds on the theory of an account stated with and to the Nelken firm, and it is this amount for which recovery is sought. Further comment and analysis are unnecessary, for it abundantly appears that the moving papers set forth a cause of action, and that the Code requirements for the issuance of a warrant of attachment have been fully met.

[2] 2. The next question is whether Berlin and Stifter are indispensable parties, and, if so, whether a judgment can be had in the action, unless they are served within or submit to the jurisdiction. As no recovery is asked against Berlin and Stifter, nor could be asked upon the theory of the action, it might well be suggested that the court might for the purpose of the action treat Berlin and Stifter as plaintiffs, even though, under the New York Code, Berlin and Stifter must be joined as defendants. In all probability, if a jurisdictional question were involved, the court might well regard Berlin and Stifter as plaintiffs, under the authority of the Hamer Case, supra. The fact that Berlin and Stifter genuinely declined to join as plaintiffs would probably not change the principle, in view of the further fact that no judgment is asked against them.

But this and other questions presented by counsel need not now be decided. Section 50 of the Judicial Code (Comp. St. § 1032) deals only with judgments and decrees. Non constat, before the case comes on for trial, the defendant will have been served or will have submitted to the jurisdiction. The plaintiff has completely fulfilled the requirements of the New York Code. He has set forth one of the causes of action covered by section 635, and he has fulfilled through the medium of his affidavit the requirements of section 636. Upon the theory upon which the action is brought there is owing from the defendant bank to the joint venturers a sum of money on an account stated, which the defendant Berlin has refused to pay after demand, and, to repeat, no relief is asked against, plaintiff's joint venturers. In these circumstances, for purpose of attachment, service upon the defendants Berlin and Stifter was unnecessary, and the questions in respect of necessary or indispensable parties and the ability of the court to recover judgment do not now arise.

The motion to vacate is denied.

In re FOX.

(District Court, D. Kansas, Third Division. June 2, 1920.)

No. 393.

Subrogation ⇐14(1)—Purchaser of bankrupt's property on avoidance of sale subrogated to rights of creditors paid.

Where the sale by a bankrupt of his stock of goods was annulled as in violation of the Bulk Sales Law of the state and the purchaser required to surrender the property or its value for the benefit of creditors, such purchaser, if without actual fraud, is entitled by subrogation to allowance of a claim against the estate equal to the indebtedness of bankrupt, which was paid from the proceeds of the sale.

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

In Bankruptcy. In the matter of L. Fred Fox, doing business as Palace Clothing Company, bankrupt. On review of order of referee, allowing in part and disallowing in part claim of Elam Bros. Affirmed as to part allowed, and reversed as to part disallowed.

Edwards, Kramer & Edwards, of Kansas City, Mo., for petitioning creditors.

Paul H. Kimball, of Parsons, Kan., and Thomas H. Edwards, of Kansas City, Mo., for trustee.

E. L. Burton, of Parsons, Kan., for L. Fred Fox.

W. P. Dillard and W. W. Padgett, both of Ft. Scott, Kan., and C. J. Taylor, of Parsons, Kan., for Elam Bros.

POLLOCK, District Judge. The facts are: The bankrupt sold his stock in trade and business to claimants, a partnership known as Elam Bros. (hereinafter called "claimants"), for the sum of $11,000, made up as follows: Cash, $8,635; indebtedness of the bankrupt assumed by claimants, $1,250; debts owed by the bankrupt to claimants, $1,115. The cash was paid, indebtedness to claimants canceled, and the debts assumed by claimants were renewed by them in such manner as to discharge the bankrupt estate from payment thereof. The sale was made from the bankrupt to claimants in violation of the Bulk Sales Law of the state (Laws 1915, c. 369). For this reason, and on this ground, creditors of the bankrupt, who were not paid out of the cash paid by claimants to the bankrupt, and whose debts were not assumed by claimants, institute this proceeding in bankruptcy.

As claimants were in possession, conducting the business, and could afford to pay more for the goods and business of the bankrupt than any other person, and had paid more than could be obtained in any other manner, in lieu of a receiver of the bankrupt business and goods, claimants gave a bond to pay the estate in bankruptcy the value of the business and goods at the date the same was purchased and taken over by claimants. Thereafter it was ascertained the true value of the stock of goods and business turned over by the bankrupt to claimants at the date same were purchased and taken possession of by claimants was $8,013.46. However, the obligation of the bond given by claimants in lieu of the surrender of the stock of goods, accounts, and business by them purchased from the bankrupt was liquidated and satisfied by the payment by claimants to the trustee in bankruptcy of the sum of $7,000.

Claimants have now presented demands against the bankrupt estate for allowance as follows: (1) The original demand of claimants against the bankrupt estate is $1,115; (2) indebtedness to the bankrupt assumed to be paid by claimants from which the bankrupt estate is relieved, $1,250; (3) cash paid on purchase price to the bankrupt, $8,635, averred to have been used by the bankrupt in satisfying his indebtedness due creditors. Of these claims the first was by the referee allowed. From this order the trustee has petitioned for review. The second and third demands were disallowed by the referee, and claimants have petitioned for review of this order.

The ground on which claimants predicate their demands against the estate is based upon the right to be subrogated to the demands of creditors of the estate which they have paid off and discharged, or from the payment of which they have relieved the bankrupt estate. Under the circumstances of this case, if the demands of claimants be disallowed in toto, the result is they have paid out for a stock of goods and business worth at the time the same was purchased $8,013.46 the sum of $18,000, or $9,365 more than the actual value of the same, which sum will have gone toward the satisfaction of the indebtedness of the bankrupt. However, if in dealing with the business and affairs of the bankrupt estate any wrong or fraud was by claimants practiced upon or intended to be practiced upon creditors of the bankrupt estate, manifestly, a court of equity will grant claimants no relief from the result of their wrongful or fraudulent acts.

Therefore the question to be determined first in this case is this: Was the sale made by the bankrupt to claimants, for which the purchase price has been paid, and which sale has been set aside, and the goods or their value restored to the bankrupt estate for the benefit of creditors, annulled on the ground of any wrong or fraud practiced or intended to be done by claimants to the creditors of the bankrupt estate? If so, equity will afford claimants no relief. On the contrary, if claimants acted in good faith, and with honest purpose and intent in making the purchase of the business and goods of the bankrupt, and paying the purchase money therefor, the valid indebtedness of the bankrupt estate was paid and satisfied out of the property and money of claimants, no good reason appears why, in so far as they may have satisfied the valid claims against the bankrupt, they may not be subrogated to the rights of the creditors whose demands were so paid, and which would have remained valid claims against the bankrupt estate, had the innocent transaction not occurred. And in so holding the creditors not paid by the bankrupt out of money received from claimants are placed in no worse plight than they would have occupied, had the transaction not occurred.

As has been seen, the ground on which the proceedings in bankruptcy are predicated, and the foundation on which the adjudication in bankruptcy rests is the sale made by the bankrupt to claimants was in violation of the Bulk Sales Law of this state, and there is evidence that claimants were advised of this fact. Is a sale so made between a bankrupt and another, as purchaser for full value, a fraud or wrong done the creditors of the bankrupt estate by the purchaser at such sale? The Bulk Sales Law of the state is established by statute, and the construction given by the highest judicial tribunal of the state is controlling here. In Linn County Bank v. Davis, 103 Kan. 672, 175 Pac. 972, it is held as follows:

"The goods, in a sense, constituted a trust fund for the benefit of all creditors alike, and as the purchaser was free from intentional wrong he may justly be subrogated to the rights of the creditors whose claims he has paid off. Note, 51 L. R. A. (N. S.) 343; L. R. A. 1917D, 1067. Nor is any reason apparent why his own claim should not be as favorably treated as those of others. We conclude, therefore, that the plaintiff should recover the propor-

tion of the value of the stock that the amount of his claim bears to the total sum owed by the vendor at the time of the sale, including the debts paid off by the buyer and that originally owing to him."

In the note to 51 L. R. A. (N. S.) 343, supra, it is said:

"While but little authority has been found upon the question as to the rights of a purchaser in violation of the Bulk Sales Law, where the purchase price has been applied to the payment of creditors of the seller, the decision in Fechheimer-Keiffer Co. v. Burton, to the effect that the purchaser is subrogated to the rights of the creditors who have been paid with his money, seems to be sound, and is supported by the other cases most nearly in point."

In Adams v. Young, 200 Mass. 588, 86 N. E. 942, it is said:

"One whose purchase of property has for that reason [fraud] been avoided by the creditors of the seller, being himself free from any actual fraud, may stand in the place of creditors whose demands he has paid out of the property or in consideration of the transfer to himself. * * * So, if he has paid off debts which constituted liens or incumbrances upon the property conveyed to him, he may, for his protection and reimbursement, take by subrogation the rights of the secured creditors whom he has thus paid. * * * The merely constructive fraud of a purchaser will not prevent him from being protected in this manner, if he has not himself actively participated in the fraud."

As the purchaser in this case acted in good faith in the transaction, and the sale was annulled solely on the ground it was made in violation of the Bulk Sales Law of this state, under the authorities, I am of the opinion claimants should be subrogated to the rights of those creditors whose debts were paid out of the purchase money by the bankrupt, and those of which payment has been assumed by claimants and the estate released from payment of the same.

Again, the order of the referee, as shown by his certificate, is based in part on the thought the creditors who received payment from the cash paid by claimants to bankrupt, and the creditors of bankrupt whose debts were assumed by claimants, by reason of the transaction obtained payment in full, while those not so satisfied will receive only a portion of their claims. Hence, it is contended, those creditors who obtained payments in full from the bankrupt in this manner received fraudulent and void preferences. If this position be correct, the same, however, might be said of the individual amounts of claimants standing now allowed under the order of the referee.

But the fact is there is no proof found in the record claimants knew or had reasonable cause to believe the amount they were paying as purchase price to the bankrupt was not sufficient to pay and discharge all of his indebtedness. Without such knowledge or notice on the part of claimants, no fraud inhered in the transaction so far as they were concerned, and, as the sale has now been annulled on another ground, the property of the estate in bankruptcy or its value has been placed in the hands of the trustee for the benefit of creditors, I fail to see on this head any reason for not allowing the claimants to take that place in the case, through subrogation, such creditors would have assumed, had they not been paid and satisfied out of the purchase price paid by claimants.

It follows the order of the referee in allowing the demands of claimants is upheld, and his order disallowing claimants to be subrogated to the rights of the creditors of the estate which they have paid and satisfied is reversed, with direction to allow the same.

It is so ordered.

UNITED STATES v. ONE ESSEX TOURING AUTOMOBILE et al.

(District Court, N. D. Georgia. July 1, 1920.)

No. 782.

1. **Internal revenue ⇐2—Prior tax acts not repealed by Eighteenth Amendment or National Prohibition Act.**
   Neither National Prohibition Act, tit. 2, § 35, declaring that all provisions inconsistent are repealed only to the extent of such inconsistency, and that no one is relieved from paying any taxes or charges imposed on the manufacture or traffic, that no liquor revenue stamps for any illegal manufacture shall be issued in advance, but that the tax shall be assessed, with an additional penalty, which shall not relieve criminal responsibility, nor the Eighteenth Amendment, forbidding the manufacture, transportation, and sale of intoxicants for beverage purposes, repealed the prior revenue laws.
2. **Internal revenue ⇐2—Vehicle used for removal of untaxed liquors may be forfeited under Revenue Act.**
   Notwithstanding the Eighteenth Amendment and the provisions of National Prohibition Law, tit. 2, §§ 3, 6, 10, declaring that transportation of liquor shall be unlawful, except as provided, etc., and section 26, providing for the seizure of a vehicle used for transportation of intoxicants, etc., Rev. St. § 3450 (Comp. St. § 6352), providing for the confiscation of any vehicle used for removal of untaxed liquors, is not, in view of title 2, § 35, repealed, and, being entirely consistent with the Prohibition Act, forfeiture may be decreed thereunder for transportation of untaxed liquors, notwithstanding the party transporting was guilty also of another offense.

Libel in Rem. Proceeding by the United States against one Essex touring automobile, claimed by Carl Little and another. On demurrer to the libel. Demurrer overruled.

Hooper Alexander, U. S. Atty., and John W. Henley, Asst. U. S. Atty., both of Atlanta, Ga., for the United States.

Sloan & Sloan, of Gainesville, Ga., for claimant.

Carl N. Davie, of Greenville, Ga., for intervener.

SIBLEY, District Judge. The libel proceeds under Rev. St. § 3450 (Comp. St. § 6352), providing for the forfeiture of vehicles used for the removal, deposit, or concealment of any article on which a tax is due and unpaid, with intent to defraud the United States of the tax, and alleges that on April 20, 1920, the automobile libeled was used for the removal of 80 gallons of intoxicating distilled spirits with the intent aforesaid. Little claims general title to the car, and Barrett claims a lien thereon by retention of title. By demurrer the libel is sought to be dismissed on the ground that the remedy under Rev. St.

§ 3450, is inconsistent with the Eighteenth Amendment of the Constitution, and with section 26 of title 2 of the National Prohibition Act (41 Stat. 315).

It is argued that prohibition is inconsistent with taxation of intoxicating liquors; that the Prohibition Act deals exhaustively with such liquors, and that the remedy by forfeiture provided in section 26 supersedes the remedy under the revenue law.

[1] 1. Section 35 of title 2 of the Prohibition Act is:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

This section expressly continued the revenue laws in force and is not contrary to the Eighteenth Amendment. That amendment does not prohibit the manufacture, transportation, and sale of intoxicating liquors for any purpose whatever, but only for beverage purposes. Such liquors may still be made, carried about, and sold for medicinal, sacramental, scientific, and some commercial purposes. The restraints applicable to liquors for such uses do not arise from the amendment, but are justified as reasonable safeguards to prevent the abuse of liberty as to them, and to attain enforcement of the prohibition for beverage purposes. Evidently there is much field left by the amendment for the operation of the revenue laws, which are preserved by section 35. Since that section expressly provides that taxation of illegal acts shall not be had in advance, and that the exaction of the tax afterwards shall not legalize them, there is no contravention, even in spirit, of the prohibitory amendment. The tax operates only as an additional penalty, and tends rather to the enforcement than the defeat of the prohibition scheme.

[2] 2. It follows, then, that distilled liquors whether produced under permit for lawful purposes or in violation of law, are still "a commodity in respect whereof a tax is imposed," in the languge of Rev. St. § 3450, and its provisions are applicable to a case within them, unless defeated by inconsistent provisions of the Prohibition Act. The suggestion that repeal was intended because the whole subject of intoxicating liquors was covered is answered by the express language to the contrary in section 35. Section 26 is not only reconcilable with Rev. St. § 3450, but applies to a substantially different subject-matter. Its material provisions are:

"When the commissioner, his assistants, * * * or any officer of the law shall discover any person in the act of transporting in violation of the

law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale," etc.

In terms it applies only when "a person is discovered in the act of transporting in violation of law." The officer must "at once proceed against the person arrested under the provisions of this title," and "the court upon conviction of the person" orders a sale. This section seems to apply only when a person is caught and can be prosecuted. The provision at the end of it as to no claimant appearing is not to the contrary, for the person transporting or possessing the liquor and the claimant of the vehicle need not be the same person. And again only unlawful transportation or possession is the occasion of the forfeiture. Since the person is to be "prosecuted under the provisions of this title," it is apparent that transportation or possession in violation of this title is the unlawful transportation and possession meant. By title 2, § 3, transportation and possession are made unlawful, except as authorized in the act. By section 6 transportation without a permit, and by section 10 transportation without making the prescribed records, is condemned. By section 33 possession after February 1, 1920, is prima facie unlawful. But none of these unlawful acts have any reference to the nonpayment of taxes and may occur equally of taxed or untaxed liquor. Rev. St. § 3450 deals only with untaxed liquor, and may extend to cases of deposit and concealment, as well as transportation, and to cases where no person can be connected with the transportation or deposit so as to be prosecuted. The forfeiture arises from no illegality under the Prohibition Act, but wholly under the revenue law. The causes of action are unlike and independent of each other. It is true that an automobile transporting untaxed intoxicating liquors without permit may transgress both statutes at the same time, but that results only in giving the United States an election as to which cause of forfeiture it will pursue. Rev. St. § 3450 still has its place in the law, and the remedy under it may be sustained in this case, if the facts alleged are proven.

The demurrer is overruled.

In re CHARLES WIRTH & CO., Inc.

(District Court, D. Massachusetts. April 7, 1920.)

Bankruptcy ⇐206—Direction that attaching creditor assign claim to trustee held proper.

Where, shortly before adjudication in bankruptcy, a creditor in suit against bankrupt attached bankrupt's funds on deposit in a trust company, and the company thereafter by mistake paid them out on bankrupt's checks an order that the attachment be retained for the benefit of the estate that the creditor assign his claim to the trustee for benefit of the estate, and that the trustee prosecute the suit to judgment to secure the attached funds, is proper; the payment by mistake not diminishing the rights of the trustee as it would not have diminished those of the attaching creditor.

In the matter of Charles Wirth & Co., Incorporated, bankrupt. An order was made to have an attachment retained for the benefit of the estate, etc., and petition to review it is filed by the Fidelity Trust Company, and opposed by Henry F. Wood and others, trustees. Order affirmed.

The certificate of Referee Olmstead is as follows:

This was a petition to review an order entered on June 25, 1919, to preserve a lien of attachment. On May 6, 1919, Henry F. Wood, Esq., the receiver appointed in said estate, filed a petition asking that an attachment of funds belonging to the debtor corporation made by Childs, Sleeper & Co. by virtue of a writ issued out of the superior court on the 15th day of April, 1919, be preserved for the benefit of said estate, in accordance with section 67f of the act (Comp. St. § 9651). On April 25, 1919, the debtor filed a voluntary petition and was duly adjudicated on the same date. The answer of the respondent Fidelity Trust Company admits all the material allegations of the petition, but denies the jurisdiction of the court in the premises. By a motion filed May 22, 1919, due notice of said application has been given to the said attaching creditors, and the debtor by its appearance has also been duly notified.

Jurisdiction as to preservation of such attachment for the benefit of an estate according to the language of said subsection seems to be undoubted. The statute provides: "And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect." In re Jules & Frederic Co. (D. C. Mass.) 36 Am. Bankr. Rep. 233, and cases cited.

As to the merits, the status of the parties is fixed as of the time of the filing of the petition. In re Howe (D. C. Mass.) 37 Am. Bankr. Rep. 601, 235 Fed. 908; Edison Electric Illuminating Co. of Boston v. Tibbetts, 241 Fed. 468, 154 C. C. A. 300; In re Michaelis & Lindeman (D. C. N. Y.) 27 Am. Bankr. Rep. 299, 196 Fed. 718.

Francis T. Leahy, of Boston, Mass., for trustees.

Eaton & McKnight and Charles T. Cottrell, all of Boston, Mass., for respondent.

MORTON, District Judge. The facts are not stated in the certificate of the referee; but they are not in dispute and from statements of counsel appear to be as follows: The bankrupt had funds on deposit in the Fidelity Trust Company. They were attached on trustee

process in a suit against the bankrupt by Childs, Sleeper & Co. on April 15, 1919. After the attachment the Trust Company, by mistake, paid out the funds on checks drawn in favor of certain creditors of the bankrupt. Nine days later the bankrupt was adjudicated on a voluntary petition. Upon the adjudication, the Trust Company, contending that the attachment had thereby been dissolved, undertook to offset its claim against the bankrupt on the checks paid by mistake against the amount of the deposit. About a month later the receiver of the bankrupt moved to have the attachment of Childs, Sleeper & Co. retained for the benefit of the estate. The learned referee so ordered, and directed Childs, Sleeper & Co. to assign their claim against the bankrupt to the trustees for the benefit of the estate, and the trustees to prosecute the suit to judgment, with the object of securing the funds affected by the attachment.

In so doing, it seems to me, he was plainly right. The mistake of the bank in paying out the deposit after the attachment had been served would not have diminished the rights of the attaching creditor; and on the facts as they now appear I perceive no good reason why it should be held to diminish the rights of the trustees.

Order affirmed.

UNITED STATES v. CHANSLOR-CANFIELD MIDWAY OIL CO. et al.

(District Court, S. D. California. September 10, 1918.)

No. A-39.

1. **Mines and minerals ⇐36—Oil location invalid.**
   Location of an oil placer mining claim in the names of a number of the locator's family and seven of his neighbors, who knew nothing of the location and refused to ratify it, but conveyed their interest without consideration to the members of locator's family who later conveyed to him, *held* to have been in effect for his sole benefit, and invalid.
2. **Mines and minerals ⇐36—Prosecution of development work held not diligent, so as to take an oil claim out of operation of withdrawal order.**
   The fact that an oil company, which owned or controlled a large number of claims in a California field, on some of which it was operating, had made preparation and assembled material for further development work in its holdings generally at the time of the presidential order of September 27, 1909, withdrawing lands from entry, *held* not such diligent prosecution of work for discovery on a claim within the withdrawal area as to take it out of the operation of such order; it not appearing that development work on that specific tract was intended.

In Equity. Suit by the United States against the Chanslor-Canfield Midway Oil Company, the Recovery Oil Company, Fred H. Hall, and others. Decree for complainant.

Decree modified 266 Fed. 145.

Henry F. May and Charles D. Hamel, both of San Francisco, Cal., for the United States.

U. T. Clotfelter, of Los Angeles, Cal., and Peter F. Dunne, of San Francisco, Cal., for defendants.

BEAN, District Judge (sitting by special assignment). The property in controversy is public mineral land of the United States and within the area of presidential withdrawal order of September 27, 1909. Two principal questions are for decision: First, whether the paper location under which the defendants claim is legal and valid; and, second, whether the defendant oil company was, at the date of withdrawal order, in diligent prosecution of work leading to discovery on the property. I have heretofore had occasion to consider many questions arising under the withdrawal order and legislation with reference thereto. My views will be found in reported cases, and especially in U. S. v. Midway Northern (D. C.) 232 Fed. 620; U. S. v. Brookshire (D. C.) 242 Fed. 718; U. S. v. Northern American Cons. (D. C.) 242 Fed. 723; U. S. v. Thirty-Two Oil Co. (D. C.) 242 Fed. 730. It is enough for present purposes to state my conclusions, arrived at after a careful examination of the record and the arguments and briefs of counsel, without elaboration.

[1] The paper location was made on January 1, 1903, by Fred Hall, in the name of Mrs. Stokes, his mother-in-law and a member of his family, and seven of his neighbors. The alleged locators did not know of the location at or prior to the time it was made, and when subsequently advised thereof declined to assume or pay any part of the expenses incident thereto, or to accept or ratify the same; but on January 28, 1903, no doubt at the request or suggestion of Hall, they executed a deed conveying their interest, if any, to Mrs. Stokes, in trust for Hall. Mrs. Stokes held the title thus acquired until July, 1908, when she conveyed to Hall, who subsequently made the development contract under which the defendant oil company entered into possession. All of the alleged locators, except two or three, testified as witnesses at the hearing. None of them had more than a very faint, if any, recollection of the transaction; but all agreed that they never at any time intended to make the location, and never claimed any interest in the property, or expended any money thereon, or received any consideration for the conveyance to Mrs. Stokes, and although the evidence is that there was no previous agreement between them and Hall that the location should inure to his benefit, and no conscious intent on their part to violate the law, the manifest effect of the transaction, if valid, was to enable Hall to acquire more land by one location than the law permits, and would therefore seem to be invalid. U. S. v. N. A. Con., supra.

[2] But, however that may be, I am clearly of the opinion that the evidence wholly fails to support the claim that defendants were in diligent prosecution of work looking to discovery on the property at the date of withdrawal. It is admitted that there was no work on the premises at that time, or for months afterwards, but it is claimed that the defendant oil company was then making preparations, by assembling material and employing labor, for the future development of the property; but I do not think the evidence justifies the conclusion sought to be drawn from it. The oil company, at the date of withdrawal, owned or controlled several thousand acres of land in

various parts of the Midway field, portions of which it was operating and developing, and it no doubt contemplated the possible, if not probable, development of other portions at some time in the near future. It does not appear, however, that any work or preparation therefor being done or made was designed or intended for the development of the particular property in question, as distinguished from its other undeveloped holdings. I do not think it can be said, as a matter of law, that such work and preparation was work leading to discovery on the various claims owned or controlled by it. The law contemplates and requires something more to bring an occupant or claimant within the saving clause of the order of withdrawal or Pickett Act (Comp. St. §§ 4523–4525).

The able and forceful argument of counsel based on section 2332, R. S. (Comp. St. § 4631), the alleged knowledge of plaintiff's agents, and the effect of the act of Congress of June 25, 1910, do not lead me to change or modify the views expressed in United States v. Midway Oil Co. (D. C.) 232 Fed. 626. The opinion of the Court of Appeals in Consolidated Mutual v. U. S., 245 Fed. 521, 157 C. C. A. 633, is not in conflict therewith as I understand it.

It is no doubt true that the defendants, and especially the Recovery Oil Company, invested and expended large sums of money on the property in good faith, and with the honest belief that they would thereby acquire title; but such investments and expenditures were made after the order of withdrawal, and after the land had ceased to be open to entry, and the parties making the same were chargeable with knowledge that title could not thus be secured, if the order of withdrawal were valid, as was subsequently decided by the Supreme Court in the Midwest Case, 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673.

It follows that the plaintiff is entitled to a decree in its favor, and one may be prepared accordingly.

CHANSLOR-CANFIELD MIDWAY OIL CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1920. Rehearing Denied July 6, 1920.)

No. 3364.

1. **Equity ⟸39(1)—In suit to restrain waste, will retain jurisdiction to determine rights of parties.**
   Where the legal title to an oil placer mining claim remains in the United States, but defendants, wrongfully as claimed, are in possession and extracting the oil therefrom, equity has jurisdiction of a suit to stop the waste, and having done so, under equity rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv), will determine the right to possession and grant appropriate relief.
2. **Mines and minerals ⟸36—Oil location held invalid.**
   The location of an association oil placer claim by one as agent for eight others, seven of whom had no knowledge of it and refused to have the expense, but at request of the locator conveyed their interest to the eighth, who was a relative of his and later conveyed to him without consideration, *held* fraudulent in law and void, and to invest him with no rights which he could convey to others.
3. **Estoppel ⟸62(5)—United States not estopped by laches of officers or agents.**
   The United States is not estopped by acts of its officers or agents, and as a general rule their laches or negligence is no defense to a suit by the government to enforce a public right or protect a public interest.
4. **Mines and minerals ⟸7—Trespasser cannot acquire title by possession and working of claim.**
   Rev. St. § 2332 (Comp. St. § 4631), providing that possession and working of mining claims by the owners or their grantors for a period equal to the time prescribed by the statute of limitations for mining claims of the state shall be sufficient to establish the right to a patent, has no application to the case of a trespasser on public land, title to which cannot be acquired under the mining laws.
5. **Courts ⟸363—Mines and minerals ⟸36—Interest, under state law, allowable from date of conversion of oil from public land.**
   Where, in a suit for accounting, the United States recovers the value of oil wrongfully extracted from public lands under an invalid location, the allowance of interest is within the discretion of the court, in the absence of statute; but where, under the state statute, a recovery for conversion includes interest from the date of conversion, interest should be from that date.

Ross, Circuit Judge, dissenting.

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

Suit by the United States against the Chanslor-Canfield Midway Oil Company and others. Decree for complainant (266 Fed. 142) from which defendants appeal, and plaintiff cross-appeals. Modified and affirmed.

This suit is to restrain waste and depletion of the oil contents of a certain described quarter section of public lands, to obtain an injunction against defendants from asserting title or interest in the lands, from trespassing thereon, for an accounting, for the appointment of a receiver, and other equitable relief. The land is included within the area prescribed by the withdrawal order of the President of the United States dated September 27, 1909.

On January 1, 1903, the land had been claimed as an oil placer mining claim

by an association of eight persons in whose names the defendant Hall had posted notices of location. The notices of location were filed for record January 28, 1903, at the request of Jane Stokes, one of the named locators. The next day, January 29, 1903, all of these persons, other than Jane Stokes, transferred such interests as they may have had to Jane Stokes, who thereafter, in July, 1908, transferred to the defendant Hall. On January 12, 1909, Hall made a development contract with the Chanslor-Canfield Midway Oil Company, defendant below and an appellant here, under which the oil company claims herein. By the contract Hall retained to himself one-half of the quarter section, which half he subsequently conveyed to the defendant appellant Recovery Oil Company; the deed being dated December 31, 1910.

The defendants joined issue and set up: (1) That the action is one in ejectment by the United States out of possession against defendants in possession, and for damages for trespasses, and that a court of equity has no jurisdiction; (2) that the act of Congress of June 25, 1910, the so-called Pickett Act (Comp. St. §§ 4523–4525), gave to the Chanslor-Canfield Company and to Hall a right to continue in occupation of the lands and to prosecute their work to a discovery, and thereupon to have patent, and to that extent abrogated whatever effect the September 27, 1909, withdrawal order had on the lands; (3) that the entry of the lands and the development thereof was pursuant to invitation of the United States, under a policy established long before September 27, 1909, and was on said date a rule of property, and thereafter, by act of Congress approved June 25, 1910, recognized by Congress by the making of the President's order of temporary withdrawal, dated September 27, 1909, wholly inoperative as to the lands described in the complaint; (4) that the company was a bona fide purchaser of the north half of the lands involved, and without notice or claim of fraud made by the United States.

The District Court denied motions to transfer the case to the law side of the court and to dismiss, retained jurisdiction, heard evidence, appointed a receiver, and decreed that the lands belonged to the United States, free of all claims of any of the appellants, gave the United States judgment in damages for $76,751, and decreed that all fixed improvements upon the lands belonged to the United States and should be turned over.

The United States is a cross-appellant, alleging error in the action of the District Court in allowing interest upon the value of oil extracted only from the date of the appointment of the receiver, and in refusing to allow costs to the United States.

U. T. Clotfelter, of Los Angeles, Cal., and Morrison, Dunne & Brobeck and Peter F. Dunne, all of San Francisco, Cal., for appellants.

Henry F. May, Sp. Asst. Atty. Gen., and Charles D. Hamel, Sp. Asst. U. S. Atty., of San Francisco, Cal., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] We first consider the question of jurisdiction. As stated, the suit was brought in equity to restrain continuing waste and depletion and for other relief, including accounting and adjudication that the property belongs to the United States free and clear of all claims of appellants.

Rule 22 of the Equity Rules (198 Fed. xxiv, 115 C. C. A. xxiv) provides:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and there be proceeded with, with only such alterations in the pleadings as shall be essential."

By an act approved March 3, 1915 (section 274a, Judicial Code [Comp. Stat. § 1251a]) it is provided:

"In case any of said courts shall find that a suit at law should have been brought in equity, or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

Rule 23 of the Equity Rules (198 Fed. xxiv, 115 C. C. A. xxiv) is as follows:

"If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable without sending the case or question to the law side of the court."

Construing these rules together with the statute, we understand that a suit in equity shall not be tried by piecemeal, but is to be proceeded with on the side in which the suit was properly brought; that is to say, if it should have been brought as an action at law, under rule 22 the court should make an order of transfer to the law side, to the end that the action may be proceeded with upon the law side. If the suit is one properly to be brought before a court of equity, it should remain upon the equitable side and there tried. On the other hand, if, in the course of the suit begun in equity, matters should arise which would ordinarily have to be determined at law, such matters shall be determined without sending the case to the law side of the court. El Dora Oil Co. et al. v. U. S., 229 Fed. 946, 144 C. C. A. 228. Applying the rule to a case where there is a serious controversy as to the title and the party in possession is holding adversely, plaintiff's remedy is at law and not in equity. But where the title and right to possession is clear, and the defendant is wrongfully in possession, extracting mineral from the land, and thus is practically consuming the substance of the estate, jurisdiction is in a court of equity to stop such waste, and, after having interfered to stop the waste, the court will determine the rights of the parties before it. Remedy at law for possession and to recover damages for the trespass is in plaintiff, but such remedy is not adequate, by no means as practical and as efficient as a remedy in equity. Magruder v. Belle Fourche, etc., Association, 219 Fed. 72, 135 C. C. A. 524. In Johnston v. Corson G. M. Co., 157 Fed. 145, 84 C. C. A. 593, 15 L. R. A. (N. S.) 1078, there was a serious controversy as to title; hence the case is distinguished from the instant one.

There is no controversy as to where the legal title to the property here involved rests; and if the defendants have no right to the oil in the lands or to the possession thereof as against the United States, then certainly remedy at law is inadequate to prevent injury of an irreparable character being done to the land, even to the destruction of the value thereof.

Again, the trespasses complained of appear to have been continuous, and if defendants should remain in possession they will continue to destroy the substance of the estate by the extraction of the oil, and

will render plaintiff's ownership valueless. In such a case a court of equity will restrain, and will also retain the suits for an accounting and satisfaction for injuries already done. Graves v. Ashburn, 215 U. S. 331, 30 Sup. Ct. 108, 54 L. Ed. 217; Goldschmidt Thermit Co. v. Primos Chemical Co. (D. C.) 225 Fed. 769; Gatewood v. New River Con. Co., 239 Fed. 65, 152 C. C. A. 115.

[2] Passing to the merits, these facts appear: On January 1, 1903, the notice of location relied upon was posted, and the location certificate recorded January 28, 1903. On January 29, 1903, seven of the eight locators, for a consideration of $10 each, conveyed their rights, title, and interests to Jane Stokes, who was the eighth locator, and who was the mother-in-law of appellant Fred H. Hall. In July, 1908, Mrs. Stokes for a nominal consideration conveyed all her right, title, and interest to her son-in-law, Hall, and he in turn on January 12, 1909, made a contract with the Chanslor-Canfield Midway Oil Company. Upon the trial all of the locators, except one who died before the suit was tried and Mrs. Stokes, an aged lady, testified. Each said in effect that he had no definite recollection of the location of the claims or of the subsequent transfer, although, when shown the deed bearing his name, each admitted that he conveyed to Mrs. Stokes as appeared by the deeds introduced in evidence.

The locators testified they had no recollection of any of the particulars connected with the matter. One said that he had a faint recollection of going to the office of a notary and signing "something"; that evidently this was done at the request of Hall; that he never paid out any money for fees or other expenses, never received anything of value in connection with the transaction, and never had any intention of acquiring any interest in oil lands in Kern county; that he had a faint recollection of some one asking permission to use his name in making a location, and now felt that he had given that consent, but could not swear positively to whom the consent was given; that he never had inquired into the value of the land, and never had paid any expenses in connection with the location of it. In substance, the other locators testified to the same effect. All of the locators denied that any agreement concerning the transfer of the property or rights had been made in advance.

Hall testified that he located the land for the eight persons because he had been in that section for some time and had located land for an association of which he was one; that he was approached by a number of people, asking him to locate oil for them, and that he spoke to a number of persons with whom he had a personal acquaintance, including some of the locators referred to in this litigation, but he could not say which ones; that those with whom he talked were unwilling to contribute toward the expenses of making the location, because they thought the land was worthless; that he made the location, and the day after recording such location certificates the locators made the deeds to Mrs. Stokes, who was a member of his household; that he had knowledge that the deed was to be executed to Mrs. Stokes, but that he did not recall whether he advised the execution of such a deed; that when he made the location he expected

reimbursement, and had no intention to acquire the land for himself; that there was no agreement or understanding of any kind by which the interests of the locators were to be his; that at the time of the location he had no interest in the claims, and that the locators were not dummies used by him to gain 160 acres for himself.

Under this evidence we think that the District Court was correct in its opinion that:

"The paper location was made on January 1, 1903, by Fred Hall in the name of Mrs. Stokes, his mother-in-law and a member of his family, and seven of his neighbors. The alleged locators did not know of the location at or prior to the time it was made, and when subsequently advised thereof declined to assume or pay any part of the expenses incident thereto, or to accept or ratify the same, but on January 28, 1903, no doubt at the request or suggestion of Hall, they executed a deed conveying their interests, if any, to Mrs. Stokes in trust for Hall."

It appears to have been a common practice for one person, acting as agent and under power of attorney for another, to make a location upon oil lands. Whether such a location is valid need not be discussed. We may assume it is, and even go so far as to assume that such a location can be made without a power of attorney, or without the knowledge on the part of the person whose name is used that a location had been made for him, provided, always, the person whose name has been used acquires knowledge of the fact of the use of his name and ratifies the act of the person who has made the location. But, notwithstanding these assumptions, the appellants are not aided, for the locators whose names were used by Hall did not know of Hall's intended use of their names to locate the lands involved, and when told that their names had been used every one of them refused to contribute to the perfecting of such locations, or to do any act toward holding the location made by Hall. However, when requested to sign deeds conveying to Mrs. Stokes whatever rights they might have, they did so at Hall's request. For about five years nothing was done upon the claims. But at the expiration of that time Hall took an assignment from Mrs. Stokes and proceeded to make a contract with the Chanslor-Canfield Midway Oil Company. The contract taken was wholly in Hall's interest; it was made without regard to any possible rights of any of the locators of the claims and without consideration of any rights that any of the locators might have had.

How can such a location be sustained as valid? We have no doubt there was no willful fraud on the part of the locators themselves; but, even so, it is perfectly plain that no one of them had any intention whatever of taking up or developing a claim upon the public lands. They were not bona fide occupants or claimants, and, although guiltless of active, positive fraud, each must be charged with a knowledge that he or she had no rights, and had no authority to make the deed to Stokes. Hall knew that the locators whose names he used refused to pay any money or to take any interest in the property, and as a consequence he acted wrongfully when he took deeds of rights which the so-called locators had acquired. No inference appears to be rea-

sonable, except that Hall made the pretended location purely in the interests of himself, or possibly some one other than the locators themselves. In Nome & Sinook v. Snyder, 187 Fed. 385, 109 C. C. A. 217, this court said:

"Any scheme or device entered into whereby one individual is to acquire more than that amount [20 acres] or proportion in area constitutes a fraud upon the law, and consequently a fraud upon the government, from which the title is to be acquired, and any location made in pursuance of such a scheme or device is without legal support and void. The proposition seems to be well established."

If further evidence of Hall's purpose were necessary, it is found in the circumstance of the quick transfer to Mrs. Stokes, his mother-in-law and a member of his family, and who, without doing any work upon the claims, held them until July, 1908, when Hall, without paying her anything, took title to the property, and soon thereafter made the contract for development.

We are satisfied that no legal title was ever passed, and that the locations were wholly invalid, and that the District Court was right in so holding. Hall gained nothing by taking the transfer to Mrs. Stokes, and thereafter from her to himself, and acquired no right or interest in the property. Therefore he could convey nothing, and could make no contract of development with the Chanslor-Canfield Company. Nome & Sinook v. Snyder, supra. Nor can the Recovery Oil Company assert rights under a contract with Hall, claiming through the same locators, under date of December 21, 1910. After careful consideration, our judgment is that the locations were void, and that appellants have no standing in court.

[3] It is argued in the brief of the appellants that the doctrine of estoppel should be applied as against the United States, because the agents of the government had full knowledge of the situation, and not only refrained from advising people, but induced them to proceed and expend money in good faith. In Utah Power & Light Co. v. United States, 243 U. S. 389, 37 Sup. Ct. 387, 61 L. Ed. 791, and Southern Oregon Co. v. United States, 241 Fed. 16, 154 C. C. A. 16, and Pine River Logging & Improvement Co. v. United States, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164, it has been laid down that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement to do or cause to be done what the law does not sanction or permit, and, furthermore, that as a general rule laches or neglect of the United States on the part of officers of the government is no defense to a suit by the government to enforce a public right or protect a public interest.

[4] It is also said that appellants Hall and the Chanslor Company acquired title to the land and a right to patent thereto independent of the location charged as being fraudulent. Appellants base this contention on section 2332 of the Revised Statutes of the United States (Comp. St. § 4631), which so far as pertinent reads:

"Where such person or association, they or their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may

be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

But the statute just referred to is a part of the statutory chapters on mineral and mining resources, having to do with the evidence which will be regarded as sufficient to establish the right of one in possession and who has worked a mining claim to obtain a patent. The statute is based upon the premise that the lands had been open to entry and could be patented under the mining laws of the United States. It was not enacted as a statute of limitation, and has no application in the case of a trespasser on land, title to which cannot be acquired under the laws of the United States. Harris v. Equator Mining Co. (C. C.) 8 Fed. 863.

[5] In the cross-appeal it is contended by the United States that the court erred in refusing to allow interest upon oil extracted from the date of conversion. The oil which was extracted after a receiver was appointed, or the value of it, came into the possession of the receiver and was awarded to the United States; there was also awarded to the United States the value of oil taken by each defendant prior to the receivership (less cost of extracting and marketing the same); but the court declined to allow interest upon the value of the oil so taken, except from the date of the appointment of the receiver. The receiver was appointed October 31, 1915, and the oil was found to have been converted at various dates, viz., by the Chanslor Company from September, 1910, and by the Recovery Company from October, 1911, as is detailed by statements of account incorporated in the record. Interest was allowed on the value of the oil so converted at the rate of 7 per cent., but only from the date of the appointment of the receiver, and not from the date of conversion. In Hammond v. United States, 246 Fed. 40, 158 C. C. A. 266, it was held that, in the absence of a statute, in cases of conversion interest is not recoverable as a matter of right, but that the question is for determination by the jury. This being the rule in an action at law, it is but fair to hold that in a suit in equity, in the absence of a statute, allowance of interest is within the discretion of the court.

In Montana Mining Co. v. St. Louis Mining & Milling Co., 183 Fed. 51, 105 C. C. A. 343, we held that, inasmuch as the statute of Montana provided that damages for the wrongful conversion of property should be the value of the property at the time of its conversion, with interest from that time, a plaintiff, entitled to a verdict for ore converted, was entitled to interest upon the value of the ore from the date of the conversion. Drumm-Flato Com. Co. v. Edmisson, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. Ed. 606, was cited in support of the rule. In California interest at the rate of 7 per cent. is allowable on moneys received to the use of another and detained from him (section 1917, Civ. Code), and by section 3287 of the Civil Code every person entitled to recover damages certain, or capable of being made certain by calculation, is entitled also to recover interest thereon from that day. Section 3336 of the California Code of 1917 is identical with the statute of Montana quoted in Montana Mining Co.

v. St. Louis Mining & Milling Co., supra, where the court ruled as heretofore stated. From this we gather that, as the statute of the state of California allows interest upon the value from the date of conversion, interest should have been allowed accordingly in the present case.

It is also urged by counsel for the United States that the court erred in refusing to allow costs, in that there are no circumstances shown which justified the court in refusing to allow costs to the United States. But the fact that the superior equities are with the United States, and it has been necessary for the protection of its rights that the present suit should be brought, does not warrant us in ruling that the discretion of the District Court was abused in refusing to award costs to the United States.

The decree is affirmed, except as to the allowance of interest upon the value of the oil converted. The decree will be modified, so as to allow interest upon the value of the oil from the date of conversion.

Modified and affirmed.

ROSS, Circuit Judge, dissents.

BENS v. UNITED STATES.*

(Circuit Court of Appeals, Second Circuit. March 30, 1920.)

No. 205.

1. **Habeas corpus ⟸27, 31—Writ may be used where court is without power to pronounce sentence.**

While a writ of habeas corpus cannot be used as a writ of error, it may be employed to obtain a discharge from imprisonment, where the court is either without jurisdiction, or without power to pronounce sentence, as where petitioner has been once tried for the same offense with which he is charged.

2. **Criminal law ⟸200(6)—Acquittal of conspiracy to commit a crime not a bar to prosecution for such crime.**

Conspiracy with another to aid a third person in evading the Selective Service Act and the aiding of such person in evading the act are distinct offenses, requiring different proof, and an acquittal on the first charge is not a bar to prosecution for the second.

3. **Habeas corpus ⟸1—Office of writ stated.**

The writ of habeas corpus is a legal process used to obtain summary relief from unlawful restraint of personal liberty.

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

4. **Criminal law ⟸195(1)—Statement of when person is "twice put in jeopardy," within Constitution.**

A person is "twice put in jeopardy," within Const. U. S. Amend. 5, declaring that no person shall be twice put in jeopardy of life or limb for the same offense, if he is put upon trial a second time for an offense of which he has been once acquitted or convicted.

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

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 8, 65 L. Ed. —.

Habeas corpus by Seton C. Bens against the United States. Judgment dismissing the writ, and petitioner appeals. Affirmed.

Charles Driggs Lewis, of Rockville Centre, N. Y., and Edmund F. Driggs, of Brooklyn, N. Y., for appellant.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y. (Charles J. Buchner, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The petitioner is in this court on an appeal from an order entered in the District Court on June 25, 1919, which dismissed a writ of habeas corpus previously issued, and remanded the petitioner to the custody of the United States marshal.

It appears that on February 18, 1919, the petitioner was indicted in the Eastern district of New York, being charged with the crime of conspiracy. The charge is that Bens conspired with one James Hanse to violate section 6 of the Selective Service Act, approved May 18, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044f), and acts amendatory thereof. At the time of the conspiracy the petitioner, Bens, was a member of the Legal Advisory Board No. 3, county of Nassau, state of New York, and Hanse was chairman of Local Exemption Board No. 3 of the same county. It was charged that Bens and Hanse conspired to aid one Joseph Gitter to evade the above-mentioned act, by advising and procuring him to register falsely and unlawfully under the provisions of the act, and by aiding, assisting, and directing Gitter to answer and file a false and perjurious questionnaire, and by granting and procuring the granting to Gitter of a deferred classification, to which he was not entitled by law.

The petitioner was tried on the indictment, and a verdict of not guilty was rendered on May 23, 1919. On the day of his acquittal one John S. Gillies made an affidavit in which he charged that Bens had aided Gitter to evade the requirements of the Selective Service Law and the amendatory acts, by advising and procuring Gitter to register falsely and unlawfully under the provisions of the said act, and by knowingly, willfully, and unlawfully writing in false answers to the questions contained in the questionnaire. Thereupon a United States commissioner issued a warrant for Bens' arrest, and he was apprehended and arraigned and entered a plea of not guilty. He was admitted to bail, but was surrendered by his bondsman on May 31, 1919, into the custody of the United States marshal.

Bens thereupon applied for a writ of habeas corpus upon the ground that he was being restrained of his liberty without due process of law and was being twice placed in legal jeopardy for the same offense. In obedience to the writ the United States marshal made a return to the effect that the charge upon which he was holding the petitioner in custody was not the same charge as that under which he had been put in former jeopardy. He alleged that the crime charged in the indictment, and of which Bens was acquitted, was the crime of conspiracy, a violation of section 37 of the Criminal Code (Comp. St. §

10201), and that the crime charged in the affidavit upon which the warrant issued was the crime of aiding and assisting another to evade the requirements of the Selective Service Law.

The District Judge heard the matter on June 7, 1919, and adjourned it to June 18, and on that day adjourned it once more, and to June 23, when he dismissed the writ and remanded the petitioner to the custody of the marshal. There are two assignments of error:

"(1) The learned court erred in dismissing the petition of said petitioner for a writ of habeas corpus and remanding him to custody.

"(2) The learned court erred, in that it failed and refused to sustain said petition and to grant petitioner's discharge from imprisonment upon the ground that he was unlawfully restrained of his liberty upon a criminal complaint charging him with the same crime, upon which charge he had been formerly duly acquitted after a trial by jury."

From what has been said it is apparent that the first assignment of error is itself an error. The District Judge did not dismiss the petition for a writ. The petition was sustained to the extent of issuing the writ, and afterwards granting a hearing. Then upon the hearing which followed the granting of the writ the court entered its order which was:

"That the said writ of habeas corpus issued out of this court on the 31st day of May, 1919, be and the same is hereby dismissed, and the petitioner is remanded to the custody of the respondent, James N. Power."

This brings us to the second assignment of error. The error assigned is that the court erred, in that it failed to sustain the petition. But, if the court erred, the error did not consist in that it failed to sustain the petition. If there were error it was in the failure to sustain the writ. In Ex parte Bollman, 4 Cranch, 75, 94 (2 L. Ed. 554), Chief Justice Marshall said:

"The power to award the writ [of habeas corpus] by any of the courts of the United States must be given by written law."

The statutes of the United States provide as follows:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify." U. S. Compiled Statutes (1916) Ann. vol. 2, § 1281; Barnes' Federal Code (1919) § 1080.

[3] Under the provision above cited it is not claimed that the District Judge was in error in his original issuance of the writ. The error alleged is, as already said, the dismissal of the writ and the remanding of the petitioner to custody. The writ of habeas corpus is a legal process, used to obtain summary relief from unlawful restraint of

personal liberty. Its purpose is simply to free the person from the unlawful restraint. It inquires into the jurisdiction, but it is seldom that mere errors of law not going to the question of jurisdiction can be reviewed on habeas corpus. Spelling on Extraordinary Remedies, vol. 2 (2d Ed.) § 1152.

The courts agree that the writ is not intended to bring in review mere errors or irregularities, whether they relate to substantive law or to the law of procedure, if they are committed by a court which has jurisdiction over the person and subject-matter. In such cases the remedy lies in an appeal or through a writ of error. The writ cannot be used as a substitute for a writ of error. It is well established that mere errors in point of law, no matter how serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, are not to be reviewed by habeas corpus. See the cases cited in the margin.[1]

In the recent case of Jones v. Perkins, 245 U. S. 390, 38 Sup. Ct. 166, 62 L. Ed. 358, the Chief Justice said it was well settled that, in the absence of exceptional circumstances in criminal cases, the regular judicial procedure should be followed, and that habeas corpus should not be granted in advance of a trial. The appellant alleged that he was illegally deprived of his liberty, because the statute under which he was held was unconstitutional. In Johnson v. Hoy, 227 U. S. 245, 247, 33 Sup. Ct. 240, 241 (57 L. Ed. 497), the court declared that—

"The writ of habeas corpus is not intended to serve the office of a writ of error, even after verdict, and, for still stronger reasons, it is not available to a defendant before trial, except in rare and exceptional cases, as pointed out in Ex parte Royall, 117 U. S. 241."

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[1] McMicking v. Schields, 238 U. S. 99, 35 Sup. Ct. 655, 59 L. Ed. 1220; Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969; Henry v. Henkel, 235 U. S. 219, 229, 35 Sup. Ct. 54, 59 L. Ed. 203; Dimmick v. Tompkins, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110; Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. 484, 46 L. Ed. 534; Storti v. Massachusetts, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120; In re McKenzie, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657; Andersen v. Treat, 172 U. S. 24, 19 Sup. Ct. 67, 43 L. Ed. 351; Baker v. Grice, 169 U. S. 284, 290, 18 Sup. Ct. 323, 42 L. Ed. 748; Ex parte Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; Ex parte Belt, 159 U. S. 95, 15 Sup. Ct. 987, 40 L. Ed. 88; United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; Ex parte Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; Ex parte Frederich, 149 U. S. 70, 75, 13 Sup. Ct. 793, 37 L. Ed. 653; In re Lane, 135 U. S. 443, 10 Sup. Ct. 760, 34 L. Ed. 219; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; Ex parte Royall, 117 U. S. 241, 250, 6 Sup. Ct. 734, 29 L. Ed. 868; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Jamison v. Wimbish (D. C.) 130 Fed. 351; In re Laing (C. C.) 127 Fed. 213; Ex parte Green (C. C.) 114 Fed. 959; Ex parte Glen (C. C.) 111 Fed. 257; Ex parte Stricker (C. C.) 109 Fed. 145; United States v. Fuellhart (C. C.) 106 Fed. 911; In re Davenport, 102 Fed. 540; Cohn v. Jones (D. C.) 100 Fed. 639; In re Fair (C. C.) 100 Fed. 149; Campbell v. Waite, 88 Fed. 102, 31 C. C. A. 403; In re Weeks (D. C.) 82 Fed. 729; Kelly v. Georgia (D. C.) 68 Fed. 652; Ex parte Conway (C. C.) 48 Fed. 77; United States v. Thomas (D. C.) 47 Fed. 807; Ex parte Kieffer (C. C.) 40 Fed. 399; In re Laundry License Case (D. C.) 22 Fed. 701.

In Glasgow v. Moyer, 225 U. S. 420, 428, 32 Sup. Ct. 753, 755 (56 L. Ed. 1147), the court declared that—

"The writ of habeas corpus cannot be made to perform the office of a writ of error."

In Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 57 L. Ed. 1101, 21 Ann. Cas. 849, the court said:

"Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions."

In Re Chapman, 156 U. S. 211, 15 Sup. Ct. 331, 39 L. Ed. 401, an application was made to the Supreme Court for the writ of habeas corpus. The petitioner had been indicted in the Supreme Court of the District of Columbia and had demurred to the indictments. His demurrer was overruled and he appealed to the District Court of Appeals, where the indictment was again sustained and the case remanded. The Supreme Court held that it was a judicious and salutary general rule not to interfere by writ of habeas corpus with proceedings pending in the courts of the United States in advance of their final determination. Mr. Chief Justice Fuller, speaking for the court, said:

"The general rule is that the writ of habeas corpus will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction, and that it cannot be used to correct errors."

And see In re Huntington, 137 U. S. 63, 11 Sup. Ct. 4, 34 L. Ed. 567; In re Lancaster, 137 U. S. 393, 11 Sup. Ct. 117, 34 L. Ed. 713; Ex parte Mirzan, 119 U. S. 584, 7 Sup. Ct. 341, 30 L. Ed. 513.

In Riggins v. United States, 199 U. S. 547, 548, 26 Sup. Ct. 147, 148 (50 L. Ed. 303) Chief Justice Fuller said:

"It is settled that the writ of habeas corpus will not issue, unless the court under whose warrant petitioner is held is without jurisdiction, and that it cannot be used merely to correct errors. Ordinarily the writ will not be granted when there is a remedy by writ of error or appeal, yet in rare and exceptional cases it may be issued, although such remedy exists."

In Boske v. Comingore, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846, a United States collector of internal revenue, who was held in prison by state authorities, was allowed upon a writ of habeas corpus to raise the question whether he was being held in violation of the Constitution and laws of the United States. The court declared that the case was one of urgency, in that the appellee was an officer in the revenue service of the United States, whose presence at his post of duty was important to the public interests.

In Ex parte Royall, 117 U. S. 254, 6 Sup. Ct. 742, 29 L. Ed. 872, the petitioner prayed for a writ of habeas corpus, on the ground that the state statute under which he was arrested and held in custody was repugnant to the Constitution of the United States. The application for the writ was denied. The reasons upon which the decision rests are those stated in another case reported in Ex parte Royall, 117 U. S. 241, 252, 253, 6 Sup. Ct. 734, 29 L. Ed. 868.

[1] But conceding that the writ cannot be used as a writ of error is it being so used in this case? Is what is complained of here a mere

error? We think the cases show that the writ of habeas corpus may be employed to obtain a discharge from imprisonment, where the court is either without jurisdiction or without power to pronounce sentence.

In Re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, an officer of the United States was under arrest by the state authorities charged with the murder of one Terry, shot by Neagle in the discharge of his duty as a deputy marshal of the United States, assigned to protect Mr. Justice Field in the discharge of his official duties. The Circuit Court of the United States for the Northern District of California (39 Fed. 843) ordered his discharge on a writ of habeas corpus, holding that Neagle had acted in the discharge of his official duty, and was held in custody for an act done in pursuance of a law of the United States, and was imprisoned in violation of the Constitution and laws of the United States. The Supreme Court affirmed the action of the Circuit Court. The opinion of Mr. Justice Miller contains an elaborate discussion of the history of the office and function of the writ of habeas corpus. There is a dissenting opinion written by Mr. Justice Lamar, concurred in by Chief Justice Fuller. It is said in the dissenting opinion:

"Whether his defense is sufficient or not is for the court which tries him to determine. If, in this determination, errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose. The office of a writ of habeas corpus is neither to correct such errors, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed. Authorities to this effect in our own Reports are numerous."

In Hans Nielsen, Petitioner, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118, it was held that, where a court is without authority to pass a particular sentence, such sentence is void, and defendant imprisoned under it may be discharged on habeas corpus. In that case the petitioner claimed that he had been convicted twice for the same offense, and that, as the court erred in its decision, he was entitled to relief by habeas corpus. Mr. Justice Bradley wrote the opinion of the court, in which he said:

"The objection to the remedy of habeas corpus, of course, would be that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on habeas corpus. But there are exceptions to this rule, which have more than once been acted upon by this court. It is firmly established that, if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant, who is imprisoned under and by virtue of it, may be discharged from custody on habeas corpus. This was so decided in the cases of Ex parte Lange, 18 Wall. 163, and Ex parte Siebold, 100 U. S. 371, and in several other cases referred to therein. * * * In the present case, it is true, the ground for the habeas corpus was, not the invalidity of an act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case;

but, in the other, it has no authority to render judgment against the defendant. * * * A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert, in a passage quoted in Ex parte Parks, 93 U. S. 18, 22. 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words. 2 Hale's Pleas of the Crown, 144. And why should not such a rule prevail in favorem libertatis? If we have seemed to hold the contrary in any case, it has been from inadvertence; * * * but, with regard to the power of discharging on habeas corpus, it is generally true that, after conviction and sentence, the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it. In the present case the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

In Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717, the application for the writ was denied; the court thinking that the cause of commitment was lawful. But in the course of an elaborate opinion, also written by Mr. Justice Bradley, it was declared that the appellate jurisdiction of the court, exercisable by the writ of habeas corpus, extends to a case of imprisonment upon conviction and sentence of a party by an inferior court of the United States, under and by virtue of an unconstitutional act of Congress, whether the court has jurisdiction to review the judgment of conviction by writ of error or not. In speaking of the writ of habeas corpus the court said:

"It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a habeas corpus, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on habeas corpus, and thus save the party the delay and expense of a writ of error. Bac. Abr. Hab. Corp. B, 13; Betherl's Case, Salk. 348, 5 Mod. 19. But the general rule is that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by habeas corpus. The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void."

In Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872, the Circuit Court in the Southern District of New York had sentenced a man to fine and imprisonment, where the statute only conferred power to punish by fine or imprisonment, and the fine had been paid. The Circuit Court then modified the judgment, by imposing imprisonment, instead of the former sentence. The Supreme Court held that the first judgment, though erroneous, was not absolutely void; but it held the second judgment was not merely erroneous. It was void for want of power to impose it, and the court ordered the prisoner discharged on

his petition for a writ of habeas corpus. The Supreme Court, through Mr. Justice Miller, said:

"The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist. It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if, on an indictment for treason, the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the state, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the Constitution."

It therefore sufficiently appears that the writ may be used where one is restrained of his liberty by the action of a court which is without jurisdiction, or where it is without power to impose sentence; and as the petitioner asserts that he is restrained of his liberty, charged with an offense which the court is without power to punish, he has the right to have that question passed upon by this court in this proceeding. If there is anything settled in our jurisprudence, it is that no man is to be twice placed in legal jeopardy. "Nemo debet bis puniri pro uno delicto" and "Nemo debet bis vexari pro eadem causa" are familiar maxims of the law. The common law, not only prohibited a second punishment for the same offense, but it went further and forbade a second trial for the same offense, whether the accused had been punished or not. It made no difference whether the first trial resulted in acquittal or conviction. Ex parte Lange, supra.

The language of the Fifth Amendment to the Constitution declares:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[4] And he is twice put in jeopardy if he is put upon trial a second time for an offense of which he has been once acquitted or convicted. There is no power in any court to try him the second time, and a second judgment would be, not merely erroneous, but absolutely void. If the petitioner herein is being held for a crime of which he has already been acquitted, the court below is without power either to punish him again or to try him again for that offense; and in such a case he has the right through the writ of habeas corpus to obtain his discharge, if the two offenses are the same. We are bound therefore to determine whether the two crimes are the same.

[2] The crime for which Bens was tried and acquitted was, as we have seen, that of conspiracy. The conspiracy is the gist of the crime. It is the entering into the conspiracy to commit the crime which constitutes the offense, without reference to whether the crime which it was conspired to commit is consummated, or even agreed upon by the conspirators in all its details. Williamson v. United States, 207 U.

S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278. A conspiracy to commit a crime is one offense, and the commission of the crime is another and a distinct offense. The power exists to separate the conspiracy from the act itself, and to affix distinct and independent penalties to each. Cline v. United States, 159 U. S. 590, 595, 16 Sup. Ct. 125, 40 L. Ed. 269. The prohibition of the Constitution is against a second jeopardy for the "same offense"; that is, for the identical crime. The offenses charged in the two prosecutions must be the same in law and in fact. Burton v. United States, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; Thomas v. United States, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; 16 C. J. 263. If the facts which would convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed in the same transaction. Ebeling v. Morgan, 237 U. S. 625, 35 Sup. Ct. 710, 59 L. Ed. 1151; Gavieres v. United States, 220 U. S. 338, 31 Sup. Ct. 421, 55 L. Ed. 489. And where a conspiracy to commit a crime is a substantive offense, neither an acquittal nor a conviction of a conspiracy to commit a crime is a bar to a prosecution for the commission of that crime, or for aiding and abetting another to commit it. Carter v. McClaughry, 183 U. S. 365, 394, 22 Sup. Ct. 181, 46 L. Ed. 236; Louie v. United States, 218 Fed. 36, 40, 134 C. C. A. 58.

The petitioner has been acquitted of the charge of conspiring with one Hanse to aid one Gitter to evade the Selective Service Law. He claims that his acquittal of that offense prevents his being put on trial charged with another and distinct offense that of aiding the said Gitter to evade the requirements of that law, and by knowingly, willfully, and unlawfully writing in false answers to the questions in the questionnaire, and by procuring the filing of said false and perjurious questionnaire. To procure a conviction of this offense it would be necessary to prove, not only that the questionnaire had been filed, but that the answers actually written in were false. As the offenses are distinct, and not identical, and the evidence which would convict of one of these crimes would not be sufficient to convict of the other, it would seem that there was no error in dismissing the writ of habeas corpus and remanding the petitioner to the custody of the marshal.

The order is affirmed.

MENTE v. EISNER, Internal Revenue Collector. *

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 192.

Internal revenue ⇐7—Income tax; loss sustained in outside speculation not deductible; "losses incurred in trade."

Under Income Tax Act Oct. 3, 1913, § II, subd. 2B, allowing as a deduction from gross income losses "incurred in trade," such deductions are limited to losses incurred in the actual business of the taxpayer, as distinguished from isolated transactions, and do not include losses sustained through dealings on an exchange by one engaged in another regular business.

Manton, Circuit Judge, dissenting.

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

Action by Eugene W. Mente against Mark Eisner, Collector of Internal Revenue. Judgment for defendant, and plaintiff brings error. Affirmed.

Frederic H. Cowden, of New York City, for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City (Vincent H. Rothwell, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. Section II, subdivision 2B, of the Act of October 3, 1913 (38 Stat. 167), provides that in computing net income for purposes of normal tax there shall be allowed as a deduction: "* * * Fourth, losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise."

Mente, a member of the firm of Mente & Co., engaged in the business of manufacturing jute bags and bagging, cotton bags and materials for covering cotton bales, filed his income returns for the year March 1 to December 31, 1913, and for the whole year of 1914. He had for some three years been buying and selling cotton on the Cotton Exchange for his individual account, in no way connected with the business of Mente & Co., and he deducted from his gross income in each year losses sustained in the year resulting from these transactions as "losses incurred in trade."

Eisner, as collector of internal revenue for the Third district of the state of New York, assessed an additional tax upon these deductions, which Mente paid under protest, taking an appeal to the Commissioner of Internal Revenue under sections 3220 and 3228, U. S. Rev. Stat. (Comp. St. §§ 5944, 5951), and the regulations of the Secretary of the Treasury in pursuance thereof who rejected his claim. Thereupon Mente began this action against Eisner, as collector, to recover the amounts so paid with interest and costs.

Treasury Decision 2090, dated October 14, 1914, reads:

"Loss, to be deductible, must be an absolute loss, not a speculative or fluctuating valuation of continuing investment, but must be an actual loss, actually sustained and ascertained, during the tax year for which the deduction is sought to be made; it must be incurred in trade and be determined and ascertained upon an actual, a completed, a closed transaction. The term 'in trade,' as used in the law, is held to mean the trade or trades in which the person making the return is engaged; that is, in which he has invested money otherwise than for the purpose of being employed in isolated transactions, and to which he devotes at least a part of his time and attention. A person may engage in more than one trade, and may deduct losses incurred in all of them: Provided that in each trade the above requirements are met. As to losses on stocks, grain, cotton, etc., if these are incurred by a person engaged in trade, to which the buying and selling of stocks, etc., are incident as a part of the business, as by a member of a stock, grain, or cotton exchange, such losses may be deducted. A person can be engaged in more than one business, but it must be clearly shown in such cases that he is actually a dealer, or trader, or manufacturer, or whatever the occupation may be, and is actually engaged in one or more lines of recognized business, before losses can be claimed with respect to either or more than one line of business, and his status as such dealer must be clearly established."

Both parties having moved for the direction of a verdict, Judge Grubb directed a verdict in favor of the defendant. We think that the language "losses incurred in trade" are correctly construed by the Treasury Department as meaning in the actual business of the taxpayer, as distinguished from isolated transactions. If it had been intended to permit all losses to be deducted, it would have been easy to say so. Some effect must be given to the words "in trade."

There is an inconsistency in making profits derived from such transactions a part of the taxpayer's gross income and, on the other hand, allowing him no deduction for losses; but tax laws are not required to be perfect, or even consistent. It must be determined from the facts in each case whether or not the losses claimed to be deducted have been incurred in a business. In this case the court must be taken to have found as matter of fact that these transactions in 1913 and 1914 did not constitute a business. Such a finding is binding upon us.

Judgment affirmed.

MANTON, Circuit Judge. I dissent from the prevailing opinion and will state my reasons.

The controversy that gives rise to this action brings to this court for construction a provision of the Income Tax Law of October 3, 1913. Section 2, subd. B, thereof sets forth deductions allowed in computing net incomes. They are, first, the expenses of carrying on any business; second, interest on indebtedness; third, taxes; and, fourth, "losses actually sustained during the year, incurred in trade, or arising from fires, storms, or shipwreck and not compensated for by insurance or otherwise." The plaintiff in error made his return for the last ten months of 1913 and the year 1914, and paid his taxes due as shown by these returns. For the period from March to December 31, 1913, he deducted from his gross income the sum of $31,555, claiming a right so to do because of loss sustained during this period of the year, and claims it occurred as a loss in trade. In his return for 1914,

he deducted $65,245.33 pursuant to the same contention, contending it was a loss sustained in trade. These losses resulted from the purchase of cotton, through brokers, upon the New York Cotton Exchange, and the subsequent sale of such cotton in the same manner at a lower price. The method of doing this business was as follows: The plaintiff in error instructed some person to buy for him a certain number of bales of cotton, and that person sought a seller, or the agent of a seller, and secured from the seller or agent an agreement to deliver cotton to the plaintiff in error at a future date at a certain price. He delivered to the seller or his agent the plaintiff in error's agreement to buy upon the same terms. It was in such transactions that the plaintiff in error met with his losses. This method of trading is a permitted business of the Cotton Exchange.

The question presented is: Does this constitute a transaction "in trade," within the meaning of section 2, subd. B, of the Income Tax Law? This kind of trade is referred to as dealing in cotton futures. The goods were not yet in existence; but does that alter the nature of the transaction? Does the fact that the goods are to be delivered in the future so distinguish the purchase as to make it something else than a deal "in trade"? In the commercial life of the day perhaps more than one-half of the products ultimately sold may be said to be contracted for long before they have come into existence. The test of obligation, either for profit or loss, must necessarily be measured by the contractual relations as expressed by the written agreement. The fact that there may be a transfer of the contract at a lower price or a higher price does not change the nature of the transaction. The contract delivered fixes the obligation of the parties and denotes a sale and a purchase. A certificate of stock, for example, in itself merely evidences a fractional undivided interest in real, personal, or corporate property. It passes from one to the other, and is regarded in itself as property. Business transactions in which the title of the property is transferred without delivery are frequent in this day. The word "trade," in its normal and natural meaning, cannot be so restricted as to apply only to transactions where actual merchandise is handled by the taxpayer, or where the specific merchandise is designated by the contract. The Treasury Department has made a ruling under section 5, known as Decision No. 2005, dated July 8, 1914, which provides as follows:

"Losses may be sustained by individuals or corporations on personal or real property. Only those losses are deductible which are sustained during the tax year 'in trade'—that is, the business which engages the time, attention, and labor of any one for the purpose of livelihood, profit, or improvement. Loss, to be deductible, must be an absolute loss, not a speculative or fluctuating valuation of continuing investment, but must be an actual loss, actually sustained and ascertained during the tax year for which the deduction is sought to be made; it must be incurred in trade, and be determined and ascertained upon an actual, a completed, a closed transaction.

"Losses sustained by individuals or corporations from the sale of or dealings in personal or real property growing out of ownership or use of or interest in such property will not be deductible at all, unless they are an incident of, connected with, and grow out of the business of the individual or corporation sustaining the loss, and are ascertained, determined, and fixed as abso-

lute in the above sense within the taxable year in which the deduction is sought to be made. * * *"

And Decision No. 2090, dated December 14, 1914, is as follows:

"Loss, to be deductible, must be an absolute loss, not a speculative or fluctuating valuation of continuing investment, but must be an actual loss, actually sustained and ascertained, during the tax year for which the deduction is sought to be made; it must be incurred in trade, and be determined and ascertained upon an actual, a completed, a closed transaction. The term 'in trade,' as used in the law, is held to mean the trade or trades in which the person making the return is engaged; that is, in which he has invested money otherwise than for the purpose of being employed in isolated transactions, and to which he devotes at least a part of his time and attention. A person may engage in more than one trade, and may deduct losses incurred in all of them, provided that in each trade the above requirements are met. As to losses on stocks, grain, cotton, etc., if these are incurred by a person engaged in trade to which the buying and selling of stocks, etc., are incident as a part of the business, as by a member of a stock, grain, or cotton exchange, such losses may be deducted. A person can be engaged in more than one business, but it must be clearly shown in such cases that he is actually a dealer, or trader, or manufacturer, or whatever the occupation may be, and is actually engaged in one or more lines of recognized business, before losses can be claimed with respect to either or more than one line of business, and his status as such dealer must be clearly established."

I do not think that Congress had in mind any such limitations of the words "losses in trade" when it enacted the income tax. Bouvier's Law Dictionary refers to "trade" as business, or any transaction or dealing by way of sale or exchange. The courts have adopted this view. May v. Sloan, 101 U. S. 231, 25 L. Ed. 797; In re H. R. Leighton (D. C.) 147 Fed. 311; United States v. Douglas, 190 Fed. 482, 111 C. C. A. 314, 36 L. R. A. (N. S.) 1075. Nowhere has it been so restricted that it has been said that the man engaged in trade must give his habitual or principal attention to the occupation or employment. "Tradesman" or "trader," whether used separately or spoken of in connection with business, indicates one engaged in the barter, sale, or exchange of merchandise or commodities. In re Surety, etc., Co., 121 Fed. 73, 56 C. C. A. 654; In re Woodward, 30 Fed. Cas. 543.

Webster's Dictionary describes "trade" as follows:

"To barter, or to buy and sell; to be engaged in the exchange, purchase, or sale of goods, wares, merchandise, or anything else; to traffic; to bargain; to carry on commerce as a business."

"Trade," as used in the act, should be considered synonymous with business. But the defendant in error interprets the words "in trade" as "in his business." A broker, who acts only as a broker, receives his income solely from his commissions. But the decision of the Treasury Department would permit him to deduct losses sustained, if he bought and sold on his own account—"as and if they are incident as a part of the business, as by a member of a stock, grain, or cotton exchange, such losses may be deducted." The Treasury decision insists that, while admitting that a person may be engaged in more than one business, in order that he may deduct his losses, it must clearly be shown that he is actually engaged as a dealer, or trader, or manufacturer, or whatever the occupation may be. His status as such dealer must be clearly established.

But nothing can be found in the act itself to place any such restriction upon the phrase "in trade." The test is not to find out what his habitual business is, or to which he may expend the greater part of his time and effort, or what may be his principal business. The determining factor, as Congress expressed it, is: Was there a loss, and was it sustained in trade? This must be our guide in determining the right to deduct. Undoubtedly the purpose of the Treasury Decision seems to be to forbid deductions of losses which result from a speculative or fluctuating valuation of a continuing investment. But the tax is imposed on the profits so obtained. If Congress intended to make this restriction, it should have guarded against reduction of such loss in taxation by a phrase which would be clear. There is an element of speculation in every transaction. Such may be the result of the purchase of a house or piece of real estate. So it may be in the purchase of shares of stock. He may buy it in the best of faith for continued investment and find it necessary to sell in a low market because of his then needs. The tax laws cannot be based upon the intent of the person taxed; they must be based upon the facts as they exist and the results which follow. This court, in New York Life Ins. Co. v. Anderson, 263 Fed. 527, — C. C. A. —, decided January 14, 1920, considered the Act of August 5, 1909, which provided, as to net income:

"It shall be ascertained by deducting from the gross amount of the income * * * all losses * * * sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property."

It was held that loss of market value of stocks and bonds is depreciation.

The Act of 1918 (section 214, subd. 5 [40 Stat. 1067]), now permits the deduction of all losses occurring in transactions "entered into for profit." These losses may be deducted from profits arising from other transactions. It is inconsistent, in my opinion, to say that a broker, who deals in stocks and bonds, is engaged in trade, and may deduct his losses, and say that the plaintiff in error, who was engaged in the cotton bagging business, may not deduct the loss that he sustained trading in the market as described. His principal business was not dealing in cotton, but in bagging; but his transaction was in trade, and the losses flowing from this effort to make profit from his trade should be allowed him as a deduction. The fact that the law was amended as above indicated, effective in 1918, evinces a dissatisfaction with the interpretation which has been placed upon the previous law.

In my opinion, the plaintiff in error was entitled to deductions which he made, and should have a judgment to recover back payments which he made to the collector under protest.

THE SIF.

(Circuit Court of Appeals, Second Circuit. April 14, 1920. On Motion to Modify Decree, May 12, 1920.)

No. 193.

1. **Collision ⇐95(1)—Concurring faults of steamship and meeting tug and tow.**

A collision at night in Bay Ridge Channel between a steamship passing out and a tow of seven coal barges, six of them in two tiers, passing up, *held* due to faults of the steamship, the tug, and the outside barges of the tow; the steamship being in fault for attempting to pass, as she thought between tows too close together for safety, the tug for being on the wrong side of the narrow channel, and both tug and the outside boats in the tow for failure to carry on such boats the lights required by the rules.

2. **Collision ⇐151—Recovery limited to vessels against which claims are asserted.**

In a suit for collision by the boats comprising a tow against a meeting steamship and the towing tug, where no claim was made against the outside boats of the tow, and they were not brought in under the fifty-ninth rule (29 Sup. Ct. xlvii), there can be no recovery against them, although in fault, for injury to the inside boats.

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

Suit for collision by Charles E. McWilliams and others against the steamship Sif, with the tugs Coleraine and Nellie Tracy impleaded. Decree holding the Sif alone in fault, and the claimant appeals. Reversed.

For opinion below, see 244 Fed. 261.

Haight, Sandford, Smith & Griffin, of New York City (John W. Griffin, of New York City, of counsel), for appellant.

Wm. C. Foster, of New York City, for appellee McWilliams.

Foley & Martin, of New York City (George V. A. McCloskey, of New York City, of counsel), for appellees the Coleraine and others.

Carpenter & Park, of New York City, for appellee Wilson.

Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for appellees McCollum and others.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. February 3, 1915, at about 6:20 p. m. the Norwegian steamer Sif coming down the west side of the Bay Ridge channel about slack water flood was in collision with the tow of the Coleraine coming up on the same side. The Coleraine had a hawser tow of seven boats, mostly coal laden, made up from port to starboard as follows:

Hudson	J. J. McAllister	M. Aldrich
M. S. Kirby	Grace and Edith	W. No. 40
	Arthur H.	

The tug Nellie Tracy brought W. No. 40 into the tow after it had started and kept alongside under one bell, without taking any part

in the towing, so as to be in readiness to take the W. No. 40, Grace and Edith, and Arthur H. out of the tow and up the East River; the Coleraine, with the rest of the tow, being destined up the North River. The hawsers of the Coleraine were at least 250 feet long; the port hawser being on the Hudson, the port boat in the first tier, and the starboard hawser on the McAllister, the middle boat of the first tier.

The owners of the boats filed libels in rem against the steamer Sif, which brought in the tugs Coleraine and Nellie Tracy under the fifty-ninth rule (29 Sup. Ct. xlvii); the claimant of the Coleraine petitioning to limit his liability. All the causes were consolidated and tried together as one case. The District Judge found the Sif solely at fault.

There can be no doubt that the pilot and master of the Sif on the bridge were searching for lights on the boats in tow and that they did not discover any until the collision was imminent. Their story is that they saw a little on the starboard bow a green light and towing lights, and further astern, but nearly ahead, a red light and towing lights. They thought they were meeting two tows; the one showing the red light being astern of the one showing the green. Therefore they blew a signal of one whistle to the tug showing a red light and ported slightly, with the intention of passing between the tows. Instead of this, the steamer ran into and sank two of the boats in the first tier on the starboard side, viz. the Aldrich and the McAllister, and damaged more or less the other boats in the tow.

Another tug, the Walter Tracy, with a light tow, had crossed the Bay lower down and turned up the easterly side of Bay Ridge channel which must have been showing a red light and towing lights all the time. The trial judge concluded that those on the Sif saw the red light of the Walter Tracy and the green light of the Nellie Tracy, not seeing the green light and towing lights of the Coleraine until after they had blown a signal of one whistle and ported. Receiving no answer, they then slowed and reversed the engines, thereby throwing her bow still more to starboard, and blew a signal of three blasts.

It is difficult to believe that, if the red light which the Sif saw was that of the Walter Tracy well on her port bow, she would have blown a signal of one whistle and ported directly into a tow showing a green light and towing lights close aboard on her starboard bow. Moreover, the pilot who was in charge of the navigation testified that he saw the red light of the Walter Tracy as she crossed well astern of the Coleraine's tow. The master of the steamer confirmed this testimony when examined in Norway under a commission at a time when nothing had been said in the case about the Walter Tracy. On cross-examination he answered that after the collision the pilot had told him that another tow showing a red light and towing lights had crossed astern of the Coleraine's tow and passed up the Bay Ridge channel between the Sif and the Brooklyn shore, although he himself had not seen these lights.

We find the steamer at fault on her own story, without reference to the District Judge's explanation of the collision. The distance of the green light of the Coleraine to the red light of the Nellie Tracy could not have been much over 50 feet, and it was clearly reckless to

propose to pass between tows so near together, even if one was astern of the other. In addition to this, the steamer's first officer should have stood at the bow with a lookout in addition. Instead of this he was keeping the lookout alone, and went below without reporting to the bridge after he saw the red light, calling the carpenter, who was standing at the windlass 40 to 50 feet abaft the bow, to be in readiness to let an anchor go, to act as lookout in his place. When the first officer returned to the lookout, the collision was imminent. The District Judge, though finding such conduct reprehensible, did not think it contributed to the collision. But we cannot say it could not have contributed.

[1] Coming to the navigation of the tugs, the Coleraine was at fault for not requiring the outside boats to carry lights in accordance with law, and of course those boats themselves were also at fault for not doing so. The rules of the steamboat inspection service of the Department of Commerce, issued under authority of the Act of June 7, 1897, § 2, as amended by Act of May 25, 1914 (Comp. St. § 7906), provide:

"Barges and canal boats, when being towed by steam vessels on the waters of the Hudson river and its tributaries from Troy to the boundary lines of New York Harbor off Sandy Hook, as defined pursuant to section 2 of the act of Congress of February 19, 1895, the East River, and Long Island Sound (and the waters entering thereon, and to the Atlantic Ocean), to and including Narragansett Bay, R. I., and tributaries, and Lake Champlain, shall carry lights as follows:

* * * * * * * * * *

"Barges and canal boats, when towed at a hawser two or more abreast, when in one tier, shall carry a white light on the bow and a white light on the stern of each of the outside boats; when in more than one tier, each of the outside boats shall carry a white light on its bow; and the outside boats in the last tier shall each carry, in addition, a white light on the outer afterpart of the stern.

* * * * * * * * * *

"When barges or canal boats are massed in tiers and towed at a hawser, as is usual on the Hudson river, there shall be carried on the forward port side of the port boat of each tier a white light, and on the forward starboard side of the starboard boat in each tier a white light, and on the after port side of the port boat in the stern tier a white light, and on the after starboard side of the starboard boat in the stern tier a white light.

"The white bow lights for barges and canal boats referred to in the preceding rules shall be carried at least ten feet and not more than thirty feet abaft the stem or extreme forward end of the vessel. On barges and canal boats required to carry a white bow light, the white light on bow and the white light on stern shall each be so placed above the hull or deck house as to show an unbroken light all around the horizon, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least five miles."

Lights so placed define exactly the size and shape of the tow. Each boat is said to have carried an ordinary hand lantern at the stern, but bow lights were not carried, and there was no proof that those ordinary hand lanterns had a range of five miles. The District Judge inferred, from the fact that the towing lights were discerned with great difficulty, that the weather conditions were unfavorable. This is no excuse for not displaying the kind of lights which and at the places where the rules require. Who can say that proper lights in proper places could not have sooner advised the Sif of the real situation? To be an excuse the proof must go as far as this. The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148. So who can say that under such circum-

stances navigating on the wrong side of the Bay Ridge channel, which is a narrow channel under article 25 of the Inland Regulations (Comp. St. § 7864)—La Bretagne, 179 Fed. 286, 102 C. C. A. 651—could not have contributed to the collision?

[2] Without going into a consideration of the contradictory estimates of time and distance, we feel satisfied that the steamer Sif, the tug Coleraine, and the outside boats themselves were all at fault. The court below is directed to enter a decree in favor of the libelants, owners of the inside boats, for their full damage, with interest and costs against the steamer Sif and the tug Coleraine; the damages of the owners of the outside boats who were themselves at fault to be borne equally by the boat, the steamer Sif, and the tug Coleraine. The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600. The owners of the inside boats having made no claim against the outside boats, there need be no consideration of what rights, if any, they have against them.

The petition of the claimant of the Coleraine to limit his liability is granted, and the petition against the Nellie Tracy is dismissed, without costs.

Decree reversed.

On Motion to Modify Form of Decree to be Entered Below.

PER CURIAM. We remain of the opinion that in these cases, the owners of the inside boats having made no claim against the outside boats and the outside boats not having been brought in under the fifty-ninth rule, no recovery can be had against them directly by the owners of the inside boats, or by the owners of the Coleraine and Sif, on the ground of contribution to the amount paid by them to the owners of the inside boats.

The motion is denied.

HERCULES POWDER CO. v. NEWTON, Commissioner of Patents.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 108.

1. **Trade-marks and trade-names ⇐3(4)—"Infallible" is descriptive, and not registrable as trade-mark for smokeless powder.**
   Under Trade-Marks Act, § 5, as amended (Comp. St. § 9490), providing that "no mark which consists * * * merely in words * * * which are descriptive of the goods with which they are used, or of the character or quality of such goods, * * * shall be registered," the word "Infallible" *held* not registrable as a trade-mark for a smokeless powder.

2. **Trade-marks and trade-names ⇐3(1)—To be registrable, if descriptive, must be something others may not employ with equal truth.**
   The fundamental inquiry in determining the registrability of a trade-mark is whether the suggested trade-mark, word, or device, with the environment proposed for it, conveys by its primary meaning something which others may employ with equal truth and equal right for the same purpose.

3. Trade-marks and trade-names ⇐3(4)—"Merely descriptive" defined.
The words "merely descriptive," as used in Trade-Mark Act, § 5, as amended (Comp. St. § 9490), providing that no mark consisting of words merely descriptive of the goods with which they are used shall be registered, mean only descriptive, or nothing more than descriptive.

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

Suit by the Hercules Powder Company against James T. Newton, as Commissioner of Patents. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 254 Fed. 906.

The bill is brought under section 4915, R. S. (Comp. St. § 9460), and section 9 of the Trade-Mark Act of 1905 (33 Stat. 727 [Comp. St. § 9494]), to procure a declaration that plaintiff is entitled to have defendant register under the act its trade-mark of "Infallible" for smokeless sporting powder. Diversity of citizenship exists between the parties; therefore, although neither is resident within the Southern district of New York, jurisdiction exists, based solely on the consent of defendant. Barrett Co. v. Ewing, 242 Fed. 506, 155 C. C. A. 282.

In 1914 plaintiff applied for registration, showing a use of the word "Infallible" as applied to smokeless sporting powder for several years. On appeal from the Examiner, defendant said that "under the circumstances" shown he held the word "descriptive" with "great reluctance." He pointed out that plaintiff's use of the word as a mark could be protected on the principles of unfair competition, but, since the Patent Office had theretofore denied registration to "Infallible" as applied to flour, the same reasons impelled to deny as to smokeless powder; for plaintiff claimed by advertisement that its powder was "uniform in velocity and pattern," not "affected by climatic changes," and "always reliable." Of such a substance he thought "Infallible" not "exhaustively" descriptive; but still it described the qualities such powder should possess, and it therefore should not be registered.

From this decision an appeal was taken to the Court of Appeals of the District of Columbia, which affirmed. In re Hercules Powder Co., 46 App. D. C. 52. This suit was then brought, and the bill dismissed; this appeal followed.

Edwin J. Prindle and Warren H. Small, both of New York City, for appellant.

L. D. Underwood and Robert F. Whitehead, both of Washington, D. C., and Francis G. Caffey, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The issue tendered by the pleadings herein is shown by an extract from the answer, viz.:

"Defendant denies that the word 'Infallible' is registrable as a trade-mark for smokeless powder under the act, * * * and avers that it is * * * precluded from registration by said act."

Thus the point is, not that registration ought not to be granted because of some proven fact, but that it cannot lawfully be conferred because the statute forbids.

Plaintiff has, we think, somewhat complicated the issue by pressing upon us as a fact proven beyond doubt that dealers and buyers of powder do not associate "Infallible" with that explosive, except as in-

dicative of its origin—"Infallible" means made by Hercules Company. If this be true, it doubtless strengthens plaintiff's rights against infringers or trespassers; it shows the existence of a business to which the mark is appurtenant, and tends to prove rights which should be protected from unfair—i. e., deceptive—competition.

But the only question we have, or can have, presently before us, is the right to register; not the value or worthlessness of what is registered. The desirability of registration under the act of 1905, to and among those in extensive and especially foreign trade, is very great, and need not be dwelt upon; yet it is too well settled to need citation that a trade-mark is not the creature of registration, but the appendage or growth of a business. The Commissioner cannot base approval or denial of application on an inquiry into the nature of petitioner's business, or a finding as to how the public regards the product thereof; he can but examine the article and the mark, and declare whether the statute prohibits their registered union.

Therefore the evidence offered by plaintiff is immaterial, and we regard the case as presenting nothing but an inquiry as to the meaning of a statute. The absence of contradictions of fact, or of contradictory inferences of fact from admitted phenomena, differentiates this case from Gold v. Newton, 254 Fed. 824, 166 C. C. A. 270, and we proceed to consider the legal question above stated.

Our present trade-mark statute (Act 1905, 33 Stat. 724 [Comp. St. § 9485 et seq.]) as amended, does not describe or define what constitutes either a good trade-mark or a registrable trade-mark. It assumes that the word has a meaning sufficiently well known to dispense with statutory definition. It does, however, lay down some rules for the guidance of the Commissioner, and this case revolves around the construction of one of those rules, viz. (Act, § 5, Comp. Stat. § 9490):

"No mark which consists * * * merely in words * * * which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered."

It has been said of these words that they only declare "the accepted law of trade-marks," and we agree with this ruling. In re National Phonograph Co., 29 App. D. C. 142.

On one point only did the present statute in effect certainly recognize, if not create, a property right previously doubtful, if not, wholly nonexistent. We refer to the so-called "10-year clause," also found in section 5 of the act, which as construed in Davids Co. v. Davids Mfg. Co., 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046, and Nashville, etc., Co. v. Coca Co., 215 Fed. 527, 132 C. C. A. 39, Ann. Cas. 1915B, 358, secured, if it did not give, to those who had exclusively used a doubtful mark for 10 years before the passage of the trade-mark statute, rights now undoubted.

But nothing can be found in the act which gives to one who has succeeded in exclusively using a merely descriptive or geographical or proper name for 10 years expiring after the passage of the act rights identical with or similar to those validated by the 10-year clause. It seems to us the clear intent of the Legislature to compel those who

wish registration for their marks, and who could not claim under the 10-year proviso, to suggest to the Commissioner for registration only those marks recognized by the "accepted law"; i. e., in the absence of further legislation by the rule announced in authoritative judicial decisions.

It is not without interest to note that, cotemporaneously with the passage of our present statute, Great Britain revised its law by passing the Trade-Mark Act of 1905 (for text see Sebastian, Trade-Marks [5th Ed.] p. 368). That act provides (section 9, subsec. 4) that a mark may be registered which is "a word or words having no direct reference to the character or quality of the goods" to be distinguished. Under this section of the act has grown up the English rule that words which are merely "laudatory epithets" are not registrable as trade-marks. See In re Crosfield [1910] L. R. 1 Ch. 130), disallowing the word "Perfection" as applied to soap; and In re Sharpe, etc., 84 L. J. Ch. 290, rejecting the word "Classic" as applied to stationery.

Though often difficult in application, the accepted legal rule for trade-marks suspected of being descriptive or geographic is not difficult to state; and it may be noted that both in the statute and in decisions the faults arising from geographic and descriptive names are treated alike—they are nearly akin. For us the authoritative rule was restated in Standard, etc., Co. v. Trinidad, etc., Co., 220 U. S. at page 453, 31 Sup. Ct. at page 457 (55 L. Ed. 536), thus:

"It [the trademark] may consist in any symbol, or in any form of words; but, as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose."

The latest ruling (Hamilton, etc., Co. v. Wolf, 240 U. S. 256, 36 Sup. Ct. 269, 60 L. Ed. 629) relies upon the same decisions and applies the same rule to a close case, and, in holding "American Girl" as not descriptive of shoes, points out that "American Shoes" would come within the prohibition.[1] It seems clear, therefore, that the Commissioner will properly act under this section of the statute if he inquires whether under ruling case law the proposed trade-mark is descriptive, unless it can be held that the statute has modified or changed the result of judicial decision by inserting the word "merely."

[3] "Merely descriptive" means only descriptive, or nothing more than descriptive. It may be that the force of the adverb is satisfied by the addition to the descriptive word of a picture or device, or by qualifying the description through the addition of another word. Thus in Re Crosfield, supra (page 143), it was suggested that, while appellant could not use the word "Perfection" as a trade-mark for soap, if he used "Crosfield's Perfection, different considerations might arise."

[1] Dennison, etc., Co. v. Thomas, etc., Co. (C. C.) 94 Fed. 651, and Kellogg, etc., Co. v. Quaker Oats Co., 235 Fed. 657, 149 C. C. A. 77, contain citations of practically all the best-considered cases on this subject.

But if the proposed trade-mark consists of a single word, then that word standing alone is merely descriptive, or it is not descriptive at all. It does not conflict with this ruling that, as suggested in Williams v. Mitchell, 106 Fed. 170, 45 C. C. A. 265, a word may be in its nature descriptive, and yet in its application not descriptive.[2]

As most English speech is to be understood only from its context, so a word often takes its hue and meaning from its environment. It is to this truth that we owe such decisions as that in Waterman v. Shipman, 130 N. Y. 310, 29 N. E. 114, holding that the word "Ideal," as applied to "fountain pens, is nondescriptive, arbitrary, and fanciful, and has no natural nor necessary application to a pen." And this court made the same ruling in respect of the same word as applied to brushes, in Hughes v. Smith, 209 Fed. 39, 126 C. C. A. 179, although the remark was not necessary to decision, inasmuch as the "10-year clause" protected that particular trade-mark.

[2] But, after making these allowances, it remains true that the fundamental inquiry is this: Does the suggested trade-mark word or device, with the environment proposed for it, convey by its primary meaning something which others may employ with equal truth and equal right for the same purpose?

Putting that inquiry in this case, it seems to us that the word "infallible," as applied to explosive powder, is merely descriptive. The word by derivation, and perhaps when accurately used, refers always to mental processes; but it has long come to mean in common acceptation "exempt from uncertainty" or "absolutely trustworthy." When applied to an explosive, it is plainly descriptive of what the powder will do, and is distinctly the "laudatory epithet" of the English cases. Comparing it with the American formulation of the rule, it is obvious that any other manufacturer of equally good powder may, with equal right and equal truth, call his explosive "Infallible."

Decisions on such a point as this are illustrations rather than ruling precedents, for the environment or application of the word may so easily modify its signification. Yet, since the word is a common one, rulings upon a word similarly suggestive of excellence and similarly common are illuminative. The word "Standard," as applied to phonographs, has been rejected (Re National Phonograph Co., 29 App. D. C. 142), and has been found equally open to objection in respect of scales (Computing Scale Co. v. Standard, etc., Co., 118 Fed. 965, 55 C. C. A. 459); while as applied to bath tubs and similar articles it has been rejected (Standard Ideal Co. v. Standard Sanitary Co., [1911] L. R. App. Cas. 78), under the Canadian Trade-Mark Act, which requires refusal of registration "if the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark properly speaking." Under this language it seemed to the Privy Council "perfectly clear that a common English word, having reference to the character and quality of the goods in connection with which it is used, and having no reference to anything else, cannot be an apt or appropriate instru-

[2] This ruling was disapproved (as it seems to us improperly) in Re American, etc., Co., 28 App. D. C. 446.

ment for distinguishing the goods of one trader from those of another."

The decisions of this court have adhered to this rule consistently, from Bennett v. McKinley, 65 Fed. 505, 13 C. C. A. 25 (instantaneous tapioca case) to Thermogene Co. v. Thermozine Co., 234 Fed. 69, 148 C. C. A. 85 (the thermos bottle case). The litigation over "Holeproof" hosiery (Holeproof Co. v. Wallach, 172 Fed. 859, 97 C. C. A. 263, modifying [C. C.] 167 Fed. 373) was decided wholly on grounds of unfair competition, as also were Siegert v. Candolfi, 149 Fed. 100, 79 C. C. A. 142 (the Angostura bitters case), Florence, etc., Co. v. Dowd, 178 Fed. 73, 101 C. C. A. 565 (the Keepclean tooth brush case), and Wrigley, etc., Co. v. Grove Co., 183 Fed. 99, 105 C. C. A. 391 (the Spearmint gum case).

It is true that in some of the decisions hereinabove cited, and many others, the distinction between rights inhering in a valid and registrable trade-mark and those arising from a defendant's unfair competition have not been plainly delimited. Yet the distinction is not shadowy; and in the closely akin matter of geographical names as trade-marks we have recently treated it at length in Scandinavia Co. v. Asbestos, etc., Works, 257 Fed. 951, 960, 169 C. C. A. 87.

We there held that geographical names did not constitute valid trade-marks, unless selected, used, and appropriated under such special circumstances as to point distinctively to origin or ownership. Of this the Chartreuse litigation is the best instance. Baglin v. Cusenier Co., 221 U. S. 592, 31 Sup. Ct. 669, 55 L. Ed. 863. Transferring that remark to the present case of a descriptive word as a trade-mark, we think that such word must be rejected, unless it is so modified by other words, phrases, or designs as to render it not "merely" descriptive, or unless common knowledge or evidence demonstrates that the descriptive word is used in a plainly nondescriptive manner. Of this last the Sterling ale case (Worcester, etc., Co. v. Reter, 157 Fed. 217, 84 C. C. A. 665), and Ludington, etc., Co. v. Leonard, 127 Fed. 155, 62 C. C. A. 269, are examples. In this last case the word "Carroms" was upheld as a trade-mark for a game, because a carrom was no part of the game.

The similarity of trade-mark and unfair competition law is obvious; the latter largely grew out of the former, and is its natural evolution. The differences between them are perhaps as well marked by extreme cases under both doctrines as in any other way. The rigid, yet far-reaching, nature of a trade-mark is well illustrated by Aunt Jemima, etc., Co. v. Rigney, 247 Fed. 407, 159 C. C. A. 461, L. R. A. 1918C, 1039, while the possibilities of relief against unfair competition find an extreme example in Shredded Wheat Co. v. Humphrey Cornell Co., 250 Fed. 960, 163 C. C. A. 210. The litigation in this circuit over this trade-mark has, we think, grown out of the very rigid language employed by the Court of Appeals of the District of Columbia in cases of this kind. The decision on the appeal of the present plaintiff is based upon adherence to the court's previous decision in Re Central Consumers' League, 32 App. D. C. 523, where the court held that it was

the object of Congress "to prohibit any one from acquiring a property right * * * in a name possessing any inherent signification that would of itself enhance the use or value of the article or articles to which it may be applied. * * * It was intended to limit the selection to mere arbitrary words." In adhering to its previous ruling the court further said of trade-mark words in general: "If descriptive at all, the act forbids the registration."

As above indicated, we think that is going too far. The suggested word must be "merely" descriptive, and must be so descriptive with reference to the particular thing to be described. The difference between suggestion and description is often hard to perceive. Complete definition seems to us impossible, but apt illustration is furnished by the present cause. An explosive powder marked as "Hercules" would be suggestive, and no person other than its maker could with equal right and equal truth call his powder by that name or any derivative therefrom; but "Infallible" is merely descriptive, because it has no association with the Hercules Company, other than that acquired by a long course of business nomenclature.

Another reason for this present action is the long line of trade-marks allowed by the Patent Office and thought by the plaintiff to be open to the same objection successfully urged against his word "Infallible." It seems to us that the registration of such words as "Perfection" and "Marvelous" for cold cream (not to speak of others) is open to criticsm, but errors in the Office cannot affect authoritative judicial decisions. It is also reasonably inferable from this record that plaintiff feels unjustly treated by refusal to register a word which it has exclusively and successfully used as a trade-mark for more than 10 years, but not for that decade which alone secures protection under the 10-year clause of the present statute. We appreciate the hardship, and are quite aware of the international trade-mark difficulties which beset the path of the American trader in foreign parts, who has not secured registration in his own country. But the remedy is with the Congress, and neither the Commissioner of Patents nor any court can change the accepted law on which the Trade-Mark Act of 1905 was built.

It is not possible under the present act for a citizen to choose as his trade-mark something invalid by general law, use it without opposition long enough to make a showing of trade repute and commercial success, derive from that success "secondary meaning" for his mark, and then apply for registration. There is much to be said in favor of a registration law which would give legal and governmental sanction to any mark which it could be shown the public had accepted. Such a system would enable this plaintiff to prevail; but Congress must first create it.

Decree affirmed.

ULMER et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 208.

1. **Criminal law ⇐1088(1)—Stipulated matter not part of record.**
Matters stipulated by counsel are not thereby made part of the record, nor can they be made a part of the record by the certificate of the judge that the stipulated matter is a correct transcript of the record "as agreed on by the parties."

2. **Criminal law ⇐1092(17)—Bill of exceptions cannot be amended after expiration of term without reservation of control over case.**
The power to amend a bill of exceptions, like the power to allow the bill on the first instance, cannot be exercised after the court below has lost its power over the case, as when the term has expired without control of the case having been reserved.

3. **Criminal law ⇐1083—Court loses power to settle by filing of writ of error.**
The trial court loses its power over a case and its right to settle a bill of exceptions after a writ of error is filed in the appellate court.

4. **Criminal law ⇐1083—Consent cannot authorize signing after filing of writ of error.**
Consent of parties, given after expiration of the term and after a writ of error has been filed in the appellate court, is ineffective to authorize the signing of a bill of exceptions.

5. **Criminal law ⇐1092(1)—Absence of trial judge from district not a "disability" which authorizes signing by another judge.**
The absence from the district of the judge who tried a cause is not a "disability," within the meaning of Rev. St. § 953, as amended by Act Cong. June 5, 1900, § 1 (Comp. St. § 1590), which authorizes another judge who is within the district to allow and sign a bill of exceptions.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Disability.]

6. **Criminal law ⇐1092(14)—When signed by another than trial judge, certificate should show reason.**
Where a bill of exceptions is signed by one who was not the trial judge, he should expressly state in his certificate the reason why he, and not the trial judge, allowed and signed the bill.

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

Criminal prosecution by the United States against Joseph Ulmer and others. Judgment of conviction, and defendants bring error. Affirmed.

The plaintiffs in error were defendants below and will be hereinafter referred to as defendants, and the defendant in error, the plaintiff below, will be in like manner referred to as the plaintiff. The defendants were tried and convicted under an indictment charging the use of the mails to defraud. The indictment contained three counts. The first and second counts charged violations of section 215 of the Criminal Code. The third charged conspiracy, in violation of sections 37 and 215 of that Code. The third count was quashed during the course of the instructions to the jury.

Section 37 relates to conspiring to commit an offense against the United States. 10 U. S. Comp. Stat. 1916, p. 12552. Section 215 relates to the use of the mails to promote frauds. 10 U. S. Comp. Stat. 1916, p. 12796. The first and second counts are alike, except in the description of the letters sent

through the mails. Each letter was alleged to have been from the company to a customer, and acknowledged a receipt of an order for whisky.

The indictment charges a scheme to defraud, and alleged that the defendants falsely and fraudulently represented and pretended to the persons intended to be entrapped and deceived that they were members and acting under the authority of the company, which they falsely and fraudulently represented to be a distiller and distributor of whisky; that it was part of the scheme to induce the victims to open correspondence with them concerning the sale of whiskies represented to be of high grade of the name of "Seminole Club" and "Overbrook Rye"; that the defendants intended to sell the victims certain cheap whiskies, which they would obtain from distillers, and to convert to their own use the proceeds, without profit to the victims.

It was further charged, as part of the fraudulent scheme, that the defendants represented to the victims that the company would deliver to them the original warehouse receipt for the whisky purchased; that the whisky could not be released from the bonded warehouse, except upon presentation of the warehouse receipt; that the victims could obtain the whiskies by making small cash payments and giving notes for the balance due: that the victims would be sole agents in the territory in which they resided; that the warehouse receipts to be delivered were issued in deference to the laws of the United States; and other similar misleading things. It was also alleged that each of the aforesaid representations, as well as others, made to the victims, as the defendants well knew, was false and fraudulent, intended to mislead and defraud the victims, the purpose being to induce the victims to part with their money and property in the purchase of the whiskies, and that the defendants knew that the certificates were of no value and were not issued in deference to any law of the United States. It was then alleged that, for the purpose of executing the scheme, the defendants placed and caused to be placed in the United States mails certain letters to which reference is made above.

The defendants were salesmen employed by the Seminole Distilling & Distributing Company, a New York corporation, whose business consisted in purchasing from distillers large quantities of whisky, which was stored in United States bonded warehouses. The company also distilled its own whisky. The company sold the whisky by means of contracts or certificates through the defendants and other salesmen.

The trial began on March 11, 1918, and was concluded on March 28, 1918. The jury returned a verdict of guilty on all the counts. Sentence was deferred until April 3d, when counsel for the defendants were heard at length. Judge Mack denied various motions made and said: "I haven't any doubt, or reasonable doubt, or any doubt at all, as to the correctness of the verdict under the law the jury has reached. I haven't any doubt as to the guilt of each one of these men."

Richard Kobsa and Joseph Ulmer were thereupon sentenced to imprisonment to 2 years in the penitentiary at Atlanta. Henry Kobsa was sentenced to 60 days in jail and to pay a fine of $500. Rudolph Szathmary was sentenced to 6 months in jail. There are 43 assignments of error. Most of these assignments appear to have been abandoned, not being mentioned in the printed brief or referred to in the oral argument.

Alfred M. Simon, of New York City (A. M. Simon and Charles Fredericks, of New York City, of counsel), for plaintiffs in error.

Francis C. Caffey, U. S. Atty., and E. Paul Yaselli, Asst. Dist. Atty., both of New York City, for the United States.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] This court on March 29, 1919, directed an order to be entered giving to the defendants the privilege of dispensing with the printing of the record and to argue "the writ of error upon a typewritten record."

The court has been furnished with the stenographer's minutes in three typewritten volumes. An examination of these volumes shows that they have not been certified. They do not pretend to be a bill of exceptions, and there is nothing about them which entitled this court to examine them.

The court has also been furnished with the following set of papers: A copy of the indictment; an amended bill of exceptions (so called), which is not signed by the judge who tried the case, and who came from outside the district, but by one of the resident judges; an amended assignment of error; a writ of error; a petition for a writ of error; an order allowing a writ of error; a stipulation, and certificate. The certificate is to the effect that the foregoing is a correct transcript of the record "in the above-entitled matter as agreed on by the parties." We took occasion to point out in Buessel v. United States, 258 Fed. 811, 817, 170 C. C. A. 105, that a stipulation does not make the matter stipulated a part of the record; and we now take this opportunity to add to what we there said by stating that matters stipulated by counsel cannot be made a part of the record by the certificate of the judge that the stipulated matter is a correct transcript of the record "as agreed on by the parties."

The trial was concluded on March 28, 1918. The amended bill of exceptions was signed on March 4, 1919. There is nothing in the record to show that the regular time within which a bill of exceptions could be signed had been extended. Under rule 5 of the District Court for the Southern District of New York, in which court the trial of this case took place, the bill might have been signed within 90 days from the date of the judgment. In Blisse v. United States, 263 Fed. 961, decided by this court at this term, we considered at length the time within which a bill of exceptions can be settled. The bill must be signed within the term at which the judgment is entered, unless during the term the time is extended, or unless it is signed thereafter by consent of the parties previously given. We also declared in that case that after a writ of error has been filed and perfected the cause comes within the authority of the appellate court alone.

[2] It is true that we have in this case an amended bill of exceptions. But the power to amend a bill of exceptions, like the power to allow the bill in the first instance, cannot be exercised after the court below has lost its power over the case, as when the term has expired without control of the case having been reserved. Michigan Insurance Bank v. Eldred, 143 U. S. 293, 298, 12 Sup. Ct. 450, 36 L. Ed. 162.

[3] And the court below loses its power over the case and its right to settle the bill of exceptions after the writ of error is filed in this court. In this case the return was not made until January 21, 1920. That, however, does not help the appellants; it not appearing that there were any extensions of time, properly made in the court below, for the allowance and signing of the bill.

[4] It does not appear in this case that there was consent of the parties to the signing of the bill after the term expired. Consent of the parties, given during the term, may be sufficient authority for the sign-

ing of the bill after the term expired. Waldron v. Waldron, 156 U. S. 361, 378, 15 Sup. Ct. 383, 39 L. Ed. 453. But in Blisse v. United States, supra, we stated our opinion to be that consent of the parties, even if expressly given, would be ineffective, if given after the writ of error had removed the case into this court.

[5] There is another matter which needs consideration. We have heretofore stated in this opinion that the amended bill of exceptions was not signed by the judge who tried the case, and who came from outside the district, but by one of the judges resident within the district. The question to be considered is whether such resident judge is authorized to settle a bill of exceptions in a case he did not try. The Act of Congress of June 1, 1872, c. 255, § 4, 17 Stat. 197 (Comp. St. § 1590), provided as follows:

"A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat at the trial of the cause, without any seal of court or judge annexed thereto."

This provision was passed on by the Supreme Court in 1899 in Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163. The court held the provision meant that no bill of exceptions could be deemed sufficiently authenticated, unless signed by the judge who sat at the trial, or by the presiding judge, if more than one sat. In that case the bill of exceptions was not signed by the judge who tried the case, but was signed by his successor in office, several months after the trial. The court held it could not be considered. The opinion states:

"It is settled that allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial. What took place at the trial, and is a proper subject of exception, can only be judicially known by the judge who has acted in that capacity. Such knowledge cannot be brought to a judge who did not participate in the trial, or to a judge who has succeeded to a judge who did, by what purports to be a bill of exceptions, but which has not been signed and allowed by the trial judge."

The provision was also construed by the Circuit Court of Appeals in the Fourth Circuit in Oxford & Coast Line R. Co. v. Union Bank of Richmond, 153 Fed. 723, 82 C. C. A. 609, and the court said:

"This provision of the statute is plain and explicit, and there can be no doubt as to its meaning. It evidently means that no bill of exceptions can be sufficiently authenticated, unless signed by a judge who sat at the trial."

After the decision of the Supreme Court, and no doubt because of it, Congress passed the Act of June 5, 1900, c. 717, § 1. That act included the provision contained in the act of 1872, above set forth, with the following addition:

"And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such

ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor." 3 U. S. Comp. Stat. 1916, Annotated, p. 3168, § 1590.

The act of 1900 was construed in 1901 by the Circuit Court of Appeals of the Seventh Circuit in Western Dredging & Improvement Co. v. Heldmaier, 111 Fed. 125, 49 C. C. A. 266. The court said:

"Is such absence from the circuit a disability, within the meaning of the statute? It is an accepted canon in the construction of statutes that 'when particular words are followed by general ones the latter are to be held to apply to persons and things of the same kind as those which precede.' * * * In the case at bar the statute authorizes the allowance and signing of the bill of exceptions by a judge other than the trial judge only in case of 'death, sickness or other disability' of the trial judge. 'Noscitur a sociis.' The term 'other disability' means disability of like character to death or sickness, not a disability arising from temporary absence from the district or circuit, if, indeed, legal disability could arise by reason of absence from the district. The statute means a physical or mental disability arising from either death, sickness, insanity, or disorder of like character, by reason of which the judge was disabled from the performance of judicial function.

"The mere absence from the district or circuit in which the case was tried is not such a disability. If it be needful that the trial judge should be personally present in the district to allow and sign the bill of exceptions, his presence should be procured. In the district from which this cause comes it is usual to procure the attendance of the District Judges from other districts to hold court in aid of the dispatch of business. It is not supposable that the statute designed that during the temporary absence of the trial judge from the district the difficult and delicate duty of correctly stating the conduct of trials held by him should be devolved upon a judge wholly uninformed in respect thereto. The statute sought to provide for an emergency where there would be a failure of justice unless the extraordinary remedy could be employed. We are of the opinion that the statute should not be extended to the case before us, and that no legal cause is stated for the allowance and signing of the bill of exceptions by a judge other than the trial judge."

The Circuit Court of Appeals in the Eighth Circuit, in Sanborn v. Bay, 194 Fed. 37, 114 C. C. A. 57, had this matter under consideration. The trial judge, after the trial and before the bill of exceptions was signed, was appointed a Circuit Judge to serve in the Commerce Court, and the court held that his acceptance of the appointment disqualified him while so serving from allowing the bill of exceptions, and that the bill could properly be allowed and be signed by another judge appointed or designated temporarily to preside in such court. The Case of the American Bonding & Trust Company was not followed; the court saying:

"While we might well agree with the conclusion reached in that particular case, we cannot think the act of 1900 was intended by Congress to limit the 'disqualification' referred to, to one occasioned by physical or mental ailment. This in our opinion would be too narrow a construction. It would not seem to accomplish the legislative purpose or afford the relief which Congress intended to afford by the language actually employed. Inability to perform duty occasioned by death or sickness was obviously not the only disability Congress had in mind. It employed a comprehensive term sufficient to cover all disqualifications, and we do not think the artificial rule, 'noscitur a sociis,' invoked by counsel, was ever intended to be employed to thwart an obvious purpose. Nothing in fact could create a more effective 'disability' than an utter

disqualification of the presiding judge to perform the act which Congress attempted to provide for."

It is apparent from the above decisions that the act of Congress is somewhat ambiguous, and its application to the facts of this case not altogether free from doubt. But the object of all interpretation and construction of statutes is to ascertain and carry into effect the intention of the law makers. The literal interpretation of a statute may lead to an absurdity and fail to express the real intent of the Legislature. When this is the case, it is well settled that the spirit of the law is to control the letter, and that a matter which is within the intention of the statute is as much within the statute as if it were within the letter, and that the statute is to be so construed as to advance the remedy and suppress the mischief as contemplated by the legislators. See Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

But was it the intention of the lawmakers to authorize a judge, who did not sit in a case, but who is resident within the district, to sign a bill of exceptions for a judge who is still in office, but who at the time the bill is to be signed happens to be outside the district in which the trial occurred? A majority of the court are not satisfied that the Congress had any such intention. In view of the explicit decision of the Supreme Court in Malony v. Adsit, supra, the majority are of the opinion that, if Congress had intended such a result, the language used in the Act of June 5, 1900, would have been more clearly and certainly indicated. The lawmakers must have had that decision fresh in their minds, and as we have already said we have no doubt the act was passed because of what that case decided. The majority of this court, therefore, are of the opinion expressed by the Circuit Court of Appeals in the Seventh Circuit in Western Dredging & Improvement Co. v. Heldmaier, supra, and hold that the absence of the trial judge from the district is not a disability within the meaning of the statute, so as to allow the bill to be allowed and signed by another judge who is within the district.

[6] It ought to be said, in any case, that where a bill of exceptions is signed by one who was not the trial judge he should in doing so expressly state in his certificate the reason why he, and not the trial judge, allowed and signed the bill. Unless this is done, this court may not know by what right one who did not try the case came to allow the bill. In the present case the certificate of the judge does not give us any information whatever upon the subject. In this connection we may also repeat what we said in the Blisse Case, supra:

"Where a bill of exceptions is signed after the term at which the judgment is rendered, but within a period allowed by an order made within the term extending the time for its settlement, or by virtue of consent of parties duly given, it ought to contain an express statement to that effect, so that it may affirmatively appear that the signing and filing of the same were with due authority."

That statement was made after the amended bill of exceptions in the instant case was signed, and the failure to find such a statement in the present bill is not on that account made the subject of criticism.

This court listened to the argument of this case without our attention being called to the facts above discussed. These facts were disclosed by our own examination of the case after the argument was concluded. Notwithstanding the fact that the government's counsel has not objected to the absence of a bill of exceptions, we are constrained by the decisions of the Supreme Court, and by those of our own court as well, to dispose of this case without examining the errors alleged.

The errors relied upon by the defendants relate to what is asserted to be the wrongful admission of evidence, and to the failure of the government to make out its case, and therefore to the alleged error of the court in denying the motion to dismiss the indictment. These questions all depend upon a bill of exceptions, and, as there is no bill of exceptions, there is nothing to consider.

Judgment affirmed.

PENNSYLVANIA CO. v. CLARK (two cases).

(Circuit Court of Appeals, Sixth Circuit. June 8, 1920.)

Nos. 3369, 3370.

1. **Carriers ⇐316(5)—Proof of collision of train with boulder makes prima facie case.**
   Proof of collision of a train with a boulder, and injury to a passenger resulting from derailment, makes out a prima facie case.
2. **Trial ⇐420—Introduction of evidence waives motion for directed verdict.**
   Where defendant introduced evidence after its motion for directed verdict was overruled, the same was waived.
3. **Pleading ⇐237(6)—Amendment should be allowed to conform pleading to proof.**
   In an action for injuries suffered by a passenger when the train struck or was struck by a boulder, variance between averment that the train struck the boulder and proof the boulder fell from the embankment and struck the train could be cured by trial amendment, which should be allowed.
4. **Carriers ⇐320(12)—Evidence of carrier's negligence sufficient to go to jury, regardless of presumption.**
   Regardless of the doctrine of res ipsa loquitur, evidence of a carrier's negligence in failing to frequently inspect an embankment *held* sufficient to go to the jury in an action for injuries sustained by a passenger when the train struck a boulder, which fell from the embankment close to the tracks.
5. **Carriers ⇐316(1)—Carrier has burden to show its freedom from negligence.**
   The happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and, the passenger being in the exercise of due care, the burden rests on the carrier to show its whole duty was performed and that the injury was unavoidable by human foresight.
6. **Carriers ⇐314(7)—Complaint held to generally charge negligence as the proximate cause of accident to train.**
   A complaint for injuries to a passenger on a train which struck a boulder, alleging that the injuries were caused by negligence in permitting the train to be wrecked and in permitting the boulder to be on the track, charges general negligence in causing or permitting the accident, so that

the doctrine of res ipsa loquitur was applicable, despite the contention that the doctrine is not applicable where specific negligence is charged alone.

7. Appeal and error ⊜171(3)—Failure to allege derailment as causing passenger's injury not important, in view of proof and charge.
In an action for injuries to a passenger on a train striking a boulder, it is not of controlling importance that the complaint did not allege a derailment, so as to invoke the doctrine of res ipsa loquitur applied in the case, where defendant presented proof of such derailment, and the court in its charge, without objection or protest, treated the action as one for derailment.

8. Appeal and error ⊜231(3)—Mere objection does not preserve contention that evidence is too remote.
A mere "I object" does not suggest that evidence of damages was remote and purely speculative, and furnishes no ground for complaint in the appellate court on that ground.

9. Carriers ⊜320(1)—Negligence in failing to inspect embankment from which boulder fell and excessive speed held for the jury.
In an action for injuries sustained by a passenger when the train struck a boulder, the question of the carrier's negligence in failing more frequently to inspect the embankment whence the boulder fell, as well as the question of excessive speed of the train, *held* for the jury, so that a requested instruction that there was no evidence of negligence in construction or operation of train or track, etc., was properly refused.

10. Trial ⊜260(8)—Requested instruction properly refused, being covered by those given.
Where the jury were told the defendant carrier was not an insurer, that unless negligent it was not liable, and that it was not liable for pure accident, the refusal of a requested instruction that defendant was not liable unless negligent, etc., was proper, it being covered.

11. Damages ⊜216(7)—Instructions held not to allow speculative damages.
In an action for personal injuries, an instruction that plaintiff could recover for pain and suffering sustained, and such as the evidence without conjecture shows she will sustain in future, was not objectionable, as allowing the jury to enter the broad field of speculation.

12. Carriers ⊜321(3)—Instruction that carrier is responsible for failure to use extraordinary skill, correct.
An instruction that a carrier is liable as to passengers to observe the utmost caution characteristic of very prudent men, and is responsible for injuries which might have been avoided by extraordinary vigilance aided by the highest skill, is correct, being a proper statement of the carrier's liability.

13. Appeal and error ⊜274(5)—Exception held not sufficient to present contention that instruction should have been limited.
An exception to a charge on liability of a carrier, "that the defendant company as a common carrier owed the highest possible degree of care and vigilance," did not call to the court's attention the claim that the instruction should have been limited to the care consistent with the operation of the business, and so the objection is not available in the appellate court.

In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Actions by Blanche Clark and by Herbert T. Clark against the Pennsylvania Company. There were judgments for the plaintiffs, and defendant in each case brings error. Affirmed.

Union C. De Ford, of Youngstown, Ohio (Harrington, De Ford, Heim & Huxley, of Youngstown, Ohio, on the brief), for plaintiff in error.

D. F. Anderson, of Youngstown, Ohio, for defendants in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Mrs. Clark, while a passenger for hire on the Pennsylvania Company's train, was injured by the collision of the engine with a large boulder which had become detached from a high embankment closely adjoining the track and had fallen upon or close to the track, thereby causing the derailment of the greater part of the train. She sued to recover damages for her personal injuries. Her husband also sued for loss of services and expenses incurred and paid by him on account of the injury to his wife. The suits were consolidated and tried together, and there was verdict and judgment in favor of each plaintiff. The writs are to review the respective judgments.

The petition in each case alleges that on the date of the collision defendant "caused and permitted a certain large boulder to become dislodged from the side of its railroad embankment, and permitted the same to fall and remain upon its said track, and that no proper inspections were had or obtained by defendant in order to discover and remove said obstruction, all of which defendant well knew, or in the exercise of the highest degree of practicable care ought to have known"; further, that when defendant's passenger train, on which Mrs. Clark was a bona fide passenger, was passing "along said line" at a place stated, "defendant then and there permitted said train to come into a violent head-on collision with said obstruction upon said track, bringing said train to such a sudden stop that this plaintiff was thrown" etc., thereby suffering certain described injuries. The petition further avers that the injuries were the direct and proximate result of defendant's gross negligence and carelessness (1) in causing and permitting the train to be wrecked; (2) in causing and permitting the boulder to be and remain upon the track; (3) in failing and neglecting to remove the obstruction from the track; (4) in failing and neglecting to make proper inspection of its track and roadbed to discover the obstruction thereupon. The answer in each case admitted that the train upon which Mrs. Clark was riding "came into contact with an obstruction upon the track," but denied that the obstruction was caused in the manner alleged.

[1, 2] Upon the trial a prima facie case for plaintiffs was presented by way of proving the collision of the train with the boulder and the damages suffered by the respective plaintiffs. Mrs. Clark's freedom from negligence is beyond dispute. At the conclusion of the plaintiffs' testimony the defendant moved for direction of verdict in its favor. The motion was overruled. Defendant then presented its testimony, thereby waiving that motion. At the close of all the testimony, defendant's motion for direction of verdict was renewed and overruled.

[3] 1. Defendant introduced testimony to the effect that while the

train was running at about 50 miles an hour the engine collided with the boulder, which had become dislodged from a high wall of slate and shale closely bordering the track. The witness said "it came from about 25 feet up from the embankment, a kind of slate let loose from the bottom." The boulder was estimated by one witness to be about 8 feet long, 4 feet in diameter, and 2 feet thick, and by another as a little larger. Its weight was estimated at from 2 or 3 tons up to 10 tons. After colliding with the boulder, the train is said to have run its length before coming to a stop. There was testimony that the boulder did not collide with the pilot, but with the front of the engine, tearing off its side at a distance of several feet from the ground, as well as the cab. Defendant's counsel argue from this that the boulder was not on the track at the time of the collision, but was in the act of falling from the embankment. If true, there was merely a question of variance between pleadings and proofs. No such question was raised on the trial, and had it been the court could and should have allowed whatever amendment of petition was necessary to meet the proofs. Pennsylvania Co. v. Whitney (C. C. A. 6) 169 Fed. 572, 577, 95 C. C. A. 70; Pennsylvania Co. v. Cole (C. C. A. 6) 214 Fed. 948, 950, 131 C. C. A. 244; Valentine v. Quackenbush (C. C. A. 9) 239 Fed. 832, 834, 152 C. C. A. 618. Defendant's plea is inconsistent with counsel's contention, and it was not plainly impossible for a boulder of the size stated to collide with the front and side of the engine, even had it reached the ground before it was struck.

[4] The basis of the contention that verdict should have been directed for defendant is that there was no evidence of defendant's negligence. Wholly apart from the doctrine of res ipsa loquitur, hereafter referred to, we think defendant's testimony presented a question for the jury whether defendant discharged its full duty in guarding against accidents such as this. It appeared from the testimony of the section foreman that the embankment was close to the track, was more than 100 feet high, was in considerable part composed of slate and shale rock, always liable to fall, especially in freezing and thawing weather, and requiring actual testings of the face of the rock from time to time by a man let down with ropes, "to find what is loose and report it to the supervisor; he tells me to go ahead, and tells me to take it down"; that such testings had not been made for about two months before the accident, although there had been freezing and thawing weather, which "is a great deal more dangerous than in open weather. It demanded very frequent examinations. I could make an examination to-day, and in a day or so after that, if we had freezing and thawing weather, pieces might fall." While the foreman thought he had made an "examination" a week before the accident, he had no record even of that. The kind of examination did not appear, nor whether it was more than an ocular view from the ground, in the course of the usual track work, nor whether sufficient to disclose whether or not the rock was loosening. The motion to direct verdict was thus properly overruled, apart from the question of negligence in the construction and care of track and the operation of the train.

[5] But we think defendant's motion properly denied for another reason: As said in Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 443, 11 Sup. Ct. 859, 862 (35 L. Ed. 458):

> It is the "settled law in this court that the happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight." [1]

[6] Counsel concede that an allegation of the derailment of the train, without averments of negligence as a proximate cause of the resulting injuries, "clearly would have stated a prima facie case against the defendant below requiring it to produce evidence as to the causes in explanation of the accident." It is contended, however, that plaintiff did not allege the derailment of the train, nor plead general negligence in causing or permitting the accident, but merely pleaded specific acts of negligence on the part of the carrier, and therefore that the doctrine of res ipsa loquitur does not apply.

Assuming that counsel's construction of the petition is correct, his conclusion is supported by a number of authorities, including Midland Valley Ry. Co. v. Conner (C. C. A. 8) 217 Fed. 956, 133 C. C. A. 628, White v. Chicago G. W. R. R. Co. (C. C. A. 8) 246 Fed. 427, 158 C. C. A. 491, and The Great Northern (C. C. A. 9) 251 Fed. 826, 829, 163 C. C. A. 660. In fact neither Railway Co. v. Conner, supra, nor White v. Railway Co., supra, was a passenger case; and in The Great Northern, supra, the accident was caused by the plaintiff's slipping upon the bathroom floor, the sides of which sloped toward the center for the purpose of drainage. But assuming, for present purposes at least, that these cases were rightly decided, they do not help defendant, for we think the petition, fairly construed, includes a charge of general negligence, at least in permitting collision between the train and the boulder. Indeed, it might fairly be said that the charges of negligence are all general, being of two classes: (1) Permitting the train to be wrecked; and (2) permitting the boulder to be on the track. Certainly the first charge of negligence, "in causing and permitting said train to be wrecked as aforesaid," is as general as a pleading well could be, and charges no negligence in permitting the rock to be on the track. The words "as aforesaid" relate to the allegation in the same paragraph that—

> "When said passenger train had reached and was passing along said line at a place near said Bellevue, defendant then and there permitted said train to come into violent head-on collision with said obstruction upon said track, bringing said train to such a sudden stop that this plaintiff was thrown," etc.

[7] Again, it is not of controlling importance that this petition does not in terms allege a derailment. Defendant presented proof of it, and the court, without objection or protest from defendant, in its charge treated the action as one for derailment. The collision was the

[1] For a full discussion of this subject see Lee Line Steamers v. Robinson (C. C. A. 6) 218 Fed. 559, 562, et seq., 134 C. C. A. 287, L. R. A. 1916C, 358.

substantial and important thing, and was admitted by plea; the partial derailment was only incidental.

We have no occasion to determine whether or not the rule that in passenger cases negligence is presumed from the mere fact of accident applies, where specific negligence alone is pleaded; for we think the better rule, sustained by the greater weight of authority, supports the application of the rule of presumption under the pleadings here. That even an unsuccessful attempt by a plaintiff to prove by direct evidence the precise cause of the accident (plaintiffs here made no such attempt) does not estop him from relying upon the inference of negligence from the accident itself, see Cassady v. Old Colony St. Ry. Co., 184 Mass. 156, 162, 68 N. E. 10, 63 L. R. A. 285; Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 324, 68 N. E. 1087; No. Chicago St. Ry. Co. v. Cotton, 140 Ill. 486, 495, 29 N. E. 899; Walters v. Seattle, etc., Ry. Co., 48 Wash. 233, 236, 93 Pac. 419, 24 L. R. A. (N. S.) 788. And see note to Walters v. Seattle, etc., Ry. Co., supra, 24 L. R. A. (N. S.) 788 et seq.; also Thompson on Negligence, § 7643.

[8] 2. The criticism upon the admission of evidence regarding the effect of Mrs. Clark's injuries upon normal child delivery cannot be considered, for the reason that the ground of the objection was not stated. A mere "I object" did not necessarily suggest that the proposed testimony was remote and purely speculative. Robinson v. Van Hooser (C. C. A. 6) 196 Fed. 620, 624, 116 C. C. A. 294; Shea v. United States (C. C. A. 6) 251 Fed. 433, 436, 163 C. C. A. 451. For the same reason we cannot consider the objections made to the testimony of Mr. Clark regarding his expenditures by reason of his wife's injuries.

[9] 3. Defendant complains that two of its requests to charge, apparently the first and second, were not given. The first was to the effect that there is no evidence tending to prove that defendant was negligent in the construction or operation of its track, train, equipment, or appliances, and that the plaintiffs are thus not entitled to recover on any such ground of negligence. By the second verdict for defendant was instructed, unless it was found negligent in the construction, inspection, maintenance, or operation of its road, train, appliances, and equipment.

We think both these requests were properly refused. As to the first: In view of the testimony of the section foreman, we think it was a question for the jury whether due care was exercised in such a construction and location of the track with reference to the embankment as left it exposed to the constant hazard of falling rocks, and in the presence of such unstable material as this was. Moreover, the fireman testified that the train was running 50 miles an hour; that the engineer applied the emergency brakes from 3 to 5 seconds before the derailment. The jury had the right to conclude that the engineer saw the rock at the time the brakes were applied. While it was moonlight, the fireman testified that in shadow the headlight would illuminate 175 to 200 feet. The train's speed was such that even after the collision it ran, according to the fireman's estimate, about 300 feet, in addition to the several hundred feet it may well have run after the

emergency brakes were applied and before the collision. In our opinion there was a question for the jury whether due care was exercised in running in the nighttime, and at a season of the year and at a specific locality where there was unusual danger of falling rocks, with a train so equipped or so operated at such speed or otherwise that it could not be stopped within the distance within which obstructions could or should have been seen.

[10] The subject-matter of the second request was, we think, fairly covered by the charge of the court on its own motion. The jury was told that the defendant was not an insurer of the absolute safety of passengers, and that unless it was negligent in the performance of its duty it was not liable, nor would it be liable if the injury resulted from "what we call an act of God" or pure accident, unmixed with failure or neglect on defendant's part. Plaintiffs were charged with ultimate burden of proving negligence by a preponderance of the evidence. Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905.

[11] 4. The charge upon the subject of damages is criticized as permitting "the jury to go beyond what is reasonably certain to be sustained in the future and to enter upon the broad field of pure speculation." We think this criticism devoid of merit. The jury was told, in the case of Mrs. Clark, that she could recover "for such pain and suffering, both mental and physical, which she has heretofore sustained, or which the evidence may show with reasonable certainty, and without mere conjecture, she will, by the greater probability, hereafter sustain, as * * * the direct and proximate result of such injuries." Similar language was used with reference to Mr. Clark's recovery. The charge on this subject was further elaborated, but we find nothing in it which, taking the charge as a whole, justifies the criticism referred to.

[12, 13] 5. The jury were told that "the carrier is liable as to passengers to observe the utmost caution characteristic of very careful and prudent men"; also that it was responsible for injuries received by a passenger "which might have been avoided or guarded against by the exercise upon the carrier's part of extraordinary vigilance, aided by the highest skill"; and again this due care was defined as "the highest possible degree of care, aided by the highest skill and performed with the utmost diligence upon its part and upon the part of its employés." This instruction was well within the authorities. In Gleeson v. Virginia Midland Ry. Co., supra, the formula used was "unavoidable by human foresight." In Pennsylvania Co. v. Roy, 102 U. S. 451, 456 (26 L. Ed. 141), the phrase employed was "injuries received by passengers in the course of their transportation, which might have been avoided or guarded against by the exercise upon his part [the carrier's] of extraordinary vigilance, aided by the highest skill." In Stokes v. Saltonstall, 13 Pet. 181, 191 (10 L. Ed. 115), the formula used was that, "so far as human care and foresight can go, he will transport them safely." This court has stated the rule to be "the exercise of the greatest and highest degree of care and caution approv-

ed by human knowledge and experience and consistent with the nature, extent, and operation of its business." Memphis St. Ry. Co. v. Bobo, 232 Fed. 708, 711, 146 C. C. A. 634. The charge in the instant case is especially criticized as omitting the words "and consistent with the nature, extent, and operation of its business," or words of similar import. It would have been entirely proper to include in the charge that limitation, and doubtless, had the attention of the trial judge been directed to that point, such limitation would have been expressed. Defendant, however, contented itself with an exception to the charge "that the defendant company as a common carrier owed the highest possible degree of care and vigilance toward the plaintiff in transporting her as a passenger." This did not call the trial court's attention to the absence of the limitation referred to. Illinois Central R. R. Co. v. Skaggs, 240 U. S. 66, 72, 36 Sup. Ct. 249, 60 L. Ed. 528; Denison v. McNorton (C. C. A. 6) 228 Fed. 401, 408, 142 C. C. A. 631. The instruction, so far as given, being within the approved authorities, the judgment should not be reversed, for the reason now advanced.

The judgments of the District Court are affirmed.

OHIO & MICHIGAN COAL CO. v. CLARKSON COAL & DOCK CO.

(Circuit Court of Appeals, Sixth Circuit. June 14, 1920.)

No. 3359.

1. **Contracts ⇐163—Sales ⇐85(2)—Absent irreconcilable conflict between written and printed matter, effect should be given to the whole; effect of strike proviso.**

In the absence of any irreconcilable conflict between written and printed matter in a contract, when it appears that the printed matter is intended to be part of the contract, the whole must be construed together, and effect given to every part thereof, and so effect should be given to a printed provision in a contract for the sale and purchase of coal that all quotations, orders, and contracts should be subject to car supply, strikes, and causes beyond the parties' control.

2. **Contracts ⇐176(2)—Understanding of parties, when doubtful, should be submitted to jury.**

Where, from the nature of printed matter in a contract, doubt arises as to the intention and understanding of the parties thereto, such question should be submitted to the jury.

3. **Contracts ⇐23—Acceptance on condition is rejection.**

Acceptance of an offer on condition is a rejection of the proposition as made, and such acceptance does not create an enforceable contract.

4. **Pleading ⇐427—Failure to put execution of contract in issue excused, where plaintiff's evidence indicated there was no contract.**

Though defendant in an action for breach of contract of sale failed to deny the execution of the contract by affidavit, as required by District Court rule 28, declaring that the failure to so deny shall relieve plaintiff from making proof of execution, yet where plaintiff introduced correspondence as showing contract, which showed that plaintiff's acceptance contained a condition not in the proposal, defendant is entitled to introduce evidence of its salesman, who prepared the proposal, to the effect that it was subject to defendant's approval, as well as subsequent correspondence showing that the contract was not contained in the correspondence introduced.

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

5. Sales ⊂⊃85(2)—**Printed provision in defendant's letter limiting liability held binding on plaintiff.**

Where printed statements in defendant's letters relative to sale of coal that contract was subject to causes beyond defendant's control, etc., were not objected to by plaintiff, whose own communications containing similar provisions, plaintiff is precluded from denying, that defendant's agreement was subject to such conditions, and hence evidence of strikes, etc., was admissible to excuse a breach.

6. Appeal and error ⊂⊃882(8)—**Defendant held not entitled to complain of the admission of an exhibit.**

Where defendant offered numerous telegrams and letters, it cannot complain of the admission of one of them, which was received without objection, but may have been prejudicial; the others having been excluded.

In Error to the District Court of the United States for the Eastern District of Michigan; John M. Killits, Judge.

Action by the Clarkson Coal & Dock Company against the Ohio & Michigan Coal Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Justin R. Whiting and Sanford W. Ladd, both of Detroit, Mich. (Warren, Cady, Ladd & Hill, of Detroit, Mich., and Atkinson & Northmore, on the brief), for plaintiff in error.

James O. Murfin, of Detroit, Mich. (Stellwagen & McKay, of Detroit, Mich., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The Clarkson Coal & Dock Company commenced an action in the court below to recover damages from the Ohio & Michigan Coal Company for breach of contract for the purchase of one cargo of about 6,500 tons of West Virginia splint coal in the proportion of 65 per cent. lump and 35 per cent. nut and slack, to be floated in May of 1916.

It is averred in the declaration that the defendant wholly failed and refused to deliver this cargo of coal during the month of May, 1916, but at various intervals between the 1st day of June, 1916, and the 5th day of October, 1916, did offer various excuses for its failure to do so and requested further time in which to furnish the same; that the plaintiff acquiesced in this request up to the latter part of October, 1916, but that defendant wholly failed, neglected, and refused to deliver this cargo of coal to the damage of plaintiff in the sum of $30,000.

The declaration avers that a copy of this contract, marked Exhibit ———, is attached thereto. This does not appear in the printed record, but the accuracy of the copy of this exhibit printed in defendant in error's brief is not questioned by plaintiff in error.

To this declaration the defendant filed a plea of the general issue. Later an amended plea was filed, with the following special notice:

"You will please take notice that the defendant will show, and insist upon in its defense, that if it be shown that any coal remains unshipped and which

was due to the Clarkson Coal & Dock Company, a corporation, under any contract, or order, as pleaded in said declaration, that such nonshipment was due to contingencies beyond the control of the Ohio & Michigan Coal Company because of delays and losses in railroad transportation, combinations, turn-outs, strikes among miners, car shortages, or other causes beyond its control, whereby it was unable to ship the cargo of coal claimed to be due said plaintiff from defendant, Ohio & Michigan Coal Company, as alleged in said declaration."

During the trial of the cause the defendant sought to amend the amended plea by adding thereto:

"Also you will please take notice that the defendant will show, and insist upon in its defense, that on or about the 13th day of October, 1916, the plaintiff and said defendant entered into a series of negotiations continuing up until the 27th day of October, 1916, by and through which said plaintiff acquiesced in said defendant's selling and disposing of such coal as it had accumulated, to be used by it towards the performing of the modified contract here in suit; that said action by said plaintiff rendered the performance of said contract by said defendant impossible; that said action was inconsistent with the demand of said plaintiff that the cargo of coal here in question be delivered thereafter and on or about November 10, 1916, and resulted in a modification and abandonment of the contract or modified contract as pleaded in plaintiff's declaration."

The court refused to permit the defendant to file this amendment to its amended plea, to which ruling of the court the defendant excepted. The court also rejected all evidence relating to the negotiations for settlement offered by defendant, except the telegram from the plaintiff to the defendant dated October 27, 1916 (Exhibit 79), to the admission of which telegram counsel for plaintiff did not object.

The court also rejected evidence tending to show delays in railroad transportation, car shortages, or other causes beyond the control of the defendant, and directed the jury to return a verdict for the plaintiff for damages in an amount equal to the difference between the contract price and the fair market price as shown by the evidence in the case, during the month of October, 1916, and up to the 27th of that month, to all of which the defendant at the time excepted. The defendant also asked the court to give in charge to the jury a number of special requests, which the court refused to give, and to which refusal the defendant excepted.

On the trial of this cause the plaintiff offered in evidence Exhibits 5 and 5–A. Exhibit 5 was not signed by the Clarkson Coal & Dock Company, but it was accepted on the part of the Ohio & Michigan Coal Company by J. A. Devoy. Exhibit 5–A was signed by the Clarkson Coal & Dock Company and forwarded by it directly to the home office of the Ohio & Michigan Coal Company.

The fact that Exhibit 5 was not signed by the Clarkson Coal & Dock Company would, perhaps, not be important, if Exhibit 5–A, signed by the plaintiff company and sent by it to the home office of the Ohio & Michigan Coal Company at Detroit, Mich., were an exact copy of Exhibit 5. Exhibit 5–A is written upon two sheets of letter paper. At the bottom of the first sheet, and preceding the signature of the Clarkson Coal & Dock Company, the following provisions and conditions are printed:

"All quotations, orders, and contracts are subject to car supply, strikes, accidents, and causes beyond our control."

These provisions and conditions are not found in Exhibit 5, signed by J. A. Devoy on behalf of the Ohio & Michigan Coal Company. This printed matter is not in small, unreadable type on the side margin of the sheet; but, on the contrary, it is at the bottom of the first page, and immediately follows the typewritten matter on that page. It is just as prominent and as easily read as any other part of the exhibit. These conditions are naturally incident to a contract of this kind, or any other kind, where the ability of the contracting parties to perform depends largely upon other individuals or agencies, over whom they can exercise no control.

[1] The Clarkson Coal & Dock Company is in no position to claim that this printed matter on its letter sheet is of no importance and was not intended by it to become a part of this contract. Evidently it was its deliberate and carefully considered intent and purpose that these conditions should apply in each and every contract made by it, either for the purchase or sale of coal; otherwise, the printing of the same upon its stationery would have been a useless and an idle performance. There is no conflict or repugnancy between the typewritten and printed parts of this exhibit. The law is well settled that, in the absence of any irreconcilable conflict between the written and printed matter, when it appears that the printed matter is intended to be a part of the contract, the whole must be construed together and effect given to every part thereof. Poel v. Brunswick-Balke-Collender Co., 216 N. Y. 310, 110 N. E. 619; Bank v. Insurance Co., 83 Ohio St. 309, 94 N. E. 834.

[2] Even if, from the nature of the printed matter or its position in the exhibit, a doubt arises as to the intention and understanding of the parties in reference thereto, then the question of their intention and understanding must be submitted to the jury. Clark v. Woodruff, 83 N. Y. 518, 522; Sturtevant Co. v. Fire Proof Film Co., 216 N. Y. 199, 110 N. E. 440, L. R. A. 1916D, 1069.

[3-5] It is claimed, however, that these provisions and conditions found in Exhibit 5–A, that do not appear in Exhibit 5, even if they should be read as a part of Exhibit 5–A, are of no importance in this litigation, for the reason that they apply only to the Clarkson Coal & Dock Company, and are not available to the Ohio & Michigan Coal Company as a defense to this action. That is no doubt true, but, if there is a material difference between these two exhibits, that fact is of vital importance in determining which exhibit, if either, expresses the true contract between these parties. Mr. Devoy, representing the Ohio & Michigan Coal Company, signed Exhibit 5. It was not signed by the Clarkson Coal & Dock Company, but that company did sign Exhibit 5–A, which exhibit contains these printed conditions and provisions for the benefit of the Clarkson Coal & Dock Company. This was not signed by Devoy. It necessarily follows that, if these two exhibits differ materially, the signature of the Clarkson Coal & Dock Company to Exhibit 5–A is not equivalent to its signing Exhibit

5. Counsel for plaintiff below recognized this fact and stated in open court:

"That if Exhibit 5 was not the original we are out of court, because there is no acceptance of it under the statute of frauds, and we would have to stop right now."

If there had been a breach of this contract on the part of the Clarkson Coal & Dock Company, and the defendant had brought an action for damages for such breach, the materiality of the difference between Exhibit 5 and Exhibit 5–A would at once become apparent, for the Ohio & Michigan Coal Company would have been compelled to predicate its action upon the exhibit signed by the Clarkson Coal & Dock Company, and its own letter accepting the same with modifications, and the letter from the Clarkson Coal & Dock Company accepting these modifications, as evidencing the true contract upon which the minds of the contracting parties finally met. The Clarkson Coal & Dock Company could then have predicated its defense upon any one or all of the printed conditions appearing in Exhibit 5–A which defenses would not have been available to it if Exhibit 5–A were an exact copy of Exhibit 5. The fact that the Clarkson Coal & Dock Company brought this action does not affect the question of the terms of the contract between it and the defendant.

It is claimed, however, that there is no such issue presented by the pleadings in this case; that under rule 28 of the District Court the failure of the defendant to deny by affidavit the execution of the contract declared upon relieves the plaintiff from making proof of the execution thereof; that under this rule the contract as pleaded must be accepted by the court as the contract between the parties without further inquiry in reference thereto.

The plaintiff, however, did not rely upon this rule, but on the contrary introduced in evidence Exhibits 5 and 5–A. If the trial court entertained any doubt that it was the intention of the parties that these printed conditions in 5–A should be part of their contract, it should have submitted that question to the jury. On the other hand, if from the position of this printed matter, the size of the type used, and its prominence in the exhibit, the trial court was of the opinion that it was clearly intended by the parties to be and become a part thereof, then, if nothing else appeared, it would have been the duty of the court to have directed a verdict for the defendant. The defendant, however, upon cross-examination of Mr. Clarkson, introduced Exhibits 8 and 9. These exhibits, taken in connection with Exhibits 5 and 5–A, and particularly 5–A, constitute a contract between the parties substantially as averred in the declaration, but containing other and further terms and conditions not set forth in the declaration or the paper purporting to be a copy of the contract attached thereto.

Exhibit 8 is the reply of the Ohio & Michigan Coal Company to the letter (Exhibit 5–A) of the Clarkson Coal & Dock Company. This exhibit was written on the letter sheet of the Ohio & Michigan Coal Company, which, like the letter sheets of the Clarkson Coal & Dock Company, upon which Exhibit 5–A was written, contains printed con-

ditions of sale. These conditions are found directly in the body of the exhibit, which is substantially in the following form:

"March 21, 1916.

"Worrell Clarkson, Pres. Clarkson Coal & Dock Co., St. Paul, Minn.—Dear Sir."

This part is in typewriting; then follows the printed matter under the caption, also printed, "Conditions of Sale and Shipment." Under this caption are printed six separate paragraphs; the first paragraph providing as to the payment of freight, the second as to when the contract shall be considered binding, the third as to the time of payment, the fourth as to delays in railroad transportation, car shortages, and the like, the fifth as to the mine weights, and the sixth as to cancellation of orders. Then follows the rest of the typewritten part.

In this letter the Ohio & Michigan Coal Company refused to approve the terms as written in Exhibit 5–A but, on the contrary, informed the Clarkson Coal & Dock Company that this would be acceptable to it with this proviso:

"That the coal usually runs 65 per cent. lump over a 1½" screen and 35 per cent. nut and slack; but should this percentage vary either way from 1 to 3 per cent., we will not permit it to be cause for adjustment in price. In other words, we do not want any questions raised on technicalities."

This letter also clearly indicated to the plaintiff that at the time it was written the defendant did not understand that any contract had been made by it or by any one in its behalf; on the contrary, it specifically stated that the proposition contained in Exhibit 5–A was not acceptable to it without a further proviso in reference to the percentage of lump, nut and slack coal. A proposal to accept an offer, if modified, or an acceptance subject to terms and conditions, is equivalent to the rejection of the proposition as made. Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240; Steamship Co. v. Mexican C. R. Co., 134 N. Y. 15, 31 N. E. 261, 17 L. R. A. 359. The reply of the plaintiff did not suggest that it then understood that the contract had been closed; on the contrary, it consented to this change in terms.

The defendant offered to prove by the testimony of Mr. Devoy, its sales agent, that at the time he signed Exhibit 5 he informed Mr. Clarkson, president of the Clarkson Coal & Dock Company, of the limitation upon his authority to contract, and that all contracts were subject to approval at the home office. The fact that Mr. Clarkson sent Exhibit 5–A, signed by him, to the home office of the defendant company, would indicate that he had knowledge that any contract made with Mr. Devoy was subject to the approval at the home office of the defendant company; otherwise no reason would appear why Exhibit 5–A was not handed directly to Mr. Devoy at the time Mr. Devoy signed and handed Exhibit 5 to the Clarkson Coal & Dock Company.

The court rejected the testimony of Mr. Devoy upon the theory that under rule 28 the execution of this contract was not a disputed question in this case. Undoubtedly that would have been a correct ruling,

had the plaintiff refrained from offering any evidence upon that subject, or if the court had rejected the evidence offered by plaintiff; but certainly the plaintiff could not voluntarily offer evidence disproving, or at least tending to disprove, the execution of the contract declared upon, and then claim the benefit of the rule relieving him from proving its execution and terms.

The evidence of Mr. Devoy was competent, and should have been received by the court; but that is not now material, for the reason that it fully appears from Exhibits 5–A, 8, and 9 that the contract was, in fact, finally negotiated by the managing officers of the Ohio & Michigan Coal Company and the Clarkson Coal & Dock Company by correspondence, and that the minds of the parties never met until the receipt of the letter of Mr. Clarkson to the defendant (Exhibit 9) consenting to the change in reference to the percentage of lump, nut, and slack coal.

While the typewritten portions of Exhibit 8 refer only to the modification in reference to the percentage of nut, lump, and slack, and the reply of the Clarkson Coal & Dock Company is confined to the same subject-matter, nevertheless the printed portions of Exhibit 8, accepting the order of the Clarkson Coal & Dock Company for this cargo of coal, sets forth at length the conditions of sale and shipment. This letter was before the Clarkson Coal & Dock Company when it wrote Exhibit 9, and it was not at liberty to ignore any of these conditions of sale so prominently brought to its attention in this letter. Each of the contracting parties having undertaken in an identical manner to inject printed conditions into the contract, neither is in a position to claim that the printed conditions in its own letters and in the letters of the other party must be wholly ignored, in determining the true terms and conditions of the contract.

The failure of the Clarkson Coal & Dock Company to object at that time to any of these printed conditions was equivalent to its assent thereto, in so far, at least, as these conditions do not conflict with any of the typewritten matter in Exhibit 8 and Exhibit 5–A. For the purpose of this case it is unnecessary to discuss any question of conflict between the several printed provisions in Exhibit 8 and the typewritten matter in Exhibit 5–A. The only one, here important, is paragraph 4, which reads as follows:

"All sales, whether price quoted f. o. b. destination or mines, are subject to delays and losses in railroad transportation and to railroad overcharges, combines and turn-outs, strikes among miners, car shortage, or any causes beyond our control."

It is apparent that there is no irreconcilable conflict between the provisions and conditions of this paragraph and the typewritten matter in any of these exhibits, and therefore the same effect must be given to the conditions printed in this paragraph as to the printed conditions in Exhibit 5–A. It follows that the trial court erred in excluding evidence in reference to delays in railroad transportation, car shortage, and other causes beyond the control of the defendant, and in directing the jury to return a verdict for some amount for the plaintiff.

[6] The defendant below offered in evidence certain letters and telegrams (Exhibits 69 to 79), all of which, except 79, were rejected by the court upon the theory that they were negotiations for a settlement of this controversy. The plaintiff naturally made no objection to the introduction of Exhibit 79, although it was subject to the same objection. In the absence of the other exhibits, it perhaps was prejudicial to the defendant; but the defendant, having offered that exhibit in evidence, cannot now complain, nor does the fact that it was admitted without objection make the other exhibits competent evidence in this case. Of course, if it had been offered by the plaintiff and received by the court, then the defendant undoubtedly would have had the right to introduce all the other exhibits in relation to this attempted settlement.

There are other questions presented by this record that, in view of the conclusions reached by this court, are not important in the disposition of this case, nor are they likely to become important upon a retrial of the same.

For the reasons above stated, the judgment of the District Court is reversed, and cause remanded for further proceedings and a new trial according to law.

WALDRON v. DIRECTOR GENERAL OF RAILROADS.

(Circuit Court of Appeals, Fourth Circuit. April 6, 1920.)

No. 1777.

1. **Railroads ⇐275(4)—Liable for injury to employé of shipper from defective car.**
   A carrier, furnishing cars to be loaded for shipment, is liable for injuries to the shipper or his employés, due to a defect in a car which might have been discovered by reasonable care in inspection, and it cannot impose this duty to furnish cars reasonably safe on the shipper to its own relief from liability for injury to an employé of the shipper.

2. **Master and servant ⇐99—Railroads ⇐266—Both carrier and shipper liable for negligence in furnishing defective car to employés for loading.**
   If the carrier is negligent in furnishing a defective car to the shipper, and the shipper in turn is negligent in furnishing it to his employé to be loaded, the carrier and shipper are both liable for resulting injury to the employé, but as between carrier and shipper the liability of the carrier is primary.

3. **Railroads ⇐278(2)—Use of obviously dangerously defective car assumption of risk.**
   While neither the shipper nor his employé owes any duty to the carrier to search for defects, the use of a car obviously so defective as to be dangerous would be either assumption of risk or contributory negligence on the part of the person operating it, according to the circumstances.

4. **Courts ⇐372(3)—Federal courts not bound by state decisions on matter of general law.**
   The question of liability of a carrier for injury to an employé of a shipper caused by a defective car furnished for loading is one of general law, in which state decisions are not binding on the federal courts.

5. **Railroads ⇐282(9)—Assumption of risk by employé of shipper using defective car question for jury.**
Whether an employé of a shipper, injured by reason of a defective car furnished for loading by a carrier, was chargeable with assumption of risk or contributory negligence, *held* questions for the jury.

6. **Master and servant ⇐217(1)—Risks from master's negligence, not obvious, are not assumed.**
Risks not naturally incident to the occupation, but arising out of the master's negligence, the employé is not treated as assuming, until he becomes aware of the defect or disrepair, and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.

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

Action by Earl Waldron against the Director General of Railroads. Judgment for defendant, and plaintiff brings error. Reversed.

George W. Howard, of Welch, W. Va., for plaintiff in error.

Graham Sale, of Welch, W. Va. (Sale & Tucker, of Welch, W. Va., and F. M. Rivinus, of Philadelphia, Pa., on the brief), for defendant in error.

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

WOODS, Circuit Judge. The plaintiff, an employé of the Solvay Collieries Company, alleges liability of the Director General of Railroads for the loss of his arm in the operation of a coal car, on the ground that the accident was due to a defective brake on the car. The controlling question is whether the District Court was right in directing a verdict for defendant on the evidence offered by the plaintiff. Plaintiff's case was as follows:

The Norfolk & Western Railroad furnished on a side track cars to be loaded with coal at the tipple of the Solvay Collieries Company. The cars were selected by the railroad company, without suggestion from the coal company. The railroad company knew they were loaded on a track of 2 per cent. grade, while they were held by brakes. On May 30, 1919, plaintiff and Ed Clifton, his assistant, were engaged in loading a car from the tipple. When the car was about half loaded, Clifton, who operated the brake, told plaintiff it was weak, and he did not know whether it would hold or not. It was especially important to keep the coal car in control, because there was a car below on the same track from which several persons were unloading furniture. Under these circumstances, as a precaution, the plaintiff placed a scotch on the track about a car length below to stop the car in case the brake should not hold. In the course of loading the car, it was necessary to move and stop it several times. The brakes held the car at these stops. When the loading was completed, and Clifton released the brakes, so that the car might move forward by gravity, he called to the plaintiff that the brakes would not hold. Seeing the car was not controlled by the brake and the scotch, which he had placed on the

track, and that it would collide with the furniture car in which men were working, the plaintiff, in the effort to control the car, placed another piece of timber before one of the rear wheels of the truck. In doing so his hand was caught by the wheel and his arm cut off. An experienced machinist and inspector examined the brake after the accident, and found a slack in the brake due to worn shoes.

When the empty coal cars were placed on the siding, the coal company took entire charge of them to the exclusion of the railroad company until they were returned loaded with coal for shipment. The railroad company sometimes furnished cars with defective brakes, and sometimes with no brakes. Plaintiff was in charge of the tipple, and either he or his helper, Clifton, was expected by the coal company to examine the brakes before the loading commenced. The outside foreman of the coal company testified:

"I give them instructions that, if they found a car that they couldn't load, to drop it on through. We have had cars in there without any brakes on them at all. If there was plenty of cars, and if there was a shortage of cars, to try to load everything there was there, if they could do it."

He testified further there was no shortage of cars on that day. Plaintiff, according to his testimony, did not know very much about brakes, and did not examine them.

[1-3] The following statement of the law will hardly be questioned, as required by reason and comparison of the principles announced in the cases below cited: A carrier, furnishing cars to be loaded for shipment, is liable for injuries to the shipper or his employé, due to a defect in the car which might have been discovered by reasonable care in inspection. The carrier cannot impose this duty to furnish cars reasonably safe on the shipper, to its own relief from liability for injuries to an employé of the shipper. If the carrier is negligent in furnishing a defective car to the shipper, and the shipper in turn is negligent in furnishing it to his employé to be loaded, the carrier and shipper are both liable to the injured employé; for the proximate cause of the injury is the defective car. But as between the carrier and the shipper the liability of the carrier is primary, for the reason that the shipper has a right to assume that cars furnished have been inspected by the carrier and found reasonably safe. While neither the shipper nor his employé owe any duty to the carrier to search for defects, the use of a car obviously so defective as to be dangerous would be either assumption of risk or contributory negligence, according to the circumstances on the part of the person operating it. Baltimore & P. R. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624; Texas & Pacific Ry. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188; Chicago, etc., R. Co. v. Pritchard, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857, and note; Ladd v. New York, etc., R. Co., 193 Mass. 359, 79 N. E. 742, 9 L. R. A. (N. S.) 874, 9 Ann. Cas. 988, and note; D'Almeida v. Boston, etc., R. Co., 209 Mass. 81, 95 N. E. 398, Ann. Cas. 1913C, 751, and note; Pennsylvania R. R. Co. v. Snyder, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700; Pennsylvania R. R. v. Hummel, 167 Fed. 89, 92 C. C. A. 541.

[4] Risque's Adm'r v. Chesapeake & O. Ry. Co., 104 Va. 476, 51 S. E. 730, and Anderson v. Baltimore & O. R. Co., 74 W. Va. 17, 81 S. E. 579, are relied on as holding that the duty is on the shipper who receives cars from a carrier to be loaded to inspect them for the protection of his employés to the exemption of the carrier. The first case cited does expressly so hold. The fact that the injury was to the property of third persons not employés of the shipper may distinguish the second case. But, if it be conceded that both cases hold the doctrine contended for, we think it is opposed to reason and the great weight of authority. The question being one of common law and general jurisprudence, a federal court must determine it for itself. Gardner v. Michigan Central R. R., 150 U. S. 349, 358, 14 Sup. Ct. 140, 37 L. Ed. 1107.

There was evidence that the railroad company furnished a car with a seriously defective brake, knowing that the brake would be depended on to hold the car loaded with coal on a steep grade, and that the defect in the brake was the proximate cause of the accident. If nothing else appeared, the liability of the railroad company would result.

[5, 6] The question of assumption of risk was for the jury. The risks not naturally incident to the occupation, but arising out of the master's negligence, "the employé is not treated as assuming, until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them." Seaboard Air Line v. Horton, 233 U. S. 492, 504, 34 Sup. Ct. 635, 640 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475); Gila Valley, etc., Ry. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521. A railroad company, furnishing an unsafe car, certainly stands in no better position than the master of the servant injured. It is true that, after the loading was half completed, the plaintiff had notice of his coworker's opinion that the brake was weak. But it had held in process of loading, and there is no evidence that plaintiff or his coworker, Clifton, knew there was any specific defect; and the defendant could not put upon the plaintiff or his employer the duty of diligence in discovering the defect. It follows that the question whether mere notice of weakness was under the circumstances sufficient to charge the plaintiff with notice of both the defect and the danger was for the jury.

Nor does the evidence necessarily require the inference of contributory negligence. The plaintiff and his coworker, Clifton, expected the scotch to so retard the car that the brake would hold it. Upon the jury's view of the reasonableness of this precaution and expectation will depend their decision of that issue.

When the plaintiff discovered that the brake and the scotch first provided failed to hold the car in control, it was not negligence in the emergency to try to stop the car, to save the life or property of others, by placing another scotch under the wheels, unless the action taken was heedless or reckless, or the emergency was brought about by plaintiff's own fault. The evidence did not warrant the withdrawal of

that question from the jury. Union Pacific R. Co. v. McDonald, 152 U. S. 262, 281, 14 Sup. Ct. 619, 38 L. Ed. 434; 18 R. C. L. 654, 655, and authorities cited.

Reversed.

THE OMSK. YANNOSKY v. LANE et al. LANE v. NORFOLK SHIPBUILDING & DRY DOCK CORPORATION.

(Circuit Court of Appeals, Fourth Circuit. April 6, 1920.)

Nos. 1756, 1757.

1. **Shipping ⇐84(3)—Ship liable for injury to repairer's workman by falling through open and unguarded hatchway.**
   A ship which agreed to furnish lights for workmen making repairs *held* not liable for injury to a workman by falling down an open hatchway, on the ground that the place was unlighted, where it furnished all the lights asked for by the contractor, and was not notified that some of them had temporarily gone out, but liable for negligently leaving the hatchway open and unguarded at night.

2. **Master and servant ⇐121(8)—Master liable for failure to furnish employé safe place to work.**
   A contractor for making repairs on a ship *held* liable for injury to a workman by falling through an open hatchway near the foot of a stairway at night, where its foreman sent the man down the stairway, knowing that the hatchway was open and the deck at the time unlighted.

3. **Shipping ⇐84(3)—Duty to keep ship safe for workmen making repairs.**
   When a ship contracted for repairs, it assumed the obligation to keep all parts of the ship under its control reasonably safe for the employés of the contractor, and it could not relieve itself of the duty by delegating it to another, who was discharging cargo.

4. **Master and servant ⇐280—Evidence held not to show assumption of risk.**
   Evidence *held* to sustain a finding that an employé engaged in making repairs on a ship, who was negligently sent in the dark near an open and unguarded hatchway, through which he fell, did not assume the risk.

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

Suit in admiralty by Sewell F. Lane against the steamship Omsk, Edmund Yannosky, claimant, and the Norfolk Shipbuilding & Dry Dock Corporation. Decree for libelant against the steamship alone, and claimant and libelant appeal. Modified.

W. W. Starke, of Norfolk, Va. (L. D. Starke, of Norfolk, Va., on the brief), for libelant.

Edward R. Baird, Jr., of Norfolk, Va. (Baird & White, of Norfolk, Va., and Victor E. Gartz, of New York City, on the brief), for the Omsk.

Leon T. Seawell, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for Norfolk Shipbuilding & Dry Dock Corporation.

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

WOODS, Circuit Judge. On February 26, 1918, the Russian steamship Omsk was moored at a wharf in the city of Norfolk, where she had been under repair by the Norfolk Shipbuilding & Dry Dock Corporation. The United States Shipping Company was discharging her cargo of cotton. The work of repair had been completed, and the workmen of the shipbuilding corporation, under the direction of its employé, J. C. Adams, were about to take out the bulkheads used in repairing. To get to the place of work, it was necessary for the workmen to go through an opening on the upper deck down a temporary stairway to the lower deck. On this deck, very near the place of work, was an open hatch. The place was usually well lighted, but on the evening of February 26, when Adams directed the workmen to go down, the usual electric lights were out. On the stairway there was very little light, and at the place of work hardly any. Sewell F. Lane, libelant, was one of the workmen directed to descend and engage in the work of removing the bulkheads. While waiting at the foot of the stairway for other workmen, he moved a few steps, fell through the open hatch, invisible to him, and was severely injured.

The alleged negligence on account of which he seeks to recover was in the failure to have the place of work lighted, and in leaving open and unguarded the hatch through which he fell. The District Court held the ship alone negligent and liable. The ship alleges that, if there was any negligence, it was that of the shipbuilding company, and, further, that the libelant should not recover, because he assumed the risk, and was guilty of contributory negligence. The libelant assigns error, in that the District Court did not hold the shipbuilding company also negligent and liable.

[1, 2] There can be no question that there was negligence in not having the place of work adequately lighted; but we are unable to agree that this was the negligence of the ship. It is true that the ship had agreed to furnish the lights, but the testimony is clear beyond doubt that all the lights that were called for by the shipbuilding company were furnished, and that no request was ever made to any officer of the ship for more lights, and no complaint was ever made of lack of lights, or failure of lights. Indeed, there seems to be no dispute that all the lights which had been called for were burning immediately before and after the accident, and that they went out from some unexplained cause just before the workmen were ordered to go down. Even then no notice was given by the shipbuilding company to any officer of the ship that the lights had failed, and no request was made for other lights. It was evident negligence for the shipbuilding company to direct its employés to proceed with the work in the darkness at a place where its representative knew there was an open hatch. The ship is acquitted of any negligence with respect to the lights, because it was given no notice of the failure of the lights and no opportunity to repair them.

But as between the ship and the shipbuilding company the primary liability is on the ship for leaving the hatch unguarded. The shipbuilding company under its contract had nothing to do with the management of the hatches, and it was the duty of the ship's master to see

that they were properly guarded, knowing that the employés of the shipbuilding company were working around them both day and night. It is true that it was necessary to keep the hatches open for the preservation of the cargo of cotton, but there were stanchions around the hatches, and a rope near by, which could have been attached to the stanchions, thus making the place entirely safe. No protection of this sort was used.

[3] The ship undertakes to discharge itself of the duty to keep the hatch protected by saying that it had given complete charge of the hatches to the shipping company, which was unloading the cotton, and that its employés had left the hatch open. This defense is unavailing. When the ship contracted with the shipbuilding company for the repairs, it assumed the obligation to keep all parts of the ship under its control reasonably safe for the employés of the shipbuilding company. It could not relieve itself of the duty by delegating it to the shipping company. Chicago City v. Robbins, 2 Black, 418, 17 L. Ed. 298; Id., 4 Wall. 657, 18 L. Ed. 427; Maryland Dredging etc., Co. v. State of Maryland (C. C. A.) 262 Fed. 11; Cramblitt v. Percival-Porter Co., 162 Iowa, 283, 144 N. W. 23; Scoggins v. Atlantic & Gulf Portland Cement Co., 179 Ala. 213, 60 South. 175; City & Suburban Railway Co. v. Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345; Thomas v. Hammer Lumber Co., 153 N. C. 351, 69 S. E. 275, 32 L. R. A. (N. S.) 584; Strickland v. Montgomery Lumber Co., 171 N. C. 755, 88 S. E. 340; 26 Cyc. 1562.

[4] There was abundant basis in the testimony for the rejection by the District Court of the defense of assumption of risk. Lane was a carpenter, with no experience on ships. The testimony of Adams that he expressly warned the workmen to look out for the hatch was contradicted by the libelant and other witnesses, and there was no testimony that this inexperienced workman was informed of the precise location of the hatch, so that he could appreciate the danger. The risks not naturally incident to the occupation, but arising out of the master's negligence, "the employé is not treated as assuming, until he becomes aware of the defect or disrepair, and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them." Seaboard Air Line v. Horton, 233 U. S. 492, 504, 34 Sup. Ct. 635, 640 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Gila Valley, etc., Ry. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521; Waldron v. Director General of Railroads (C. C. A.) 266 Fed. 196.

The defense of contributory negligence was not conclusively made out by the fact that Lane would not have fallen, if he had not taken a few steps at the foot of the stairway or ladder, for the same reason, namely, that there was testimony that he was not warned of the open hatch, and no testimony that he was informed of its precise location.

We find that the proximate causes of the accident were the negligence of the shipbuilding company in not furnishing its employé a safe place to work, and the negligence of the ship in not having the hatch guarded as its duty to the shipbuilding company and its employés re-

quired. The decree of this court will be entered, directing the decree of the District Court to be modified accordingly.

Modified.

In re MARGOLIES et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 179.

1. **Bankruptcy ⇐446—Discretionary order revisable only for abuse of discretion.**
   A discretionary order in bankruptcy is reviewable on petition to revise only for abuse of discretion.

2. **Bankruptcy ⇐418(1)—Discharge does not deprive court of summary jurisdiction over bankrupt.**
   The discharge of a bankrupt does not deprive the court of bankruptcy of jurisdiction, while the estate remains unclosed, to entertain a summary proceeding by his trustee to require him to surrender property alleged to have been fraudulently concealed.

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of Harry Margolies and Benjamin Kliedman, bankrupts. On petition by Harry Margolies to revise order of District Court. Affirmed.

The bankrupts were adjudicated in January, 1918, and Margolies was discharged on July 18, 1919. Some months later, the estate not being closed, the trustee required Margolies to show cause why an order should not pass requiring him to turn over to said trustee the sum of $6,812.32, alleged to be or to represent the value of property concealed and withheld by him from his estate in bankruptcy. Margolies appeared and pleaded that the court was without jurisdiction to entertain the motion, because he had been discharged. This was overruled, and an order entered sending the matter to a commissioner to ascertain the facts and report. This order the petitioner brings up for review.

Sol. M. Selig, of New York City, for petitioner.

Alexander Levine, of New York City, for trustee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The order complained of is plainly interlocutory, for the petitioner has as yet been required neither to pay nor perform; the trustee is given leave to prove his case—nothing more. It is also in a sense discretionary, for the court might have considered (as has often occurred in similar cases) that the certain expense of the proposed investigation outweighed probable gain.

[1] We have pointed out that under the statute discretionary orders can be revised only for abuse of discretion, which is error of law (In re Weidenfeld, 254 Fed. 680, 166 C. C. A. 175) and that while we can review interlocutory proceedings, it is not advisable so to do (In re Strauss, 211 Fed. 123, 127 C. C. A. 521; In re Horowitz, 250 Fed. 106, 162 C. C. A. 278). As, however, this record raises nothing but

a question of jurisdiction, and one of some novelty, we conclude to entertain the petition, as an exception to, and not a relaxation of, the general rule above stated.

[2] Bankrupt's doctrine is that because, and solely because, he has a discharge, the court is without power (unless and until the discharge is revoked) to compel him by order to surrender concealed property, which, except for the discharge, it would be a contempt for him, after such order, to retain. Sections 2 (7), (13), (15), and 7 (2), of Bankruptcy Act (Comp. St. §§ 9586, 9591), It is not argued that discharge gives complete immunity for undiscovered wrong; it is admitted that plenary suits under sections 67 and 70 (sections 9651, 9654) may still be brought; but it is said that the personal control of court over bankrupt, by which he may be summarily required under pain of contempt to surrender whatever he unlawfully retains from his trustee (In re Schlesinger, 102 Fed. 117, 42 C. C. A. 207), vanished with, and by reason of, discharge.

No such quality is expressly given discharge by the act; but by inference from section 14 (section 9598) it is urged that, since a discharge must be refused if a bankrupt has concealed his property with intent to hinder, etc., or has refused to obey lawful orders of the court, it follows that, when the court discharges, it "certifies" that the applying bankrupt has not concealed, etc., and has obeyed all lawful orders; wherefore it is a disregard of its own judgment summarily to hale a discharged bankrupt before the court that found so much in his favor.

This view of discharge is merely wrong. In granting discharges the court adjudges or "certifies" nothing further than that affirmative proof has not been given establishing the existence of one or more of the grounds for refusing discharge. The language of section 14 is that the judge "shall * * * discharge the applicant unless" he has done a forbidden thing; and that this language has been construed to mean unless the objecting parties show that he has done the forbidden is too well known to require citation. That discharge is not a certificate of character we have recently pointed out. In re Hughes, 262 Fed. 500 (opinion Dec. 10, 1919). Indeed the act itself defines "discharge" to mean a "release" from provable debts other than those excepted by the statutes. Section 1, subsec. 12 (Comp. St. § 9585). As has recently been said, a "discharge operates merely to extinguish creditors' claims." In re Walsh, 256 Fed. 654, 168 C. C. A. 47.

A stronger argument may be founded on the analogies of the act of 1867 (14 Stat. 517) and the decisions thereunder. It was then held that after discharge a bankrupt could not be compelled to execute a conveyance necessary to enable his trustee to realize the proceeds of a Stock Exchange seat, and that the court's power to summon a bankrupt for examination concerning property said to have been fraudulently transferred passed away with discharge.[1]

[1] In re Dole, 11 Blatchf. 499, Fed. Cas. No. 3,964, and cases cited; In re Witkowski, 10 N. B. R. 209, Fed. Cas. No. 17,920; In re Nichols (D. C.) 1 Fed. 842, and (apparently contra); In re Heath, 7 N. B. R. 448, Fed. Cas. No. 6,304—the last a decision by Blatchford, J.

The differences between the present and former bankruptcy acts are very marked, and most of the cases cited rest upon the language of the twenty-sixth section of the late statute (R. S. §§ 5104 and 5107), providing that the bankrupt must "until his discharge be subject to the order of the court, and shall * * * do * * * all acts required by the court * * * to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated." But especially Woodruff, J., in Re Dole, supra, fortified decision by considering many other parts of the statute, and came to the conclusion that that personal control over the bankrupt which is the essence of summary jurisdiction terminated with discharge.

In like manner we might be asked to consider section 1 (4), which defines the word "bankrupt" to "include," not only a person against whom an involuntary petition has been filed, or who has himself filed a petition or been adjudged, but also one against whom is preferred "an application to set a composition aside or to revoke a discharge," and also section 29b, which makes criminal the concealment of property belonging to the estate on the part of an accused "while a bankrupt or after his discharge"; and the argument might be made that one ceases to be a bankrupt when holding an unrevoked discharge, and it is only against him as a bankrupt that summary orders for examination or surrender of property may be entered. Though the argument is not without weight, we conclude that the present statute does not require the construction given that of 1867 in Re Dole. No such proviso as that of Rev. St. § 5104, can be found in the act of 1898, and the argument resting on the references just made to the language of the present statute fails for other reasons.

In Re Harper (D. C.) 175 Fed. 423, it was pointed out that some of the definitions in section 1 of the statute read "shall mean," while others read "shall include," and it was held not to have been "intended that definitions of words used in the act reading 'shall include' shall exclude other meanings or definitions of the word, or limit the ordinary and well-understood meanings." [2]

The word "bankrupt" was not invented by the act of 1898; it has a long and interesting history, and was well understood to mean generically one who had done or suffered something by law declared to be an act of bankruptcy. Bouvier, Law Dict., Ed. 1868. When, therefore, the portions of the statute first above referred to lay down generally the duties of bankrupts and the jurisdiction of the courts over them, it requires a specific restriction to terminate the power of the court over the bankrupt before the power of the court over the estate in bankruptcy comes to an end. The whole act should be construed in the spirit of the last paragraph of section 2 (Comp. St. § 9586), which declares that "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were

[2] In re Harper is a decision by Ray, District Judge, whose connection with and familiarity with the spirit of the Bankruptcy Act (owing to his membership in the judiciary committee of the House of Representatives at the time of its passage) is commented on in Remington on Bankruptcy, vol. 1, p. 15.

certain specific powers not herein enumerated." But the court's power over the estate does not end until the estate is closed by the discharge of the trustee upon the settlement of this accounts (Clark v. Pidcock, 129 Fed. 750, 64 C. C. A. 273), or by the revesting of the estate in the bankrupt by the confirmation of a composition (In re Hollins, 238 Fed. 787, 151 C. C. A. 637). It is also opposed to the history and spirit of bankruptcy legislation to affix or annex to discharge anything more than the statute explicitly gives to it. All discharges are a comparatively modern innovation, mitigating the status of bankruptcy, which historically was terminable only by death or annulment.[3]

The point before us was presented in Ex parte Waters, L. R. 18 Eq. 701, in 1874, where one partner, a discharged bankrupt, had used his employment by the creditors' committee to devote funds of the estate to paying his private creditors. He was proceeded against as for a contempt, and it was held:

"There is no distinction by reason of the fact that the debtors' discharge had been granted before this money was misapplied. The discharge only releases them from the debts provable * * *—not from the obligation to perform the duties prescribed by the statute."

In later English statutes a discharged bankrupt is specifically subjected to punishment as for contempt if he fails to give the trustee such assistance as is required in the "realization" of the estate—Bankruptcy Act 1914, part I, § 26 (9)—but the Waters Case rests on language as general as that of our statute.

The question argued has been decided adversely to this petitioner in the lower courts—assuming (as we do) that the power to examine a bankrupt as to his estate is fundamentally the same as that which compels him to give up or turn over whatever he has no right to retain. Mr. Olmstead, referee in the Massachusetts district, considered it at large in Re Peters, 1 Am. Bankr. R. 248, as did also Mr. Wise, referee in the Southern district of New York in Re Westfall, 8 Am. Bankr. R. 431, and the latter decision was expressly approved and confirmed by Adams, District Judge.

That the power of examination existed "at any time before final disposition of the estate" was assumed in Re Bryant (D. C.) 188 Fed. 530. And see Remington on Bankruptcy, § 473, citing In re Chandler (D. C.) 135 Fed. 893, affirmed (without discussion of this point) 138 Fed. 637, 71 C. C. A. 87.

Order affirmed, with costs.

[3] See Baldwin on Bankruptcy, Introduction; Remington on Bankruptcy, § 2414 et seq. Cf. Standard, etc., Co. v. Kattell, 132 App. Div. 539, 117 N. Y. Supp. 32, for an extreme example of refusing to a discharge proceeding any attribute of a judgment or decree.

LEVY v. SCHORR.

(Circuit Court of Appeals, Third Circuit. May 7, 1920.)

No. 2519.

1. **Bankruptcy ⟸418(1)—Court has summary jurisdiction over bankrupt notwithstanding discharge.**
   Notwithstanding a bankrupt's discharge, where the estate has never been technically closed, the bankruptcy court has summary jurisdiction to compel the bankrupt, by order, to surrender to the trustee property belonging to the estate, the existence of which was canceled or had not come to the knowledge of the trustee before discharge was granted.

2. **Bankruptcy ⟸372—Estate not closed, though trustee discharged without final meeting of creditors and settlement of accounts.**
   The estate of a bankrupt was never technically closed, and a discharge of the trustee was of no effect, where there was no final meeting of creditors and settlement of the trustee's accounts.

Petition for Revision and Review of Proceedings of the District Court of the United States for the Eastern District of Pennsylvania, in Bankruptcy; J. Whitaker Thompson, Judge.

In the matter of Abraham Levy, individually, and trading as A. Levy & Co., bankrupt; George J. Schorr, trustee. An order reversing an order of the referee was set aside on reargument, and the case referred back to the referee for further proceedings (261 Fed. 432), and the bankrupt brings a petition to revise and review the decree. Affirmed.

Jacob Weinstein and Maurice J. Speiser, both of Philadelphia, Pa., for petitioner.

Edwin I. Fischer, of Philadelphia, Pa., for respondent.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

PER CURIAM. [1] Aside from some contentions made on behalf of the bankrupt, which need no further comment than that we have considered them and find them without merit, the only question in this case is whether a bankrupt, who has received a discharge, which has not been and cannot be revoked, is thereafter subject to the summary jurisdiction of the bankruptcy court, in the sense that that court may by order compel the bankrupt to surrender to his trustee in bankruptcy property belonging to the estate in bankruptcy, the existence of which has been concealed or has not come to the knowledge of the trustee before the discharge was granted. The court below answered this question in the affirmative, and we think rightly so. The question has very recently been before the Circuit Court of Appeals of the Second Circuit in In re Margolies, 266 Fed. 203, — C. C. A. —, and there likewise received an affirmative answer. In the latter case, the decisions under the Bankruptcy Act of 1867 (14 Stat. 517, c. 176), which are relied upon by the bankrupt in this case, were examined and found inapplicable to the present Bankruptcy Act (Comp. St. § 9585 et seq.). As we are entirely satisfied that the rea-

soning of the Circuit Court of Appeals of the Second Circuit in the Margolies Case is sound, as is also that of the learned District Judge in this matter, we deem it unnecessary to reiterate or attempt to supplement the same. We may merely add that in our judgment, in view of the comprehensive jurisdiction conferred upon the bankruptcy courts by the present Bankruptcy Act, it is not reasonable to attribute to Congress an intention to disable a trustee in bankruptcy from availing himself of the summary jurisdiction and effective process of the bankruptcy court as against a bankrupt who has received his discharge and has succeeded in concealing, for the period limited by the statute for revoking a discharge, the existence of property which should have been surrendered.

[2] As was held by the court below, under the decision of this court in Clark v. Pidcock, 129 Fed. 745, 64 C. C. A. 273, the estate of this bankrupt was never technically closed, and a previous discharge of the trustee was of no effect, because there was no final meeting of the creditors and settlement of the trustee's accounts. Consequently the question as to whether a bankruptcy court may exercise the summary jurisdiction before mentioned over a bankrupt who has been discharged, when the estate has been properly closed, and then reopened because it is thereafter made to appear that it has not been fully administered, is not now before us; but we do not wish our silence on that question to be understood as approving a previous order (vacated by the order now under review) entered pursuant to an opinion rendered by the learned judge of the court below, to the effect that under the circumstances of this case no such jurisdiction could be exercised.

The order brought here for review is accordingly affirmed, with costs.

NATIONAL PICTURE THEATRES, Inc., v. FOUNDATION FILM CORPORATION.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 230.

1. **Appeal and error ⇐954(3)—Discretion in denying preliminary injunction reviewable, where question is one of law.**
   Where granting or denial of a preliminary injunction is based on a finding on controverted facts, it is an extreme case which will justify interference with the discretion of the primary court; but where there is no fact in doubt, and the question is one of law only, the law not only guides, but coerces, discretion.

2. **Trade-marks and trade-names ⇐70(3)—Imitation of name of successful play unfair competition.**
   When a play has attained such popularity that its name has plainly acquired a secondary signification, suggestive of that particular play, equity will, under the rules of unfair competition, prevent the use of the same name or any colorable imitation thereof as descriptive of another and competing production.

3. **Copyrights ⇐36—Of book or play covers picture rights.**
   The owner of a copyright on a book or play owns the right to represent on a screen photographs telling the copyrighted story, and may assign such right.

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4. Trade-marks and trade-names ⇐95(1)—Grounds of injunction against unfair competition.

To entitle a complainant to an injunction against unfair competition, he must have an actual property right to protect, there must be a real present or prospective competition, and the endeavor to get the same trade from the same people at the same time must on defendant's part be with wrongful intent to gain the advantage of that celebrity of which complainant is owner; but such intent may be inferred from the inevitable consequences of the act complained of.

5. Trade-marks and trade-names ⇐95(3)—Imitation of name of picture play enjoined as unfair competition.

Complainant, as owner of motion picture rights in a play entitled "Blind Youth," which as a spoken play had attained wide popularity, toward the production of which complainant had expended money, *held* entitled to a preliminary injunction to restrain the production by defendant of a motion picture play under the name of "The Blindness of Youth," which was adapted from another play having a different name.

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

Suit by the National Picture Theatres, Incorporated, against the Foundation Film Corporation. From an order denying a preliminary injunction, complainant appeals. Reversed.

Appeal from an order in equity denying motion for an injunction pendente lite, entered in the District Court for the Southern District of New York. Prior to June, 1919, one Tellegen and another, being the authors of a play or drama entitled "Blind Youth," were the owners of the copyright of said play and of all the dramatic and motion picture rights in and to the same. In December, 1919, plaintiff herein by divers mesne assignments became the owner of a motion picture play based upon said dramatic composition known as "Blind Youth." The work of photographing the situations of the photoplay "Blind Youth" was at once begun, but before it was ready for production defendant announced by advertisement its intention to produce, or permit others to produce, a picture play to be known as "The Blindness of Youth."

Defendant's production is said to be "adapted from the great French success 'The Torrent,'" and it is herein assumed that the subject-matter or incidents of "Blind Youth" and "The Blindness of Youth" are wholly dissimilar, further than that both deal with the misadventures and dangers of youthful inexperience of life. Jurisdiction herein rests on diversity of citizenship. The bill is one for unfair competition only, and prays for an injunction against the use by defendant of the name "The Blindness of Youth" as applied to "any motion picture play."

The spoken play "Blind Youth" is proven without contradiction to have attained wide popularity over considerable portions of the United States, largely on account of the reputation of one of the authors and the principal actor—Tellegen. It also appeared that on July 10, 1915, one Byers registered and claimed copyright upon a "certain dramatic composition entitled 'The Blindness of Youth.'" This is a wholly different composition from the play upon which defendant's motion picture production is based, and it is not asserted that Byers' copyrighted play influenced defendant's choice of title, nor is any reason assigned for using the alleged infringing name in place of "The Torrent," except that such change of title is common in trade circles. Plaintiff promptly moved for preliminary injunction, and appeals from the order denying the same.

Konta, Kirchswey, France & Michael, of New York City (Royal W. France, of New York City, of counsel), for appellant.

House, Grossman & Vorhaus, of New York City (Nathan April, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The propriety of reviewing, and indeed our right to review, the order appealed from, is questioned because, in refusing relief, the court below exercised judicial discretion. Where decision is dependent on controverted facts, it is an extreme case that justifies departure from the rule "that the discretion of the primary court [is not] to be interfered with." Texas, etc., Co. v. Collier, 195 Fed. at page 66, 115 C. C. A. 83. But here no fact is in doubt; there is before us only a question of law, and law not only guides, but coerces, discretion.

We have held that "whenever it is manifest to the court that, upon the case made, an injunction will be granted at final hearing, * * * one should be awarded * * * preliminarily, in the absence of facts presenting special equitable considerations to induce the court, in the exercise of judicial discretion, to withhold it" (Allington, etc., Co. v. Booth, 78 Fed. at page 878, 24 C. C. A. 379); and Armat, etc., Co. v. Edison, etc., Co., 125 Fed. 939, 60 C. C. A. 380, well illustrates how the "contradictory character" of affidavits produces a situation wherein the appellate court will vacate preliminary injunction granted, or refuse one on appeal from a denial.

[2] The question at bar is whether when a play has attained such popularity that its name has plainly acquired a secondary signification (i. e. one suggestive of that particular play) equity will, under the rules of unfair competition, prevent the use of the same name, or any colorable imitation thereof, as descriptive of another and competing production. It is to be noted that plaintiff's asserted right does not rest on copyright, though derived from a copyright owner; therefore it may be admitted that a name as such is not protected by the Copyright Act (Glaser v. St. Elmo Co. [C. C.] 175 Fed. 276, and cases cited), nor by trade-mark registration (Atlas, etc., Co. v. Street, 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. [N. S.] 1002).

[3] Yet it remains true that the owners of copyright on a book or play own the right to represent on a screen photographs telling the copyrighted story (Kalem Co. v. Harper, 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285); therefore the assignment to this plaintiff gave a lawful right, which by the investment of capital and labor has been made a business. Where unfair competition is charged "the rights of the parties are to be determined [by principles] similar to those which are well known to govern trade-marks, although the combination of elements is more complex than in devices which commonly go by that name" (per Holmes, J., New England, etc., Co. v. Marlborough, etc., Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377).

[4] To expand this thought: The plaintiff must have a right in being, an actual property, to protect (Manners v. Triangle, etc., Co., 247 Fed. 301, 159 C. C. A. 395); there must be a real present or prospective competition, that is, an endeavor to get the same trade from the same people at the same time;[1] and that endeavor must on the defendant's part be unfair, that is with a wrongful intent to "gain the advantages of that celebrity" (McLean v. Fleming, 96 U. S. at page 251 [24 L. Ed. 828]), of which plaintiff is the owner; but such intent, though it must be deemed to exist in fact, may be inferred from the inevitable consequences of the act complained of (Samson, etc., Works v. Puritan, etc., Mills, 211 Fed. at page 608, 128 C. C. A. 203, L. R. A. 1915F, 1107, and cases cited; Notaseme, etc., Co. v. Straus, 201 Fed. 99, 119 C. C. A. 134; Miller, etc., Co. v. Behrend, 242 Fed. at page 518, 155 C. C. A. 291.)

[5] All the requisite elements of recovery are here present; plaintiff has a veritable property or business; that the exhibitions of the parties compete, in that they appeal to the same people who at the same time in the same town incline to visit the "movies" is very plain; the necessary consequences of such a colorable imitation of plaintiff's name as is defendant's is deception of the public; and, finally, no equity is shown against plaintiff's prompt demand. Therefore as matter of law plaintiff was entitled to injunction.

The court below rightly gave no weight to the defense based on Byers' registration of a play, named as is defendant's. Whatever may be Byers' rights, unfair competition is a trespass, and no trespasser can justify by setting up the right of one to whom he is a legal stranger.

Order reversed, with costs, and cause remanded, with directions to grant relief.

[1] Thus there could be no competition between an "Ideal fountain pen" (Waterman v. Shipman, 130 N. Y. 301, 29 N. E. 111) and an "Ideal hair brush" (Hughes v. Smith Co., 209 Fed. 37, 126 C. C. A. 179); but it can and did arise between a "Keepclean toilet brush" and a "Sta-Kleen tooth brush" (Florence Co. v. Dowd, 178 Fed. 73, 101 C. C. A. 565).

AMERICAN SOCIALIST SOC. v. UNITED STATES.*

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 186.

1. **Army and navy ⇐40—"Whoever," as used in Espionage Act, § 3, includes corporations.**
   In Espionage Act June 15, 1917, tit. 1, § 3,[1] providing that "whoever, when the United States is at war, shall willfully make or convey false reports or false statements, * * * or shall willfully obstruct the recruiting or enlistment service," etc., shall be guilty of an offense, the word "whoever" is to be construed as including corporations and partnerships.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Whoever.]

2. **Army and navy ⇐40—In prosecution for willfully obstructing recruiting, evidence to show intent admissible.**
   In a prosecution under Espionage Act for willfully obstructing the recruiting and enlistment service by the publication and circulation of pamphlets containing matter calculated to discourage military service in the war, evidence of the publication and distribution by defendant of other similar matter *held* admissible on the question of intent.

3. **Army and navy ⇐40—Publication and circulation of pamphlet held to warrant conviction for willfully obstructing recruiting service.**
   That the author of a pamphlet was acquitted of the charge of thereby obstructing the recruiting and enlistment service in time of war, on the ground that it was not written with such intent, *held* not inconsistent with the conviction of his codefendant, which published and circulated the pamphlet.

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

Criminal prosecution by the United States against the American Socialist Society. Judgment of conviction (260 Fed. 885), and defendant brings error. Affirmed.

S. John Block, I. M. Sackin, and Walter Nelles, all of New York City (Samuel Seabury, of New York City, of counsel), for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City (Earl B. Barnes and Theodor Megaarden, both of New York City, of counsel), for the United States.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment of conviction of the American Socialist Society for violation of section 3, title 1, of the Espionage Act. It was indicted jointly with Scott Nearing, the author of a pamphlet entitled "The Great Madness," which was published and distributed by the society. The jury acquitted Nearing, but found the society guilty on the third and fourth counts of the indictment. The third count charged the defendants with unlawfully, willfully, knowingly, and feloniously attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States. The fourth count charged them with unlawfully, willfully, knowingly, and feloniously obstructing the

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 12, 65 L. Ed. —.

[1] Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c.

recruiting and enlistment service of the United States. Judge Mayer set aside the verdict on the third count, and sentenced the society on the fourth count to pay a fine of $3,000.

The section in question reads:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both." 40 Stat. 219, c. 30, tit. 1, § 3.

Counsel for defendant does not dispute the finding of the jury that "The Great Madness," which was written, printed, and distributed after the passage of the Espionage Act of June 15, 1917, was of a nature, or at least might fairly have been found by the jury to have been of a nature, calculated to obstruct the recruiting and enlistment service of the United States.

[1] The first objection is that the use of the word "whoever" in the section demonstrates the intention of Congress to exclude corporations. No doubt an apter word might have been employed, or it might have been defined in the act as including corporations. But without this we cannot conceive that Congress intended to except corporations and partnerships from the prohibition, or that it can have intended to permit corporations and partnerships to commit with impunity the other even more serious offenses enumerated in the act, viz. to willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, or to willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. Common sense requires the act to be construed, even at the expense of its letter, so as to cover the mischief intended to be prevented. The Supreme Court did this in the case of Church of the Holy Trinity v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. See, also, United States v. Union Supply Co., 215 U. S. 50, 30 Sup. Ct. 15, 54 L. Ed. 87, and Commonwealth v. Graustein Co., 209 Mass. 38, 95 N. E. 97.

It is next objected that the testimony shows that the society did not publish and distribute the pamphlet with any intention to obstruct the recruiting or enlistment service of the United States. It was proved that the defendant Nearing sent the manuscript to the Rand School, operated by the society, in August, 1917. Karpf, the manager of the Rand Book Store, read it and gave it to Cohen, a director of the society and chairman of the publication committee, who read it. Mrs. Mailly, the executive secretary of the Rand School, also looked it over hastily. The society paid Nearing for the pamphlet and published 10,000 copies in September and a second edition of 10,000 copies in October, 1917. February 8, 1918, at the annual meeting of the society,

the publication committee reported that two pamphlets by Scott Nearing had been published. In this situation the jury could properly find that the pamphlet was printed and distributed by authority of the society.

The judge charged the jury that they must acquit the society, unless they found that the employés or committee of the society, who acted personally in relation to the pamphlet, were authorized by the board of directors or the membership of the corporation to obstruct the recruiting or enlistment service. This was a question of fact supported by some evidence, and the finding of the jury in favor of the government is binding upon us.

[2] The society next objects that the court erred in admitting other of its prior publications. They were competent on the question of the specific intent with which the pamphlet in question was published. If the statute had made it a crime simply to commit acts tending to obstruct the recruiting and enlistment service of the United States, there would be no propriety in showing that the society, defendant, had published similar pamphlets on prior occasions. But the statute requires the government to prove in addition the specific deliberate intent to obstruct. It would certainly throw light upon defendant's mental attitude to show that on previous occasions it had published pamphlets recommending such obstruction. Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566. Such publications would tend to rebut the possibility that the publication complained of was accidental or against orders. Marshall v. United States, 197 Fed. 515, 117 C. C. A. 65.

[3] The last objection is that the judgment should be reversed, because, if the author of the pamphlet was not guilty, the publishers could not be guilty. It is said that Nearing must have been acquitted on one of two grounds, viz. either that the pamphlet itself was innocuous or that he had no intent to obstruct the recruiting and enlistment service of the United States. If the acquittal of Nearing was on the first ground, the society ought also to have been acquitted. We are therefore justified in finding that the acquittal was on the second ground. The statute, in defining the offense, imposes the additional condition that the act shall be done with the specific intent of obstructing the recruiting and enlistment service of the United States. The jury might believe that Nearing did not write these harmful views with the intent of obstructing the recruiting and enlistment service of the United States, and at the same time believe that the Society did print and distribute them with that intent. Such findings would not be inconsistent. This is a matter of fact, of which the jury are the sole judges, and with it we have no concern.

The judgment is affirmed.

O'BRIEN v. LASHAR et al. (two cases).

(Circuit Court of Appeals, Second Circuit. April 7, 1920.)

No. 235.

Appeal and error ⊂=82(3)—Refusal to make decree pro confesso absolute and opening it are not appealable orders.

Orders for decree pro confesso, which did not make the decree absolute, and for opening the decree to permit defendants to make motions to dismiss or to file answer, are interlocutory orders, which are not appealable.

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

Two suits by James J. O'Brien against Walter B. Lashar and others. From orders refusing to make the decree pro confesso absolute, and opening it to permit defendants to plead, plaintiff appeals. On motion to dismiss. Appeals dismissed.

James J. O'Brien, in pro. per.

W. H. O'Hara and A. M. Marsh, both of Bridgeport, Conn., for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. This appeal is not taken under section 129 of the Judicial Code (Comp. St. § 1121), but on the ground that the court below erred in not making the decree pro confesso absolute, and also in opening it to permit the defendants to make motions to dismiss or to file answers. These orders are interlocutory, and as such not appealable. If erroneous, they can be corrected only on appeal from a final decree in the cause.

Motion granted.

WHITLOCK COIL PIPE CO. v. MAYO RADIATOR CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 173.

1. **Patents ⊂=328—843,864, for motor car radiator, valid and infringed.**

The Brinkman patent, No. 843,864, for a cooler or radiator for motor cars, *held* valid, and as disclosing the first honeycomb construction of an automobile radiator is entitled to a liberal range of equivalents; also *held* infringed.

2. **Patents ⊂=157(1) — "Continuous strip" may consist of separate strips soldered together.**

In a claim for a "continuous strip" of metal, "continuous" should be taken in a mechanical sense, and two pieces of metal contiguously placed and soldered together may be considered as a continuous strip, when together they function like one strip.

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

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

Suit by the Whitlock Coil Pipe Company against the Mayo Radiator Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 257 Fed. 752.

Plaintiff owned and sued upon the three claims of patent to Brinkman, No. 843,864, dated February 12, 1907, application filed January 29, 1903. The invention is for a "cooler." The article described finds its use as a radiator for motor cars driven by gasoline engines. Water in the jacket of such engine is cooled by going through passages or conduits, whose external surface is as freely as possible exposed to the air. Earlier and familiar types of radiators are illustrated by the Daimler apparatus (British 10,257, of 1898), which is (in the language of a claim) a "vessel adapted to receive the water, with tubes passing through said vessel and being opened at both ends, and with means for effecting a strong draft through said tubes."

In various forms it was art prior to Brinkman to make a radiator of tubes of appropriate length spaced apart and parallel with each other, and fixed at each end in a wire or metal screen or holder into which the tube ends were soldered or otherwise appropriately made watertight. Into the box thus interrupted by tubes which were air passages water flowed, and passing between the tubes was cooled. Brinkman's effort was, according to his specification, to "simplify the construction, decrease the weight, and reduce the cost of this class of refrigerating apparatus, and at the same time increase its efficiency * * * by constructing [the refrigerating section of a radiator] from a continuous strip of sheet metal which is crimped or corrugated, so that when the corrugated sheet is bent or returned upon itself at regular intervals the corrugations will match and form the opposite sides of a tubular space for the passage of air. But * * * the sheet at every alternate interval is corrugated in opposite directions, in order that every alternate fold of the sheet will produce a narrow, continuous, serpentine passage through which water may flow in a thin layer in contact on both sides with the walls of the air tubes." His water passage was made of appropriate and desired width by "offsetting" the edges of the corrugated metal strip and bringing said set-off edges into soldered contact. This construction produces what is fairly described as the "honeycomb" or "cellular" type of radiator, fabricated of thin sheet metal, preferably copper. It avoids the construction of a framework of pipes held by terminal wires or sheets in spaced relationship.

Brinkman in his specification declared that he did not confine himself to any particular shape of corrugations, and his first and most general claim is as follows: "In an apparatus of the class described, the combination with a water chamber 5 and a water chamber 7, of an interposed refrigerating section, consisting of a continuous strip of corrugated sheet metal doubled upon itself in a series of folds, with the ends of the folder sections attached to said water chambers, and inclosing a series of restricted water spaces communicating at the ends of the folds with said water chambers, substantially as described."

The second claim varies from the first in specifying the "offset edges" of the strip of corrugated metal, and the third is as follows: "In an apparatus of the class described, the combination with upper and lower water chambers, of a refrigerating section between said water chambers, said refrigerating section consisting of restricted water passages between said chambers, said water passages having inclosing walls of sheet metal with their edges offset in opposite directions, brought into contact and soldered together, and of a series of parallel air passages between said water passages and transversely thereto, formed by the contact of said inclosing walls."

Defendant's radiator is likewise composed of corrugated metal, but the corrugation or bending is so acute that, when one bent strip is fitted to another, a series of square air passages is produced, but the water passages result from offset edges as described by Brinkman. The trial court held the patent invalid, but, if so construed as to be valid, not infringed. Plaintiff appeals.

Harrie E. Hart, of Hartford, Conn. (Robert H. Parkinson, of Chicago, Ill., of counsel), for appellant.

Franklin G. Neal, of New Haven, Conn., for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] That broad claims do not broaden invention, nor protect what (usually in the light of subsequent competition) the patentee thinks he invented, is a sound rule (Lovell v. Seybold, etc., Co., 169 Fed. 288, 94 C. C. A. 578);[1] and the dismissal below was rested on this doctrine. The evidence submitted, however, compels us to find that this case is not within the rule. Whether Brinkman made an invention, and, if so, the grade or importance thereof, depends, not only on what he did, but when he did it; for it is common knowledge that ever since about the time of his filing date inventors of all ranks have been very busy with motor cars and their appurtenances. The trial court made no finding as to date of invention, but we perceive no difficulty in assigning the early summer of 1901 as the time when Brinkman physically embodied his fundamental idea in a section of radiator. Commercial construction followed in the fall of 1902.

In 1901, so far as this record reveals facts, Brinkman was the first to make or propose to make a radiator suited for the hard service of a motor car out of thin sheet metal, using the corrugations thereof, connected or slightly separated as desired, to form tubes or passages for both air and water, and to obtain by attaching one corrugation to another and indefinitely repeating the conjunction a structure of any desired size that may almost be called integral and is both strong and light. The rank of an invention often depends on the nature or extent of the art which may be invoked to explain or limit it. Corrugated sheet metal had been used to facilitate the condensation of steam (Ljungstrom, No. 574,157), and that art may be admitted as cognate; but Brinkman first made the honeycomb radiator of an automobile, and he therefore stands "at the head of a class [and] is entitled to a liberal range of equivalents" (Lamson, etc., Co. v. Hillman, 123 Fed. 423, 59 C. C. A. 517), unless defeated by some weakness other than the nature of his inventive thought.

The only prior art worthy of mention is Maybach, whose several foreign patents are earlier than his United States patent No. 709,416. That device may be described, in words largely taken from specifications, as a means of determining and maintaining a spaced arrangement of pre-existing tubes; the air going through the tubes and the water through the spaces. It may be as good a radiator as that described in the patent in suit, but to us it does not even suggest the "honeycomb" construction.

[1] This ruling was long ago made by Blatchford, J., in Masury v. Anderson, 11 Blatchf. 165, Fed. Cas. No. 9,270. He added that if, while operating under his patent, the patentee "at one time insists on too much, or at another on too little, he does not thereby work any prejudice to the rights actually secured" to him by his patent.

Unless the patent be limited to the exact device, or rather to the mode or method of making the machine set forth in the specification, infringement cannot be denied; and indeed we think it is not denied.

Such limitation is asserted, because the first and second claims specifically define the "refrigerating section" of the cooler as "consisting of a continuous strip of corrugated sheet metal"; and the specification tells at considerable length how the sheet can be doubled upon itself and the operation repeated. If the radiator of a large truck were thus fabricated, it would require a metal strip 550 feet long, and Brinkman never made his machines in that way; he has always taken strips of convenient length and soldered them together when in place, and so does the defendant.[2]

[2] Accordingly defendant asserts that upon "the continuous strip of sheet metal the whole patent is predicated." The argument is not without strength, but cannot prevail; for the matter is not in the ordinary sense one of construction whereof the rules have been recently restated in Fulton Co. v. Powers, etc., Co. (C. C. A.) 263 Fed. 578. The construction here appropriate is purely verbal, for if the substance of invention as described be regarded, the defendant is plainly within any reasonable range of equivalents, as that phrase is so well defined by Sanborn, J., in National, etc., Co. v. Interchangeable, etc., Co., 106 Fed. 710, 45 C. C. A. 544; and if we have rightly apprehended the essential nature of this invention it is equally certain that defendant has taken "the substance" thereof. Cimiotti, etc., Co. v. America, etc., Co., 115 Fed. 504, 53 C. C. A. 230.

Thus the final question is whether the unfortunate phrase, "continuous strip" of metal, puts claims 1 and 2 in the list of "patents * * * couched in language so plain and unambiguous as to leave no room for construction." Ryan v. Metropolitan, etc., Club, 144 Fed. 699, 75 C. C. A. 515. We think not; and as matter of verbal interpretation we agree with Coxe, J. (Brown v. Reed Mfg. Co. [C. C.] 81 Fed. 48; appeal dismissed 96 Fed. 1005, 37 C. C. A. 665), that "continuous" may and here should be taken in a mechanical sense; and two pieces of metal contiguously placed and soldered together may be considered as a continuous piece when together they function like one piece.

Acceptance of this signification for "continuous" renders it unnecessary to inquire along somewhat broader lines whether, considering that generic inventions in their first embodiments frequently work imperfectly, Brinkman's severing of metal sheets was more than that "mere readjustment" thought immaterial by this court in Scott v. Fisher Co., 145 Fed. 922, 76 C. C. A. 447, or whether defendant has "used the idea of the patent modified only in respects which the patentee left open for modification." Van Kannel, etc., Co. v. Straus, 235 Fed. 137, 148 C. C. A. 631. It also avoids consideration of the third claim.

Decree reversed, with costs, and the cause remanded, with directions to sustain the claims in suit and grant the usual interlocutory decree.

[2] We have not overlooked Brinkman's later patent, No. 779,581, but think it relates to a different type of radiator, and that it contains no language inconsistent with plaintiff's position as to the patent in suit.

G. REIS & BRO., Inc., v. REFORM INITIAL CO., Inc., et al.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 216.

1. **Patents ⊂=328—1,294,560, for filler form for embroidery void for lack of invention.**
   The St. Clair patent, No. 1,294,560, for a filler form for embroidery, *held* void for lack of invention.

2. **Words and phrases—"Fill."**
   To "fill" embroidery is to stuff out the figure, which is the ornamentation, by covering the stuffing with the silk, cotton, or other threads used by the embroiderer.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fill.]

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

Suit in equity by G. Reis & Bro., Incorporated, against the Reform Initial Company, Incorporated, and others. Decree for defendants, and complainant appeals. Affirmed.

Appeal from decree of District Court dismissing bill in equity for infringement of all the claims of patent No. 1,294,560, issued February 18, 1919, for a "filler form for embroidery." Claim 6 is typical, and is as follows:

"A filler form comprising a body of felt compressed beyond its normal density and saturated by a water soluble stiffening agent maintaining it in compressed condition, whereby said body is adapted to expand to its normal dimensions when said stiffening agent is washed out."

S. Mortimer Ward, Jr., of New York City (Gorham Crosby, of New York City, of counsel), for appellant.

Thomas Ewing, of New York City (George H. Gilman, of New York City, of counsel), for appellees.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. To the end that embroidery may stand out from the embroidered fabric more prominently than it will or can through or by the thickness of the thread or filament applied, it has long been customary to "fill" the embroidery; i. e., to stuff out the figure which is the ornamentation by covering the stuffing with the silk, cotton, or other threads used by the embroiderer. It is easier to do this if the stuffing or filling is preconstructed in the shape or outline of the intended ornament of embroidery, and this construction was generically old.

The patentee's desired result, as specified, was to produce a "filler form * * * which will * * * give to the finished embroidery the desirable well-rounded contour [and] * * * will expand * * * so as to take up any looseness in the embroidery stitches, and permit of the finished embroidery being washed an indefinite number of times without injury." The quoted claim, even without evidence as found in the record, sufficiently shows that the patentee's means con-

sist in cutting figures (usually the letters of the alphabet) out of starched felt.

Considering the admitted antiquity of filled embroidery and of felt stiffened in many ways, including starch, the field left for invention was indeed narrow, and plaintiffs can and do contend only that their use of felt solubly stiffened is so remotely analogous to any former use thereof, that (being productive of a new result) it sufficiently evidences exercise of inventive faculty, within Potts v. Creager, 155 U. S. 608, 15 Sup. Ct. 194, 39 L. Ed. 275.

But the field of invention was further and especially narrowed by a prior patent (No. 1,063,734) for a filler form "comprising united one or more layers of textile fabric, and one or more layers of material [giving] shape retaining qualities or firmness, * * * for example, * * * unwoven fibrous material, digested wood pulp, or other forms of cellulose, compressed." That this included compressed felt is undeniable.

Consequently the patent stands or falls on the expansible or "plumping" capacity of felt when freed of starch. On this point we hold on the evidence, and as matter of fact that no such capacity is shown to exist in any useful degree. We are further of opinion that, such trifling expansibility being a long known function of felt, its use for embroidery filling amounts (at the most) to no more than a change of material for attempting the more perfect accomplishment of the same work, which is not patentable. Potts v. Creager, supra.

While, as above intimated, we are not persuaded that there is by plaintiff's means any "more perfect accomplishment," this case is entirely within the principle of our decisions in Ambursen, etc., Co. v. Hydraulic, etc., Co., 211 Fed. 982, 128 C. C. A. 480, and New York, etc., Co. v. Sierer, 158 Fed. 819, 86 C. C. A. 79, while Marconi, etc., Co. v. De Forest, etc., Co., 243 Fed. 564, 156 C. C. A. 258, illustrates a case where there was a new use or application and a wholly new result.

Decree affirmed, with costs.

WIRE WHEEL CORPORATION OF AMERICA v. C. T. SILVER, Inc.

(District Court, S. D. New York. May 13, 1919.)

1. **Patents ⇐328—1,047,702, for spoke lacing, void for lack of invention.**
The Pugh patent, No. 1,047,702, for spoke lacing, *held* void for lack of invention, in view of the prior art.

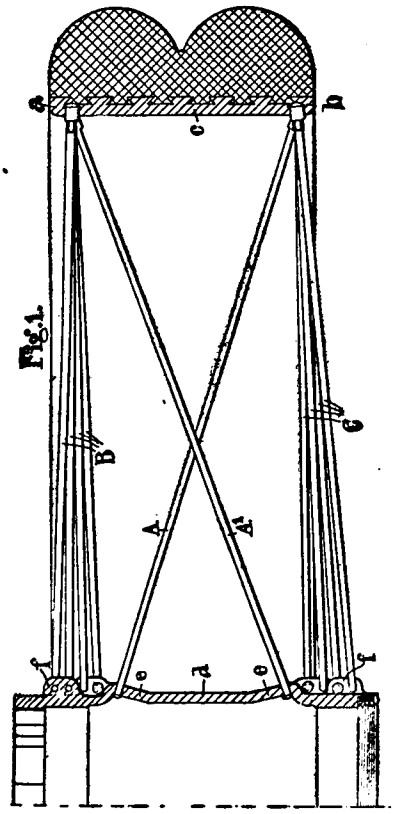
2. **Patents ⇐36—Commercial success as evidence of invention.**
Commercial success is a most hazardous test of invention; its main value being in cases where the existing means have for some time been unsatisfactory and where the new step has at once answered the need and displaced what went before; and where to this is added the fact that others have earlier tried to reach the same result such proof has added weight.

In Equity. Suit by the Wire Wheel Corporation of America against C. T. Silver, Incorporated. Decree for defendant.

Decree affirmed (C. C. A.) 266 Fed. 229.

Figures 1, 2, 3, 6, and 7 of the Pugh patent, and Figures 1, 2, and 5 of the Hammon patent, referred to in the opinion, are as follows:

PUGH PATENT.



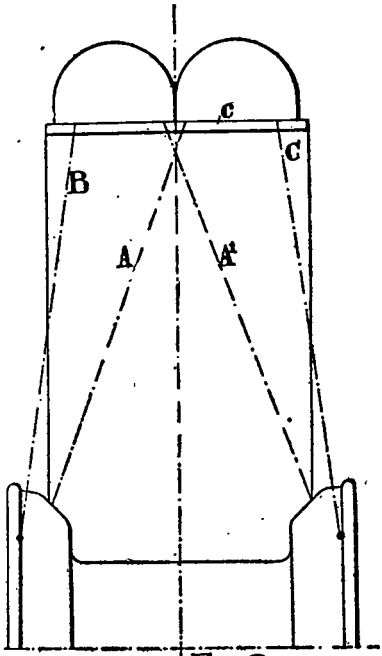


Fig. 2.

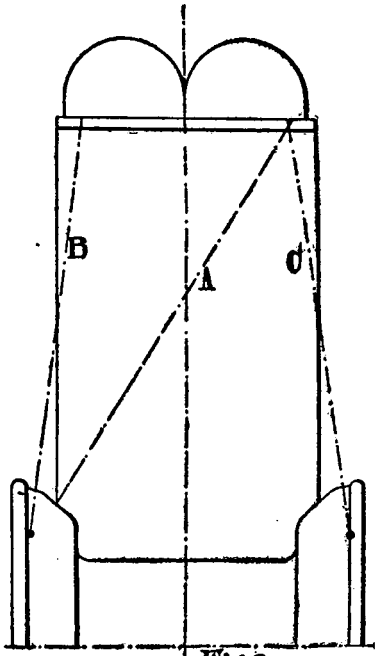


Fig. 3.

Fig.6

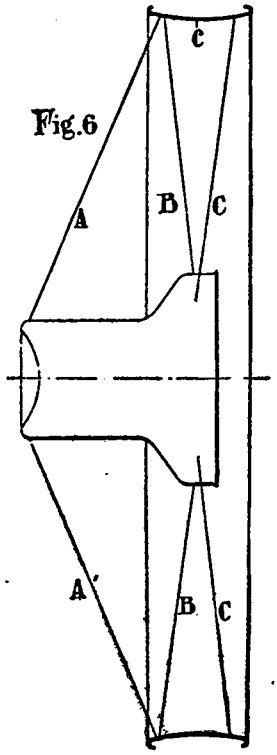
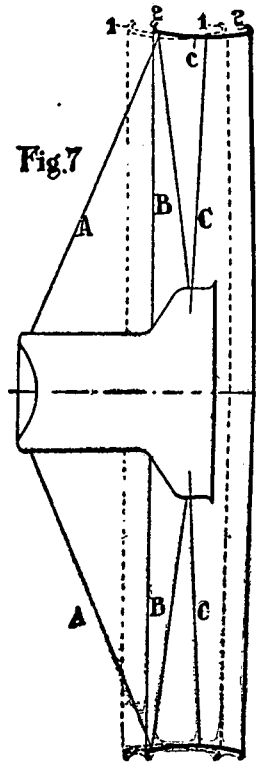


Fig.7



HAMMON PATENT.

Fig. 1.

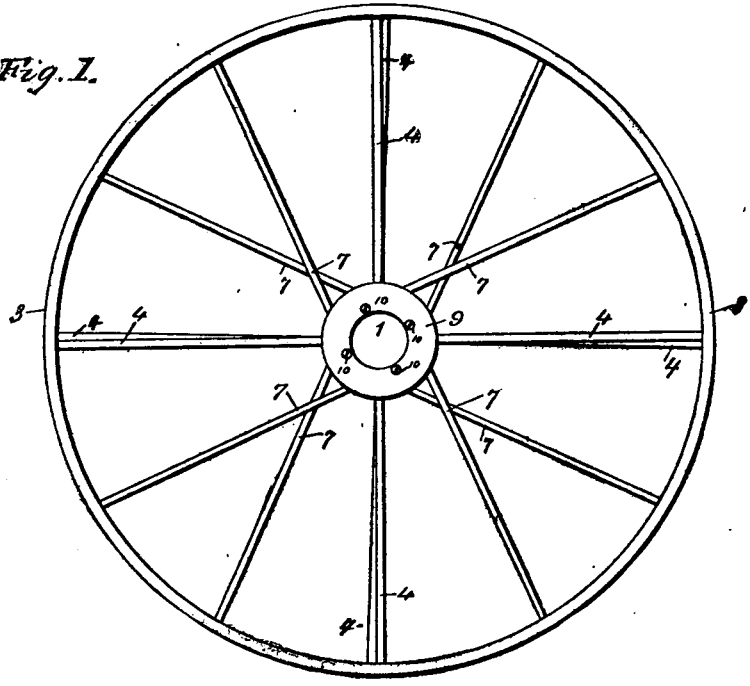


Fig. 2.

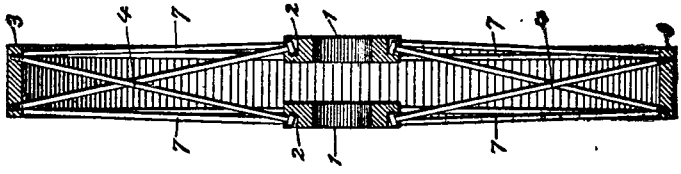
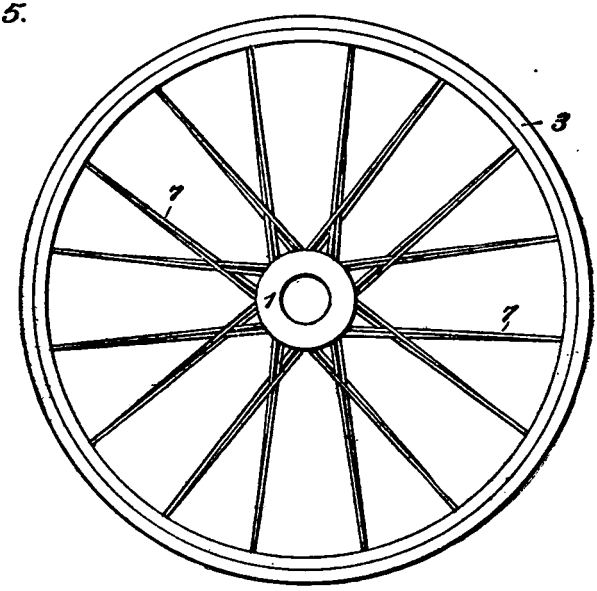


Fig. 5.



Charles Neave, of New York City, Frank Parker Davis, of Chicago, Ill., and Clarence S. Walker, of Buffalo, N. Y., for plaintiff.

Melville Church, of Washington, D. C., and Oscar W. Jeffery and Harry G. Kimball, both of New York City (George M. Finckel, of Columbus, Ohio, of counsel), for defendant.

LEARNED HAND, District Judge. [1] As the issue of validity must in my judgment necessarily go against the patent, I shall confine myself to a discussion of that alone. The tension wheel was concededly old; indeed, the world owes it to the imagination of that varied and amazing genius, Leonardo da Vinci. It depended upon the fact that the hub of a wheel might be made to hang from its upper spokes as well as rest on its lower. However, it was at once obvious that the spokes themselves, having no inherent rigidity, but only tensile strength, could not suffer the torsional strains involved in a traction torque at the hub, if they ran radially from hub to felloe. The line of strain, being tangential to the hub, cuts directly across a radial spoke. Hence it became known long before Pugh's time that, to be effective, traction wheels should have the spokes set tangentially to the hub, from which it also followed that the tangents must run in both directions, else the hub would tend to twist under its own load. I may therefore assume the knowledge of the art of a tension wheel with spokes set tangentially.

Pugh had before him two requirements; i. e., to brace such a wheel against shock coming from without for the most part, and to accommodate his wire tension wheel to the conventional established gauge of

the motor car. The shocks he provided against, where the wheel remained symmetrical, by running spokes from the ends of the hub to the opposite side of the felloe. This is shown in Figures 1, 2, and 3 of his patent. This was all that was necessary in cases where he need not concern himself with the gauge of the vehicle. However, it so chances that this much of his patent had been exactly disclosed in every detail, so far as I can see, by Hammon, 574,538, over 20 years before, in 1897. Hammon's Figure 2 shows a tension wheel of which the spokes are both tangential and radial, and laced precisely as Figure 1 of Pugh and substantially as shown in his Figure 2, though the cross-lacing does not run to the extreme rim of the felloe. Figure 5 of Hammon shows a tension wheel all of whose spokes are tangential, but laced slightly differently from the Pugh patent (Figures 1 and 2). The lacing of Figure 5 of Hammon differed from that of Figure 1 for no essential reason that I can perceive. It is clear at a glance that at pleasure either the spokes, *4*, of Figure 1 might be tangential or that the spokes, *7*, of Figure 5 might be laced as shown in Figure 2.

Again, in Sharp's British patent of 1908, 2,618, exactly similar lacing is shown of a wheel all of whose spokes are tangential. Grauert and Humphris show the same lacing in wheels with radial spokes. This art taken as a whole anticipates Pugh, so far as Figures 1, 2, and 3 go, and must have made well known the system of cross-lacing which the defendant has adopted.

It is quite true, however, that Figures 1, 2, and 3 of the patent in suit do not show the central plane of the wheel offset from the center of the hub, and it is upon this element alone that the patent may rely. Pugh's earlier British patent (sub nom. Rudge-Whitworth, 1905, 14,892) shows an offset or "dished" wheel for a motor car, made up of two sets of tangentially disposed tension spokes or wires, each set running from one side of the hub to the nearer side of the felloe. That wheel is precisely the same as Figures 6 and 7 of the patent in suit, except for the fact that, instead of running all the spokes from the inner side of the hub to the inner side of the felloe, half are run to the inner side and half are crossed to the outer side. In short, Figures 6 and 7 show no greater bracing power from outside shocks than the earlier patent, but they do show a bracing against shocks from within.

The sole question upon which validity depends is therefore this: In view of Hammon, Sharp, and the other patents noted, was it invention to change Pugh's first patent by running half the spokes from one side of the hub alternately to opposite sides of the felloe? The defendant has copied Hammon's and Sharp's spoke arrangement exactly; all he has done is to make it into a "dished" wheel, a thing disclosed, not only in Pugh's earlier patent, but in Eisenhuth and Harrington as well. In considering the invention involved in this change it must be remembered that it added nothing of value to the wheel taken alone, but only made the cross-lacing available for a standard motor car. The necessities of a "dished" wheel were forced upon Pugh only by the conventional tracking gauge or tread already established for motor cars. No one has suggested that wheels made like Hammon's or Sharp's

would not have answered quite as well as Pugh's, except that they would not have been put upon standard motor cars without increasing their tread, or changing the width of the chassis.

I cannot bring myself to see that, having once solved the "problem," assuming it was any problem at all, of "dishing" the ordinary wire wheel, it took any inventive power to make Hammon's and Sharp's wheel into a "dished" wheel, precisely as the defendant has done. Once the conditions of the industry presented that necessity, all the means were at hand to meet it. Doubtless it is always a difficult question to say, when any step is taken in art, what degree of imagination it required. Possibly judges are not well qualified to restate to themselves the stage in the technique of the art reached when the step was taken, or try to put themselves in the position of those who took it, yet the settled law requires them to do so, and, if not, novelty and invention would be synonymous.

I know of no objective test which will serve to answer that question, which arises in nearly every case; it must be solved by an attempt to reconstruct the scope and limits of imagination of the ordinary skilled man. Had such a one, having seen Pugh's first wheel, wished to use Hammon's or Sharp's lacing upon wheels that must not increase their tread, the solution would, I think, have come automatically. He would have only to shorten the spokes on one side and lengthen them on the other. Had he needed help for that, Pugh's patent was at hand. Perhaps there is nothing more to be said on the matter; I own I cannot think of any process of reasoning by which it can be further elucidated. The required standard of conduct in such cases, as in some other branches of the law, e. g., negligence, notice, and the like, is not susceptible of deductive application; it must be constructed in each case for that case.

[2] As in all successful patents, the patentee, properly enough, relies upon the supposed proof of invention arising from commercial exploitation. It is a most hazardous test. Commercial success, as the courts have repeatedly observed, may arise from many other reasons than a new inventive idea. Without trying to lay down any exhaustive definition of the conditions where it may be helpful, I can very generally say that its main value is in cases where the existing means have for some time been unsatisfactory, and where the new step has at once answered the need and displaced what went before. When to this is added the fact that others have earlier tried to reach the same result, the proof becomes telling, and we hesitate to substitute our own judgment for the objective evidence that the new thing was not so easy to make as it looked.

The commercial conditions in Britain, where the patent arose, are nearly absent from this record. It appears that the wooden wheel, which has had a large vogue in the United States since 1905 and in France, never became popular in Britain, owing to the scarcity of wood. Pugh designed his offset wheel for motor cars in 1905, while the industry was in its earlier development, and so far as appears this was a satisfactory wheel. Perhaps the most that should be said is that the "Budd" wheel in the United States, which is also a "two-

spoke," has had a substantial test, and has not showed any dangerous weakness. Sharp designed his cross-lacing in 1908, only three years later, and prima facie, as I believe, the whole patent in suit was at hand. In April, 1909, one year later, Pugh combined the two, not as a separate invention, but as a new form, really unchanged, of Sharp, of whom he was probably not aware. Indeed, more properly it may be said to have been an adaptation of Sharp to heavy trucks. I see no reason to suppose that it was through any lack of inventive thought that the art was obliged to wait for a year to disclose the combination of Sharp and Pugh. Certainly there are many other possible explanations which one can conjecture, and which the proof does not exclude. So much, then, for the British commercial development of the wheel; at best it throws no light upon the question of invention.

Coming next to the United States, the evidence is much completer, but it does not show that the combination was desired before it appeared, or that it concluded successfully a series of unsuccessful experiments. The industry did not try to use the "dished" wheel, or the cross-lacing, and find them ineffectual for lack of combination. There is not the slightest evidence that the appearance of wire wheels waited upon Pugh. Fashion appears largely to have controlled the kind of wheels which the industry should adopt. When the motor car was originally manufactured commercially in the United States, it was fitted with wire wheels, generally with radial spokes, which continued until about 1905. The tread had not been so definitely established as at present, and in any event no "dishing" was required to accommodate a new form to old standards. Such wheels as were made were "symmetrical," and Hammon or Sharp would have answered all cross-lacing needs, if such there were.

In 1905, almost "overnight," the fashion changed to the wooden "artillery" wheels adopted from the French, who dominated taste in such matters because of their earlier development of the art and their finer workmanship. This type of wheel quite displaced the original "symmetrical" wire wheel, and fixed, as it were, a standard or "normal" tread. It controlled the market till 1911 or 1912. Then partly because of the introduction of English cars of the highest quality, of which the best known is the Rolls-Royce, but probably chiefly because of the energy, successful advertising, and other kinds of commercial suggestion of one Houk, the fashion began in part to turn back towards wire wheels. The result, however, was by no means to exclude the "artillery" wheel, which has more than held its place till the present time. But in 1909 Pugh had already invented the wheel of the patent in suit, and the solution was at hand as soon as the demand for it began to arise under Houk's commercial manipulation.

Nothing could therefore be more erroneous than to suppose that the American market had waited for the combination represented by Pugh's wheel, knowing the "dished" wheel and the cross-lacing, but failing to understand that their combination would bring the solution which they wished. On the contrary, it was either from the exceptional capacities of Houk, who knew how to make people buy what he, and not they, wanted them to buy, and from the introduction of

the higher grades of English cars. To accept commercial success as a test of invention under such circumstances is therefore to subject the art to a monopoly upon faulty analysis. No doubt the wire wheel, as such, always had its advantages and its apostles, as it has to-day; but its adoption did not depend upon some key to unsolved difficulties of structure.

Finally, it appears fairly clear that Pugh originally thought his invention to lie substantially in the cross-lacing. He asserts that the invention especially relates to heavy-wheeled vehicles like motor omnibuses, with heavy broad tires. "The invention consists in a wire-spoked wheel, in which the rim is carried by two sets of spokes, and two or more sets of additional spokes are provided; said spokes being disposed at considerable inclination to the central plane of the wheel, so as to give lateral strength and rigidity to the wheel." This was "the invention" whose "further object" was subsequently asserted to be in allowing a lateral displacement of the plane of the wheel. I infer that Pugh thought the "dished" wheel an illustration, an example, an embodiment of his invention of cross-lacing, in which he apparently thought himself the pioneer. The patent does not suggest, in spite of the "dishing" claims, that he supposed it would be invention to apply the cross-lacing, if old, to the "dished" wheel of his earlier patent. Yet those claims, as it now transpires, have only that on which to stand. It can hardly serve him that he later tried to limit his British patent to its "dished" wheel application, possibly through his discovery of Sharp. His original intent is disclosed by his original specification.

I conclude that the claim in suit is void for noninvention, and the bill will be dismissed.

WIRE WHEEL CORPORATION OF AMERICA v. C. T. SILVER, Inc.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 213.

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

Suit by the Wire Wheel Corporation of America against C. T. Silver, Incorporated. Decree for defendant (266 Fed. 221), and plaintiff appeals. Affirmed.

F. P. Davis, of Chicago, Ill., for appellant.
O. W. Jeffrey, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

UNITED STATES v. CRAIG.

(District Court, S. D. New York. March 8, 1920.)

1. **Contempt ⊜29—Administrative officers not privileged to commit contempt of court.**

While an administrative officer is not liable civilly for acts done or statements made in course of official duty, he is not privileged to commit a contempt of court.

2. **Contempt ⊜2—Obstructing administration of justice.**

In order to constitute a "contempt" of court, within Judicial Code, § 268 (Comp. St. § 1245), by such misbehavior as to obstruct the administration of justice, it is not necessary that it should be directed to any definite or particular matter then pending for decision, nor is it material whether or not it in fact influenced the court.

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

3. **Contempt ⊜9—Letter making false charges against judge in pending causes constitutes contempt.**

A letter written and made public by the comptroller of the city of New York at a time when a number of suits were pending in a federal court against transportation companies of the city in which receivers had been appointed who were operating the lines, and various matters were from time to time coming before the court for decision, containing a false charge that the judge was responsible for a policy of denying to the writer and other members of the board of estimate and apportionment any access to original sources of information concerning the property and affairs of the companies *held* to constitute a contempt of the court, within Judicial Code, § 268 (Comp. St. § 1245), as misbehavior so near the court as to obstruct the administration of justice.

Proceeding for contempt by the United States against Charles L. Craig. On demurrer to information. Overruled.

Francis G. Caffey, U. S. Atty., and Ben. A. Matthews and David V. Cahill, Asst. U. S. Attys., all of New York City.

William P. Burr, Corp. Counsel, of New York City (Edmund L. Mooney, William E. C. Mayer, William C. Fitts, Charles T. B. Rowe, and Alfred B. Cruikshank, all of New York City, of counsel), for defendant.

MAYER, District Judge. Defendant has demurred to the information charging him with contempt of court and has set forth 28 grounds of demurrer. It will not be necessary to refer in detail to all the contentions urged in support of the demurrer.

The proceeding against defendant is brought under section 268 of the Judicial Code (Comp. St. § 1245), which is in part as follows:

"The said courts [United States courts] shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; Provided, that such power to punish for contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice. * * *"

The contemptuous writing charged is contained in a letter alleged to have been written under date of October 6, 1919, and caused to be

delivered to the public service commissioner in response to an invitation to a conference in respect of the transportation situation in the city of New York. Two extracts from the letter will illustrate the difference between free and legally allowable criticism, on the one hand, and statements charged to be contemptuous, on the other.

Referring to refusal of this court to appoint at the time an additional or coreceiver "acceptable to the board of estimate and apportionment" in equity suits under which certain railroad properties came into the custody of this court, the letter of October 6, 1919, set forth, among other things,

"As you must be aware, it is a very common thing in large receiverships to appoint additional receivers, particularly where there are varied and conflicting interests; and I have never been able to understand why, in a matter of great public concern such as this, Judge Mayer set himself against it."

Defendant had full right to make the observation supra. The right to criticize the correctness of the decisions of courts and judges has always existed under our form of government, and must continue to exist, not merely as a right possessed by the individual, but as a safeguard to our institutions. Such criticism often invites valuable discussion and deliberation, and not infrequently results in correcting error. But such right must not be confused with "the misbehavior * * * so near" the presence of the court "as to obstruct the administration of justice." Of this latter conduct the following from the letter of October 6, 1919, is a sufficient illustration:

"Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible of denying to myself and other members of the board of estimate and apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York."

It is alleged in the information, inter alia:

"Neither the defendant nor any member or members of the board of estimate and apportionment, nor any other authorized representative of the city of New York, has ever been denied by this court, or by any one acting under its authority, or by either of said receivers, or by the said trustee, or by any authorized representative of either of said receivers or of said trustee, access to any original or other source of information concerning any of the property or affairs of any public utility corporation holding any franchise from, or any franchise to operate over, on, or under any street of, the city of New York. * * *

"1. In said letter it was stated that this court in the said suits and proceeding was responsible for a policy of denying to the defendant and to other members of the board of estimate and apportionment of the city of New York any access to original sources of information concerning the property and affairs of the various public utility corporations in the hands of receivers appointed by this court and holding franchises to operate in the streets of New York; whereas, in truth and in fact, this court never adopted such a policy, but, on the contrary, afforded to the defendant and to all members of the board of estimate and apportionment of the city of New York access to the said original sources of information, and every facility for obtaining information concerning the property and affairs of the said corporation, and expressly directed that the city of New York and its officials should have access to such information, and in truth and in fact at no time since this court assumed jurisdiction of any of said corporations as aforesaid has this

court, or any one acting under its authority, ever denied to the defendant, or to any member of the board of estimate and apportionment, or to any authorized representative of the city of New York, or of any of its officials, access to original or to any other sources of information concerning the property or affairs of any of said corporations. * * *

"All of the foregoing statements in said letter, numbered from 1 to 4, inclusive, and each of them, are and were false, and were known by the defendant to be false when made, and were made in reckless disregard of the truth.

"In addition to the statements above enumerated, the defendant by such letter intended to charge, and willfully, knowingly, unlawfully, falsely, and contemptuously therein and thereby did charge, that the court concealed the truth from the public and public officials, and kept hidden facts which, in order to protect the public interests, should have been known to the public and public officials; whereas, in truth and in fact this court did not conceal the truth, or keep any facts hidden, from the public or from any public official, but, on the contrary, prior to the writing of said letter, this court ordered and directed that there should be given to the public and public officials every opportunity to ascertain the truth and every facility which might aid in revealing the truth, and caused the corporation counsel for the city of New York to be served with notice of all proceedings in said suits other than those relating to the ordinary current administration of said receiverships."

Expressed in simple language, what the information charges is that the part of the letter quoted was knowingly false, and that the court never denied access to original sources of information, but had ordered and directed the contrary course.

Read with the entire context, there is no escape from the conclusion that the letter in this respect charged a court of justice with adopting a policy which denied to public officials access to original sources of information to which such public officials were entitled. On demurrer, the court can look only to the face of the writing, and is not enlightened as to what was in the mind of the defendant, as distinguished from what was expressed by him in writing.

Such a charge is, indeed, grave. If true, the court which sanctions such a course is rightly subject at least to serious criticism. If false, he who is responsible for the utterance has undertaken a serious responsibility in publishing that which, if believed, must bring a court into contempt and distrust, and in any event must create doubt in the minds of the uninformed as to the propriety and right of the court's conduct.

The question, then, is whether such writing, alleged to be knowingly false, constitutes the contempt denounced by section 268 of the Judicial Code. Since the decision in Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186, there is no longer any question that it is not necessary that the contempt be committed in the physical presence of the court, nor in the courthouse itself, nor in its corridors. The holding to the contrary in the case of In re Daniels (C. C.) 131 Fed. 95, was, in effect, overruled by the Toledo Newspaper Co. Case, supra, and there can no longer be any doubt that, if the other elements of contempt exist, the misbehavior, although it did not take place in the physical presence of the court, did occur "so near thereto" as to subject the defendant to the jurisdiction of this court, under the doctrine of the Toledo Case.

[1] It is contended, however, that defendant in his capacity as

comptroller of the city of New York was entitled to what his counsel speak of as "political privilege," or, to use the language of their brief:

"The letter of the defendant comptroller * * * was the subject of absolute privilege."

This point might, on demurrer, be disregarded, for the reasons set forth in the opinion of this court dated December 23, 1919; but, as it is pressed again, it may as well be disposed of. The case before the court is not one of civil liability, as were Spalding v. Vilas, 161 U. S. 483, 16 Sup. Ct. 631, 40 L. Ed. 780, De Arnaud v. Ainsworth, 24 App. D. C. 167, 5 L. R. A. (N. S.) 163, Farr v. Valentine, 38 App. D. C. 413, Ann. Cas. 1913C, 821, and Chatterton v. Secretary of State, 2 Q. B. 189. In these cases, it was sought to hold public officials in money damage in connection with writings published in the performance of their duties. The privilege accorded as a necessary protection is thus summed up in the Spalding Case, supra:

"We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a department, it is clear—and the present case requires nothing more to be determined—that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action; for personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs, as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals."

But neither in the cases above cited nor in any other case in the American or English Reports can there be found any decision which holds that there is a privilege, absolute or qualified, to commit contempt of court. Nor is there any analogy between misbehavior in the sense of section 268 of the Judicial Code and the publication or utterance of the written or spoken word which may constitute libel or slander. In the one case, the courts are impersonal, and are concerned only with—

"the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice."

In the other case, the injury is individual to him who is libeled or slandered, and a case might conceivably arise where a person might be guilty of contempt of court, and yet not be liable in damages as for libel or slander to the judge in respect of whose court he has committed contempt. Nor is the comptroller of the city of New York clothed with any privilege which will protect him for acts committed in contempt of court. He is not a member of the Legislature, even though it may be urged that the board of which he is a member has certain delegated powers in the nature of legislative functions; and, indeed, for that matter, no one would contend that a member of the Legislature would be free to commit contempt of court by misbehavior outside the halls of the legislative body in any manner he pleased as to the act or conduct of any court or judge.

[2] It is further contended that, as the information does not set forth that any particular motion or other particular matter was then awaiting decision, it follows that the information fails to set forth any act of contempt. This argument proceeds upon the theory that, although an action or suit is pending, contempt can only be committed if the misbehavior is directed to a definite matter which is to be disposed of by the court's order, judgment, or decree, dealing with that precise subject-matter.

[3] In the case at bar, the information sets forth that two consolidated causes in equity and one bankruptcy proceeding were pending in this court on October 6, 1919. By virtue of the equity causes (the information shows) there came into the custody of the court large and extensive properties of public utilities, subway, elevated, and surface transit lines. It is plain that in the equity causes and the bankruptcy proceeding the court would be called upon from time to time to make orders and decrees. Such orders and decrees would not merely affect the property as such, but necessarily affect the relation of the property to the public.

The very nature of the properties and the legal proceedings involving them cast upon the court from the beginning a continuing duty, which must necessarily be performed through the agency of orders, instructions, and decrees decided upon from time to time and expressed in such form as may be appropriate. Until, therefore, the property is no longer in the court, and the court by its final decree or proper order has released the property from its custody, and has no further duty to perform, the equity suits and the bankruptcy proceeding are in every sense pending.

If the act or conduct attacked has been completed and is not susceptible of change, it may be contended with considerable merit that the attack can no longer "obstruct the administration of justice." It is also true that many of the cases have occurred where a particular subject-matter was literally sub judice. Naturally, cases of contempt arise most frequently with reference to a particular subject or point of controversy. But, bearing in mind all that has been so definitely said in the opinion of the Chief Justice in the Toledo Case, supra, the

test really is not whether the "misbehavior" is directed against the decision of a particular question sub judice, but whether it is of such a kind as to be obstructive of the administration of justice. See, also, Ex parte McLeod, 120 Fed. 130; Ex parte Hudgins, 249 U. S. at page 383, 39 Sup. Ct. 337, 63 L. Ed. 656; U. S. v. Shipp, 203 U. S. at page 574, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265. As stated by the United States attorney:

"But, so far as can be discovered, in no case has it ever been held that, in order to constitute contempt, the particular matter with which the court was concerned must in fact have been then in its mind for future action. So narrow and precise a subdivision of the steps in a cause would, it is submitted, make a farce of the authority and duty of the courts to maintain their dignity and enforce opportunity for the exercise of their lawful powers in orderly fashion. * * * The only method by which actual substance can be given to an effective use made of the indisputable power of the court to prevent attempts at interference with the free exercise of its functions in a cause is, upon consideration of the nature of the cause itself and the character of the comment or conduct involved, to determine in each instance whether or not the comment or conduct is such that the natural tendency would be to influence or bring about 'the baleful result' which is prohibited. This is the governing principle in every well-considered or authoritative decision on the subject. It is believed that there is not to be found in the books anything to the contrary, either in the form of deliberate statement of the law or of action by a court."

See, also, In re Chadwick, 109 Mich. 588, 67 N. W. 1071; People v. News-Times Publishing Co., 35 Colo. 253, 84 Pac. 912; Patterson v. Colorado, 205 U. S. at page 460, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689.

Finally, examining the information, it appears that it is alleged that the court was falsely charged in effect with a policy or course of conduct by which it denied to public officials access to original sources of information. It will be noted that defendant refers to "the policy" for which the court is responsible. Indeed, counsel for defendant assert in their brief:

"The information itself discloses on its face that Judge Mayer had adopted a settled policy and a fixed purpose in regard to the character of the information to be accorded by the receivers and the trustee to the city officials."

But counsel contend that this action of the court was "presently final." It must be plain that "policy" means a continuing course in a pending cause, and the alleged false statement in respect thereof looked to the present and the future, as well as the past. But it is not necessary to place the decision of this question on either narrow or technical ground. The question is broader and reaches further.

Such statements as are alleged in the information to be knowingly false have, for their purpose and expected effect, the creation of a fear in the mind of the court that it will invite popular distrust, and perhaps condemnation, if it continues the course which it has pursued. The assault is based on the assumption—fortunately rarely correct—that the court will shape its decisions to meet passing popular approval and to avoid passing popular criticism. It is intended to play on human frailty, and to deflect and deter the court from the performance of its duty, and drive it into a compromise with its own unfettered

judgment, by placing it, through the medium of knowingly false assertion, in a wrong position before a public which has little opportunity to investigate the facts and ascertain the truth.

Such conduct, however futile in its results, clearly constitutes "an obstruction to the administration of justice." All the problems of a pending cause, and, in a larger sense, the community itself, are entitled to the free and unaffected exercise of that judgment which, under the Constitution, has been confided to the courts. As said by Mr. Justice Holmes in Patterson v. Colorado, supra:

"When a case is finished, the courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."

The question is not whether, as matter of fact, the court has been or will be deterred from the performance of its duty; but, as said by Mr. Chief Justice White:

"The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty. * * * Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications, and therefore there was no proof tending to show the wrong complained of. But here again not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts." Toledo Newspaper Co. v. U. S., 247 U. S. 419, 421, 38 Sup. Ct. 560, 62 L. Ed. 1186.

Being of the opinion, therefore, that the information sets forth facts constituting "misbehavior" of the defendant "so near" to the presence of the court "as to obstruct the administration of justice," the demurrer is overruled.

Monday, March 15, 1920, at 10:30 a. m., in room 331, Federal Building is fixed as the time and place to plead to the information. Settle order on one day's notice.

RANKIN v. MILLER et al.

(District Court, D. Delaware. August 19, 1918.)

No. 231.

1. Pleading ⇐335—Supplemental bill, delivered to clerk, held to have been "filed."

Where a supplemental bill and motion for leave to file it had been delivered to the clerk, of which defendant's counsel had notice, it was "filed," within Comp. St. § 1594, though, at the court's suggestion that the matter be deferred until a motion to dismiss a previous supplemental bill was disposed of, the application was withdrawn for the present (citing Words and Phrases, Second Series, File.)

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

2. Pleading ⊂=276—Leave to file supplemental bill granted.

Where, pending a motion to file a supplemental bill substituting as plaintiff a successor of the original plaintiff as receiver, that receiver resigned and his successor applied for leave to file a new supplemental bill, substituting himself as complainant, which was withdrawn until disposal of the pending motion to dismiss, the court will grant leave to file the bill after withdrawal of the preceding supplemental bill, if it has discretion to do so.

In Equity. Suit by George C. Rankin, as receiver, against Charles R. Miller and others. On motion to file a supplemental petition, substituting Charles D. Hamner as plaintiff. Leave to file granted.

John F. Neary, of Wilmington, Del., for plaintiff.
Hugh M. Morris, of Wilmington, Del., for defendant Miller.

McPHERSON, Circuit Judge. When this suit was begun in 1902 the plaintiff was George C. Rankin, receiver of the First National Bank of Alma, Kan. The parties proceeded in a leisurely fashion for more than 10 years, but finally brought the case to a hearing and put in their evidence; the result being that on July 15, 1913, Judge Bradford filed an opinion in favor of the plaintiff. In the course of the suit he delivered three opinions, which are reported in 130 Fed. 229, 199 Fed. 342, and 207 Fed. 602. Although the court decided in favor of the plaintiff (207 Fed. 602), no formal decree has yet been entered; the reason, perhaps, being that Rankin had resigned on March 27, 1913, before the decision was announced. He was succeeded by Scott Nesbitt, who served until May 1, 1915, but was never substituted as plaintiff on this record. In turn Nesbitt was succeeded by Charles K. Korbly, who filed a supplemental bill on September 27, 1915, by leave of the court, asking to be made a party. A motion to dismiss this bill was filed on March 17, 1917, and while the motion was pending the defendants' time for answering it was extended. While the motion was still undecided, Korbly resigned, and on May 1, 1917, Charles D. Hamner became his successor. He promptly took steps to be substituted as plaintiff, and on June 4, 1917, asked the court for leave to file a second supplemental bill with this object. It is true, however, that nothing appears in the docket entries in reference to the matter, and on July 11, 1918, he again asked leave to file the bill; the motion being made under Act Feb. 8, 1899, c. 121, Comp. Stat. § 1594. One of the defendants objected that the motion is too late, and urges as a reason that the "motion or supplemental petition" to substitute has not been "filed at any time within twelve months" after May 1, 1917, the date of Korbly's retirement.

[1] As it seems to me, the objection should not prevail. The affidavit of Hamner's counsel, the averments of which are not disputed, shows that on June 4, 1917, when the motion to file was first made, Judge Bradford suggested that the matter be deferred until the motion to dismiss Korbly's supplemental bill should be disposed of. In this suggestion counsel acquiesced, and the clerk's rough minute of that day contains the notation:

"Mr. Neary moves ct for leave to file further supplemental bill.
"Withdraw application for present time."

But the motion and the supplemental bill were then in the clerk's hands, with his notation thereon of the date when they came into his possession, and they have been in his official custody among the papers of the case ever since. The defendants' counsel had notice of the motion, and were acquainted with the contents of the bill; but they did not object, and did not then intend to object, to the mere filing.

I regard what was done on June 4 as the full equivalent of a formal filing and a taking of the motion under advisement, and I think it would be technical in the extreme to hold otherwise. The subject is considered, and cases cited, in 2 Words and Phrases, Second Series, ad verb. "File," in 8 Stand. Ency. Proc. 977 et seq., and in 19 Cyc. 528, 529.

[2] Moreover, if I have any discretion in the matter, I should permit the bill to be filed now. The motion to dismiss Korbly's supplemental bill was not disposed of until January 22, 1918, when the motion was abandoned, and the 4 months' delay of Hamner's counsel after that date to bring his own motion forward is satisfactorily explained and excused by his affidavit. But I think it is sufficient to decide the pending motion on the other ground, and I therefore direct the clerk formally to file the second supplemental bill as of June 4, 1917, and to order answers to be filed thereto within 30 days.

GREEN v. SOUTHERN TIMBER CO.

(District Court, S. D. Georgia, E. D. June 26, 1920.)

Logs and logging ⟸3(9)—Reservation of shore strip construed.

Exception or reservation in timber conveyance of "timber or trees standing within 150 feet of the margin of the uplands. * * * The intent * * * is to save and except such * * * trees as stand within 150 feet of the river front, this margin being reserved for the purpose of protecting the bluff or river frontage from the encroachment of the tides"—*held* to reserve all trees and timber standing within 150 feet from the line where the water (whether on marsh land or otherwise) touches the upland; the intention being, not to fix the boundary only at those portions of the river where the land was so high as to be a bluff, but to reserve a frontage on the land contiguous to the water 150 feet wide.

In Equity. Suit by Gay Green against the Southern Timber Company. Decree for complainant.

H. Wiley Johnson, of Savannah, Ga., for plaintiff.
Adams & Adams, of Savannah, Ga., for defendant.

BEVERLY D. EVANS, District Judge. The owner of land conveyed certain timber thereon by an instrument containing the following exception and reservation:

"Excepting and reserving, however, from said granted and leased premises the timber or trees standing within 150 feet of the margin of the uplands; it being understood and agreed that said excepted timber or trees is not to be turpentined or cut, and that no railroad or tramroad through the said mar-

gin of timber shall be built or run up and down said margin, except directly through the same, to a place of landing wherever necessary. The intent and meaning of this reservation or exception is to save and except such standing timber and trees as stand within 150 feet of the river front; this margin being reserved for the purpose of protecting the bluff or river frontage from the encroachment of the tides."

The controlling question on the interlocutory hearing for an injunction against a purchaser from the grantee to restrain the cutting and removal of the timber alleged to have been reserved is the construction of the above exception or reservation.

I construe the exception in the timber lease to reserve all trees and timber standing within 150 feet from the line where the water (whether on marsh land or otherwise) touches the upland. I reach this conclusion by giving effect to the words of the exception, and of the grantor's interpretation of them, so as to give to both a reasonable effect. The exception definitely fixes that line as the "margin of the upland." The interpretative clause calls it the "river front." The purpose of the grantor, as stated by him, was to protect "the bluff or river frontage from encroachment of the tides." Construing both clauses together, I do not think that the words "bluff" and "river frontage" were intended to fix the boundary only at those portions of the river where the land was so high as to be a bluff, but the grantor's purpose was to reserve a frontage on the land continguous to the water 150 feet wide. This view is strengthened by the provision in the exception that no railroad or tramroad shall be run up and down "said margin." This provision is a negation of the lateral use of the upland excepted, and evidently was intended to prevent the construction of a railroad or tramroad over the upland within 150 feet of the water line, for its entire length.

Giving this construction to the reservation in the lease, a pendente lite injunction, in view of the other facts in the record, should be granted.

In re BUTCHER et al.

Petition of MAGUIRE.

(District Court, D. Massachusetts. May 5, 1920.)

No. 25984.

Bankruptcy ⊂=345—Creditors contributing to expense of litigation not entitled to preference from fund recovered.

Creditors contributing to the expense of litigation by the trustee are not generally entitled to preferential payment from the fund recovered, beyond repayment of their expense contributions.

In Bankruptcy. In the matter of Ella C. Butcher and Grace Marshall, bankrupts. On review of order of referee denying petition of Maguire, executor. Affirmed.

Arthur T. Johnson, of Boston, Mass., for Maguire.
Wilbur H. Powers, of Boston, Mass., for bankrupts.

MORTON, District Judge. The present proceedings raise no question as to the allowance of expenses of litigation from the amount recovered; it being taken for granted, apparently, by all parties concerned, that they are allowable. The prayer of the petition is that the amount recovered—

"should be treated as a special fund and should be first devoted to the payment of the claims of those creditors who contributed to and guaranteed the expense of the trustee in bringing and carrying forward said litigation * * * in proportion to the amount of their contribution thereto."

The amount recovered is now part of the estate in bankruptcy, the distribution of which is governed by the Bankruptcy Act (Comp. St. § 9586 et seq.). As said in In re Morris, 204 Fed. 770, 123 C. C. A. 220, the act contemplates equality of treatment among creditors of the same class. It is at least doubtful whether the court has power to make a different distribution of assets from that provided in the act. To award preferences among creditors for supposedly meritorious or helpful service by them in the administration of the estate would introduce a wide, and I think unwise, element of discretion. It certainly ought not to be done unless the effect of a refusal to contribute to the fund required for litigation by the estate was squarely put to creditors at the time when they were asked to contribute, as it was in Cornell v. Nichols, 201 Fed. 320, 119 C. C. A. 558.

Order of referee affirmed.

UNITED STATES v. ROBINSON et al. and five other cases.

(District Court, W. D. Oklahoma. June 11, 1920.)

Nos. 2158–2161, 2164, 2165.

1. **Conspiracy ⇐43(5)—Averments as to conspiracy cannot be aided by allegations as to overt acts.**
   Regardless of whether the conspiracy requires the commission of an overt act to become criminal, averments as to formation of the conspiracy cannot be aided by allegation as to commission of an overt act, so as to charge an offense, but the conspiracy must be sufficiently charged.

2. **Indictment and information ⇐110(10)—Indictment averring conspiracy to charge excessive price of sugar insufficient to state any offense.**
   Assuming the validity of Food Control and District of Columbia Rents Act, Oct. 22, 1919, making it unlawful for any person to exact excessive prices for any necessity, or to aid or to abet doing of any act made unlawful, an indictment charging that defendants did conspire, combine, and agree, etc., that they would purchase and cause to be purchased large quantities of sugar, which is a necessity, and would exact and receive excessive prices therefor, is insufficient to state any offense, for, though the general terms of the act be sufficient, and "excessive" has well-defined meaning among lexicographers, the indictment itself must state the particulars charged, so as to give some basis showing that an excessive price was exacted; a charge in the general language of the statute being insufficient.

J. T. Robinson and another, Harry E. Alton and another, O. H. Dietz and another, Oscar D. Halsell and another, John D. Thomas

and another, and Charles E. Van Cleef and others were severally indicted for violation of the Food Control and District of Columbia Rents Act of October 22, 1919. On demurrers to indictments. Demurrers sustained.

Wilson, Tomerlin & Threlkeld, of Oklahoma City, Okl., for defendants Dietz and Morris.

P. C. Simons, of Enid, Okl., and Keaton, Wells & Johnston, of Oklahoma City, Okl., for defendants Alton and Smallwood.

Pierce & McClelland and E. E. Blake, all of Oklahoma City, Okl., for defendants Halsell and Crahan.

Cottinham & Hayes, of Oklahoma City, Okl., for defendants Thomas and Rucks.

Keaton, Wells & Johnston, of Oklahoma City, Okl., for defendants Van Cleef, Cooter, and Farnam.

POLLOCK, District Judge. The above entitled and numbered cases are each and all prosecutions by the government under the amendment of October 22, 1919, known as the Food Control and the District of Columbia Rents Act (chapter 80, 41 Stat. 297). To the indictments defendants, each and all, have demurred on similar grounds. These demurrers have been presented in oral argument, and now stand submitted for decision on voluminous briefs of counsel for respective parties. As the indictments and the demurrers thereto are so like or similar in nature, language, form, and legal intendment as to present in each case the same legal controversies, they may well be, and will be, ruled by this one memorandum.

The charge made against defendants, briefly stated, is that of a conspiracy to sell a named necessary food product at an excessive price. While in each case but one offense is charged, many overt acts are alleged to have been done in furtherance of the purpose of the illegal confederacy. The act charged to have been violated by defendants is of course a war measure, the force and effect of which will end and the act itself sink into desuetude when, if ever, the late war between this nation and the Central Powers of Europe shall have been formally declared at an end. In the course of this memorandum the fact that such formal declaration required to end the war in theory had not been made at the date the law was enacted, therefore at said time the fact this country still remained at war, will be conceded.

Again, the complete, absolute, and plenary power of Congress to enact any and all legislation by it deemed appropriate or necessary in time of actually existing warfare between this country and another or others to preserve its national life is also conceded. Hence the question here presented concerns itself more with the sufficiency of the facts pleaded in the foregoing indictments to charge against defendants a public offense under the settled principles and forms of criminal pleading than as to the constitutional right and power of the Congress to legislate on the subject of food control in the exercise of the war powers by Congress, to protect the country and feed and maintain its armies in time of war. Viewed in this light, it is evident the language

of the act itself must be first considered in connection with the charging part of the several indictments in a determination of the question presented.

[1, 2] The language of the act under which the indictments in these cases are found reads:

"It is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: Provided, that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: Provided further, that nothing in this act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them." Section 2.

The charging part of the indictment in case No. 2158 (identical or similar in all of the other cases) reads:

"Defendants, then and there being, did then and there willfully, unlawfully, knowingly, and feloniously conspire, combine, agree, and arrange with each other, and with divers other persons to the grand jurors unknown, to commit an offense against the United States of America; that is to say, that each and all the aforementioned defendants unlawfully, willfully, knowingly, and feloniously did conspire, combine, agree, and arrange with each other, and with divers other persons to the grand jurors unknown, that they should and would, as the managing and active officers of Carroll, Brough & Robinson, a corporation, and as individuals, purchase and cause to be purchased large quantities of sugar, which commodity is a food used for consumption and is a necessary, from the Great Western Sugar Company, of Denver, Colorado, the Alton Mercantile Company, of Enid, Oklahoma, and the California & Hawaiian Sugar Refining Company, of San Francisco, California, and divers other sugar refineries, and divers wholesale dealers in sugar and brokers, whose names are to the grand jurors unknown, and that they should and would, when said sugar was so purchased by Carroll, Brough & Robinson, a corporation, by and through the said defendants, as the active officers in charge thereof, then and there unlawfully, willfully, knowingly, and feloniously demand, exact, and receive, and cause Carroll, Brough & Robinson, a corporation, to willfully, unlawfully, and knowingly, and feloniously exact, demand, and receive, *excessive prices therefor* from the retail grocers, merchants, and dealers in sugar in the state of Oklahoma, and other territories to the grand jurors unknown."

From the above quotations from the amendment of the act under which these prosecutions are instituted, and from the language employ-

ed by the pleader in the indictment, it is seen the charge as presented is in the exact language of the clause of section 4 of the act as amended. The question first presented by the demurrers to the several indictments, is this:

Conceding war to have actually or theoretically existed at the date this amendment took effect (October 22, 1919), and further conceding to Congress the fullest and most absolute plenary exercise of legislative power at the date this enactment took effect to provide for the safety of the nation and the maintenance of its armies then engaged in war, through the preservation and control of necessary and essential food products of the country, and further conceding the right of the Congress to create just such exceptions and exemptions from the operation of the act which are found written therein, the questions remain: Does an indictment charging, as these do, the defendants, in the language of the statute, state a public offense under the settled principles of the law of criminal pleading and practice in this country essential to be observed in any orderly enforcement of the laws of our land, and having a reasonably decent regard for the safety of the individual citizen against oppression, which is, or should be, the supreme law of our land? (2) If so, is it within the constitutional power of the Congress to carve out and create a new criminal offense in language so broad, comprehensive, indefinite, general and uncertain of meaning as is clause (e) of the amendment above quoted? If both of these questions be answered in the affirmative (and they will be considered together), it is obvious the indictments presented must be held impregnable to the challenge made by the demurrers; otherwise, not.

A glance at the language employed by the pleader in drafting the indictments is sufficient to show it was his thought the language employed by the Congress in the act is sufficiently definite and certain to charge the commission of a public offense, and this for the reason the language found in the charging part of the indictments is identical with that found in the act itself. Hence the question first presented is this: Conceding the constitutional validity of the act in creating in clause (e) a new criminal offense, if sufficient issuable facts be pleaded to bring the defendants within the prohibition of the act, yet is an indictment drawn under said clause in the language therein employed sufficiently definite and certain to state a public offense?

In the consideration of this question it must be borne in mind the charge here presented is one of criminal conspiracy to violate the provisions of said clause (e). If this criminal conspiracy be that created by the amendment itself, then it was entirely unnecessary for the pleader to set out the doing of the many overt acts in furtherance of the unlawful confederacy to make out a complete or punishable offense in these cases, for none such are required to be either pleaded or proven under the language of the act itself. Hence the acts alleged to have been done in furtherance of the conspiracy add nothing whatever to the charging portion of the indictment.

Again, if the conspiracy attempted to be charged in these cases is framed under the old conspiracy act (section 37 of the Penal Code

[Comp. St. § 10201]), while it is requisite in such case to plead and prove the doing of one or more overt acts by one or many of the coconspirators after the formation of the conspiracy and in furtherance of its unlawful purpose to make out a completed and punishable offense, yet such overt acts charged to have been done cannot be resorted to, to explain or aid in any manner in making out the criminal charge of conspiracy. This is the settled law. In United States v. Britton, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698, Mr. Justice Woods, delivering the opinion of the court, says:

"The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiæ, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that, in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. Reg. v. King, 7 Q. B. 782; Commonwealth v. Shedd, 7 Cush. 514."

In Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, Mr. Chief Justice Fuller, delivering the opinion for the court, says:

"The conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

In Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545, Mr. Justice Brewer, delivering the opinion of the court, says:

"If the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere."

See, also, Bannon & Mulkey v. United States, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494; Hyde v. Shine, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90; Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

Hence it is seen all that is here charged against defendants is a conspiracy to charge excessive prices for the necessary commodities by them sold. What constitutes this excessive price is nowhere defined, stated, or charged. What the market price of the necessary commodity was at the time is not stated or charged. What the true or intrinsic value of this necessary food product is, in comparison with other necessary food commodities, is not stated. In certain of the cases, at least, defendants are charged as wholesale merchants dealing or trading in this necessary food product at wholesale, in which event, to remain in such business, of necessity, they must continue to replace the stock of the commodity as exhausted by sales. Yet in no manner or way is such replacement cost or value stated. Indeed, the charging part of the indictments in these cases nowhere alleges the amount charged or the price at which defendants purchased the necessary food products; hence the only act charged against defendants in these cases is the bald, naked conclusion in the mind of the pleader that defendants conspired to charge a price (not stated) which the

grand jurors find or considered in their minds (no other standard of measure is given) to have been excessive?

True, the prices now charged and paid, and which have for some time prevailed, are unquestionably excessive as compared with those of former years. But the reason for this is not difficult to see nor hard to understand. Whether the prices charged by defendants, whatever they may have been, will, in future, be regarded as excessive, no man living can tell with certainty. In all probability the answer to this question depends more upon whether this country shall continue to feed warring Europe and our people at war in Europe, or whether our people shall again settle down to normal, natural, peaceful life of producing a sufficient food supply, than it does or will on acts of Congress or criminal prosecutions in our courts of justice.

What is an excessive price or a low price for any commodity, in all reason, is, and ever must continue to be, one of comparison only. "There is nothing either good or bad, but thinking makes it so." Being a matter capable of ascertainment only by comparison, and incapable of being judged by any fixed standard, and, in the end, controlled by the law of supply and demand, can it be possible for the law-making power, in the first instance, to create a criminal offense in such vague, indefinite, uncertain language as is that found in clause (e) of the amendment, above set forth; and, having done this, again, is it possible under the settled principles of criminal practice and procedure in the courts of justice of our country, guided by a written Constitution, to charge a citizen with the commission of a crime in the vague, indefinite, uncertain, general language of this enactment? I do not so believe, and if it be so held, now or in the future, by our courts, then our much-vaunted freedom of the individual citizen from oppression will become as unstable, uncertain, and untrustworthy as hieroglyphics written in mud.

In support of the validity and sufficiency of the charging part of the indictments it is by the government contended the word "excessive," employed, has a well-defined meaning among lexicographers and those speaking the English tongue. Grant this, but it proves nothing. The word "rascal" also has a dictionary definition; so do the words "villain" and "villainous." But who would have dreamed of contending, no matter what form the criminal act took, an indictment merely charging a citizen with being or acting as a villain or a villainous rascal would define or charge him with any possible criminal offense.

In other words, even though conceding the power of the Congress to make criminal the demanding, exacting, or receiving of excessive prices for necessary food products in the broad general language employed in clause (e) of the amendment, yet an indictment charging the commission of the substantive offense under such a statute, or an indictment charging a conspiracy to commit such substantive offense as in these cases, must allege, in addition to the language creating the offense such independent, issuable facts as, if proven, will convince the minds of the jurors trying the case the prices demanded and received by the defendants under the circumstances were excessive, and not leave the decision of this question to be determined by the beliefs

or conclusions of the jurors as to what is or is not excessive. In such cases as these, when the law-making power employs general terms only, or when the statute creates the offense in mere generic terms, or, still more closely allied to this case, where the charging part of the indictment contains a mere conclusion of the pleader, in all such cases a charge in the language of the statute is wholly insufficient to present any issuable public offense to the jury. This has always been the settled rule of criminal pleading in the courts of this country, as may be seen by reference to a few of the adjudicated cases controlling here. Thus, in the great case of United States v. Cruikshank et al., 92 U. S. 542, 23 L. Ed. 588, Mr. Chief Justice Waite, delivering the opinion of the court, in passing on this precise question, said:

"It is an elementary principle of criminal pleading that, where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, it must descend to particulars.' 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, *facts are to be stated, not conclusions of law alone.* A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

In United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, Mr. Justice Field, delivering the opinion for the court, said:

"The statute upon which the indictment is founded only describes the general nature of the offense prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general, and with few exceptions, of which the present is not one, the universal, rule on this subject is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted, without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially, or by way of recital. * * * The doctrine invoked by the solicitor general, that it is sufficient, in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. One or two cases will serve as an illustration of the doctrine."

In United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819, Mr. Justice Harlan, delivering the opinion for the court, returned answer to the following specific question:

"Whether it is sufficient, in an indictment drawn under that portion of the section which prohibits the use of a still, boiler, or other vessel, for the purpose of distilling, in any building or on premises where vinegar is manufactured or produced, to charge the offense in the words of the statute."

The answer is as follows:

"Where the offense is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop, Crim. Proc. § 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

Sherwood, Justice, delivering the opinion of the court, in State v. Meysenburg, 171 Mo. 1, 71 S. W. 229, quoting from Bishop's New Criminal Procedure, § 331, said:

"The facts in allegation must be the primary and individualizing ones. Thus a charge that the defendant committed larceny discloses only a secondary fact, produced by a combination of primary facts and law; in other words, it is a conclusion of the law. This does not suffice. The pleader should set out the primary facts, disconnected from the law; then the court, knowing the law and applying it to them, will deduce the legal result."

Elsewhere the same author observed:

"A statute having made it punishable for one not a qualified voter to vote at an election, a charge of the offense simply in these words was adjudged inadequate; for whether or not the defendant is such voter is a deduction of the law from the facts, and, though a statute may define an offense by its legal result, not so an indictment. It must state the facts whence the result comes, thus notifying the defendant of what he must meet, and putting upon the record a proper case for the court's adjudication."

See, also, on this head, State v. Graham, 38 Ark. 519.

In the light of the cases cited, controlling here, which might be indefinitely multiplied, it must be held, even considering the amendment under which the indictments in these cases are drawn to be within the constitutional power of Congress, that an indictment in the language of the statute presents no issuable fact to be tried and determined by the jury; hence is insufficient. The principal reliance of the government as against the demurrers based on this ground is the case of Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232, in which was considered the sufficiency of an indictment drawn under the provisions of the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830). While it is true some language found in the opinion in this case, prepared by Mr. Justice Holmes, might seem to support the contention made by the government in these cases, yet that case dealt with such terms as "restraint of trade," "monopoly," etc., which terms have a well-settled meaning at the common law. Hence, while what is said may be applicable to the indictment returned in that case, yet it would be misleading and dangerous in the extreme, and subversive of the fundamental principles in criminal pleading, to extend some of the language employed in that opinion to such a case as these, dealing with the term "excessive price," which has no settled, legal definition or significance, but only one given to it by lexicographers.

Many decisions and statements emanating from other courts in pass-

ing upon different parts of section 4 as amended have been employed in argument in these cases, some inclined to support and other some to deny the constitutional validity of the several parts of the amended act. I do not find it necessary in these cases at this time to rule the question of constitutional validity raised. Even if that be conceded, the indictments are fatally defective for want of sufficient averment of issuable facts.

It follows, both in the very reason of the case itself and on fundamental principles of criminal pleading, as deduced from the well-considered opinions of powerful jurists speaking for the highest court of the land, the indictments in these cases present no issuable facts to be tried and determined by a jury touching the guilt or innocence of the defendants, but mere conclusions of the pleader; hence they are insufficient, and the several demurrers thereto must be and are sustained.

It is so ordered.

UNITED STATES v. TURNER.

(District Court, W. D. Virginia. July 15, 1920.)

1. **Criminal law ⟸313—Legislature presumed to have had knowledge of prior laws.**
   It will be presumed, where it was contended that prior revenue legislation was repealed by the National Prohibition Act, that Congress had knowledge of the prior acts.

2. **Internal revenue ⟸2—Statute forbidding removal of untaxed spirits not repealed by the National Prohibition Act.**
   The National Prohibition Act, intended to prevent the use of intoxicating liquor as a beverage, which preserved war-time prohibition acts and in section 35 declared that existing laws were not repealed, unless inconsistent, did not work a repeal of Rev. St. § 3296 (Comp. St. § 6038), forbidding the removal of untaxed spirits.

3. **Criminal law ⟸29—One act may be violation of two statutes.**
   There is no constitutional objection to making one act or transaction a violation of two statutes, although both emanate from the same sovereignty, if each offense embraces an element not embraced in the other.

4. **Intoxicating liquors ⟸224—If defendant introduces evidence of permit to remove liquor, government must rebut it.**
   In a prosecution under the National Prohibition Act for removing liquor without a permit, the government need not prove want of a permit to make out a prima facie case; but if defendant should introduce substantial evidence that transportation was authorized by a permit, the government would then have to introduce evidence that no permit was issued, or that it was obtained by fraud, or that it did not apply to the act of transportation charged.

5. **Internal revenue ⟸2—National Prohibition Act, forbidding removal of liquor without permit, did not repeal statute making removal of untaxed liquor an offense.**
   The provision of the National Prohibition Act making an offense the removal of liquor without a permit did not impliedly repeal Rev. St. § 3296 (Comp. St. § 6038), making the transportation of untaxed spirits an offense; the two offenses embracing different elements, although emanating from the same sovereignty.

6. **Internal revenue ⊂⊃2—Revenue statute prohibiting removal of untaxed spirits not inconsistent with National Prohibition Act.**
Rev. St. § 3296 (Comp. St. § 6038), making it an offense to remove untaxed spirits, is not, as regards the offense or punishment, inconsistent with the National Prohibition Act, denouncing the transportation of liquor without permit, and hence was not impliedly repealed.

7. **Internal revenue ⊂⊃2—Statute forbidding removal of untaxed spirits not repealed by National Prohibition Act.**
Rev. St. § 3296, forbidding removal of untaxed spirits, denounces an offense which may be different from that embraced in National Prohibition Act, tit. 2, § 25, declaring that it shall be unlawful to have or possess any liquor intended for use in violating the article, and hence the earlier section was not repealed.

8. **Internal revenue ⊂⊃2—Statute forbidding concealing untaxed liquor not repealed by National Prohibition Act.**
Rev. St. § 3296 (Comp. St. § 6038), forbidding the concealing of untaxed liquor, was not impliedly repealed by National Prohibition Act, tit. 2, §§ 21, 25, denouncing the offense of maintaining a liquor nuisance, and declaring that it shall be unlawful to possess liquor with intent to violate the act.

H. L. Turner was indicted for removing and concealing untaxed spirits. On demurrer to the indictment. Demurrer overruled.

The defendant has been indicted, under section 3296, Rev. St. (Comp. St. § 6038), for removing and for concealing untaxed spirits. The offenses are charged to have been committed on June 27, 1920. The defendant demurred to the indictment, on the ground that the Volstead Act (41 Stat. 305) repeals section 3296. The demurrer was overruled.

Section 3296, Rev. St., reads: "Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."

Joseph H. Chitwood, U. S. Atty., of Roanoke, Va.
John L. Lee, of Lynchburg, Va., for defendant.

McDOWELL, District Judge (after stating the facts as above). [1, 2] The chief purpose of the framers of the Volstead or National Prohibition Act (Act Oct. 28, 1919, 41 Stats. 305) was to reduce and as far as possible to prevent the use of intoxicating liquor as a beverage. Title 1 increases the powers of the government to enforce sundry temporary prohibition statutes—for instance, section 12 of the Selective Service Act (Act May 18, 1917, 40 Stat. 76, 82 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2019a]; Act Oct. 6, 1917, 40 Stat. 393 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2813e]); section 15 of Act Aug. 10, 1917, 40 Stat. 276, 282 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛l); and the fourth clause of Act Nov. 21, 1918, 40 Stat. 1045, 1046 (Comp. St. Ann. Supp. 1919, §§ $3115^{11}/_{12}$f–$3115^{11}/_{12}$ggg, $3115^{11}/_{12}$h). As the war prohibition acts are expressly saved from repeal by section 7, title 1, of the Volstead Act, the "exist-

ing laws" mentioned in section 35, title 2, must be some or all of the older statutes, such as the "Reed Amendment," section 5, Act March 3, 1917, 39 Stat. 1069 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), Act. Oct 3, 1917, 40 Stat. 329 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10387e), Act Feb. 8, 1875, 18 Stat. 310 (Comp. St. § 5966), and sections 3258, 3279, 3296, Revised Statutes (Comp. St. §§ 5994, 6019, 6038).

Sections 3, 6, and 12 of title 2 of the Volstead Act contemplate and provide for the manufacture under permit of potable liquor for medicinal and scientific uses. Title 3 provides a rather elaborate scheme for the manufacture of high-proof liquor for industrial uses. The word "liquor," as used in title 2 (section 1), includes the phrase "distilled spirits," used in section 3296; and the definition of "alcohol," in section 1 of title 3, is identical with the definition of "distilled spirits," in section 3248, Rev. St. (Comp. St. § 5982). Section 9 of title 3, providing for "industrial alcohol plants," reads in part:

"Industrial alcohol plants and bonded warehouses established under the provisions of this title shall be exempt from" some 40 sections of the Revised Statutes, including sections 3258 and 3279, but not including section 3296, although the 13 sections immediately preceding section 3296 are included.

The intention that section 3296 shall be preserved, at least in respect to industrial alcohol plants, is obvious; and, in view of this section (9 of title 3), it is equally obvious that the presumption of law that the lawmakers knew of the existence of section 3296 (Sutherland, Statutory Construction, § 333; 36 Cyc. 1135) is reinforced by actual knowledge. Hence it cannot be argued that the draftsmen of the Volstead Act were ignorant of the provisions of section 3296.

[3-6] A. It will tend to clearness to discuss first the clause prohibiting the removal of untaxed liquor. In this district it is a common practice of the illicit distillers to collect the liquor at the distillery in barrels and then roll the barrels along the ground (usually down grade and for no very great distance) to some place of temporary concealment. Another method, sometimes employed, is to run the liquor from the distillery to a place of concealment by means of a hidden line of pipe. Section 6 of title 2 of the Volstead Act forbids any one to "transport" liquor without a permit. There is at least room for some doubt if, giving to the word "transport" its ordinary signification, it could properly be said that rolling a barrel of liquor along the ground, or running liquor through a pipe, was "transporting" liquor, and, if not, here are at least two methods of removing liquor which are not covered by the transporting clause of the Volstead Act.

It is true that section 3296 and the transporting clause (section 6, title 2) of the Volstead Act may in some cases both apply to the same transaction. For instance, if one were, without a permit, to convey a barrel of untaxed liquor in his wagon, he would violate both statutes. It is therefore argued that Congress could not have intended to keep this clause of section 3296 in force, as it is said that it would be unconstitutional to make one and the same act a violation of two statutes. There is no constitutional objection to making one act or one

transaction a violation of two statutes, although both emanate from the same sovereignty, if each offense embraces an element not embraced in the other. See Carter v. McClaughry, 183 U. S. 365, 394, 395, 22 Sup. Ct. 181, 46 L. Ed. 236; Gavieres v. U. S., 220 U. S. 338, 31 Sup. Ct. 421, 55 L. Ed. 489; Ebeling v. Morgan, 237 U. S. 625, 630, 631, 35 Sup. Ct. 710, 59 L. Ed. 1151. In each of the above cases the Supreme Court cites with approval Morey v. Commonwealth, 108 Mass. 433, in which it is said:

"A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

I assume that in a prosecution for transporting liquor without a permit the government would not have to prove the want of the permit in order to make out a prima facie case. 16 C. J. 530; 1 Elliott, Ev. § 141; 4 Wigmore, Ev. § 2512. But if the defendant should introduce any substantial evidence tending to show that the transportation had been authorized by a permit, the government would then have to introduce evidence that no permit was issued, or that it was obtained by fraud, or that it did not apply to the act of transportation charged. Consequently it must be held that the want of a permit is an element in the offense of transporting under the Volstead Act, and this element clearly does not exist in cases for removing under section 3296. In a prosecution under section 3296 (when the removal is accomplished by transportation, as well as in all other cases), an element of the offense is the fact that the liquor was untaxed, which must be proved by the government; and this element does not exist in prosecutions for transporting under the Volstead Act. It seems to follow that the argument for repeal, based on the impropriety of imputing to Congress an intent to violate the Constitution, is of no force; and as it is constitutional to make the same transaction a violation of both statutes, the intent of the Volstead Act could have been to leave the removal clause of section 3296 in force.

It is said that the two statutes are inconsistent. When the identical offense denounced by an old statute under a heavy punishment is by a more recent statute made punishable with less severity, there is inconsistency. The intent shown by the recent statute is repugnant to and contradictory of an intent to keep in force the old statute. But such is not the situation here. Since the two statutes denounce different offenses, the fact that different punishments are affixed does not show repugnance. Where each offense embraces an element not existing in the other, the foundation for predicating inconsistency is wanting. There is no inconsistency in an intent to punish differently different offenses. I know of no reason for saying that the intent of the framers of the Volstead Act may not have been to permit prosecutions under both of these statutes. Punishing moderately the movement of taxed liquor, or of liquor not proved to be untaxed, does not seem at all inconsistent with an intent to punish severely the movement of liquor proved to be untaxed. The mere fact that one who is removing un-

taxed liquor may also be transporting liquor without a permit goes to show that these two criminal statutes may be violated by one transaction; but it affords no reason for denial of an intent to enforce either or both statutes, although with different punishment for the two offenses.

By far the commonest difficulty encountered by the government in prosecutions for removals of liquor under section 3296 is that of proving beyond reasonable doubt that the liquor was untaxed. A recognition of this difficulty and an intent to aid and supplement the old statute by the transporting clause of the Volstead Act seems to me to comport with the chief purpose of the framers of the Volstead Act much better than does an intent to repeal the removal clause of section 3296. Both statutes are useful in preventing the use of intoxicating liquor as a beverage. Neither fully covers the ground; but the two together seem to reach every method of evading the fundamental intent of the Volstead Act, in so far as the movement of liquor is concerned, and the use of intoxicating liquor as a beverage to any considerable extent necessitates movement of liquor.

It is further argued that the Volstead Act completely covers the field, and that therefore the intent to repeal the old statutes is implied. I have mentioned at least two methods of removing illicitly made liquor which plainly violate section 3296, and which probably cannot properly be treated as within the transporting clause of the Volstead Act. Moreover, I have not found in the Volstead Act any prohibition of the act of concealing liquor (taxed or untaxed), none of working in an illicit distillery, and none of carrying material for distillation to such a distillery. The old statutes (sections 3279 and 3296, R. S.), which forbid such acts, have always been among the most efficient checks on the illicit manufacture of liquor. It seems, therefore, that a statute which omits such prohibitions cannot be said to completely cover the field; and indeed the very absence of such prohibitions in the Volstead Act is itself strong evidence of an intent to keep in force such of the old statutes as supply the deficiencies of the new statute.

[7] B. The effect of section 25, title 2, of the Volstead Act on the removal clause of section 3296 must also be considered:

"It shall be unlawful to have or possess any liquor * * * intended for use in violating this title. * * *"

One who is engaged in removing untaxed liquor may in many cases be said to have or possess the liquor, and the fact that the liquor is intended for use in violation of some one or more of the provisions of title 2 of the Volstead Act would in many cases be readily inferable from the surrounding circumstances. If section 25 is applicable to every case in which a conviction under section 3296 may be had, there would be more force in an argument for an implied intent to repeal the old statute. There is, however, at least one class of cases to which section 3296 clearly applies, and to which section 25 could be applied only by rather violently straining the meaning of the words of the statute. In this district the majority of removals of liquor (in considerable quantity) are made (at night) in automobiles or motor trucks,

and frequently the chauffeur is the employé of the owner of the liquor. If, as may frequently happen, the owner of the liquor rides with the chauffeur, it could not very fairly be said that the chauffeur had had or had possessed the liquor. The owner of the liquor being present, it is he who has and is in possession of the liquor, rather than his employé. The employé may, and usually does, violate section 3296, but cannot fairly be said to violate section 25 of the Volstead Act. No reason is perceived for the existence of an intent on the part of the framers of the Volstead Act to exempt from prosecution the many chauffeurs who are employed by illicit distillers to remove untaxed liquor.

It is hardly necessary to say that the two offenses are different, and that each has an element not in the other. Under section 3296 it must be proved that the liquor was untaxed; under section 25 it must be proved that the defendant was in custody or possession of the liquor, and that the unlawful intent existed. On the whole, an intention on the part of the framers of the Volstead Act that this clause, as well as the transporting clause, should overlap and supplement section 3296, seems much more probable than intent to repeal the removal clause of section 3296.

[8] C. The clause of section 3296 prohibiting concealing untaxed liquor next requires consideration. The offense of maintaining a common nuisance, under section 21, title 2, of the Volstead Act, is so entirely different from the act of concealing untaxed liquor, that no discussion of section 21 seems necessary. By section 25, title 2, of the Volstead Act, it is forbidden to have or possess any liquor intended for use in violation of title 2.

If, as may happen, the person who conceals untaxed liquor is not the owner of the liquor, and if the owner be present at the time, it could not fairly be said that the employé had had or had possessed the liquor although he might clearly violate the concealing clause of section 3296. As the act of concealing liquor (taxed or untaxed) is not expressly prohibited by the Volstead Act, I can find no good reason for an implied intent to repeal this clause of the old law. The old statute will in some cases be useful in carrying out the chief purpose of the framers of the new statute, the two offenses are not the same, different evidence is required, and there is no inconsistency. An intent to punish severely the act of concealing untaxed liquor and an intent to punish moderately the act of possessing liquor with the forbidden intent are not repugnant; and, as taxes are still imposed on the manufacture of every kind of intoxicating liquor, it is a graver offense to conceal untaxed liquor than to possess liquor which has been or may have been taxed.

The most satisfactory conclusion I have been able to reach is that the framers of the Volstead Act did not intend a repeal of any part of section 3296.

In re FRED C. HENDERSON, Inc.

(District Court, D. Massachusetts. October, 1919.)

Bankruptcy ⊂⊃234—Creditor may examine debtor before adjudication.

A creditor may be allowed to examine officers of a debtor corporation before adjudication under Bankruptcy Act, § 21a (Comp. St. § 9605), and is not required to prove its status as a creditor further than by its oath to the application.

In Bankruptcy. In the matter of Fred C. Henderson, Incorporated, bankrupt. On review of order of referee allowing creditor to examine officers of debtor corporation under Bankruptcy Act, § 21a (Comp. St. § 9605). Affirmed.

The following is the opinion of Referee Olmstead:

This was a petition to review an order allowing the Bankers-Commercial Security Company, Incorporated, a creditor, to examine the officers of the debtor corporation. An application was duly made by said creditor under Bankruptcy Act, § 21a (Comp. St. § 9605). To this application an answer was filed, in which were fully set forth the objections to the granting of any examination. The answer denies that the Bankers-Commercial Security Company, Incorporated, is a creditor. At the hearing before me, counsel for the Exchange Trust Company, the objecting creditor, was given an opportunity to introduce evidence to show that said Bankers-Commercial Security Company, Incorporated, was not a creditor, but declined to produce any such evidence. The application on behalf of said creditor is sworn to. I find, therefore, that the said applicant is a creditor, and such status is established by its oath. Whitney v. Dresser, 200 U. S. 532, 535, 26 Sup. Ct. 316, 50 L. Ed. 584, 15 Am. Bankr. Rep. 326.

That applications under section 21a (see forms 28–30, § 30 [Comp. St. § 9614]; sections 7(9), 55b [sections 9591, 9639]) are favored, and that a creditor need not even prove his claim, has been held. In re Jehu (D. C. Tenn.) 2 Am. Bankr. Rep. 498, 94 Fed. 638; In re Walker (D. C. N. D.) 3 Am. Bankr. Rep. 35, 96 Fed. 550; In re Prussian (D. C. Mich.) 43 Am. Bankr. Rep. 13, 255 Fed. 857. Furthermore, this right and privilege of examination are not confined to creditors, but extend to "parties in interest." Sections 29c(3), 47a(5), 49 (sections 9613, 9631, 9633).

That creditors have a right to examine before adjudication and that certain inconveniences may arise, if such examinations are delayed, is also settled by the Supreme Court. Cameron v. U. S., 231 U. S. 710, 34 Sup. Ct. 244, 717, 58 L. Ed. 448, 31 Am. Bankr. Rep. 604.

All the other objections in the answer, in my opinion, are met by the reasons for early examinations set forth in the latter decision of the Supreme Court.

Jacobs & Jacobs, of Boston, Mass. (Joseph B. Jacobs, of Boston, Mass., of counsel), for petitioner.

Robert E. Harding, of Boston, Mass., for objector.

MORTON, District Judge. Order of referee for examination of officers of corporation affirmed.

REID et al. v. KITSELMAN.

KITSELMAN v. REID et al.

(Court of Appeals of District of Columbia. Submitted March 11, 1920. Decided May 3, 1920.)

Nos. 1303, 1304.

Appeal from Commissioner of Patents.

Interference proceeding between Pettis A. Reid and others and Alva L. Kitselman. From a decision awarding priority as to some of the counts to Reid and others, and as to the other counts to Kitselman, both parties appeal. Affirmed.

J. C. Dowell, of Washington, D. C. (Dowell & Dowell, of Washington, D. C., on the brief), for Reid and others.

Wm. S. Hodges, of Washington, D. C. (Charles W. La Porte, of Peoria, Ill., on the brief), for Kitselman.

SMYTH, Chief Justice. Reid, Reid & Kelley were placed in interference with Kitselman concerning a device for producing woven wire fencing. There are 57 counts involved. Space will not permit us to set them all out, and it is difficult to select a few that would be typical. Therefore we refer those interested to the opinion of the examiner of interferences, where all the counts can be found. Some of the counts were awarded to Reid, Reid & Kelley, and others to Kitselman. Each side appeals from so much of the decision as is against it.

The three tribunals of the Patent Office concur as to the disposition of all the claims except five, and as to those the Examiners in Chief and the commissioner are in accord.

The questions involved are somewhat intricate. We have studied them with care. It is not necessary to set down here the process by which we have reached a determination, because the Examiners in Chief and the Commissioner have thoroughly analyzed the matter in their respective opinions, and we approve their conclusions and the reasoning upon which it rests. The Commissioner awarded Kitselman priority as to counts 1 to 18, inclusive, 20 to 36, inclusive, 38 to 45, inclusive, 48 to 52, inclusive, 54 and 55; and to Reid, Reid & Kelley he awarded priority as to counts 19, 37, 46, 47, 53, 56, and 57. His decision is affirmed.

Affirmed.

KITSELMAN v. REID et al.

(Court of Appeals of District of Columbia. Submitted March 11, 1920. Decided May 3, 1920.)

No. 1305.

Patents ⇐113(7)—Decision of three patent tribunals not disturbed, unless manifestly wrong.

Where the three tribunals of the Patent Office concur in awarding priority to senior applicants in interference proceedings, a decision of the commissioner should be affirmed, unless there is manifest error.

Appeal from Commissioner of Patents.

Interference proceedings between Alva L. Kitselman and Pettis A. Reid and others. From a decision awarding priority to Reid and others, Kitselman appeals. Affirmed.

Wm. S. Hodges, of Washington, D. C. (Charles W. La Porte, of Peoria, Ill., on the brief), for appellant.

J. C. Dowell, of Washington, D. C. (Dowell & Dowell, of Washington, D. C., on the brief), for appellees.

SMYTH, Chief Justice. From a decision by the Commissioner of Patents, awarding priority to Reid, Reid & Kelley, the senior parties, in an interference, Kitselman appeals.

The invention involved relates to double series machines for making two rolls of fence simultaneously. This appeal is a companion of the appeal in Nos. 1303 and 1304, 49 App. D. C. 377, 266 Fed. 255, in which the same parties are concerned, this day decided. The three tribunals of the Patent Office concur in awarding priority to Reid, Reid & Kelley. Where this is so, unless there is manifest error, the decision of the Commissioner should be affirmed. Greenawalt v. Dwight, 49 App. D. C. 82, 258 Fed. 982, and cases therein cited; Hopkins v. Riegger, 49 App. D. C. 188, 262 Fed. 642; and Kennicott v. Caps, 49 App. D. C. 187, 262 Fed. 641. We find no such error in this case, and therefore the decision of the Commissioner is affirmed.

Affirmed.

KING et al. v. WEISS & LESH MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. June 11, 1920.)

No. 3383.

1. **Injunction ⇐101(3)—Acts of white strikers, which would intimidate colored workers, may be restrained, though they would not intimidate white men.**
   Where white workers in plant struck, acts of intimidation which prevented the colored employés from working may be restrained, although such acts would not necessarily have prevented white workers from continuing in employment; the case being one of intimidation, and the timid being entitled to protection against unlawful threats and intimidation, even though the acts would not be sufficient to affect bolder persons.
2. **Appeal and error ⇐996, 1009(1)—Inferences from evidence for trial court; findings not disturbed, save in clear case.**
   On appeal from a decree enjoining interference with and intimidation of nonstriking employés, the fact findings of trial judge will not be overturned, save in a clear case, and his inferences as to what constituted intimidation by white workers of colored workers will be deferred to.
3. **Injunction ⇐128—Finding that colored workmen were intimidated held warranted.**
   A finding that colored workmen were intimidated and prevented from working *held* warranted, although such workmen, who made affidavits as to intimidation, repudiated the same when called before a public meeting of strikers.
4. **Appeal and error ⇐1043(5)—Unlawful restraining order against strikers harmless.**
   Although the first restraining order against strikers was invalid, being issued upon a vague and general showing, and not in compliance with Clayton Act, § 17 (Comp. St. § 1243a), yet where it was superseded by a preliminary injunction, and there was no showing of any injury by the restraining order, the issuance of the order, which had become moot, will be treated as harmless.
5. **Injunction ⇐150—Restraining order should be special.**
   As Clayton Act, § 19 (Comp. St. § 1243c), requires an order restraining strikers to be in reasonable detail, a general order against all unlawful interference with nonstriking employés is too broad, not clearly pointing out what was forbidden.
6. **Injunction ⇐101(1)—Right to conduct business is protected as a property right.**
   The right of an employer to keep his business running, notwithstanding the strike of some employés, is a property right, and will be protected, although Clayton Act, § 20 (Comp. St. § 1243d), forbids the issuance of an injunction in labor disputes, etc., except in case of injury to property or property rights.
7. **Courts ⇐85(1)—District Court rule, requiring defendant to make deposit to secure clerk fees, cannot be reviewed on appeal.**
   District Court rule, requiring defendants to make a deposit to secure clerk fees before filing a defense, which was enforced against them, cannot be attacked on appeal by defendant from an adverse decree, but must be brought to the appellate court, if at all, by some direct challenge.
8. **Courts ⇐78—Power to require defendants to make deposit to secure clerk fees rests with the District Court.**
   The power to make a rule requiring defendants to make a deposit to secure clerk fees before filing a defense rests with the District Court, and it will be presumed that the court gave due weight to all considerations in promulgating rule.

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Bill by the Weiss & Lesh Manufacturing Company against E. R. King and others. From a decree enjoining defendants from continuing a course of intimidation and threats in promoting a strike, they appeal. Affirmed without prejudice to modification.

R. G. Brown, of Memphis, Tenn. (R. G. Brown, of Memphis, Tenn., on the brief), for appellants.

Phil M. Canale, of Memphis, Tenn. (Holmes & Canale, of Memphis, Tenn., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. [1, 2] The court below granted an injunction restraining the appellants from continuing a course of threats and intimidation in promoting a strike against the plaintiff below. This company had some 150 employés, of whom about 20 were white and about 130 were colored. Most of the white men joined in the strike and picketed the plant. The next day most of the colored men did not go through the picket lines, and the plant was shut down. Immediately upon the granting of the preliminary restraining order and the assurance that they were thereby protected, the colored employés generally returned, and the plant was continued in operation. The substantial complaint now made is that the weight of evidence was against the existence of any violence, or intimidation, or unlawful threats, but, on the contrary, showed that the strikers kept within their legal rights, whether measured by the Clayton Act (section 20, Act Oct. 15, 1914 [Comp. St. § 1243d]), or by the general principles independently applicable. More specifically, the complaint is that the District Judge gave undue weight to the fact that the strikers and the pickets were white men and the intimidated employés were colored; that he considered, as constituting unlawful intimidation, words and acts to which there would have been no rightful objection, if addressed to or used against white men; and thereby held that, in such cases, the defendants' rule of conduct must be varied according to the color of the nonstrikers. We do not so interpret the action of the District Judge. Whether or not we can take judicial notice ourselves of the supposed fact, certainly we cannot disregard the finding of the trial judge that it is a fact that, in that community and at the time in question, speech and action by white men would intimidate and terrify the typical colored laboring man, when the same things would not have serious effect upon the typical white laborer. The question is not one of color; it is one of individual or class intimidation. As was said by Judge McPherson, in Atchison Co. v. Gee (C. C.) 139 Fed. 582, 584:

"One man can be intimidated only when knocked down. But the peaceful, law-abiding man can be and is intimidated by gesticulations and by menaces. * * * Perhaps such a man * * * may be a timid man; but such a man is just as much entitled to go and come in quiet, without even mental disturbance, as is the man afraid of no one, and able, with or without weapons, to cope with all comers. The frail man, or the man who shuns disturbances, or the timid man, must be protected."

Not only must we apply the familiar rule that we will not overturn the fact findings of the trial judge, save in a very clear case, but we must recognize that a judge who has lived a lifetime in a community, and knows its atmosphere and feelings and prejudices, is more competent than we are to draw a correct inference as to what is and what is not intimidation as against one class in that community. As we said in Toledo v. Toledo Rys. Co., 259 Fed. 450, 453, 454, 170 C. C. A. 426, referring to our reluctance to overrule a finding of fact:

"Especially must that be true where the rightfulness of the conclusion depends largely upon that general knowledge possessed by all citizens of the community, including the judge, and which cannot be reproduced in the printed record."

[3] The finding that there was unlawful intimidation depends, not only upon the view which the judge took of the effect of the characteristic timidity of the colored laborers, but also upon his view of the credibility of certain of the colored witnesses. When they returned to work, they were given an increase of pay, and they then made affidavits showing some acts and some threats of physical violence. Later some of these same affiants were called before a public meeting of strikers, and, when interrogated, denied their former statements, and expressed hearty sympathy with the strike. The defendant insists that the judge should have rejected their first affidavits, because evidently influenced by their increase in pay, and should have accepted their later statements. We cannot say he was wrong in thinking that the earlier statements were less likely than the later ones to be the result of undue pressure, nor in concluding that the facts of stopping work when a picket line appeared, and of resuming work as soon as the injunction issued, were, after all, very persuasive upon the issue whether the first quitting of work was voluntary, or was the result of intimidation and fear.

[4] The first restraining order was issued upon a showing which was vague and general; and the restraining order was subject to special criticism for the reason that it forbade "all interference" with plaintiff's workmen, rather than "all unlawful interference," which was the language of the later orders. It also lacked compliance with some of the provisions of section 17 of the Clayton Act (section 1243a). However, any criticism on the form of this restraining order is now moot. It was very shortly superseded by the preliminary injunction, issued after a hearing, and that, in turn, has been superseded by the permanent injunction. It does not appear that any injury was done by the restraining order, as distinguished from the later injunctions, or that the due preservation of any right requires present attention to this criticism.

[5] The preliminary and final injunctions enjoined, not only threats and intimidation against the workmen, but also "all unlawful interference" with them. Such general language is not advisable in an injunction order of this kind, since it leaves the door open for controversy, both as to what is interference and as to what is unlawful. Doubtless words of general import must sometimes be used so as to give an order its due breadth; but we think that, in most cases, more

distinctive words than these can be selected, and the defendants thereby be more accurately informed as to what is forbidden. This is also the effect of section 19 of the Clayton Act (section 1243c)—"in reasonable detail." The record does not show any specific objection by defendants to the language of the injunction in this respect, or whether any modification in this particular would now be of practical importance. If the parties think it would be, our present order of affirmance will be without prejudice to any such modification which the trial court, on due application, may think proper to make.

[6] We understand defendants' counsel also to take the position that, since section 20 of the Clayton Act prohibits an injunction, excepting in case of injury to property or property rights, the issue of the injunction was in conflict with this act, because the right of the plaintiff to continue its business, free from unlawful obstruction, was neither "property" nor a "property right." There is no sufficient basis for this contention. The Clayton Act did not undertake to make new definitions of "property" and "property right." It used these terms in their then accepted and well-understood definitions. It was dealing with the fact that between the recognized property right of the employer to conduct his business and the other recognized right of the employés to strike, more or less conflict would arise; and it was prescribing the kind and degree of injury to this employer's right which should be deemed rightly appurtenant to the employés' conflicting right, and which should therefore not be deemed unlawful. No court has held, since the passage of the Clayton Act, so far as we find, that it was intended to forbid an injunction in aid of an employer's right to keep his business running, in any case where the injury to that right, which the defendants were inflicting, is beyond the limits which the act purports to authorize. That the right to prosecute a lawful business without unlawful obstruction is either property or a property right has always been recognized, and is at the foundation of equity jurisdiction in this entire class of cases. It is sufficient to cite Hitchman v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 52 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, as an example of the unquestioned acceptance of this basis of jurisdiction.

[7, 8] Complaint is also made because the trial court enforced against the defendants the existing District Court equity rule, which requires a defendant to make a deposit to secure clerk fees in advance before his papers in defense may be filed. Such a question cannot be collaterally raised, on such an appeal as this, but must be brought to this court, if at all, only by some direct challenge. While the clerk is compelled to collect his fees at the time the services are performed, and while an advance deposit may be the only practicable method by which he can do so, yet, when we consider that the defendant is brought into court and compelled to defend, and that all services rendered generally in a case by the clerk are chargeable, in the first instance, against plaintiff and his cost deposit, it may well be that only a comparatively small deposit should be required from defendant. However, the power to make a rule on this subject rests with the District Court, and it is to be presumed that due weight has been given to all

the considerations affecting the requirements embodied in this rule. If interested counsel or parties think otherwise, doubtless the District Court will entertain a direct application to modify the rule, and if this court has any reviewing power, it can then be invoked in some suitable manner.

While the modification which we have suggested in the language of the decree below may not be of practical importance, we cannot be sure of the contrary. For this reason, and as the appellants have already paid the substantial costs of this court, we award no further costs to either party.

The decree below is affirmed without prejudice to modification as herein specified.

DAVIS et al. v. HENRY.

(Circuit Court of Appeals, Sixth Circuit. August 2, 1920.)

No. 3390.

1. **Courts ⇐316—Bill dismissed where omitted necessary party, if aligned as plaintiff, would destroy jurisdiction based on adverse citizenship.**
A salesman for a corporation, receiving part payment in commissions, has not sufficient interest to maintain suit to enjoin striking employés of the corporation from interfering with other employés, and a bill by such salesman, filed in the federal court, will be dismissed, the corporation and strikers being citizens of the same state, and the court having jurisdiction only by reason of the adversity of citizenship between the salesman and the strikers, for the corporation is a necessary party plaintiff, and, if aligned as plaintiff, diversity of citizenship would be destroyed.

2. **Parties ⇐1—Where controversy could not be determined without him, party is "indispensable party."**
The test of indispensability of party is not whether the decree is bound to injuriously affect the rights of the absent party. It is enough that such absence may leave the controversy in such a situation that the final determination may be inconsistent with equity and good conscience.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indispensable Party.]

3. **Injunction ⇐114(2)—Employer held indispensable party to suit to enjoin strikers.**
Where the object of a strike was to compel employer to maintain an open shop, the employer was an indispensable party to the suit to enjoin acts of interference by the strike leaders, some of which might be lawful, and a suit for that purpose cannot be maintained by a mere salesman of the employer.

4. **Injunction ⇐157—Restraining order should be special.**
A restraining order against strikers should be in reasonable detail, and a general order against interference in any way or manner and from picketing the highways or means of ingress, etc., acts which do not necessarily constitute unlawful influence, is too broad.

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

Bill by Harry E. Henry against John Davis and others. From an order awarding a temporary injunction, defendants appeal. Reversed and remanded, with directions to dismiss the bill.

Ernest Woodward, of Louisville, Ky. (F. J. Pentecost, of Henderson, Ky., and Moorman & Woodward, of Louisville, Ky., on the brief), for appellants.

Edward P. Humphrey, of Louisville, Ky. (John C. Worsham, of Henderson, Ky., and W. W. Crawford and Humphrey, Crawford & Middleton, all of Louisville, Ky., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. This is an appeal from an order awarding temporary injunction in a suit brought by appellee, as sole plaintiff, against certain former employés of the Delker Bros. Buggy Company, of Henderson, Ky. (as well as one other individual defendant and a local labor union), restraining certain activities on the part of defendants in the course of a strike directed against the buggy company and the operation of its factory. The bill and affidavits make out a case of violence toward and intimidation of the buggy company's employés, which, under the decisions of the Supreme Court and of this court, amply justifies injunctive relief, provided plaintiff has such an interest as entitles him to maintain this suit without joining the buggy company. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; Sona v. Aluminum Castings Co. (C. C. A. 6) 214 Fed. 936, 131 C. C. A. 232; Tosh v. West Ky. Coal Co. (C. C. A. 6) 252 Fed. 44, 47, 164 C. C. A. 156.

The asserted jurisdiction is based solely on diverse citizenship of the parties; the plaintiff being a citizen of Tennessee, and all the defendants being citizens of Kentucky. The buggy company is also a citizen of Kentucky, and, if made a party and aligned as a plaintiff, diversity of citizenship would disappear. It is rightly conceded that, if the buggy company is an indispensable party, it must be aligned with the plaintiff.[1]

[1] The basis of plaintiff's asserted right to maintain this suit, without making the buggy company a party, is that plaintiff had a subsisting contract with the buggy company whereby he was, for a period of one year from July 1, 1919, "to devote his energies as in the past to the sale of the lines of goods manufactured by the Delker Bros. Buggy Company in the same territory he has been having in the past, for which he is to receive a salary of $7,500, payable in equal monthly payments, based on sales of $190,000 computed on goods shipped," together with an added compensation of 3 per cent. and 2 per cent., respectively, on two certain grades of goods shipped during the year. It appears that when the bill was filed (January 31, 1920) plaintiff had already sold $354,000 of the company's goods, $159,000 of which had already been shipped by the company, that amount only having been yet fully manufactured, the remainder being either in course of manufacture or to be manufactured; that the buggy company's ability to

[1] Dawson v. Columbia Trust Co., 197 U. S. 178, 180, 25 Sup. Ct. 420, 49 L. Ed. 713; Steele v. Culver, 211 U. S. 26, 29, 29 Sup. Ct. 9, 53 L. Ed. 74; Hamer v. N. Y. Railways Co., 244 U. S. 266, 274, 37 Sup. Ct. 511, 61 L. Ed. 1125.

fill all these orders was seriously threatened by defendants' conduct; and that its inability so to do would entail a loss to plaintiff of commissions to a maximum of more than $4,000, and also to a possible scaling of his salary, if less than $190,000 of goods were shipped, in addition to the possibility of plaintiff's making still further sales during the remaining portion of the year.

The buggy company had a direct and predominating interest in putting an end to the strike, and plaintiff could not properly file this bill, unless by virtue of special and peculiar interests and relations; nor even then could the presence of the buggy company be dispensed with, unless, in its absence, the rights of the parties before the court could consistently with equity and good conscience be fully and completely determined, and without injury to the rights of the buggy company or the defendants. In several cases one having a special interest in a corporation or its property has, under the circumstances there existing, been held entitled to maintain suit in the federal courts to restrain the prosecution of a strike against the corporation threatening the destruction of or injury to such special interest, and without aligning the corporation as a plaintiff, where to do so would defeat jurisdiction. Among the more prominent of these cases are Chesapeake & Ohio Coal Agency v. Carroll (C. C.) 119 Fed. 942; Id. (C. C. A. 4) 124 Fed. 305, 61 C. C. A. 49; Ex parte Haggerty (C. C.) 124 Fed. 441; Fortney v. Carter (C. C. A. 4) 203 Fed. 454, 121 C. C. A. 514; Jennings v. United States (C. C. A. 8) 264 Fed. 399.

In the Chesapeake & Ohio Case, supra, an injunction suit was brought by a selling corporation, which had contracts with mining companies, by which the selling corporation was to take all the mining companies' product at the mines and to pay for the same, whether sold by plaintiff or not, to furnish transportation, and to sell the coal at prices fixed by the companies, receiving a stipulated sum per ton for its services. In reliance upon these contracts plaintiff had contracted for the sale of large quantities of coal and coke, which could only be supplied by the mining companies. It also appeared that these companies would not necessarily be injured (indeed, they might be benefited [2]) by the strike (which relieved them from liability upon their contracts with plaintiff), while plaintiff's business would be ruined thereby. They were also held to have no interest in plaintiff's rights under its contracts of sale. These mining companies were made defendants, were alleged to be irresponsible, and injunction was asked to restrain them from allowing the individual defendants or others to do acts tending to interfere with the coal companies' employés. The decision involved only the sufficiency of the bill as against demurrer. The opinion of the Circuit Court of Appeals not only commented upon this prayer, but distinctly recognized the possibility of actual fault on the part of the mining companies. The bill thus asserted, not only a right with which the mining companies were not concerned, but an adversary relation on their part.

[2] Iron Molders' Union v. Niles-Bement-Pond Co., infra, 258 Fed. at page 412, 169 C. C. A. 424.

In Fortney v. Carter, supra, the bill was filed by the mortgage bondholders of a corporation, who were held to have "an independent personal right to protect their interests in the premises." It was held that neither the mining company nor the mortgage trustee were necessary parties. The published opinion of the District Court, on which the decision below was affirmed, does not show the reasons for that conclusion (evidently stated in a former unpublished opinion), except by the statement that it is "immaterial whether the [mining] company as such has aided them in the prosecution of this suit or not, and no question of collusion can arise. It is undisputed that they have instituted this suit to preserve such right."

In Ex parte Haggerty, supra, a bill to restrain unlawful action by strikers had been filed by the trustee of mortgage bonds secured upon all the property of the mining company against whom the strike was directed. The mortgagor was not a party. Jurisdiction was involved as affecting liability for violation of an injunction issued in that suit. Judge Goff held that upon the issues in that case, and as no relief was prayed against the mortgagor, full and complete justice could be done between the parties before the court without the presence of the mortgagor mining company, and that jurisdiction thus existed.

Jennings v. United States, supra, involved a review of a judgment of conviction of contempt in violating an injunction in a suit brought by a mortgage trustee and a mortgage bondholder. The mortgagor traction company was made a party defendant, and the bill prayed that the traction company be restrained from ceasing to operate its cars, and that it be compelled to so operate. The traction company was held "not an indispensable party to the mortgagee's suit in equity to enjoin the wrongdoers, the defendant Jennings and his associates, from irreparably injuring or destroying the plaintiff's security and property."

Assuming, for the purposes of this opinion, that the cases we have been considering were properly decided (and we know of no others more favorable to plaintiff), yet in our opinion these cases, taken together, fall far short of asserting a broad rule that the corporation against which a strike is directed is not an indispensable party to any injunction suit by a third party who has a pecuniary interest in putting an end to the strike. It seems clear that the instant case differs radically in more than one of its salient features from each of the cases referred to. In our opinion plaintiff has no interest in the subject-matter of the strike independent of or separate from the interests of the buggy company. He was merely a salesman for or (as the District Judge characterized him) an employé of the buggy company. True, his compensation was by way of both salary and commission; but that did not make him the less a mere salesman and agent. The goods he sold were those of the buggy company, and sold as such. The purchasers presumably made their payments directly to the buggy company. It is plain that the plaintiff is injured only as the buggy company is injured, and equally directly.

If plaintiff has an interest entitling him to maintain this suit without the presence of the buggy company, where shall the line be drawn?

Plaintiff's interest in the continuation of the buggy company's business without interruption was no greater or more direct than that of the ordinary superintendent or manager of a manufacturing plant, employed for the year upon a salary plus commission, or even upon a salary without commission, in a case where the stoppage of the business would stop or suspend the salary. In a less degree, although equally certainly, every employé for a fixed time, even on salary alone, has or may have a personal and financial interest in the continuance of the business. In our opinion, those sustaining such relation have not an interest so independent of and separate from that of the corporation as to enable the maintenance of a suit of this character in the absence of the employer, unless the latter is unwilling or unable to act. But not only does the bill fail to show any lack of inclination on the part of the buggy company to fill plaintiff's orders, or to resist and end the strike; it, on the contrary, expressly alleges that the company has attempted to manufacture the goods sold by the plaintiff, and that it is doing all in its power to put down the strike. It does not appear that plaintiff is better able than the buggy company to effectively prosecute this suit, unless as he may be able to invoke a preferred jurisdiction in the federal courts.

Taking into consideration plaintiff's relations to the buggy company and the contents of the bill, the inference seems inevitable that the instituting of suit by plaintiff, without joining the buggy company, is for the sole purpose of giving jurisdiction to the courts of the United States.

[2, 3] Iron Molders' Union v. Niles-Bement-Pond Co., 258 Fed. 408, 169 C. C. A. 424, involved a situation similar in many of its features to the instant case, although differing therefrom in the fact that there the plaintiff controlled, as a subsidiary, the defendant who we held should be aligned as a plaintiff. In spite of this difference, we think the case before us fairly falls within the principles applied in the Iron Molders' Union Case. Moreover, in none of the cases to which we have referred, and except as stated in the margin,[3] was any attempt made, so far as appears from the published reports, to determine any existing controversy between the corporation and its employés, or to determine conditions of employment. The relief asked was against violence, coercion, intimidation, or conduct apparently thought, whether rightly or not, to be unlawful, without reference to any relations between the employer and the employés. In the instant case, however, the bill is not confined to complaint of acts of violence or unlawful conduct, irrespective of relations between employer and employés, and efforts to protect the buggy company's property therefrom, but it goes materially further. The bill states, among other things, that the object of the strike is to compel the buggy company to maintain a "closed shop," which "the said * * * buggy company

[3] In Jennings v. United States, supra, the bill set up a contract between the corporation and a local union, but only the question of contempt in violating the injunction was involved, the defendant was a party to the bill, and did not appeal from the order for injunction, and it was held that the allegations of the bill otherwise were sufficient to establish the right thereto.

has refused to do, contending that it has a right to employ such proper persons as it pleases, without regard to whether they belong to a labor union or not." Further, the bill asked injunction, not only against violence and intimidation, but against "coercing in any manner employés of the * * * buggy company who are not affiliated with * * * local union No. 20 into joining the said local union or labor organization, * * * and from attempting in any manner to coerce or force the Delker Bros. Buggy Company into unionizing its plant and from preventing it from keeping what is known as open shop."

True, the buggy company was entitled to exercise its own judgment whether or not it should unionize its plant; but, on the other hand, its employés had an equal right by lawful means to accomplish the unionizing of the plant, and in a very proper sense the settlement of the question of open shop or closed shop relates to conditions of employment, which should not be decided without the presence of the buggy company, and with which question plaintiff is not concerned. The test of indispensability is not whether the decree is bound to injuriously affect the rights of the absent party; it is enough that such absence may "leave the controversy in such a situation that the final determination may be inconsistent with equity and good conscience." Rogers v. Penobscott Co. (C. C. A. 8) 154 Fed. 606, 83 C. C. A. 380. So far as we are advised, no court has yet gone so far as to hold the corporation against whom the strike is directed not an indispensable party under circumstances such as exist here.

But whether or not the buggy company should be held an indispensable party, if plaintiff had a sufficient special and independent interest in maintaining the bill for injunction, the considerations just referred to emphasize the lack of such independent right of action and the mischiefs possible to result from its recognition.

[4] Apart from the question of plaintiff's right to maintain this bill, the order appealed from went too far in enjoining against "interfering in any way or in any manner, directly or indirectly, with the plaintiff or the Delker Bros. Buggy Company or the employés of the Delker Bros. Buggy Company, * * * and from picketing highways or means of ingress and egress to and from said plant of said buggy company"—acts which do not necessarily constitute an unlawful interference. King v. Manufacturing Co., 266 Fed. 257, decided by this court June 7, 1920.

In our opinion, plaintiff had no authority to maintain the suit, at least without the presence of the buggy company, and for this reason the order appealed from must be reversed, and the record remanded to the District Court, with directions to dismiss the bill.

HODGSON v. VROOM.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 237.

1. **Copyrights ⇐89—Review of temporary injunction by Circuit Court of Appeals not limited by prior decision of lower court.**
   The power of the Circuit Court of Appeals to consider the merits, on appeal from order of District Court denying temporary injunction in suit to enjoin production of a play as being an infringement of plaintiff's copyright, is not hampered by the fact that another District Court, in a prior suit by plaintiff against another for the same purpose and on the same ground, had rendered decree for plaintiff.
2. **Equity ⇐416—Decree held a "consent decree."**
   A decree in a prior suit to enjoin production of a play on the ground of it being an infringement of a copyright held a "consent decree"; that is, one entered on consent of the parties as to what the decision should be, constituting a mere agreement of the parties under sanction of the court.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consent Decree.]
3. **Equity ⇐416—Nonappealability incident and indicia of consent decree.**
   Nonappealability is not only an incident to a consent judgment, but one of the indicia of the nature of the decree entered.
4. **Copyrights ⇐89—No duty in injunction suit to conform to consent decree of another district.**
   There is no duty on the court, in suit to enjoin production of a play as an infringement of plaintiff's copyright, to conform to the decree in a prior suit in another district involving the same copyright and play, but against a different defendant, where such decree was a consent decree.

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

Action by Ruby L. Hodgson against Edward Vroom. From an order denying application for injunction pendente lite, plaintiff appeals. Affirmed.

Plaintiff is the (remarried) widow of one Samuel E. Gross, and by virtue of his last will and testament is the owner of a certain copyrighted play entitled "The Merchant Prince of Cornville." Mr. Gross was a resident of Chicago, and while engaged in a business described as "operating in real estate" he wrote and completed by 1879 the play in question. In the year 1900 one Palmer and the late Richard Mansfield were producing upon the stage in Chicago Edmond Rostand's play of "Cyrano de Bergerac," whereupon Gross sued Palmer, Mansfield, and others in the United States Circuit Court for the Northern District of Illinois, seeking to enjoin them from performing or publicly representing said "Cyrano de Bergerac," upon the ground that this play constituted an infringement of the copyright of "The Merchant Prince of Cornville."

Pursuant to the practice then obtaining in equity, testimony was taken before a master in chancery, who on May 19, 1902, reported that in his opinion it was "impossible to avoid the conclusion that the melodrama of 'Cyrano de Bergerac' performed by defendant Mansfield is a clear and unmistakable piracy of [Gross'] play, 'The Merchant Prince of Cornville.'" Wherefore he reported as matter of law that Mr. Gross was "entitled to a decree enjoining and restraining defendants * * * from producing, exhibiting, or presenting * * * 'Cyrano de Bergerac' on any stage or in any theater or in any manner in the United States, and also to an accounting of profits, and also to such other and further relief as equity may require."

Two days later, and on May 21, 1902, this report was brought before the District Judge for the Northern District of Illinois, and a decree was entered which recites that "no objections [had been] filed to" the master's report; "whereupon," continues the decree, "said defendants appearing in open court by counsel and consenting to the entry hereof, it is ordered that the report of E. B. Sherman, Esq., master in chancery, * * * [be] in all respects approved and confirmed, and that the defendants * * * hereby are perpetually enjoined and restrained from publicly representing or performing * * * 'Cyrano de Bergerac,' * * * or any play substantially identical therewith, or any play including or containing the balcony scene of 'Cyrano de Bergerac,' or any scene substantially identical therewith; * * * and it is further ordered that complainant is entitled to an accounting of the profits realized by the said defendants through the presentation * * * of 'Cyrano de Bergerac,' but said complainant electing to waive said accounting of profits and accept the sum of one dollar in lieu thereof, it is further ordered that complainant do have and recover from the said defendants the said sum of one dollar, together with the costs of this suit."

The plaintiff in this action, having learned that the defendant Vroom contemplated the production of "Cyrano de Bergerac" in the city of New York, brought this suit to prevent such production, alleging in substance that Rostand's play is an infringement of the copyright of "The Merchant Prince of Cornville," in that Cyrano "consists largely of a piracy upon 'The Merchant Prince of Cornville' in plot, arrangement, situation, characters, ideas, and language." The District Judge refused plaintiff's application for an injunction pendente lite, whereupon plaintiff took this appeal.

Harry D. Nims, of New York City, for appellant.
Stephen H. Philbin, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The single question of law presented by this appeal is whether the District Court, or this court, or both, is bound by the decree entered in Chicago in 1902 to grant preliminary relief; it is not asserted that the decree against Mansfield and Palmer is res adjudicata as against this present defendant.

The matter might be disposed of by pointing out that, whatever may be the effect of the Chicago decree so far as the District Court is concerned, it does not in the least hamper the power of this court. Cf. Victor, etc., Co. v. Starr, etc., Co. (C. C. A.) 263 Fed. 82; Thomson-Houston, etc., Co. v. Hoosick, etc., Co., 82 Fed. 462, 27 C. C. A. 419; Baldwin v. Abercrombie, etc., Co., 228 Fed. 897, 143 C. C. A. 293. The question as to what the District Court should do (not what it could do) under circumstances like the present depends upon the inquiry whether the Chicago decree of 1902 was or was not a "consent decree."

[2, 3] The nature of consent decrees and something of their history are learnedly set forth by Hammond, J., in Kelly v. Milan (C. C.) 21 Fed. 862 et seq. (the affirmance of this case in 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. Ed. 97, does not touch this point). The distinction between a decree in common form and a consent decree is the difference between a consent to submit a case to the court for decision and a consent as to what the decision shall be. When there is a consent as to what the decision shall be, the decree is a "mere agree-

ment of the parties under the sanction of the court, and is to be interpreted as an agreement."

A decree on consent is not appealable, in the sense that no errors will be considered which were in law waived by the consent given. United States v. Babbitt, 104 U. S. 767, 26 L. Ed. 921. Therefore nonappealability is not only an incident to a consent judgment, but one of the indicia of the nature of the decree entered.

Tested by these rules, the decree in Gross v. Mansfield was plainly a consent decree upon its face. The moving papers before us contain a good deal of information or suggestion as to why the Chicago litigation ended in an agreement of parties, after a rather lengthy and probably expensive proceeding before the master in chancery; but we need not consider these matters. The record—i. e., the decree as entered—speaks for itself.

[4] It is quite true, as urged by appellant, that there is close analogy between actions under the patent laws and suits upon copyright (Scribner v. Straus [C. C.] 130 Fed. 389), and great stress is laid upon that long line of decisions holding that decrees in patent causes are entitled to great weight, when subsequent action is brought on the same patent against other alleged infringers. But this proper rule is one of comity, which may persuade, but cannot compel. Mast, etc., Co. v. Stover, etc., Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856. There is great power of persuasion in a procession of consent decrees, as evidencing public acquiescence in the plaintiff's asserted right; but there is no legal compulsion in any consent decree, because the judicial action is no more than a registration of the will of the parties. National, etc., Co. v. New England, etc., Co. (C. C.) 123 Fed. 6, 436. It follows that the lower court was entirely justified in examining anew the interesting inquiry whether the Frenchman, Rostand, in or about 1896, pirated the literary work of Mr. Gross, of Chicago. On this literary question it is sufficient to say that we entirely agree with the District Court.

The order appealed from is affirmed, with costs.

THE WALTER GREEN.

THE BURNS BROS. NO. 34.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 171.

Shipping ⇐79—Barge, which put line on string of barges to save herself, held liable for resulting damage.

A barge, which to save herself from destruction after she had been loosened from her moorings by a large ice floe, placed a line on a string of barges fastened to an adjoining pier, as a result of which the line from those barges to the pier parted, is liable for the resulting damage.

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

Libel by John J. Hammond against the barges Walter Green and Burns Bros. No. 34. Decree for libelant against the barge Walter Green, and the claimant of that barge appeals. Affirmed.

The following is the opinion of Learned Hand, District Judge, in the court below:

This case is even more confused than the usual case, but at the same time I attribute the confusion largely to the fact that the occasion was one of considerable danger and the witnesses' attention could not be directed very critically to what was going on. I have therefore, in these cases in which there is a conflict of testimony, to judge a good deal on the probability of the situation. Some of the facts are settled beyond dispute. The Walter Green lay nearest to the pier end and the Burns Bros. outside her. About 3 o'clock on the afternoon of the 30th of December a large floe of ice—the second one of its character, which one of the witnesses described as extending from shore to shore—moved down on the ebb tide, and this motion broke loose, first the Burns Bros., and, second, the Green. There is no testimony that the Burns Bros. broke loose before that. Their berths had been recognized as being very dangerous berths all through that day. The Burns Bros. had been injured by the ice, and her middle compartment was filled; she was in a dangerous condition. It was the purpose of the Burns Bros. to get inside the slip, because they could get no tug to save her, and I must conclude, from the purposes of the Burns Bros., and from some other circumstances that I will mention, that at the time she tried to go in the slip the four boats which had been on the north side of the pier still remained in place alongside, had not broken loose, and were not hanging across the pier corner. In the first place, if they had been so hanging, it would have been useless to pass a line to them, because it would not have been of any service in warping the Burns into the slip. The outer of these four boats, which was the No. 76, itself lay further out than any of the rest. She was not bow and bow with the McCann, which lay next to her. If the Frank, the McCann and the No. 76 had broken loose and were angling on the pier end, the stern of the No. 76 would have been well below the north side of the lower pier and well out in the ice, and she would have offered no possible means for warping in the Burns. So I cannot accept that as probable. The contrary is sworn to by Cartman and Smith, and although Southard and McGraw say that they had broken loose, I must choose between those two stories, and I choose the one which says that they still lay alongside.

Take another reason for the same conclusion: What could possibly have moved those three boats away from their safe berth? Concededly the ice did not bother them; the ice did not come inside the pier ends. What could have been the reason for their breaking loose and hanging in an extraordinary position, and in a very dangerous position, where they were? Something must have wrenched them off; there must have been some violence to accomplish this. Now, we have an adequate explanation of the violence subsequent to this time; that is, the momentum of, first, the Burns, or, second, the Green, hanging onto the projecting end of the No. 76. That is an adequate cause, but there is no other adequate cause that I can see. For all these reasons, therefore, I do not accept that part of the story. No one says that the Burns broke loose these three boats; if any boat did it, it was the Green. Everybody agrees in that, and so I exculpate the Burns, because there is no evidence to hold her.

The question then remains of the Green. Everybody agrees—except McGraw, who did not see it—that at some time there was a line between the No. 76 and the Green. There are varying accounts as to what happened while that line was on, but everybody agrees that there was a line on, and two of the three witnesses say it was that line which caused the three boats to break loose by parting the bowline of the Frank. This was a six-inch line, but after the Green swung on it it had to carry the whole weight of the Green, incumbered as it was by ice, and such weight as there was of the other three

boats. Probably the weight of the other three boats was not great, because the tide was ebb and pressed the boats against the ends of the pier. But there was plenty of weight in the Green, and the ice with which she was incumbered did break said line, and the only reasonable conclusion I can come to is that that was what did break the bowline of the Frank. The situation was subsequently saved, because the three boats fell forward on the pier end and another bowline was got out. In this Cartman—a particularly honest witness—helped Smith; he helped put out the second bowline, and so the flotilla held. The question that comes is: If these are the facts, whether there is a fault in the Green. Mr. Zabriskie says there is no evidence as to who put the line out. That is true; there is no direct evidence on that, but I think we must agree that the line was put out with the consent and by the direction of the master of the Green, though he does disclaim it. There was no one else there on his boat who could pass a line. I do not know how the line could have got out unless he passed it. Certainly he must have been in an acquiescent attitude toward that fact, and I think I am justified in the conclusion that he did pass the line, and so I find. Now, if he did it, he did it in an effort to save his boat, and that was very commendable. I agree that that was his duty, but in so doing he imperiled the other boats to whom he tied, and if he saved himself in that way it is part of his expense of saving that he should make good the damage. Even so, it was a proper thing to do, because he might well have been lost if he had not held fast, and it was conduct which we doubt he would repeat.

It is suggested that it was a case of inevitable accident, but that was not so. His breaking loose was a case of inevitable accident, but his fastening a line to another boat to save himself is not an inevitable accident. One is tempted almost to speak of it as in the character of salvage, but of course it is not that. It is a damage inflicted on another boat in an effort to save a larger value, and as such it forms a charge against the property that has been saved. It is none the less a tort because it is a moral and most excusable tort, so it necessarily follows that the libelant will take a decree against the Green, but the libel against the Burns will be dismissed, without costs.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellant.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for appellee Burns Bros.

Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for appellee Hammond.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

REDMAN et al. v. MURRAY W. SALES CO.

SAME v. NATIONAL MILL SUPPLY CO.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1920.)

Nos. 3365, 3366.

1. **Mechanics' liens ⇐132(1)—The filing of an affidavit within limit is jurisdictional.**
   The filing of an affidavit for a mechanic's lien under the Michigan statutes, within the time limit, is jurisdictional.
2. **Mechanics' liens ⇐132(10)—Where owner bought material from time to time, affidavit within 60 days after last order held sufficient.**
   Under Comp. Laws Mich. § 14796, declaring that any person, who shall in pursuance of any contract, express or implied, written or unwritten, furnish any labor or material in or for building, shall have a lien therefor, and section 14800, declaring that a materialman shall file a verified statement or account within 60 days from the date on which the last materials shall have been delivered, a materialman who agreed to supply owner with materials needed for repairs, and furnished materials as ordered, though there was no definite contract, is entitled to a lien for all the materials supplied, where less than 60 days elapsed between the various orders, and an affidavit was filed within 60 days after the last material was furnished, for the transaction may be considered as single, the owner by subsequent orders allowing the previous ones to be carried over, and notwithstanding the owner gave a mortgage during the repair period.
3. **Mortgages ⇐154(2)—Mortgagee of building being repaired held charged with notice of materialman's lien.**
   One receiving a mortgage while building was being repaired is charged with notice of materialman's right to lien.

Appeal from the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In the matter of the receivership of the St. Clair Power Company. The claims of the Murray W. Sales Company and the National Supply Company for liens for material furnished were allowed, and Walter H. Redman and others in each case appeal. Affirmed.

Suit to enforce a lien for materials furnished. The pertinent Michigan statutes, found in the Compiled Laws of 1915, are as follows:

Section 14796: "Every person [a] who shall, in pursuance of any contract, express or implied, written or unwritten, existing between himself as contractor, and the owner * * * of any interest in real estate, build, * * * [or] repair * * * or [b] who shall furnish any labor or materials in or for building * * * [or] repairing * * * any * * * building * * * and every person who shall, [c] as[1] subcontractor, [d] laborer, or materialman, perform any labor or furnish materials to such original or principal contractor or any subcontractor, in carrying forward or completing any such contract, shall have a lien therefor upon such * * * building * * * and also upon the entire interest of such owner * * * in and to the lot or piece of land * * * to the extent of the right, title and interest of such owner * * * at the time work was commenced or materials were begun to be furnished by the contractor under the original contract, or by the subcontractor who furnishes or is furnished with any labor or material."

Section 14800: "Every * * * materialman * * * who wishes to avail himself of the provisions of this statute, shall make and file * * *

[1] The word "be," in the statute, is probably a misprint for "as." See previous law.

a just and true statement or account * * * which statement shall be verified by affidavit. Such verified statement or account shall be filed within 60 days from the date on which the last of the materials shall have been furnished * * * by the person claiming the lien, which statement may be in the following form: * * * A. B., * * * being duly sworn, says that he furnished certain labor (or materials) in and for * * * repairing * * * a certain ———, situated on the land hereinafter described, in pursuance of a certain contract with C. D., the owner, (or * * * contractor, subcontractor * * * as the case may be). The performance of such labor (or the furnishing of such materials, or both) was begun on the ——— day of ———, and the last of such labor was performed (or such materials furnished or both) on the ——— day of ———. * * *"

"The property of the St. Clair Power Company having been sold in receivership proceedings in the court below, questions of priority in the proceeds arose between mortgage bondholders and receivership certificate holders, on the one hand, and lien claimants, on the other. The District Court, confirming the report of the master, gave priority to the liens. The mortgage interests bring these two appeals. The mortgage securing the bond issue may be considered as taking effect January 2, 1917. In the summer of 1916, some new interests acquired title to a disused paper mill, which title became vested in the paper company.

The claim of the National Mill Supply Company has this history: On August 31, 1916, there was a conversation between an agent of the supply company and the president of the paper company. The latter said they were starting in to make general repairs, in order to put the mill in good condition for operating, and wished to know whether they could get from the supply company such materials as the latter handled—which were boiler tubes, piping, paint, cement, etc. The things chiefly in the minds of the two parties seem to have been the ability of the supply company to ship promptly and the ability of the paper company to pay. The former became satisfied that the latter was entitled to ordinary trade credits, and announced that it would furnish to the paper company, from time to time, such materials as the latter might order for this job, and would make prompt shipment at reasonable prices and on usual terms. For the purposes of this opinion, we assume that the paper company did not agree to order any definite amount of materials, and that, until there was a subsequent specific order, it incurred no enforceable obligation, and then only from time to time to the amount of each individual order. Pursuant to this arrangement, materials needed and used in this same general and continuing repair job were ordered and shipped as follows: September 9, 1916, $65.78; December 1, 1916, $921.60; February 28, 1917, $302.50. Each of these items was separate, in that it was ordered by itself, shipped by itself, and became separately due and payable at the expiration of the specific credit given. Indeed, it might be assumed, as was true in the companion case, that some items were separately settled and paid for. All were parts of one transaction, in that they were all items of the contemplated course of business covered by the general arrangement that the supply company would furnish what was ordered for the job.

The supply company filed its statement of account on April 2, 1917. No question is made as to the right to a lien (as of that date) for the item of February 28th, but it is urged that, as to the earlier items, more than 60 days had elapsed after the materials were furnished, and it was too late to fix a lien by filing the statement.

Wallace T. Stock, of New York City (Lewis & Kelsey, of New York City, on the brief), for appellants.

Ralph B. Wilkinson, of Detroit, Mich. (Wilkinson & Hinkley, of Detroit, Mich., on the brief), for appellee Murray W. Sales Co.

J. F. Wilson, of Port Huron, Mich. (Moore & Wilson, of Port Huron, Mich., on the brief) for appellee National Mill Co.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1-3] The filing of the affidavit within the time limited is jurisdictional (Godfrey Co. v. Kline, 167 Mich. 629, 133 N. W. 528), and the question to be decided is whether, when there has been a succession of purchases of materials for use in repairing a manufacturing plant, each purchase being a distinct sale, upon which a separate right of action arose, and the successive sales not being covered by any general advance contract binding upon both parties, a statement of lien filed within 60 days after the last item will reach back and sufficiently cover all the items in the succession, or whether, on the other hand, its force is exhausted when it has reached back to the beginning of the 60-day period.

The appellant's argument is that the lien statute refers only to things done and furnished "pursuant to a contract" with the owner; that, when the section providing for the verified statement refers to "the materials" which "shall have been furnished," it must refer to those materials furnished pursuant to the contract, without which the lien cannot exist; that, unless there is a definite, mutual obligation, there can be no contract, within accepted definitions; and that, if each successive purchase stands only upon the separate contract therefor, each gives rise to a separate right of lien, which right in turn is, after 60 days, exhausted, if not exercised.

The language of the statute regarding a contract is very broad—"express or implied, written or unwritten"; but it is not easy to see how this expands the scope of the term so as to reach, for example, a proposition which had never been accepted or a tentative arrangement to be performed if the parties should thereafter reach an agreement as to details, although, in these cases, there would often be an acceptance or an acquiescence which would raise the necessary implication. The statute cannot intend to require in all cases an otherwise valid contract, because it plainly covers contracts which might be invalid under the statute of frauds; but the interest of the owner in the property is not reached by lien, unless the owner has made a contract. The Supreme Court of Michigan, in Woods v. Ayres, 39 Mich. 345, 33 Am. Rep. 396, says:

"To constitute either [an express or implied contract], the parties must occupy to each other a contract status, and there must be that connection, mutuality of will, and interaction of parties, generally expressed, though not very clearly, by the term 'privity.'"

For this reason there is difficulty in thinking that a mere indefinite arrangement and expectation that purchases will be made—as, for example, an arrangement that the merchant will supply materials for the job from time to time, if the parties can from time to time agree upon prices and conditions—would be such a contract as the statute contemplates, if a precedent general contract were essential as a binder for the different items. Whether this difficulty would be insuperable we do not decide. When we have to do with such a succession of such contracts as there is here (interpreting the facts according to appellant's contention), it is clear that there was an express contract by the owner with the materialman as to each purchase, and therefore the

underlying necessity that as to every item there must be a contract with the owner is fully satisfied.

It is open to contention that, since clause (d), as we have arranged the statute above, covers the case of a materialman furnishing materials to a contractor or a subcontractor, clause (b) must refer to the furnishing of materials directly to the owner, and since clause (b) does not contain the condition "in pursuance of any contract," either directly or by strict grammatical construction, the whole basis of appellant's argument therefore fails. However, this may be an overnice construction, and it is impossible to conceive a case where materials which are furnished to and accepted by the owner are not taken pursuant to at least an implied contract. We are inclined to disregard this distinction, and to assume that "in pursuance of any contract," etc., applies to all the various lienors contemplated by the statute.

In the provision that one furnishing the "materials for repairing" shall have a lien therefor on condition that he files his claim within a fixed time after the "last of the materials" was furnished, there is the necessary implication that all the items are held together by some common tie, but nothing to indicate that this tie must be a contract creating, at the beginning, a mutual obligation lasting until the end, and we think all requirements inherent in the language or principle of the statute are met when all the items are ordered from time to time by the owner from the materialman, and all pertain to and are procured for one matter of building or repairing, which has not been either finished or abandoned, and when there was an initial offer to furnish, for this one matter, all materials which might be ordered, though no general acceptance making a definite mutual obligation. We see no reason for requiring, as between owner and materialman, any stricter construction; nor for saying that the lien statement will not reach back to an item more than 60 days old, unless the owner was, at the earlier date, under legal obligation to buy the later item. Whenever the owner, at the later stages of the transaction, gives further specific orders for material, he is in effect consenting that these items come in under the one general transaction, and is extending the time within which statement of lien may be filed, and it seems apparent that the owner may, if he wishes, do this, as against his own interests and those of any one who steps into his shoes.

When we come to consider the case of a mortgage, given as this one was, the same reason prevails. The mortgagee, on January 2d, was bound to know that a repair job was in progress, and would have learned, upon inquiry, that materials had been furnished in December, and that further material must be had. Before the 60 days had expired from the first order, the owner had given further orders, and those had kept alive or extended the right to file the lien, and on January 2d that right in the materialman was absolute. The mortgagee took with notice of this fact, and, as to the materials furnished before that date, it cannot be seriously prejudicial to the mortgagee that the owner, instead of compelling the immediate filing of the statement of lien by refusing or neglecting to make further specific orders, has given these orders and thus kept alive the same right which existed on January 2d.

Articles which were furnished after that date presumptively added to the mortgagee's security and give scant basis for claim of prejudice. The mortgagee knew or was bound to know that a right to impose a lien for the articles already furnished then existed, and that this right was likely to be extended to the materials necessary to finish the job then in progress, if the owner thought best to order the remaining materials from the same source. There is no serious hardship to such a mortgagee. If he objects to the possibility of such a future lien for the remaining materials needed upon a pending job, he can, as a condition of the loan, require the owner to discontinue the work or get the materials elsewhere.

We are not required to consider a case where the 60 days had expired when the mortgage was given, and where, therefore, the right to the lien was gone, unless the owner, at his option, bought more materials. In such a case, it would depend upon the future discretion or whim of the owner whether the right to lien should be restored, and the mortgagee could not know or learn the condition of the title in this respect. The intervention of the mortgage interest after the materialman had lost all right to impose the lien would raise a somewhat different question; the common tie, the unity of purpose, might be thought broken; on the other hand, a mortgagee, chargeable with notice when he takes his mortgage that a repair job is in progress, is subject, generally, to the equities existing against his mortgagor. We do not undertake to pass upon the question so presented.

It is to be remembered that there is no statutory requirement for unity of contract; unity of purpose well satisfies every theory of unity necessarily implied from the statute; and it has been natural to look for a single contract covering all items, because that would demonstrate unity of purpose. There is analogy, too, in the rule that a time limitation on a right of action runs from the last item in a running account. While this is or may be statutory, it illustrates that a series of specific contracts may, for some purposes, be construed as one transaction.

Our conclusion is in general accord with the results reached by the Supreme Court of Michigan in the two cases that most resemble this: Smalley v. Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; Union Trust Co. v. Casserly, 127 Mich. 183, 86 N. W. 545. True, each case carries more or less implication that an entire contract was necessary, but whatever contract was essential was found to exist; and it is not easy to see that there was any greater obligation upon Casserly to order the later items of lumber than there was upon the paper company to give the February order which it did give. The criterion quoted in 127 Mich. at page 185, 86 N. W. at page 546, from Phillips on Mechanics' Liens, is not, as counsel say, solely whether the whole should "form one matter of settlement." That was an alternative. The other was, "if the several parts form an entire whole." However, we are better satisfied to rely also upon our study of the principles of the statute rather than to rely alone upon these two decisions.

Noye Co. v. Thread Co., 110 Mich. 161, 67 N. W. 1108, is not inconsistent. There was a formal and complete contract, and the court

held that the work under it had been finished and the contract closed by final settlement. It refused to allow this closed contract to be tacked to a new and later one. That is not necessarily to forbid the tacking of consecutive orderings of fractional parts of the same general lot of materials. The thought of the citation from Phillips on Mechanics' Liens, § 324, "So, if materials be furnished under distinct contracts, each must stand of its own merits, and the lien must be filed under each contract within the time limited," is sufficiently satisfied, if it be applied to a case like Noye Co. v. Thread Co.

It is familiar knowledge that large quantities of building materials are furnished by dealers therein and used in the erection or repair of buildings, etc., merely upon specific from day to day orders and without any agreement which would prevent collection of the price of each item as if it were wholly separate from the others, but pursuant to a general offer to provide the whole as and if specifically ordered. In these so-called running accounts, it may often happen, and perhaps is usually true, that there is no obligation of any kind upon either party relating thereto preceding the giving and accepting of the order for each item. If appellants are correct, the materialman, in such a case, cannot allow more than 60 days to expire after the first item before filing claim of lien therefor, and each item must have corresponding treatment. We think such a construction would be against the spirit of the Michigan act, is not required by the Michigan decisions, and would be against the analogy of those decided cases which are best considered and arise under the most similar statutes. Jones v. Swan, 21 Iowa, 181; Premier v. McElwaine Co., 144 Ind. 614, 621, 43 N. E. 876; State v. Norwegian, etc., 45 Minn. 254, 255, 47 N. W. 796: O'Neill v. Taylor, 59 W. Va. 370, 379, 53 S. E. 471; Big Horn v. Davis, 14 Wyo. 455, 458 et seq., 84 Pac. 900, 85 Pac. 1048, 7 Ann. Cas. 940; Hensel v. Johnson, 94 Md. 729, 733, 51 Atl. 575; Joplin v. Oklahoma, etc., 36 Okl. 547, 552 et seq., 129 Pac. 40.

What has been said fully covers the appeal of the Murray W. Sales Company. Appellant's theory is there more difficult to sustain, in that we would hesitate to find the absence in fact of an entire contract which would be sufficient even under appellant's theory.

The order of priority in each case is affirmed.

In re ATWATER et al.

(Circuit Court of Appeals, Second Circuit. May 19, 1920.)

No. 219.

1. **Evidence ⟸409—Parol evidence inadmissible to vary writing.**
Parol evidence is inadmissible to vary a written instrument, and so cannot be received to show that claims not included in a release were understood at the time of execution to be embraced.

2. **Evidence ⟸450(12)—Parol evidence admissible to explain a release.**
Parol evidence is admissible to explain a release, where not changing the nature of contract, but showing the reason for its execution and its application; but a valid release conclusively estops the parties from litigating a claim released and forever extinguishes a personal right of action.

3. **Release ⟸23—Invalid release binding until set aside.**
A release, even if invalid, is binding on the parties, until attacked in proper manner and set aside.

4. **Cancellation of instruments ⟸4—A release may be canceled for mistake, fraud, etc.**
Where a release is invalid because of mistake, fraud, duress, or undue influence not inherent in its execution, it may upon proper application be canceled by court of equity.

5. **Release ⟸25—The intention of the parties must govern.**
A release, like other contractual obligations, has for its primary rule of construction the intention of parties, which must govern; but this intention must be ascertained from the words used in the instrument, and not from matters dehors the writing.

6. **Release ⟸22—Claim for funds given bankrupt to purchase seat on exchange barred by release.**
Where claimant advanced to his son, one of the bankrupts, funds sufficient to purchase a seat on the New York Stock Exchange, and in order to comply with rules of exchange as to ownership executed a release of all claims on account of advances, *held* that, notwithstanding claimant received interest on the amount paid, such release is binding with respect to ordinary creditors of partnership of which the son was a member, and claimant cannot as against them assert any right to the proceeds of sale of exchange seat, even though there were no persons entitled under rules of exchange to priority in the proceeds, for a release completely extinguishes all rights, etc.

Ward, Circuit Judge, dissenting.

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

In the matter of Morton Atwater, Eliot Atwater, Gilbert F. Foote, and Harold W. Sherrill, individually and as copartners doing business as Atwater, Foote & Sherrill, bankrupts. On petition of Stephen G. Guernsey and others the claim of Edward S. Atwater was expunged, and claimant appeals. Affirmed.

Frank B. Lown, of Poughkeepsie, N. Y., for appellant.

C. W. H. Arnold, of New York City (Daniel P. Hays and Henry H. Kaufman, both of New York City, of counsel), for respondent trustee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The firm of Atwater, Foote & Sherrill were stockbrokers engaged in business at Poughkeepsie, N. Y. A

petition in bankruptcy was filed against this firm, and it was duly adjudicated a bankrupt. One of the members of the bankrupt firm was Eliot Atwater, a son of the appellant. The firm was formed under articles of copartnership under date of June 1, 1912, which partnership expired by limitation June 1, 1915. On June 1, 1916, new articles of copartnership were executed, providing for a partnership on a yearly basis from June to June of each year, and thereafter continued indefinitely, but terminable by any partner on 60 days' notice prior to June 1 of any year.

At the time of the adjudication in bankruptcy, the firm existed under the terms of the second agreement, dated June 3, 1916. Before this partnership was formed, Mr. Foote and Mr. Sherrill were doing business as Foote & Sherrill. About June 1, 1912, they were joined by Morton and Eliot Atwater, the sons of the appellant, who was the president of a bank in Poughkeepsie and a man of large means. The father had theretofore done business with the firm of Foote & Sherrill. As a result of his active negotiations, the terms of the copartnership were arrived at. The articles of copartnership provided, among other things, as follows:

"Second. It is understood and agreed that Morton Atwater furnishes to the partnership the loan of fifty thousand dollars ($50,000), working capital; Gilbert F. Foote and Harold W. Sherrill the good will and the business, of the agreed value of ten thousand dollars ($10,000), which they have established and built up under the firm name of Foote & Sherrill; Eliot Atwater the use of his membership on the New York Stock Exchange.

* * * * * * * * * *

"Third. Every six months there shall be paid to Eliot Atwater such an amount as shall pay interest for six months at the rate of six per cent. (6%) per annum on seventy-five thousand dollars ($75,000), being the purchase price and initiation fee of his membership on the New York Stock Exchange.

* * * * * * * * * *

"Fourth. All the earnings of Eliot Atwater, as a member of the New York Stock Exchange, shall accrue to the firm.

* * * * * * * * * *

"Tenth. In the event that Eliot Atwater should wish upon the dissolution of the partnership, to sell or transfer his membership on the New York Stock Exchange, he agrees to give to Morton Atwater, Gilbert F. Foote, and Harold W. Sherrill the option to purchase said membership at the price then current, but said option shall expire 60 days after the dissolution of the partnership."

On May 16, 1912, a seat on the exchange was purchased by Eliot Atwater; payment therefor was made by Edward S. Atwater. Thus, at the time of entering into the copartnership agreement, Eliot Atwater individually owned a seat on the New York Stock Exchange. Prior to June 1, 1912, the appellant executed and delivered to Eliot Atwater a sealed general release—

"of all claims and demands whatsoever in law or in equity which against the said Eliot Atwater I ever had, now have, or which I or my heirs, executors, or administrators hereafter can, shall, or may have, * * * and more particularly by reason of an advance of the sum of $75,000 made to said Eliot Atwater to enable him, the said Eliot Atwater, to purchase a membership in the New York Stock Exchange."

A release of like import was executed and delivered on the same day to Eliot Atwater, and referred to a payment of $2,010 paid as in-

itiation fee to the New York Stock Exchange. This sum was paid by the appellant, thus making $75,000, which is the subject of the claim presented by the appellant to the trustees, and which has been expunged by order of the court below.

The questions presented on this appeal are: (1) Was the Stock Exchange seat owned by the firm, or was it the individual property of Eliot Atwater? (2) Is the appellant estopped from asserting his claim as against the firm or individual members? In other words, what is the effect of the release given?

It is explained by the appellant that the release in question was given solely for the purpose of satisfying the rule of the New York Stock Exchange requiring a member to own his seat free from all liens and incumbrances. The requirement for this is that found in article 15 of the constitution of the New York Stock Exchange, which provides as follows:

"Sec. 3. Upon any transfer of membership, whether made by a member voluntarily, or by the governing committee, or the committee on admission in pursuance of the provisions of this constitution, the proceeds thereof shall be applied to the following purposes, and in the following order of priority, viz.:

"First. The payment of all fines, dues, assessments and charges of the Exchange or any department thereof against members whose membership is transferred.

"Second. The payment of creditor's members of the Exchange, or firms registered thereon, 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 admission.

"If said proceeds shall be insufficient to pay such 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 admission."

It is apparent, from the date of purchase of the membership by Eliot Atwater and from the terms of the copartnership agreement, which are quoted above, that Eliot Atwater individually owned the membership in the Stock Exchange, and did not convey it to the firm at any time during the existence of the copartnership. The copartnership agreement provides that Eliot Atwater should not share in the profits, unless the earnings and commissions on the Exchange equaled or exceeded the amount paid to him for the same period for interest upon the value of his membership in the New York Stock Exchange. The copartnership articles further provided that, every six months after the formation of the firm, interest was to be paid by the firm to Eliot Atwater. He, in turn, paid the same to his father, the appellant, and after a time the firm's checks were made out directly to the appellant. Thus it will be observed that Edward S. Atwater received interest on the $75,000 which he advanced to his son, Eliot Atwater, at the time of the formation of the copartnership, and this continued down to the last interest period before the bankruptcy.

It is contended by the appellant that, the membership in the New York Stock Exchange, being the individual property of Eliot Atwater, the proceeds of the sale belong to his individual estate; that, since it appears there were no Stock Exchange creditors whose names have a

preference under the rules, an individual creditor, such as the appellant, is entitled to be paid from such individual estate before any part of it be applied to the payment of the firm's debts. Apparently the membership has been sold.

[1-6] What effect have the releases upon appellant's claim? Releases may be invalid for lack of proper formality, for want of legal consideration, for incapacity of releasor to execute by reason of the absence of real consent thereto, or owing to illegality. On the other hand, a release is not invalid because improvidently executed, or because the releasee did not need the money to be paid, and voluntarily waived payment of the full consideration therefor. The scope and extent of a release depend as a rule upon the interest of the parties as expressed in the terms of the particular instrument. Parol evidence is inadmissible to prove that claims not included in the writing were understood at the time of the executing of the release to be embraced in the transaction. Parol evidence cannot be offered to vary the document. St. Louis & S. F. Ry. Co. v. Dearborn Co., 60 Fed. 880, 9 C. C. A. 286; Holbrook v. Sperling, 239 Fed. 715, 152 C. C. A. 549. Parol evidence is admissible where, while not changing the nature of the contract, it shows the reason for the execution of the release, and points out its use and application.

But a valid release as conclusively estops the parties from reviving and litigating the claim released as a final act, and it forever extinguishes a personal right of action. It completely discharges and extinguishes all rights and claims of the releasor against the releasee which are included in the release; and this is true, even though the releasee fails fully to perform a promise which was the consideration for the release, unless the operation of the release was based upon full performance. Even if invalid, it is binding upon the parties until attacked in a proper manner and set aside. Where a release is invalid because of mistake, fraud, duress, or undue influence, not inherent in its execution, it may, upon proper application, be canceled by a court of equitable jurisdiction. A release, like every other contractual obligation has for its primary rule of construction the intention of the parties. This must govern. This intention, however, must be clear from the words used in the instrument, and not from matters dehors the writing. Hoes v. Van Hoesen, 1 Barb. Ch. (N. Y.) 379; Sherburne v. Goodwin, 44 N. H. 271.

The release here does not contain any limitation which would indicate an intent at the time of its execution of a conditional delivery, so as to satisfy the requirements to purchase a membership upon the Exchange. We cannot read into the language of the release such limitation, and thus defeat the claims of other creditors. The appellant was an attorney at law, although not actually engaged in practice. He had full opportunity to read and understand the force and effect of the document he executed. He released the whole world from payment of the sum involved. By this document, he represented, not only to the Stock Exchange members, but to every one, that so far as he was concerned his son owed him nothing for the Stock Exchange membership. Nor can we support the claim of the appellant, because he

received interest on the loan of $75,000 from his son against this sealed and solemn instrument of release. We think he is estopped from asserting his claim.

In Sterling v. Chapin, 185 N. Y. 395, 78 N. E. 158, the action was for a copartnership accounting between two brothers, the plaintiff's testator and the defendant. No rights of creditors arose. The question decided by the court was one as to the rights between the partners. The deceased partner had advanced all the money for the purchase of a membership in the Stock Exchange. The deceased partner had given a release to the Exchange similar to the one here. It will be noted that the delivery was made to the Stock Exchange, and not to the borrower of the money. An account was opened in the books of the copartnership several years after the execution of the release, and it was carried on such books at the time of its dissolution, and in that account the defendant each year, exclusive of the one ending when the partnership was dissolved, was charged with interest on the balance shown due from him, and was credited with various payments, in addition to which the defendant, more than 2½ years after the execution of the release, wrote to his brother a letter which acknowledged his indebtedness to him of the amount charged against him. The court, in holding the obligation a valid one, said:

"What I emphasize is that we have here the uncontradicted and unexplained admission of the defendant, by entries which are binding upon him, that at a certain date the copartnership advanced money to or for him, and that this copartnership indebtedness was not affected by a prior individual release of one copartner."

We are of the opinion that the court below did not err in sustaining the special master, who reported, expunging the claim of the appellant.

Order affirmed.

WARD, Circuit Judge (dissenting). A release under seal cannot be contradicted by one party as against the other, or as against a third party who has been prejudiced by relying upon it, as, for instance, in this case, against the Stock Exchange or Stock Exchange creditors for whose benefit the release was executed. But obviously both parties to a release may agree that between themselves it really meant something different from what it said. In this case, for instance, if there had been no bankruptcy, Eliot Atwater and his father, Edward S. Atwater, could have agreed that the release, though general was made for the benefit of the Stock Exchange creditors only, and that the transaction was as between themselves a loan by the father of the price of the seat to the son. If that was the fact, no other creditor of Eliot Atwater could prevent his father from recovering and collecting a judgment from him for the amount of the loan. So, if Eliot Atwater had died, any admission by him to this effect could have been availed of by his father. Sterling v. Chapin, 185 N. Y. 395, 78 N. E. 158.

On the other hand, any creditor of Eliot who had relied upon the release, and who would be prejudiced by its being contradicted, might insist upon its literal enforcement as to him. This is on the ground of estoppel. But there is no evidence whatever in this case that any

creditor of the firm or of Eliot Atwater individually did so rely, or even know of the existence of the release, and I think there can be no estoppel in favor of the trustee in bankruptcy representing the creditors in general. It is to be noted that Edward S. Atwater is not claiming title to the bankrupt's seat, or to its proceeds, but is simply asking to prove his claim for money loaned to the bankrupt. I think the proof of claim should be allowed, and if in the course of the bankruptcy proceedings the trustee can show that any creditor or creditors, by relying on the release, have been prejudiced, relief may be given to them.

KOHLSAAT et al. v. PARKERSBURG & MARIETTA SAND CO.

(Circuit Court of Appeals, Fourth Circuit. May 12, 1920.)

No. 1786.

1. **Shipping ⊂=54, 58(2)—Hirer liable for loss of boat only in case of negligence, and plaintiff has burden of proving negligence.**
   The hirer of a boat is not an insurer of the property, and can be held liable for its loss only when caused by his negligence, and in an action by the owner to recover for the loss the burden of proving such negligence rests throughout on plaintiff, and although proof that the boat was not returned as agreed may make a prima facie case, which requires evidence from defendant to show the manner of loss, it does not shift the burden of proof, which remains with plaintiff.

2. **Evidence ⊂=90—"Burden of proof" defined.**
   "Burden of proof" primarily means the duty resting on one party or the other, usually the party having the affirmative, to establish by preponderance of evidence a proposition essential to the maintenance of the action. Sometimes, however, the phrase is used to describe the duty of going forward with the evidence during the progress of the trial, after a prima facie case has been made by plaintiff, when the burden devolves on defendant.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Burden of Proof.]

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

Action by the Parkersburg & Marietta Sand Company against John E. C. Kohlsaat and others, partners as C. Crane & Co. Judgment for plaintiff, and defendants bring error. Reversed.

Charles H. Stephens, Jr., of Cincinnati, Ohio (Fitzpatrick, Campbell, Brown & Davis, of Huntington, W. Va., on the brief), for plaintiffs in error.

John H. Holt, of Huntington, W. Va. (Holt, Duncan & Holt, of Huntington, W. Va., on the brief), for defendant in error.

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

KNAPP, Circuit Judge. Plaintiffs in error, defendants below, leased from defendant in error, plaintiff below, a certain derrick boat

for the term from August 11, 1917, to the 31st of December of that year, when it was to be returned to the lessor at Parkersburg, W. Va., "in as good condition as the day received, less the usual wear and tear." The boat was duly delivered to the lessees, who used the same in their lumber business at Brent, on the Kentucky side of the Ohio river, some 10 miles above Cincinnati. Early in December the river was frozen over, and defendants tied the boat to the shore. The cold weather continued with extreme severity for two months or more, except for a few days around Christmas. Twice the boat was forced from its moorings by the moving ice, first for about 150 feet, later for a mile or so, and each time again secured. In February, 1918, when the ice gorge broke up, the boat was carried down the river and became a total loss.

[1] Plaintiff brought this suit to recover the value of the boat and an unpaid balance of the agreed rental. The latter item is not in dispute. Whether defendants are liable for the value of the boat depends upon whether it was lost through any negligence on their part. As this was clearly a question of fact for the jury, the verdict in favor of plaintiff should stand, if the trial court was right in its ruling on the burden of proof. In the course of his instructions to the jury the learned judge repeatedly stated that the burden of proof, on the issue of negligence, was cast upon the defendants. For example, in the earlier part of the charge it was said:

"The failure to return, I say, creates a presumption of negligence, and therefore upon a charge of that kind the burden to show that the defendant was not in default shifts to him. Now, he can meet that by proof of due care on his part in all the contingencies that arose while the boat was in his possession. That matter has been testified about, and argued about, and it is for you, throughout all the circumstances shown in this case, to determine whether that burden that was upon the defendant has been met."

And in the closing statement, the last word before the jury retired, they were again told:

"Now, as I have said, it is the duty of the plaintiff to prove his case by a preponderance of the evidence; but I have charged you, and I repeat that charge, that upon the admitted facts the plaintiff starts out, having proved the loss of the boat, with a presumption that it was negligently lost, and it is for the defendant to show that it was not negligently lost, and that, as I say, shifts the burden upon that issue."

[2] There appears to be some confusion of thought and some conflict of authority, particularly in the earlier decisions, because of the double meaning of the phrase "burden of proof." Primarily it means the duty resting on one party or the other, usually the party having the affirmative, to establish by preponderance of evidence a proposition essential to the maintenance of the action. In this sense the burden of proof never shifts or changes, but remains from first to last where it is placed by the pleadings or the substantive law of the case. Sometimes, however, the phrase is used to describe the duty of going forward with the evidence during the progress of the trial. The plaintiff may offer sufficient proof to make a prima facie case, or he may be aided by a presumption of law, which, if nothing further appeared, would entitle him to a verdict; and when this happens the burden of

meeting the prima facie case devolves on the defendant. Thus, the duty of "going forward"—that is, the necessity of producing further evidence—may shift back and forth as the trial proceeds. But when all the proofs are in, and the case is ready for submission to the jury, the question of whose duty it was to go forward with the evidence at any turn of the trial practically disappears; and the more important question arises as to which party has the burden of establishing by the greater weight of evidence the proposition in dispute; or, to use the expressive language of Prof. Wigmore, which party takes the risk of nonpersuasion.

This distinction bears directly on the ruling under review. A bailee for hire is not an insurer of the property placed in his possession, and cannot be held to answer if it be lost or damaged without his fault. He contracts to take ordinary care of the property, and is liable only for loss occasioned by his own negligence. Hence the essential element of a bailor's cause of action, the fact to be established by him, is negligence on the part of the bailee. On that issue the burden of proof rests all the while on the plaintiff, and at no stage of the trial can it be passed over to the defendant. True, it is often said that when the plaintiff proves delivery of the property to the defendant, and that it has not been returned as agreed, the burden of proof shifts to the other side. These facts may make a prima facie case, or, as the court below puts it, give rise to a presumption of negligence; but, whatever the form of expression, the meaning is always the same, namely, that it then becomes the defendant's duty to go forward with the evidence and explain how the damage occurred. And this is entirely reasonable, for presumably the facts in that regard are within his knowledge. But when this has been done, and especially if it be shown that the loss resulted from a cause consistent with due care on his part, the duty of going forward has been met and the prima facie case overcome; and for the reason that the right of recovery in such case depends upon whether or not the defendant was negligent, and on that issue, as already said, the burden throughout is on the plaintiff.

And this has long been the settled rule of law. In Railroad Co. v. Reeves, 77 U. S. (10 Wall.) 176, 190 (19 L. Ed. 909), which was an action against a carrier for damage to goods, and in which the defendant claimed that the damage was caused by an extraordinary flood, the Supreme Court said:

"It is not necessary for him [defendant] to prove that the cause is such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it."

Again in Transportation Co. v. Downer, 78 U. S. (11 Wall.) 129, 134, 135 (20 L. Ed. 160), also an action against a carrier on a bill of lading which exempted losses occasioned by perils of navigation, it was said:

"If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading.

The burden of establishing such negligence and inattention rested with the plaintiff, but the court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the court erred."

In the recent case of Southern Railway Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836, which seems directly in point and controlling of the case at bar, the ruling is as follows:

"The railway company was therefore liable only in case of negligence. The plaintiff asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence."

A pertinent statement of the law is found in Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467, cited with approval in the Prescott Case, supra:

"It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman, who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not, of course, intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real 'shifting' of the burden of proof. The warehouseman, in the absence of bad faith, is only liable for negligence. The plaintiff must in all cases, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him."

To the same effect is Willett v. Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684, in which the court says:

"As the only contract of the warehouseman is that he will use due care in keeping the property, and deliver it on demand, if, after using due care, he shall have it in his possession, a plaintiff must show a breach of this contract to entitle him to recover, either in contract or tort. We do not see how, by changing the form of his declaration, he can change the liability or rights of the warehouseman. Whatever the form of declaration is, he is required to prove a breach of the contract. It may be that, where there is a refusal to deliver, the plaintiff may make out a prima facie case upon proving this fact, because such refusal, if unexplained, is some evidence of the breach of the contract. But this does not shift the burden, originally on the plaintiff, to prove a breach of contract."

Of like and unmistakable import are, among others, Washburn-Crosby Co. v. Johnston, 125 Fed. 273, 60 C. C. A. 187, United Metal Co. v. Pryor, 243 Fed. 91, 155 C. C. A. 621, Pacific Mail S. S. Co. v. Panama R. R. Co., 251 Fed. 449, 163 C. C. A. 625, Hunter v. Ricke Bros., 127 Iowa, 108, 102 N. W. 826, Hughes v. Atlantic City Ry. Co., 85 N. J. Law, 212, 89 Atl. 769, L. R. A. 1916A, 927, and Standard Marine Ins. Co. v. Traders' Compress Co., 46 Okl. 356, 148 Pac. 1019.

In the light of these authorities we are constrained to hold that the learned judge was in error in charging the jury that the burden of proof was on the defendants to show that the boat was not lost by their negligence; and it cannot be doubted, when the opposing proofs on this issue are examined, that the error was prejudicial. The judgment must be reversed, and the cause remanded, with instructions to grant a new trial.

Reversed.

JAMES STEWART & CO. v. NEWBY.

(Circuit Court of Appeals, Fourth Circuit. April 26, 1920.)

No. 1746.

1. **Master and servant ⟸265(5)—Injury of servant raises no presumption of master's negligence.**
   Negligence of the employer is an affirmative fact, to be proved by an injured employé, and the fact of an accident raises no presumption of such negligence.
2. **Trial ⟸420—Error in refusing to direct verdict waived by introduction of evidence.**
   Error in overruling a motion for directed verdict, made at the close of plaintiff's case, is waived by the introduction of evidence by defendant.
3. **Master and servant ⟸279(2)—Single act of negligence insufficient to prove incompetency of employé.**
   In an action for injury to a servant, where incompetency of a fellow servant is charged, the burden of proving this, and that defendant knew, or with ordinary care should have known, of such incompetency, rests upon plaintiff, and a single act of negligence by one who was experienced and generally competent is insufficient.
4. **Trial ⟸252(1)—Instruction must be predicated on facts in proof.**
   An instruction on an assumed state of facts to which no evidence applies tends to withdraw the attention of the jury from the issues actually involved, and is erroneous.
5. **Master and servant ⟸287(7)—Whether negligent employé was acting as vice principal question for jury.**
   Where there was evidence tending to show that the breaking of a boom on a scow when being used to raise a heavy timber from a pier, by which a workman on the scow was injured, was due to the improper placing of the scow by the foreman in charge, whether the master was liable for failing to furnish the servant with a safe place to work *held* a question for the jury, dependent upon whether, on the facts shown, the foreman in placing the scow was acting as a vice principal and performing a nondelegable duty of the master.
6. **Appeal and error ⟸1053(1)—Error in receiving incompetent and prejudicial evidence not cured by final exclusion.**
   Where on trial of an action against an employer for injury to an employé, plaintiff was permitted to introduce evidence, subject to objection, that defendant was protected against liability by insurance, the exclusion of all such evidence at the close of the trial *held* not to have cured the error in its reception.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action by L. L. Newby, administrator of the estate of Oscar C. Sawyer, deceased, against James Stewart & Co. Judgment for plaintiff, and defendant brings error. Reversed.

Leon T. Seawell, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for plaintiff in error.

Edward Walbridge, of Norfolk, Va., for defendant in error.

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

WATKINS, District Judge. This action was begun by Oscar C. Sawyer for injuries sustained while working for James Stewart & Co., a corporation conducting a general contracting business, and which was, at the time of the accident complained of, engaged in building a pier in the waters of Hampton Roads, near Sewell's Point, Va. The accident occurred on July 26, 1918. After the declaration was filed, and before the trial of the case, Sawyer died in consequence of his injuries. His administrator was substituted as plaintiff, and recovered a verdict of $10,000. At the time of the accident plaintiff in error had in its employment several hundred men under the direction of its general superintendent, J. H. Halpin, a man of about 30 years' experience in construction work. The workmen were divided into squads or gangs, each under the control of a gang boss; the one in which Sawyer worked being under the direction of Gustav A. Erickson, a man of about 11 or 12 years' experience in construction work. This gang was engaged in operating a certain floating Batter pile driver and pile engine, which were then being used in lifting and placing in position heavy timbers. Erickson had no power to employ or discharge the laborers under him. The engineer had had about 23 years' experience around engines. The Batter pile driver is described in the declaration as consisting of—

"a high frame, with a large beam, or leads, and also having a jibboom connected therewith; also certain bolts, pulleys, belting, and shafting, and apparatuses and appliances, and the same was operated by said pile engine, propelled by means of steam and electricity, having the power to raise to a height a large beam or pole, to which beam is attached a heavy mass of iron, and then dropping the same upon a pile, driving it into the ground; that the said jibboom attached to said pile driver was used to lift heavy masses of timber, poles, beams, planks, and to place same where needed."

The jibboom, which is frequently referred to in the evidence as the gin pole, was an upright piece of timber, used sometimes to pull the piles into place for driving, and sometimes as a derrick for handling material. It was on the same order as a derrick, but was stationary, instead of having a swing, as a derrick. It was estimated in the testimony to be about 50 to 65 feet in length, 8 or 9 inches in diameter at the top, something over a foot in diameter at the bottom, and approximately 12 inches in diameter at the point where it broke. This gin pole stood alongside the Batter, and a cable ran through and over a block, with loose ends extending from the block, so that it could be moved up and down to the point desired. The uncontradicted testimony showed that the gin pole was of sufficient strength, with proper use, to lift a weight of over 3,000 pounds, that it had been in use for several months, and that during this time it had constantly been used in lifting timbers of this weight.

At the time of the accident certain heavy timbers, about 24 feet in length, had been placed alongside the docks. The appliances mentioned were loaded on a floating scow, or barge, and it was the custom and proper method of operation that this scow should be moved from time to time, so that, when the timbers were lifted, the jibboom should be opposite the center of each of them, in order that the strain of the lifting should be straight over the pole, and not at an angle. The placing of the scow in proper position for each lift was in charge of Erickson, the gang boss, and it was his duty, after seeing that each piece of timber was properly hooked for the lift, to signal the engineer, who then applied the power and started his engine. Sawyer, at the time of the accident, was engaged as a timber handler, and was at one end of the pile driver, picking up some wire. In attempting to raise one of the timbers, which was 12 inches by 12 inches, and 24 feet in length, and which weighed from 900 to 1,000 pounds, there is testimony to indicate that the scow had not been placed in proper position, that is to say, it had not been moved so that the jibboom should be opposite the center of the timber, and, in consequence thereof, that this piece caught under some other heavy pieces, and this added weight, coupled with the fact that the pull was at an angle, instead of in a straight line, caused the gin pole to break at a distance of some 15 or 20 feet from its top, and the broken piece fell upon Sawyer, crushing and injuring him so seriously that his death resulted after several months of suffering.

The specific negligence charged in the declaration was: First, failure to provide competent, skillful, and experienced persons to operate the pile driver, pile engine, and other appliances; second, failure to provide a reasonably safe and proper place to work; and, third, failure to furnish and maintain safe machinery and appliances. In his evidence in chief, the defendant in error produced no testimony as to the negligence complained of, further than evidence of the fact that the gin pole broke and caused the injury.

At the conclusion of this testimony, plaintiff in error moved for a directed verdict, which was refused. Thereupon a number of witnesses were introduced in its behalf. They testified, among other things, that the gin pole had been properly selected and was suitable for the purpose for which it was intended to be used; that the engine, machinery, and appliances were without defect; that the engineer and foreman were competent, safe, and experienced persons; and that proper inspections were had. None of this testimony was contradicted. In an attempt to show how the accident occurred, plaintiff in error introduced witnesses whose testimony tended to show that the accident was caused, as above stated, by failure to move the scow into proper position, and that the accident was due to the timber being caught under other heavy timbers and the lift being attempted at an angle; these two facts causing such a strain on the gin pole as to result in the break. At the conclusion of all the testimony, plaintiff in error renewed its motion for a directed verdict, which was again refused.

During the progress of the trial the attorney for the defendant in error, over objection of opposing counsel, repeatedly attempted to

prove that plaintiff in error was protected by insurance, and that the Accident Insurance Company was liable for whatever damages might be recovered in this case. Having reserved his decision, the presiding judge, at the conclusion of all the testimony, excluded all evidence as to the accident insurance. A number of letters regarding the liability of the Accident Insurance Company were offered in evidence by the defendant in error, but were excluded by the presiding judge, who certifies, in signing an exception thereto, that he did so, believing that the trend of authority on the subject required the exclusion of these papers, and that he did not mean, in so doing, to express his individual views regarding the propriety and right of having such papers in evidence.

[1] The first assignment of error relates to refusal of the motion for a directed verdict. Had plaintiff in error rested its case upon the testimony in chief of the complainant, this motion would have been meritorious, because no evidence of negligence had then been produced, except the mere fact that the gin pole broke and caused the injury. The law is settled beyond controversy that such proof alone was not sufficient to charge the master with liability. "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence." Patton v. Texas & P. R. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Texas & Pacific Railway Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; Dixie Peanut Co. v. Lewis, 118 Va. 577, 88 S. E. 72; The Montcalm (D. C.) 249 Fed. 760; Burras v. Cudahy Packing Co., 230 Fed. 596, 144 C. C. A. 650. Upon what ground the motion was refused at the conclusion of complainant's testimony is not specifically stated. It is apparent, however, that the motion must have been refused on the ground that there was some evidence to go to the jury upon the question of defective appliances. That this was the opinion of the court is shown by what was said in signing the first bill of exception, wherein, commenting on the charge as to fellow servants, it was stated that this instruction should doubtless have been qualified, "having regard to the inapplicability of that doctrine, if the jury should have found the fact that the injury arose by reason of the defective appliances of the defendant."

[2] However, any right which the plaintiff in error may have had, as to a directed verdict in the first instance, was waived when it undertook to produce testimony on its own behalf to disprove the acts of negligence charged against it. Its right then became dependent upon all the testimony submitted at the trial. Silsby et al. v. Foote, 14 How. 218, 14 L. Ed. 394; Wilson v. Haley Live Stock Co., 153 U. S. 39, 14 Sup. Ct. 768, 38 L. Ed. 627; Runkle v. Burnham, 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694; Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746; American Locomotive Works v. Thornton, 259 Fed. 409, 170 C. C. A. 381.

[3] As will be shown later on in this opinion, there was sufficient evidence at the conclusion of the testimony to go to the jury upon the question of whether the master furnished a reasonably safe place for

the servants to work. A new trial, however, must be ordered for the reason that, under the instructions of the court, the jury could not have held the master liable without basing its verdict, either upon the charge that the appliances were defective, or that the master negligently failed to furnish reasonably competent, safe, and skillful servants to operate the machinery and appliances. As shown above, there was no evidence upon which negligence could be predicated as to appliances. The only evidence of unskillful, negligent, or unsafe servants was that which tended to show that Erickson, the gang boss, failed in the one instance to move the scow into proper position. It is uncontradicted that he was an experienced and competent man, and there is nothing to show that he had ever before been careless, or that the master knew, or had reason to suspect, that he was an incompetent or unsuitable man for his position. One act of negligence on the part of an employé under such circumstances is not sufficient to charge the master with liability in employing him. 2 Thompson on Negligence, 1054; 26 Cyc. 1297, note 91; Spring Valley Coal Co. v. Patting, 86 Fed. 433, 30 C. C. A. 168; Hunter v. Alderman, 89 S. C. 502, 71 S. E. 1082. Where incompetency of a fellow servant is charged, the burden of proving this is upon the complainant, and it must be shown that the defendant knew, or with ordinary care could have known, of such incompetency. The presumption is that the employer has done his duty in this respect. 18 R. C. L. 728; Wabash Ry. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605.

The second assignment of error relates to the court's instructions to the jury upon the law of the case, and, among other things, it is charged that the instructions were erroneous in so far as they related to safe appliances and experienced and competent employés, for the reason that there was no evidence adduced to support the charge of negligence in that respect. The jury was instructed as to the duty of the defendant to provide reasonably safe and suitable appliances and to provide a skillful, competent, and experienced man to manage, use, and control the Batter pile driver and engine, and was instructed that if it should find that the defendant was guilty of negligence in this respect, and that the injury was due to such negligence, a verdict should be rendered for the plaintiff.

[4] As shown above, there was no evidence in these particulars upon which the liability of the plaintiff in error could have been predicated, and the charge, therefore, was in that respect misleading and erroneous. "An instruction not based on the evidence is erroneous and should not be given." Clarke v. Kownslar, 35 U. S. (10 Pet.) 657, 9 L. Ed. 571. "Charges to juries must be confined to the issues and must be predicated on facts in proof." Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 27 Sup. Ct. 412, 51 L. Ed. 708; Pennsylvania R. Co. v. Buckley, 210 Fed. 268, 127 C. C. A. 86; Stanley v. Beckham, 153 Fed. 152, 82 C. C. A. 304; Bishop Co. v. Dodson, 152 Fed. 128, 81 C. C. A. 346; Citizens' Gas & Electric Co. v. Nicholson, 152 Fed. 389, 81 C. C. A. 515. "An instruction upon an assumed state of facts, to which no evidence applies, tends to withdraw the attention of the jury from the issues actually involved, * * * and thus to reach

an erroneous result." Railroad Co. v. Houston, 95 U. S. 703, 24 L. Ed 542; Railroad Co. v. Blessing, 67 Fed. 277, 14 C. C. A. 394; Northwestern Mut. Life Ins. Co. v. Stevens, 71 Fed. 263, 18 C. C. A. 107; B. & M. Ry. Co. v. McDuffey, 79 Fed. 942, 25 C. C. A. 247.

That the charge complained of must have misled the jury is manifest from the fact that the court further charged "that the engineer in charge of the engine, and the foreman, or boss, of the gang in the operation of the work, were fellow servants," and that if they believed "from the evidence that the accident and consequent injury were caused by the negligence of Erickson, the foreman, or Brothers, the engineer, the defendant (plaintiff in error) is not liable for such acts, and you must find for the defendant." While there is some conflict of testimony as to the actual cause of the accident, the only testimony tending to show negligence sufficient to justify a verdict for complainant was to the effect that the accident was caused by the failure of Erickson to have the scow placed in proper position before making the lift. If, therefore, the jury followed the instructions of the court, as we must presume it did, its verdict must have been predicated upon the assumption that the master had negligently failed to furnish safe and suitable appliances or safe, skillful, and competent fellow servants.

[5] Another charge of error in the second assignment was to the effect that the court erred in instructing the jury as to its duty to furnish a reasonably safe place to work, when the evidence showed that it was a case of the use of instrumentalities, and not a case involving the doctrine of a safe place to work. As has been already shown, there was evidence to the effect that the accident was caused by the failure of Erickson, the gang foreman, to have the scow placed in proper position before attempting the lift. Whether the master was liable for such negligence, if established, is dependent upon whether his act was that of a vice principal or of a fellow servant. The general principles applying to what constitutes the positive or nondelegable duties of a master, and as to what risks are assumed by a servant, have been clearly established and defined, and there is now but little conflict of authority relative thereto. Among other principles that now receive universal recognition are these:

It is the positive and nondelegable duty of the master to furnish its servants with reasonably safe and suitable appliances with which to work, with a reasonably safe place in which to work, with reasonably competent, safe, and skillful fellow servants to work with, and to use reasonable diligence at all times to maintain these conditions. The test is reasonable care or diligence, and the degree of care required depends upon the circumstances of each case. Extra danger requires extra care. Instruction and warning must be given where the hazard of the employment demands it. The skill and constancy of supervision, and the frequency or extent of instruction, inspection, repair, and adjustment required, depend upon the character of the work and the dangers incident thereto. What constitutes due care or negligence in any particular case, is ordinarily a question of fact for the jury. The master's duty has been characterized as a duty of provision. In its broad and proper sense, it implies, or should imply, not only the sup-

ply of the appliances, place, and persons required, but of reasonably maintaining the safety of the conditions originally required. The master is not an insurer of these conditions, but is responsible for them at all times to the extent that reasonable prudence requires. Where a place has been rendered unsafe by the mere shifting operations of fellow servants in the usual course of the work, an exception occurs. If unexpected contingencies and dangers are brought about by the methods of work adopted by fellow servants, rendering the place unsafe, this will not ordinarily make the master liable; the test being reasonable foresight and prudence. Kreigh v. Westinghouse, 214 U. S. 255, 29 Sup. Ct. 619, 53 L. Ed. 984; Gulf Transit Co. v. Grande, 222 Fed. 817, 138 C. C. A. 243; Cybur Lumber Co. v. Erkhart, 238 Fed. 751, 151 C. C. A. 601; Bennett v. Crystal Carbonate Lime Co., 146 Mo. App. 565, 124 S. W. 608; Dunn v. Great Lakes Dredge & Dock Co., 161 Mich. 551, 126 N. W. 833. But to hold that the master cannot in any instance be chargeable for new conditions, rendering a place unsafe, would be absurd, and the safety which he is charged with providing should not be jeopardized by too nice theoretical refinements.

In the case of Regan v. Parker-Washington Co., 205 Fed. 692, 123 C. C. A. 648, L. R. A. 1915F, 810, there is an interesting discussion of certain conflicts of opinion, regarding the principles by which it can be determined whether one is a vice principal or a fellow servant, and of the final determination of these questions by our Supreme Court. It is certain now that the test is duty, and not rank, and is determined by obligation, rather than authority. Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 383, 13 Sup. Ct. 914, 37 L. Ed. 772; Randall v. B. & O. Ry. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; Northern Pacfic R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; Martin v. Atchison Topeka & S. F. Ry. Co., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; Northern Pacific R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; Alaska Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; New England R. Co. v. Conroy, 175 U. S. 334, 20 Sup. Ct. 85, 44 L. Ed. 181; Northern Pacific R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Weeks v. Scharer, 111 Fed. 331, 49 C. C. A. 372; M'Donald v. Buckley, 109 Fed. 290, 48 C. C. A. 372; Baltimore & Ohio R. Co. v. Brown, 146 Fed. 24, 76 C. C. A. 482; Weeks v. Scharer, 129 Fed. 333, 64 C. C. A. 11; Missouri Valley Bridge & Iron Co. v. Walquist, 243 Fed. 120, 155 C. C. A. 650; Union Pacific R. Co. v. Marone, 246 Fed. 917, 159 C. C. A. 188; Atchison, T. & S. F. R. Co. v. Moore, 29 Kan. 632; Mast v. Kern, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 581; 18 R. C. L. pp. 712 to 715, 741 to 743, and 751 to 754. Prima facie all servants in the common employ of a single master are fellow servants. So it has generally been held that a gang foreman in charge of a squad of ordinary laborers is a fellow servant with them, and not a vice principal of the master.

As applicable to the facts of the decided cases, the conclusions reached in this respect have generally been correct. In some instances, however, the language employed has been misleading, and there is

considerable apparent conflict and occasionally some real conflict in the decisions. In some instances the language employed would indicate that gang foremen are fellow servants with their subordinates, irrespective of the scope of their duty. In others the issue has been determined upon the basis of the foreman's right or the absence of his right to employ and discharge. The real test is whether the master has intrusted to such one the limited duty of mere operation on the one hand, or a broader duty involving provision on the other. When one is charged with a nondelegable duty of a master, liability for his negligence thereof exists, if injury is thereby caused to another servant of any rank whatever, superior, equal, or inferior. Since, however, all who enter a common employment are prima facie fellow servants, in order to render the master liable specific testimony must be produced to show that the offending servant is charged with some duty of provision, and not merely the ordinary service of operation. The weight of the testimony in that respect, and the inferences to be drawn therefrom are generally questions for the jury. In determining such questions it may, and often does, become important to consider the rank of the servant. As stated by this court in Russell v. Champion Fibre Co., 214 Fed. 965, 131 C. C. A. 259, a foreman in charge of and controlling workmen is presumed to observe the presence or absence of proper safety appliances, and it is his duty to warn those working under his direction and control of dangers which are not obvious to them. See Northern Pacific R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Consolidated Interstate-Callahan M. Co. v. Witkouski, 249 Fed. 833, 162 C. C. A. 67; Federal Mining & Smelting Co. v. Anderson, 247 Fed. 472, 159 C. C. A. 526; Alaska Pacific S. S. Co. v. Egan, 202 Fed. 867, 121 C. C. A. 225; Hunter v. Alderman, 89 S. C. 502, 71 S. E. 1082.

The basic fact of all liability of the master is the servant's agency. He acts as it were by power of attorney. If the power is special and limited, the master's liability is limited accordingly; if broad and general, his liability is naturally extended. If the supervision is of such character as to charge the foreman with the duty of inspection, his knowledge becomes the knowledge of the master, and entails an immediate liability which does not pertain to servants of lower order not so charged. The foreman may be charged with the duty of maintenance or repair, in which case, both his knowledge and his duty become the knowledge and duty of the master, so as to require him, not only to exercise reasonable diligence to discover, but also to provide against danger. On the other hand, the servant not charged with such duty has a right to rely upon the master's fulfillment of his obligation. He need not anticipate that the master will be negligent; the law's requirement is an assurance to him that the master has done his duty. Whether the foreman is charged with a nondelegable duty of the master, in a particular case, as above stated, is a question of fact to be determined from all the evidence. If there is no testimony to show such fact, the court should charge, as a matter of law, that the foreman is a fellow servant, because the mere fact that he is a foreman is not sufficient. If the admitted facts show that he is charged with

such nondelegable duty, the court should instruct the jury to this effect. If, however, there is positive evidence, or evidence from which a reasonable inference may be drawn, that he is so charged, however conflicting the testimony, the question should be submitted to the jury. Without further comment, we hold that there was sufficient evidence to go to the jury upon the issue as to whether Erickson was a vice principal or a fellow servant with the injured employé, and as to whether the master furnished a reasonably safe place to work.

[6] The last question in the case relates to the testimony as to the employer's protection by liability insurance. It is true that the testimony was ultimately ruled out. This, however, was not done promptly. Complainant's counsel brought the matter to the attention of the jury almost at the beginning of the trial, and by repeated efforts persistently directed the attention of the jury to it, and it was not until the conclusion of the whole testimony that it was finally excluded. The general rule is that, where inadmissible evidence has been received during a trial, the error is cured by its subsequent withdrawal, or by an instruction of the court 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; Union P. R. Co. v. Thomas, 152 Fed. 371, 81 C. C. A. 491; Armour & Co. v. Kollmeyer, 161 Fed. 78, 88 C. C. A. 242, 16 L. R. A. (N. S.) 1114; Horsford v. Glass Co., 92 S. C. 260, 75 S. E. 533. "There is this exception to the rule. Where the evidence thus admitted is so impressive that in the opinion of the appellate court its effect is not removed from the minds of the jury by its subsequent withdrawal, or by the instruction of the court to disregard it, the judgment will be reversed." Armour & Co. v. Kollmeyer, supra; Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663; Waldron v. Waldron, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453; Horsford v. Glass Co., supra.

Whether the effect of the evidence thus improperly introduced may be subsequently removed by its exclusion and an instruction to disregard it depends upon the character of the evidence. This court must take cognizance of the general recognition among the members of the bar, as well as by the courts, of the harmful effect upon the minds of jurors of such testimony as was here sought to be introduced. The only purpose for which such evidence is presented is to prejudice the jury, and the poison is of such character that, once being injected into the mind, it is difficult of eradication. Where it is allowed to remain during the whole course of a trial, and by persistent unrebuked references is allowed to influence the jurors' consideration of all the other evidence during the trial, the antidote of a final instruction to disregard the testimony is ineffective. The removal of the fly does not restore an appetite for the food into which it has fallen. The exclusion of the testimony should be prompt and decisive, and should leave no doubt, either of the impropriety of the attempt to introduce it, or of the court's condemnation of such attempt. Verdicts cannot be relieved of the danger of criticism as long as there is a basis for the opinion that they have been rendered through the influence of prejudice.

Not a few of our courts have gone to the extent of holding that a

case should be withdrawn from the jury and a mistrial ordered for the mere asking of a question of the character under consideration, on the ground that the effect of it is so harmful that it cannot be removed by the instruction of the court, and that the conduct of counsel in such case is so culpable that he ought not to be permitted to enjoy the fruits of a verdict which might have been influenced by such question. The authorities are overwhelming that such evidence is inadmissible, that it should be promptly excluded, and that the striking out of the testimony when once admitted does not obviate the necessity for a new trial, if the evidence is so impressive that its effect is not removed by subsequent withdrawal or instruction to disregard. To the cases above cited may be added Washington Gaslight Co. v. Lansden, 172 U. S. 541, 19 Sup. Ct. 296, 43 L. Ed. 543; Maytag v. Cummings, 260 Fed. 75, — C. C. A. —; Knickerbocker Trust Co. v. Evans, 188 Fed. 550, 110 C. C. A. 347; Chicago, M. & St. P. Ry. Co. v. Newsome, 174 Fed. 394, 98 C. C. A. 1; Levy v. J. L. Mott Iron Works, 143 App. Div. 7, 127 N. Y. Supp. 506; Cosselmon v. Dunfee, 172 N. Y. 507, 65 N. E. 494; Steve v. Bonners Ferry Lumber Co., 13 Idaho, 384, 92 Pac. 363; Walters v. Appalachian Power Co., 75 W. Va. 676, 84 S. E. 617; Herrin v. Daly, 80 Miss. 340, 31 South. 790, 92 Am. St. Rep. 605. The case of Horsford v. Glass Co., 92 S. C. 236, 75 S. E. 533, is directly in point, and the able opinion of Mr. Justice Woods in that case fully sustains the views herein expressed.

Reversed.

ROBERTS et al. v. CRISS.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 178.

1. **Abatement and revival ⇐69—Suit does not abate on death of party pending writ of error.**

   As a general rule, the death of a party pending a writ of error furnishes no ground for abatement of the suit.

2. **Appeal and error ⇐334(6)—Effect of failure of representative of deceased party to come in stated.**

   Under rule 19 of the Circuit Court of Appeals (150 Fed. xxx, 79 C. C. A. xxx), providing that on the death of a party pending a writ of error or appeal the adverse party may procure an order requiring his representatives to come in and be made parties, and that unless they do so the moving party, if plaintiff in error, shall be entitled to open the record and have the cause heard and determined, where such representative fails to come in pursuant to the order, he is not entitled to be heard, or to recover costs in case of affirmance.

3. **Contracts ⇐113(4)—Contract requiring violation of rules of exchange by member illegal.**

   A contract between a member of the Stock Exchange and another, under which such member was to use his membership in violation of the rules of the Exchange, is illegal.

4. **Contracts ⇐138(1)—Illegal contract cannot be made basis of suit between parties.**

   A contract, the basis of which is the violation by one of the parties of a contract with a third party, will not be enforced by a court as between the parties.

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

Action by Jesse Nevin Roberts and another against Hugh Ferguson Criss. Judgment for defendant, and plaintiffs bring error. Pending appeal, defendant below died, and Helen G. Criss, administratrix, appeared on order. Affirmed.

The plaintiffs are citizens of the state of Ohio and residents of the city of Cincinnati, in that state. The defendant is a citizen of the state of New York and a resident of the Southern district therein. The complaint avers: That on January 3, 1905, the plaintiffs and the defendant, together with one Thomas B. Criss, since deceased, entered into a partnership under the firm name of Roberts, Hall & Criss. That the firm was formed to conduct a general brokerage and commission business, with offices in Cincinnati and in the city of New York, and that it carried on such business until June 5, 1912. That the partnership agreement contained a provision that during the continuance of the partnership no one of the firm should engage in speculative contracts or purchases. That at the time when the partnership was formed, and ever since, the defendant has been a member of the New York Stock Exchange. That in the month of January, 1910, the defendant, Criss, in violation of his agreement, engaged in contracts of a speculative nature, which resulted in his suspension from the Stock Exchange because of obligations which neither he nor the firm could meet; the firm becoming insolvent, which led to the appointment of a receiver over its assets. That because of the facts above stated the plaintiffs sustained large pecuniary losses, and a large part of the assets of the partnership were used in settlement of the losses resulting from these speculative contracts. That on June 5, 1912, the plaintiffs agreed with defendant, Criss, to release him from all their claims against him, the consideration being a new partnership agreement to be entered into between them, by which there should be secured to the plaintiffs for a period of four years all the benefits to be derived from a membership in the New York Stock Exchange through the use of defendant's seat therein; Criss having been restored to his membership in the Exchange. That the new partnership agreement was made and business was carried on under it until January 25, 1915. That shortly prior to that date the plaintiffs were advised by defendant that the partnership agreement of June 5, 1912, had been examined by the Stock Exchange officials, who required it to be forthwith rescinded as in contravention of its rules, under penalty of the suspension of defendant, Criss, from its membership. That thereupon, in order to prevent the suspension of defendant, Criss, as aforesaid, the partnership agreement of June 5, 1912, was dissolved, and it was agreed that the dissolution should not constitute a release by the plaintiffs of any legal rights to which they were entitled as against Criss.

It is alleged that defendant has failed to perform his agreement to secure to plaintiffs the benefit of his membership in the Exchange, and that by reason of his failure the plaintiffs have been obliged to transact their business as non-members of the Exchange, and have been compelled to pay full commissions on all sales and purchases made for their customers, and that their good will has been impaired and their credit injured and a large amount of business has been diverted from them, to their damage in the sum of $100,000, and they bring suit for the recovery of that amount. At the close of the case defendant moved to dismiss the complaint, and the court granted the motion.

Hartwell Cabell, of New York City, for plaintiffs in error.

N. E. Harby, of New York City, for administratrix of defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). Before considering this case on the merits, there is a preliminary matter to

which reference must be made. A brief has been presented to the court which is entitled "Brief Submitted by Administratrix of Defendant in Error." It is signed by counsel, who describes himself as "Attorney for Administratrix of Defendant in Error." The brief contains this statement:

"The defendant died on January 25, 1919; this brief is submitted by his administratrix appointed in New Jersey."

[1] Counsel who presented this brief was heard upon the argument. There is, however, the question whether the action has abated, and whether there is a defendant before the court.

In Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804, the defendant died after argument in the Supreme Court, but before the case was decided. The court affirmed the judgment nunc pro tunc as of the date when the case was argued. As a general rule the death of a party pending a writ of error furnishes no ground for the abatement of the suit. In Green v. Watkins, 6 Wheat. 260, 5 L. Ed. 256, decided in 1821, the court, speaking through Mr. Justice Story, said:

"There is a material distinction between the death of parties before judgment, and after judgment, and while a writ of error is depending. In the former case, all personal actions by the common law abate; and it required the aid of some statute, like that of the thirty-first section of the Judiciary Act of 1789, c. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived. * * * But in cases of writs of error upon judgments already rendered a different rule prevails. In personal actions, if the plaintiff in error dies before assignment of error, it is said that by the course of proceedings at common law the writ abates; but, if after assignment of errors, it is otherwise. In this latter case, the defendant may join in error, and proceed to get the judgment affirmed, if not erroneous; and he may then revive it against the representatives of the plaintiff. * * *"

[2] Rule 19 of this court (150 Fed. xxx, 79 C. C. A. xxx) provides that whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives of such deceased party may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases. In this case that course was not pursued, and the executrix has not been admitted as a party to the suit. But rule 19 also provides that, if the representatives of the deceased do not become parties to the action, the other party may suggest the death on the record, and on motion obtain an order that, unless they do become parties to the action within 60 days, the party moving for the order, if plaintiff in error, shall be entitled to open the record and on hearing have the judgment reversed, if it be erroneous. The executrix of the defendant, Criss, not having asked to be made a party, the plaintiff in error gave her notice that he would move for an order requiring her to become a party within 60 days, and that, if she did not, he would be entitled to a hearing and have the judgment reversed, if it should be found to be erroneous. This court granted the order on November 18, 1919, over the objection of the executrix, who appeared specially and denied the jurisdiction of the court to make the order "or continue the cause against me as executrix of my said husband or otherwise." But, as the executrix never complied with the privilege accorded to her to become a party within the

specified period, or for that matter at any time since, she is not now and never has been a party to the action, and her counsel was without right to file a brief or to be heard on the argument, and she is without right to costs, if the court concludes that there is no reason why the judgment should be reversed.

[3] At the conclusion of the plaintiff's case the defendant's motion to dismiss on the merits was based on two grounds:

(1) Because it appeared that the plaintiffs and defendant knew at the time that the last copartnership agreement was made that it violated the rules of the New York Stock Exchange; that two parties have no rights, one against the other, if they depend upon a contract which at the time of its making is known to be in violation of some other contract which is obligatory.

(2) Because plaintiff testified that he refused to make the new contract with the defendant, which would have given the plaintiff the right to do business on the New York Stock Exchange, although defendant was ready, willing, and able to make the contract according to his agreement.

The court granted the motion and directed the jury to render a verdict for the defendant. "The case," said the court, "therefore, seems to come down to this: The plaintiffs, with knowledge that the defendant was a member of the New York Stock Exchange and bound by its rules—in other words, that he had a contractual relation with the Exchange to obey these rules—entered into a contract with the defendant in violation of these rules. This was a contract to commit a tort and can form no basis for recovery in his action."

The agreement of January 3, 1905, and that of June 5, 1912, provided for the formation of a "partnership" to carry on a general brokerage business in stocks, bonds, and other securities; but neither agreement in fact or in law created a partnership. Under the terms of these agreements there was to be no division of assets or profits. Criss was to carry on his business in New York as a member of the New York Stock Exchange, and was to retain all his profits arising therefrom. The plaintiffs were to carry on their business in Cincinnati, and were to retain all the profits arising therefrom. It was also provided that the death of any of the parties should not work a dissolution of the firm, and that the surviving "partners" should enjoy the benefits accruing from the membership of Criss upon the Exchange. The plaintiffs, as purported "partners" of Criss, carried on, as they admit, a large and profitable business with sundry members of the Stock Exchange, on all of which business they received a large per cent. of the regular commissions charged by said members of the Exchange, because they were apparently partners of a member of the Exchange. Under their agreement their business was to be conducted under the rules of the Exchange. Those rules provided (XXXIV, §§ 2 and 3) that a partnership might conduct its business on the Exchange under the terms provided for members, if one of the general partners had a membership in the Exchange, and if the interests of the partners in the main house and branch houses of the firm were identical. In this case they clearly were not identical in the sense intended. The rules also provided that the individual members of a firm not members of the Exchange were not to possess the privilege of having their individual transactions executed on the Exchange upon the terms applicable to members. No

person elected to membership could be admitted to the privileges of the Exchange until he had signed the constitution of the Exchange. That constitution was the contract between the members and by signing it the member pledged himself to abide by it. Article 17, § 6, provided that any member adjudged guilty of willful violation of the constitution, or of any resolution of the governing committee, should be subject to suspension or expulsion therefrom.

We agree that it is the right of the members of this Exchange to have the contract entered into by all of them duly observed by each of them. We agree that if A., who is not a member of the Stock Exchange, enters into an agreement with B., who is a member, for the conduct of business on the Exchange under its rules, and if that agreement involves a violation of the rules, the agreement so made is an attempt to violate the proprietary rights of the other members of the Exchange. These rights are property rights, and the attempt on the part of A., knowing the rules, to have B. violate his agreement with his associates, is a malicious attempt to have B. break a contract with the members and obtain for A. rights which violate the terms of the constitution by which the members of the Stock Exchange are governed.

The agreement of June 5, 1912, like the agreement of January 3, 1905, violated the rules of the Exchange. If the plaintiffs did not understand when they made it that the agreement of January 3, 1905, violated those rules, they became aware of the fact shortly after the agreement was made; for they were distinctly informed by Criss that the Exchange held that the agreement was in violation of the rules. Nevertheless the agreement of June 5, 1912, which was not substantially different in the matter now under consideration, continued the objectionable provision. So that shortly prior to January 25, 1915, the plaintiffs were advised by defendant, Criss, that the agreement of June 5, 1912, had been examined by the officials of the Stock Exchange and held by them to be in contravention of the rules of the Exchange, and that he had been ordered by its officers to abrogate the agreement forthwith under a penalty of a suspension from its membership; that thereafter, and on January 25, 1915, in order to prevent the suspension of defendant, Criss, from the Exchange, the "partnership" of June 5, 1912, was dissolved, it being agreed, however, that the dissolution should not release Criss from any liabilities he was under to the plaintiffs.

The cause of action is stated in paragraph 15 of the complaint. That paragraph is as follows:

"That the defendant, although at all times since the 25th day of January, 1915, a member in good standing of the New York Stock Exchange, and in the full exercise of all the privileges of such membership, has failed and refused, and still fails and refuses, to secure to plaintiffs the benefit of his membership in said Exchange in the transaction of their business, and that by reason of said failure and refusal plaintiffs have been obliged to transact their business as nonmembers of said Exchange, and without the benefits accruing to membership therein."

The agreement upon which the suit is based grew out of and is based upon the agreement of June 5, 1912. And in Armstrong v. Toler, 11

Wheat. 258, 6 L. Ed. 468, Chief Justice Marshall, speaking for the court, declared that the law was correctly stated which told a jury that:

"Where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it."

It appears that the cause of action grows out of the failure of defendant to secure to the plaintiffs the benefit of defendant's membership in the Exchange, when to have done so would have caused him to break his contract with the Exchange. The question comes down to this: Can such a cause of action be sustained? There can be no doubt concerning the answer which must be given to such a question. We are satisfied that the agreement into which these parties entered violated the rules of the Exchange, and that all parties, the plaintiffs as well as the defendant, knew that fact when they entered into it. The court below was clearly right in saying that the plaintiffs with knowledge that "the defendant was a member of the New York Stock Exchange and bound by its rules—in other words, that he had a contractual relation with the Exchange to obey these rules—entered into a contract with the defendant in violation of these rules."

[4] The courts do not aid the parties to illegal agreements. If any principle of law is settled it is that a party to an illegal undertaking cannot come into a court either of law or equity and ask to have his illegal contract carried out. Ex dolo malo non oritur actio, and in pari delicto potior est conditio defendentis. It makes no difference whether the contract has been executed, or remains still excutory. The defense of illegality may be set up, not as a protection to defendant, but as a disability in the plaintiff. It was said by Lord Mansfield in Holman v. Johnson, 1 Cowper, 341, 343:

"No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

In Dent v. Ferguson, 132 U. S. 50, 66, 10 Sup. Ct. 13, 19 (33 L. Ed. 242), the Supreme Court, speaking through Mr. Justice Lamar, cited with approval Chancellor Walworth's opinion in Bolt v. Rogers, 3 Paige, 154, 157, in which he said:

"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 consequence of their own misconduct."

In Hocking Valley Ry. Co. v. Barbour, 190 App. Div. 341, 179 N. Y. Supp. 810, recently decided, the plaintiff had sold certain gondola cars to the Central Locomotive & Car Works. Prior to that sale the plaintiff had entered into a contract with one Wardwell for the sale of 300 of the said gondola cars. The two sales left about 50 cars belonging to the plaintiff unsold. The plaintiff, apparently being unwilling to hazard a liability to Wardwell by making the sale to the Central

Locomotive & Car Works, insisted that the latter should give a bond, executed by it and signed by defendant's testator, to save the plaintiff harmless from all damages and costs which might result if the plaintiff made the sale. The bond was given, the contract between the plaintiff and Wardwell was broken, and all the cars were delivered to the Central Locomotive & Car Works. An action was then brought by Wardwell against the plaintiff, and judgment was obtained for the breach of contract. Then suit was brought by plaintiff against the executors of the bondsmen upon his contract to save the plaintiff harmless from all damages arising from the failure to deliver the cars to Wardwell. The Supreme Court, Appellate Division, First Department, held the action could not be maintained, as the bond was unenforceable, having been executed as an inducement to the seller to break his contract with a third party. The bond was executed for an illegal purpose. In the course of its opinion the court said:

"Whatever right of action Wardwell may have had against the plaintiff, he had a primary right to have his contract consummated, and as this indemnity bond was given with full knowledge of all the parties of the fact that its purpose was to procure the plaintiff to deliberately violate his contract with Wardwell, the court will not give its aid. The law cares nothing for what a fraudulent party may lose, but will leave the parties where it finds them, and will leave them to disentangle themselves from the meshes in which they have become involved by their fraudulent agreement."

In Wald's Pollock on Contracts (3 Am. Ed.) 376, it is said:

"An agreement will generally be illegal, though the matter of it may not be an indictable offense, and though the information of it may not amount to the offense of conspiracy, if it contemplates any civil injury to third persons. Thus an agreement * * * to carry out some object in itself not unlawful * * * by means of * * * breach of contract or breach of trust is unlawful and void."

In 13 Corpus Juris, § 343, it is said that—

"An agreement is illegal and void where its object is the commission of a civil wrong against a third person, although the wrong may not be an indictable offense or crime, either at common law or under the statutes. This is true, for example, * * * of an agreement to perpetrate a fraud on a third person."

It is clear to us that the plaintiffs' cause of action grows out of an illegal and immoral contract. The immorality of the agreement to allow the plaintiffs the use of defendant's seat on the Stock Exchange contrary to the rules of the Exchange, and known to be so to all the parties, is so apparent that discussion is really unnecessary; and it is a well-established principle of sound public policy that no court will lend its aid to a plaintiff who grounds his action upon an immoral agreement. Therefore the court below was right in his direction to the jury to find a verdict for the defendant.

The fact that the illegality of the agreement was not pleaded is of no moment. In Oscanyan v. Winchester Repeating Arms, etc., Co., 103 U. S. 261, 26 L. Ed. 539, the court held that the illegality of the contract might be considered without being pleaded, saying:

"The position of the plaintiff that the illegality of the contract in suit cannot be noticed, because not affirmatively pleaded, does not strike us as having

much weight. We should hardly deem it worthy of serious consideration, had it not been earnestly pressed upon our attention by learned counsel. * * * It [the objection of illegality] was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law. * * * It would not be restrained by defects of pleading, nor, indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered."

Inasmuch as the cause of action grows out of an agreement which the court cannot recognize, it is unnecessary to consider any other question. The direction of a verdict, in favor of the defendant, was justified under the circumstances.

There being no defendant in this court, as heretofore stated, there can be no costs.

Judgment affirmed.

UNITED STATES v. SANTINI.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 211.

Customs duties ⇐129—Evidence to establish fraudulent introduction of merchandise.

In an action by the United States against an importer, under Tariff Act Oct. 3, 1913, § III, par. H (Comp. St. § 5526), to recover the value of merchandise alleged to have been introduced by means of fraudulent invoices, it is not essential that plaintiff prove the actual market value of the merchandise, and the introduction in evidence of original invoices, showing that defendant paid more than the price given in the invoices on which it was entered, is sufficient to require submission of the case to the jury.

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

Action by the United States against Hubert Santini. Judgment for defendant, and the United States brings error. Reversed.

Francis G. Caffey, U. S. Atty., of New York City (Harold Harper, Sp. Asst. U. S. Atty., of New York City, of counsel), for the United States.

Carl E. Whitney, of New York City, for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The plaintiff in error sued under paragraph H, § III, of the Tariff Act of October 3, 1913 (Comp. St. § 5526), to recover $13,482.83. This is the value of the merchandise that had gone into consumption, which merchandise, it is claimed by the government, was entered and introduced into the commerce of the United States by the defendant in error and his partner, who do business under the name of the Italian Bedspread Company, by means of fraudulent written entries and invoices. There are 18 importations of merchandise, imported at various times between September 21, 1915,

and July 13, 1916. These are enumerated in the complaint filed. At the close of the government's case, the claim was reduced to $37,070.92 by reason of the withdrawal of one of the claims and failure of proof as to some of the others. The proof at the trial tended to establish that the Italian Bedspread Company, with the knowledge of the defendant in error, paid more money for merchandise which was imported from Italy than was set forth in the entry and invoices presented to the collector. It was proved that different invoices, stating a price higher than the price set forth in the papers filed with the collector, were delivered to the defendant in error by the shipper. By this, and through two letters which were offered in evidence, the government contends that it established an intent to defraud the government of revenue. The letters are as follows:

"In view of the present circumstances they (the Tessitura di Brembate) cannot continue to sell at the prices established before the war. We succeeded in getting the September shipment at the same prices, but the October shipment, which will be the next will be advanced 5 per cent.; the shipment for November and after, they don't know at this time if they can manufacture them, it depending upon the price they will be able to make. We tried, regarding the future shipments, to get the advance in prices limited to a maximum of 5 per cent., but failed, as you will note from their letter. Therefore we must take up each shipment separately. As you are the sole receivers of Fedra and given the limited production, the promise made you, the advance you will easily make up by the good prices you will get in your market, and then you know all contract prices are being advanced, so that the decision of the Brembate Company must not surprise you. Summing up, save cable instructions to the contrary, we will continue to ship the Fedra at the prices we are able to obtain, certainly the lowest prices possible. The consular invoice, save advices to the contrary, we will compile always at the contract prices and for the advance we will compile a supplemental invoice which will not figure in the invoice; it will be a debt apart, so that you will continue to pay the same customs duties and at least in that you will not be sacrificed. As the Brembate Company compiled the September consular invoice, an unusual procedure, we thought that they had received your instructions. We asked them and they answered, no. We let that consular invoice stand, being already made out, and so as not to entangle your matters unduly. After this we will always compile the invoices. These friends communicated your letter to us, which remains unanswered with the others inclosed."

And the reply:

"Brembate. If the Brembate Company, cannot do without it, we accept the 5 per cent. advance for next year, but we do not want to climb any higher for fear of breaking our neck. The 5 per cent. means already an advance of L. O. 75 per quilt, and should suffice. That's right about the consular invoices. Respect the contract always, because we want to avoid annoyances."

Paragraph H of section III of the Tariff Act (Comp. St. § 5526) provides:

"That if any consignor, seller, owner, importer, consignee, agent, or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall make any false statement in the declarations provided for in paragraph F without reasonable cause to believe the truth of such statement, or shall aid or procure the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived

of the lawful duties or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates. That the arrival within the territorial limits of the United States of any merchandise consigned for sale and remaining the property of the shipper or consignor, and the acceptance of a false or fraudulent invoice thereof by the consignee or the agent of the consignor, or the existence of any other facts constituting an attempted fraud, shall be deemed, for the purposes of this paragraph, to be an attempt to enter such merchandise notwithstanding no actual entry has been made or offered."

There are now 16 importations concerning which proof was offered at the trial. It is the claim of the government that as to each of these 16 importations, the evidence required the trial judge to submit the evidence to the jury as a question of fact for them to determine whether or not there were fraudulent written entries or invoices made out and an undervaluation, thus cheating the government of its lawful revenue. The District Judge dismissed the action for failure of proof as to true market value, holding as a matter of law that the proof as to what was paid, standing by itself, is insufficient to show market value.

The Tariff Act expressly requires that the invoice, stating the time when, the place where, the person from whom, the same is purchased, or agreed to be purchased, and the actual cost thereof, or the price agreed upon, fixed, or determined, shall be given in the case of purchased goods. It is obvious that this requirement is to place before the appraiser the actual paid or agreed price, and that for the purpose of appraisal. No other statement of market value is required. The appraiser is not bound or limited by the price paid or agreed to be paid in his examination. Under the act it is apparent that he may make inquiry as to what is in fact the true market value, and to this end he may examine as to market values by certificates or affidavits of persons engaged in the particular trade to which the merchandise belongs. Ordinarily, if truthful, the statement as to actual price paid is the basis for fixing the market value. It has long been established that proof of sales of merchandise is admissible in determining the market value. In re Bloch, 109 Fed. 790, 48 C. C. A. 650; Ommen v. Talcott (D. C.) 175 Fed. 261; Matter of Johnston, 144 N. Y. 563, 39 N. E. 643; Parmenter v. Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032. This is so for the reason that the price agreed upon by the parties to the sale ought to be some evidence of the value of property which has changed hands in a transaction executed in good faith.

The Tariff Act, paragraph I, permits the importation, upon setting forth the price paid for goods, to make "such deduction from the cost or value given in the invoice or pro forma invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise or lower the same to the actual market value or wholesale price of such merchandise." This permits acceptance, if the price paid is not the actual market value. The failure to set forth any acceptance, and to use the figures given upon each of the entries

here in question, is an admission or statement that the price as paid was the true market value, and this was for the jury's consideration. While it was permissible for the government to prove the foreign market value where the goods were purchased, still we think that was not essential to the establishment of the government's prima facie case. It was sufficient for the government to establish that the false statement in the invoice tended to deprive the United States of revenue. United States v. 99 Diamonds, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185. If the jury was satisfied that the purchase price of the importations in question was greater than the sums made as entries when the importation took place, the jury could find fraud in making such written entries and invoices. Without rehearsing the testimony as to each of the 16 importations concerning which proof was adduced, it is sufficient to say in each instance the government established the importation on each particular date, the entry and invoice presented to the collector stating the name of the seller and the price actually paid for said merchandise. The proof further established payments made by the Italian Bedspread Company for merchandise which is sufficiently identified to justify a jury question of its connections with the particular shipment, indicating that the price paid to the seller was greater than the value given in the invoice, and in each transaction there was some loss of revenue to the government. This, taken in connection with the letters which were exchanged between the house of Galimberti & Co., of Genoa, who acted as the assemblers and bankers of the Italian Bedspread Company, and the defendant in error, would indicate a fraudulent purpose and intent to defraud the government.

Paragraph T, § III, of the Tariff Act (Comp. St. § 5791), provides as follows:

"T. That in all suits or informations brought, where any seizure has been made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant, and in all actions or proceedings for the recovery of the value of merchandise imported contrary to any act providing for or regulating the collection of duties on imports or tonnage, the burden of proof shall be upon the defendant: Provided, that probable cause is shown for such prosecution, to be judged of by the court."

Whether probable cause was shown for the prosecution under this section is to be judged by the court. Probable cause as used means less than evidence which would justify a conviction, and in the case of seizure, circumstances which warrant suspicion. We think the facts here present reasonable ground for suspicion. In each case submitted, the amount paid exceeded the consular invoice. In these instances, the defendant in error knowingly received private bills showing a higher price paid for the merchandise and, in one instance, the defendant in error not only received a bill, but forged it to explain the increase to the general appraiser. The letters above quoted support suspicion upon reasonable grounds.

We think the evidence here required the questions of fact to be submitted to the jury.

Judgment reversed.

WALLACE & CO. v. REPETTI, Inc. *

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 212.

1. **Trade-marks and trade-names ⟸21, 28—Right to trade-mark not dependent on length of use.**
   The right to the exclusive use of a trade-mark does not depend on any particular period of usage; but, having been adopted in good faith, the right thereto inures and will prevail against any subsequent user.
2. **Trade-marks and trade-names ⟸32—Abandonment must be intentional to forfeit rights.**
   To establish abandonment of a trade-mark as a defense, it is essential to show, not only acts indicating a practical abandonment, but an intent to abandon.
3. **Trade-marks and trade-names ⟸32—Permitting use by another of somewhat similar device not abandonment.**
   Where a registered trade-mark for candy boxes consisted of the name "Blue Bird" and the picture of a blue bird, printed in blue ink, permission to another manufacturer to use an art box decorated with a hand-painted, highly colored, picture of two blue birds flying, without advertising or using the name "Blue Bird," *held* not an abandonment of the trade-mark.
4. **Trade-marks and trade-names ⟸98—Willful infringer liable for accounting.**
   Where defendant continued to clearly infringe a trade-mark after warning and with full knowledge of complainant's rights, complainant *held* entitled to an accounting.

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

Suit in equity by Wallace & Co. against Repetti, Incorporated. Decree for complainant, and defendant appeals. Affirmed.

Harry D. Nims, of New York City, for appellant.

Mock & Blum, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On January 14, 1913, the appellee was granted the registration of the name "Blue Bird" and the figure of a blue bird as a trade-mark for a candy box. The evidence indicates that this mark for the appellee's goods was used from September, 1912. The District Court granted the appellee an injunction restraining the appellant from using the blue bird mark and also for an accounting. A comparison of the appellee's box and that of the appellant shows the large figure of a blue bird in the upper left-hand corner of each box, above the phrase "Blue Bird for Happiness." In the appellee's box the figure of the blue bird is directly above the phrase, while in the appellant's box it is above, but not directly above. The printing on both boxes is in blue ink, and blue ribbon tied in substantially the same way. In each case the box contains an equal weight of candy.

The appellee contends that it has the sole right to the use of this trade-mark, not only by reason of the registration, but by such use as to invoke in its aid a common-law right to maintain this action against

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 254 U. S. —, 41 Sup. Ct. 13, 65 L. Ed. —.

the appellant for unfair competition. Thus the appellee has contended that it has used the trade-mark since its registration, and, indeed, before that date, giving no one else the right so to use, except the limited right which was granted to Whitman & Son, Incorporated, to the use of a hand-painted picture of two blue birds solely as a decorative feature, and not as a trade-mark. The District Court found that such use by Whitman & Son, Incorporated, was in a practically noncompetitive line. The only other use of the blue bird on candy boxes appears to be that in the case of Spoehr, who manufactured candy and used the blue bird mark in the state of Illinois. When the appellant started to infringe, in 1916, it was warned against continuation of such infringement, and some correspondence then took place between the parties, and it was only after there was a protest by Whitman that this action was commenced.

The questions here presented are: (1) Has the appellee, by granting permission to Whitman & Son, Incorporated, under the terms and conditions, lost its property in the trade-mark? and (2) has the use of the trade-mark in the business of the appellee been protected by the use of it as such trade-mark, or has its business and method of carrying on the same been such as to lose the trade-mark right, because of the small number of sales by it? and (3) can it be said that because of the infringement of Spoehr, of Illinois, the trade-mark has been appropriated by such infringement, and the appellee lost its property rights therein?

[1] The evidence indicates that appellee's business was established in 1870. It never had a large or extended business. It has done little or no advertising; but it adopted this trade-mark and registered it, and its sales have been continuous throughout the country. It has always featured the blue bird brand as one of its brands upon its price lists as published. It appears that some 2,500 or 3,000 of these price lists were printed each year and sent to regular patrons and those who made inquiries. Its candies with this box, containing the trade-mark, were continuously on sale at its stores in New York City. Under this proof, we are satisfied that the trade-mark belong to the appellee after its registration, and its property rights continued therein undiminished or unabridged. The appellee's rights accrued as soon as it put goods on the market bearing this trade-mark. Its use was prior to that of other manufacturers who attempted to use it. The right to use does not depend upon any particular period of usage. This trade-mark having been adopted in good faith, the right thereto inures and will prevail against any subsequent user. Kathreiner's Maltzkaffee v. Pastor Kneipp Medical Co., 82 Fed. 321, 27 C. C. A. 351; Walter Baker & Co. v. Delapenha (C. C.) 160 Fed. 746.

[2] In order that an abandonment may be established as a defense, it is essential to show, not only acts indicating practical abandonment, but an intent to abandon. Thus, where the appearances may be sufficient to indicate an abandonment, this may be satisfactorily explained by showing a want of intention to relinquish the right claimed. Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60. There is no penalty which inflicts the loss of right of

property in trade-marks by nonusage, unless there also be found an intent to abandon. Of course, intent may be inferred from the facts shown; but the facts must be adequate to support a finding of abandonment. To give up for a long period and to discontinue the use of the trade-mark "Blue Bird," and permit others to use it indiscriminately without prosecution, would amount to an abandonment. Baglin v. Cusenier Co., 221 U. S. 580, 31 Sup. Ct. 669, 55 L. Ed. 863.

[3] But the evidence here is insufficient to make out a case of abandonment, and, indeed, we think it is sufficient to establish the claim of the appellee that, within the scope and extent of its business, the appellee exercised its property right in the trade-mark sufficiently often. It appears that prior to Easter, 1916, Whitman & Son, Incorporated, of Philadelphia, well established candy manufacturers, adopted the name "Blue Bird" and put it on boxes bearing one or more blue birds. They used the words "Blue Birds." In 1916, the appellee warned against such continued use, and in response thereto, on June 9, 1916, Whitman & Son, Incorporated, protested against the claim of willful infringement. The appellee exonerated Whitman & Son, Incorporated, from willful infringement, and granted permission to continue the sale of this box upon condition that they continue to use two blue birds, and provided the box of candy was not advertised as the "Blue Bird brand" or the "Blue Bird box." The blue birds then used by Whitman & Son, Incorporated, consisted of two fanciful and artistically colored blue birds flying against the sky. It was a hand-painted box, and Whitman & Son, Incorporated, contended that they were known as art packages. No lettering of any kind was used, nor was any representation of the blue bird used in advertising matter. In June, 1916, Whitman & Son, Incorporated, wrote:

"We assure you that we intend to respect all of the rights of our good friends, Messrs. Wallace & Co., and we believe that you will have no cause for complaint as to the method used in the future in marketing this hand-painted package."

All the advertising by Whitman & Son, Incorporated, with the use of the figure of the blue bird, did not have any effect upon the ultimate consumer, as it appears that it was not identified by the consumer as the Blue Bird brand, nor was it ever called for or identified as such brand. In addition to the benefit accorded the owner of the trade-mark, it is the purpose of the trade-mark law to confer a benefit upon the ultimate consumer. Cuervo v. Owl Cigar Co. (C. C.) 68 Fed. 541. We think that the disposition of the controversy between the appellee and Whitman & Son, Incorporated, is not evidence of an abandonment of the trade-mark or a dedication of it to public use. Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828.

The testimony indicating a use of the blue bird trade-mark by Spoehr is that of Conrad Spoehr. He testified that he did use the blue bird upon candy boxes in sales which he made in Illinois. It appears that he sold only at retail in Chicago. When the appellee heard of this, it duly informed Spoehr to desist. This incident cannot be said to

constitute such laches on the part of the appellee as to bar the right to maintain this action. To be sure, it was the duty of the appellee to enforce such right against those whom it knew, or of whom it had notice, were infringing. It cannot be chargeable with laches for failure to prosecute an infringement before it knows or has such notice as would lead an ordinarily prudent person to inquire and learn the existence of the infringement. Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005. The use by Spoehr was five months after the appellee adopted the blue bird. It appears that the appellant infringed without knowledge of Spoehr's infringement. There was not such delay on the part of the appellee as would support the defense of laches. Delaying the commencement of the action from the date of infringement to the date of the commencement of the action is not such delay as would prevent the restraint of future infringement. Aunt Jemima Mills Co. v. Rigney & Co., 247 Fed. 407, 159 C. C. A. 461, L. R. A. 1918C, 1039. There are no such unusual circumstances here which would warrant supporting the defense of laches.

[4] The acts of the appellant here were indulged in, not only before, but after, full warning and with knowledge of the appellee's rights and its intentions. The appellant did not at any time modify its business conduct, but continued to infringe; and this was without the acquiescence or consent of the appellee. We think that under these circumstances the appellee was entitled to an accounting. Garrett & Co. v. Schmidt, etc., Co. (D. C.) 256 Fed. 943; Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274.

The burden of proof was upon the appellant to show by evidence that extraordinary circumstances exist which require the application of the doctrine of laches. This burden it has not sustained.

Decree affirmed.

CHENEY BROS. et al. v. HINES, Director General of Railroads, et al.

(Circuit Court of Appeals, Second Circuit. March 29, 1920. On Motion for Rehearing April 9, 1920.)

No. 233.

Railroads ⇐5½, New, vol. 6A Key-No. Series—Right to refuse to accept commodity for carriage judicial question.

Legality of order of Director General of Railroads effective February 29, 1920, entitled "Freight Rate Authority No. 21474 Corrected," and amending Consolidated Freight Classification by canceling ratings on silk and placing silk in the list of commodities that will not be accepted for carriage, *held* to present a judicial question, and complainants, manufacturers of silk, *held* entitled to a preliminary injunction restraining enforcement of such order.

Hough, Circuit Judge, dissenting.

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

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

Suit in equity by Cheney Bros. and others against Walker D. Hines, Director General of Railroads, and others. From an order denying a preliminary injunction, complainants appeal. Reversed.

Walter Gordon Merritt, of New York City (John M. P. Thatcher and Austin, McLanahan & Merritt, all of New York City, of counsel), for appellants.

Alexander H. Elder, of Washington, D. C. (Douglas Swift, R. W. Barrett, Henry Wolf Bikle, Parker McCollester, C. M. Sheafe, Jr., Ray Rood Allen, and M. B. Pierce, all of New York City, and Theodore W. Reath, of Philadelphia, Pa., of counsel), for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. Cheney Bros., a corporation of the state of Connecticut, and a number of other corporations, firms, and individuals engaged in the business of buying, selling, and manufacturing raw silk, artificial silk, thrown silk, and spun silk, filed a bill in equity on behalf of themselves and all others similarly interested against Walker D. Hines, Director General of Railroads, on behalf of the government, a number of railroad companies engaged in interstate commerce, and three individual defendants, Collyer, Crossland, and Fyfe, agents of all the railroad companies, to restrain them from publishing and putting into effect orders authorized by the defendant Hines, praying:

"(1) That the defendants, * * * and all railroads operating under the consolidated freight classification and federal control, their and each of their agents, servants, attorneys, and all persons acting by or under their authority, suggestion, or direction, be restrained and enjoined from putting into effect or operation 'Freight Rate Authority No. 21474 Corrected' and the freight classification issued in accordance therewith, and from refusing to transport raw silk, artificial silk, spun silk, or thrown silk, and from refusing to transport such silk at the rates provided in the Consolidated Classification just prior to the issuance of said Freight Rate Authority, until such rates are hereafter changed by proper authority."

Under Transportation Act Feb. 28, 1920, § 200 (a), federal control of the railroads ended March 1, 1920, and under section 208 (a) all rates, fares, and classifications in effect February 29th continued in force and effect until changed by state or federal authority or pursuant to authority in law. The defendant Hines issued an order, termed "Freight Rate Authority No. 21474 Corrected," effective February 29, 1920, amending Consolidated Freight Classification No. 1, as follows:

"This will authorize, effective on thirty days' notice, amendment to Consolidated Freight Classification No. 1, to cancel the ratings on silk provided for in items 32, 33, and 34, page 363, and to amend rule 3 of said Classification to include the same articles in the list of commodities that will not be accepted for shipment."

The defendants Collyer, Crossland, and Fyfe have published and put into effect the said order.

The District Judge declined to issue a preliminary injunction, upon the ground that he had no authority to do so.

Section 10 of the Act of March 21, 1918, entitled "An act to provide

for the operation of transportation systems while under federal control, for the just compensation of their owners, and for other purposes" (40 Stat. 451 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j]), provides:

"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. * * *

"During the period of federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation or practice of any carrier under federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act: Provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

It will be seen from the above that the powers of the Director General are the same as those of the carriers, except that rates fixed by him are to be treated with a little more ceremony than the rates fixed by the carriers. For the purposes of this case the powers are the same. What is complained of is not a question of rates, fares, charges, classifications, regulations, or practices, or changes therein, which would be an administrative subject within the cognizance of the Interstate Commerce Commission, but is, not merely a temporary embargo, but a permanent prohibition of the carriage of silk at all, which is, we think, a judicial question, clearly within the cognizance of the courts.

It is the elemental duty of the common carriers to accept and carry all goods usually carried. Silk is a form of merchandise which has been carried by the companies for many years. The output of the mills in 1919 in this country is said to have exceeded in value $600,000,000, and the plaintiffs, if refused transportation, will suffer irreparable injury. The refusal of the defendant Hines had no connec-

tion with his war powers, but was founded solely on the value of silk and the danger of loss by the carriers through theft. This would be a reason for fixing a rate of freight proportional to the value of the silk and to the risk of the carriers, but is no better reason for an absolute prohibition than would exist in the case of wheat or coal or any other goods.

Defendants contend that the order is an administrative act, the reasonableness of which is for the Interstate Commerce Commission in the first instance, and they see some support for the prohibition in the provisions of section 4281, Rev. Stat. (Comp. St. § 8019), but we do not. It enumerates certain articles, like precious metals, stones, securities, "silks in a manufactured or unmanufactured state," which, if laden as baggage or freight on a vessel, their value and character must be stated in writing and entered on the bill of lading, in default of which the "master or owner of the vessel shall not be liable as carriers thereof in any form or manner." Far from authorizing the vessel owners to refuse to carry such goods, as the railroads are doing, the section seeks only to protect them against imposition, and to give them an opportunity to exercise more than usual care in respect of unusually valuable freight.

As it is the wish of the parties to lose no time in reaching a final determination, it will be enough for us to say that we are quite satisfied that a judicial question is presented for our cognizance, and that a preliminary injunction should issue as prayed for. A similar conclusion has been reached in an opinion just handed down in the District Court for the Eastern District of Pennsylvania, Viscose Co. v. Hines et al., 263 Fed. 726.

Order reversed.

HOUGH, Circuit Judge, dissents.

On Motion for Rehearing.

PER CURIAM. The fact that nothing was said in our opinion about express companies, or carriage of silk by express or by automobile, is not to be taken as evidence that we overlooked these considerations. The question before us was the right of the Director General, or of the railroad carriers, to refuse to carry silk as freight. The thing principally complained of was the amendment of rule 3 to include silk. The cancellation of the ratings was incidental. If the amendment is invalid, the cancellation of the rates is invalid, and the existing rates continue.

This suit is a class or representative suit, both as to the plaintiffs and as to the defendants. We think the injury to the plaintiffs more entitled to consideration than the possible embarrassments to the business of the carriers that are suggested. It is unreasonable to ask us to affirm an order which we think, and have decided, should be reversed. So a certificate to the Supreme Court for instructions does not lie in the case of interlocutory orders, even if we were disposed to grant it. Sections 128 and 239, Judicial Code (Comp. St. §§ 1215, 1216).

Motion denied.

KEEVENY v. CHARLES R. McCORMACK & CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 172.

1. **Brokers ⇐58—Not entitled to commission for negotiating sale of ship in violation of Shipping Board Act.**
   Under Shipping Board Act, § 9 (Comp. St. § 8146e), prohibiting under penalty the sale of any vessel of United States registry to any person not a citizen of the United States without approval of the Board, a broker *held* not entitled to commission for negotiating the sale of a vessel in violation of the act, which sale the board refused to permit.
2. **Brokers ⇐86(5), 88(3)—Evidence insufficient to relieve owner from liability for commission on sale of ship and to present case for jury.**
   Defendant, which refused to complete sale of a vessel negotiated for it by plaintiff as broker at an authorized price, but offered to sell to the same purchaser at an increased price, *held* not released from liability to plaintiff for his agreed commission, on the ground that it was not shown that the purchaser was able to pay the price, because his testimony indicated that others were to be interested with him in the purchase, and the case should have gone to the jury.

Hough, Circuit Judge, dissenting in part.

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

Action by Eugene D. Keeveny against Charles R. McCormack & Co. From a judgment dismissing the complaint as to the first and second causes of action stated, plaintiff brings error. Reversed, as to second cause of action.

John M. Gardner, of New York City, for plaintiff in error.

Wherry & Mygatt, of New York City (Frederic E. Mygatt and William M. Wherry, Jr., both of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. The questions in this case arise out of the dismissal by the court at the close of the plaintiff's case of the first and second causes of action in the complaint.

The first cause of action alleged that the defendant, owner of the motorship City of St. Helens, agreed to pay the plaintiff a commission of 5 per cent. on the price if he found a purchaser acceptable to the defendant; that in the month of October the plaintiff did find a purchaser ready, willing, and able to purchase the vessel for the sum of $460,000; and that the defendant agreed to accept said sum from the said proposed purchaser, by reason whereof the plaintiff became entitled to the sum of $23,000, no part of which had been paid, although duly demanded.

[1] The plaintiff in his opening stated that the purchaser was a Frenchman, the representative of a French syndicate; that the contract had been executed between him and the defendant for the pur-

chase of the vessel for the sum of $460,000, and $40,000 had been deposited by the purchaser to be paid on delivery of the bill of sale.

Section 9 of the Act of September 7, 1916 (Comp. St. § 8146e), to establish a United States Shipping Board, etc., provides:

"When the United States is at war, * * * no vessel registered or enrolled and licensed under the laws of the United States shall, without the approval of the board, be sold, leased, or chartered to any person not a citizen of the United States, or transferred to a foreign registry or flag. No vessel registered or enrolled and licensed under the laws of the United States, or owned by any person a citizen of the United States, except one which the board is prohibited from purchasing, shall be sold to any person not a citizen of the United States or transferred to a foreign registry or flag, unless such vessel is first tendered to the board at the price in good faith offered by others, or, if no such offer, at a fair price to be determined in the manner provided in section ten.

"Any vessel sold, chartered, leased, transferred, or operated in violation of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000 or to imprisonment of not more than five years, or both such fine and imprisonment."

By the first section of the act (Comp. St. § 8146a) the term "person" includes corporations, partnerships, and associations, whether domestic or foreign.

The Shipping Board refused to permit the sale. Although nothing was said upon this subject in the contract, the statute is written into it as a part of the law of the land, where the contract was made and to be executed. By this law neither the purchaser could buy nor the owner sell, and we think the trial judge was right in dismissing this cause of action.

Great reliance is placed by the plaintiff on our decision in Warner v. Gaston, 261 Fed. 993, — C. C. A. —, but we do not think it applies. In it the British regulation was not relied on by the defendants when they refused to perform, nor pleaded as a defense after suit brought. There was nothing to show that the British government intended to make sales without permission of the Shipping Controller void, nor was there any penalty so far as the record showed for such a sale. The purpose of the regulation was apparently to enable the government to keep track of all such negotiations.

[2] The second cause of action stated that the plaintiff, under the same agreement with the defendant, had procured in November, 1917, another purchaser ready, willing, and able to buy the vessel for $460,000, by reason whereof he became entitled to $23,000, no part of which had been paid, although duly demanded.

The purchaser in this case was one Dougherty, an American citizen, and a member of the firm of J. F. Whitney & Co. The plaintiff testified that Hauptman, vice president and treasurer of the defendant, a corporation of California, representing it in the matter, went with him to the office of J. F. Whitney & Co., talked over the sale of the steamer, and agreed to accept $460,000 if sold to an American citizen who would assume the other obligations that had been agreed upon. In pursuance of this conversation the following letter to the defendant was forwarded to Hauptman, then at Washington:

"New York, November 23, 1917.

"Messrs. Chas. R. McCormack & Co., New York, N. Y.—Gentlemen: We offer your firm for the Aux. Schr. City of St. Helens the sum of $460,000, less $10,000 commission to J. F. Whitney & Co., vessel to be registered in the name of Theodore Dougherty; all other conditions covering charter party, hull insurance, etc., as discussed with your Mr. Hauptman. If you will be good enough to draw a contract as you understand it, we will secure buyer's signature to same. Mr. Theodore Dougherty is an American-born citizen. This offer has no connection with any previous negotiations we have on this vessel with yourselves.

"Yours very truly, J. F. Whitney & Co.,
"Per Ph. Stauderman."

The plaintiff testified as to a conversation with Hauptman on his return from Washington:

"The conversation between us. I said to him, I said, 'Well you got my firm offer at Washington?' He said, 'Yes.' I said, 'I didn't get your long-distance telephone call, because I was out of the hotel at the time.' And I said, 'Well, I am glad the deal has gone through finally. Now, it is only necessary for you to draw up the contract. They are ready to sign it and put up the money and close the deal. I have complied with what you wanted. This Mr. Dougherty is a native-born American citizen. There cannot be any question about him. The terms are as you said it would be, less 5 per cent. commission, which you agreed.' He said, 'I will tell you, out of the 5 per cent., commission, Mr. Keeveny, you will have to take care of Whitney for $10,000, because that was the understanding.' I said, 'That is the understanding.' So he walked up and down the floor a few moments, and finally he said: 'I will tell you, Keeveny, about this thing. Our people out on the Pacific Coast are getting pretty chesty about these boats. The conditions are looking a little bit better. The Shipping Board is liable to commandeer the Allard and the Portland.' Whether he said they had commandeered them or not I don't know, or it was about to happen; but he said, 'They feel kind of chesty,' and he said: 'These people down here will stand for more money. They want the boat bad enough, no doubt.' 'So,' he said, 'I will tell you what you do, you go back at them, and tell them to raise the price to $475,000.' And I told him: 'How in the world can I go down there now, after you agreeing to sell for $460,000? They have made you a firm offer on your own proposition, complying with every condition you exacted. If I would go in their office, they would slam the door in my face.' I said: 'You have no right to raise this price. It is not business. You said you would close.' I said: 'My letter to you, that I sent you accompanying that firm offer to Washington, told you that if you would phone me or wire me they would come to Washington to close it down there at Washington; if you had any business to keep you there for three or four days, they would come down on the night train and get there in the morning and close it up there.' So I told him that I would not go down to Whitney & Co.'s office and see them, or try to raise this price. He could do as he felt about it. I felt my commission was earned, and I wanted it. I had performed my services, and, if he was going to back out a second time, then I could not help it, that was all. He said: 'Well, I will tell you, I don't know what to say, but I tell you, they want to get more money, and they are anxious to get the boat, and will pay more money.' And he said, 'I am going up to the hotel to think it over.'"

The foregoing was confirmed by the testimony of the witness Parker.

November 30, 1917, the defendant replied to the letter from the purchaser as follows:

"November 30th, 1917.

"Messrs. J. F. Whitney & Co., 8-10 Bridge Street, New York City—Gentlemen: This will acknowledge receipt of your favor of November 23d, in which you make us a firm offer to the sum of $460,000, less a commission of

$10,000 to yourselves, for the American motorship or auxiliary schooner City of St. Helens, vessel to be transferred or sold by us to Theodore Dougherty, an American citizen. In reply will say that we must decline your offer.

"We are willing, however, to sell the above-named vessel through you, to Theodore Dougherty, for the sum of four hundred and seventy-five thousand ($475,000) dollars cash, less a commission of $10,000 to J. F. Whitney & Co., providing that you are in a position to accept all the other terms and conditions of this offer to sell this vessel, of which terms and conditions we believe you are fairly well informed through conversations had between your Mr. Stauderman and the writer. If the above-named price for this vessel is satisfactory to you, we are prepared to proceed at once to draw up a contract between us covering the terms and conditions above referred to.

"The offer above made you is subject to acceptance on or before 5 o'clock p. m. to-day, November 30, 1917, and is contingent upon our being able to agree on all the terms and conditions. In making the above offer, we are doing so with the distinct understanding, as stated in your letter of November 23d, that this offer has no connection in any manner with any previous negotiations had with you regarding the sale of this vessel to Capt. Pierre Le Gougnec or to Alliance Shipping Company.

"Yours very truly, Chas. R. McCormack & Company,
"By ———, Vice Pres. & Treas."

The court dismissed this cause of action, upon the ground that the plaintiff had not shown that Dougherty was able to buy the vessel. This was principally upon his testimony as follows:

"Q. How were you going to pay for this boat, Mr. Dougherty? A. In the same way I would expect to pay for any boat.

"Q. From your own money? A. Some of my own money; yes, sir.

"Q. Where were you going to get it? A. Well, our firm has purchased other boats, and we have generally managed to find the money."

Upon redirect examination Dougherty was asked:

"Q. Now, Mr. Dougherty, if that offer of yours to pay $460,000 under the terms and conditions specified had been accepted by McCormick & Co., would you have been able and would you have paid cash for the same?

"Mr. Mygatt: I object to that as incompetent and calling for a conclusion.

"The Court: Objection sustained. It is clearly incompetent. (Exception.)

"Q. Would you have completed the purchase?

"Mr. Mygatt: I make the same objection.

"A. I would.

"The Court: Objection sustained. Strike out the answer.

"Mr. Gardner: I take an exception. That is all."

Dougherty's answer is quite consistent with the meaning that he had not $460,000 in cash at the moment, which might be said of many millionaires. The fact that he intended to associate others with him in the ownership of the boat does not show that he could not pay for it himself. He was the purchaser, and liable for the price, notwithstanding his intention to associate others with him in the venture. Such syndicates are a common form of investment. The plaintiff was not obliged to show what friends Dougherty had interested or expected to interest in the venture. Indeed, negotiations to that effect after the defendant had refused to perform would have been a pure waste of time.

But as between the plaintiff and the defendant, the plaintiff, if his testimony were believed, was entitled to his commission if he produced a purchaser ready, willing, and able to buy the vessel for $460,000. It clearly appears that Dougherty was ready and willing to buy at that

price, and that he was acceptable to the defendant appears from its letter that it would sell to him at that increased price of $475,000. The jury might well have found from these facts that Dougherty was ready, willing, and able to buy for $460,000, the price fixed upon between the plaintiff and the defendant, upon which the plaintiff was to receive a commission of 5 per cent. See Mooney v. Elder, 56 N. Y. 238, and Duclos v. Cunningham, 102 N. Y. 678, 6 N. E. 790.

Judgment reversed.

HOUGH, Circuit Judge (dissenting in part). With the opinion of the court as to the first cause of action I entirely agree.

In respect of the second cause of action the complaint averred that plaintiff had found "a purchaser ready, willing, and able" to buy defendant's ship, which allegation was specifically denied. It was therefore incumbent on plaintiff affirmatively to prove the applicability to his purchaser of each one of the foregoing adjectives. This was never done. I do not think there was a refusal to accept plaintiff's proposed purchaser on some ground other than his inability to perform, but if such was the case the contract as pleaded still required proof under all three heads, and the defense of inability was still open. The cases are collected in 4 R. C. L. 307 et seq.

I dissent as to the second cause of action.

UNITED STATES FIDELITY & GUARANTY CO. v. WESTRUMITE PRODUCTS CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 200.

Indemnity ⇐12—Indemnitor not discharged pending adjudication of indemnitee's liability.

Plaintiff, which deposited bonds with defendant, a surety company, to indemnify it against liability, including costs, expenses, and counsel fees, by reason of its becoming surety, in compliance with an act of Congress, for parties granted a franchise to construct a street railroad in Hawaii, and required to complete a certain part of the road within two years, which was not done, *held* not entitled to recover the bonds on the ground that an extension by Congress of the time for doing the work, without defendant's consent discharged it from liability, where its liability was asserted and had not been adjudicated.

Ward, Circuit Judge, dissenting.

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

Replevin by the Westrumite Products Company against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant brings error. Reversed.

Leonidas Dennis, of New York City (Robert Gray and Wm. J. McArthur, both of New York City, of counsel), for plaintiff in error.

William O. Gennert, of New York City, for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The defendant in error sued in an action in replevin to recover from the plaintiff in error five bonds of the Baltimore & Ohio Railroad Company. These bonds were deposited with the plaintiff in error as collateral security under an indemnity agreement given by the Dunken Realty Improvement Contracting & Construction Company, to protect it against losses in the execution of a bond on behalf of the contracting firm of Conness & Johnson. Defendant in error was the assignee of the indemnitor, the Dunken Company. The plaintiff in error gave its bond, an indemnity agreement, to the county of Hawaii. A franchise was granted to Conness & Johnson and associates to construct and maintain a street railway in the district of South Hilo, Hawaii. The franchise provided that the construction of the road should be commenced within one year, and that at least two miles of the road should be completed and in operation within two years of such commencement. It was further provided, by this congressional act that Conness & Johnson give a bond to the county of Hawaii in the sum of $5,000, conditional for such completion, equipment, and operation of the two miles of the railroad within the period of two years. The surety company, the defendant below, executed and delivered its bond as such indemnitor. The bond provided that if the principal (Conness & Johnson), their associates and assigns, or any corporation that may be organized by them to take over and exercise the rights and privileges conferred by the act of Congress, shall, within two years, subject to the terms of said proviso, have completed, equipped, and have in full operation at least two miles of the railroad, then the obligation shall be void; otherwise, it was to remain in full force and effect.

The surety bond was executed on the 24th of October, 1912, and on August 20, 1913, the Dunken Company delivered the bonds in question to the plaintiff in error and entered into an agreement which stated the terms under which the bonds were deposited with the plaintiff in error. It was provided:

"First. That the surety company shall have the right in its discretion to retain said collateral, as hereinafter provided, until the liability of the surety company, on account of having executed said bond, shall cease and determine, and at its option to reclaim said collateral for its protection as surety upon any other bond, which it has executed or may hereafter execute for said Leland S. Conness and W. H. Johnson.

"Second. In case the surety company, for or by reason or in consequence of having executed said bond, or any other bond which it has executed or may hereafter execute for said Leland S. Conness and W. H. Johnson, shall for any cause, at any time, sustain or incur any liability, or be put to any loss, costs, charges, suits, damages, counsel fees, or expenses of whatever kind or nature, the said surety company shall have at any time or times thereafter full power and authority without notice to sell and assign and deliver said collateral, or any part thereof, at any broker's board, or at public or private sale, at the option of the said surety company, its successors or assigns, and with the right to be purchaser itself at such broker's board, or at public or private sale, and appropriate all the proceeds, or such part of the same as may be necessary in order to protect or reimburse itself against any such liability, loss, costs, charges, suits, damages, counsel fees, and expenses, as aforesaid, and after deducting all legal or other costs and expenses of such sale, and the aggregate amount of all said loss, costs, charges, fees, and expenses, as aforesaid, shall return the remainder of said collateral or the

balance of the proceeds from the sale thereof, as aforesaid, if any, to the said Dunken Realty Improvement Contracting & Construction Company or to any person or persons legally authorized to receive the same."

The contractors or principal debtors of Conness & Johnson did not comply with the franchise provision requiring that the two miles of railroad be completely equipped and in operation within the two-year period. The time for completion expired August 1, 1914. However, before the expiration of the two-year period, Congress passed an act extending the time for four years after the date of the original franchise. This meant an extension of two years. Such extension was given without the consent or approval of the plaintiff in error or that of the owner of the bonds, the Dunken Company. At the end of the extended period, the principal debtors had failed to complete the two miles, and Congress again extended the time two years, without the consent of the plaintiff in error or the indemnitor. The acts of Congress were without the consent of the plaintiff in error. Upon failure to build the two miles of railroad and have the same in operation, and on October 24, 1912, the board of supervisors of the county of Hawaii made a claim and demand upon the plaintiff in error for the penalty of its bond. A resolution was passed to this effect. A certified copy was served upon the plaintiff in error.

It is contended by the defendant in error that the extension of time as granted by Congress to do the work, which the bond guaranteed would be performed, operated as a discharge of the surety from any liability on its bond, and therefore the indemnitors are entitled to receive back the bonds received as collateral, upon the ground that liability on the bond given to the county of Hawaii has ceased and determined. The rule is well settled that if a creditor or obligee, by a valid and binding agreement, without the assent of a surety, gives further time for payment or performance to the principal debtor, the surety will be discharged. Clark v. Gerstley, 204 U. S. 504, 27 Sup. Ct. 337, 51 L. Ed. 589; Uniontown Bank v. Mackey, 140 U. S. 220, 11 Sup. Ct. 844, 35 L. Ed. 485. The agreement between the Dunken Company and the plaintiff in error, under the terms of which the bond was deposited, provided further:

"In case of full determination of liability to the surety company on said bond without any loss or damage to it as aforesaid, * * * competent evidence furnished to that effect, the said collateral shall thereupon be returned."

It was incumbent upon the defendant in error to prove by competent evidence a full termination of liability to the surety company on said bond "without any loss or damage to it as aforesaid." Concededly, there has been a breach of the provision of the franchise for failure to construct, complete, and operate the road as agreed would be done. The plaintiff in error indemnified the county of Hawaii against a loss resulting from such breach, and the plaintiff in error could only be relieved from responsibility under its bond upon the claim that, the time of performance having been extended without the consent of the plaintiff in error, the obligations under the bond have been relieved.

But the plaintiff in error is still obligated to defend a threatened action. A claim is presented having a force of official action on the part of the supervisors of the county of Hawaii. It may or it may not be prosecuted in a court of law, but there is the danger to the plaintiff in error that such prosecution of the claim will be undertaken. We cannot say that the county of Hawaii would be unsuccessful in its attack upon the validity of the extensions of time granted by Congress. The question is not presented to us now. Even if the plaintiff in error was successful in an action, it still might incur counsel fees and expenses of litigation. Collateral security was deposited to protect against such loss. The defendant in error has not attempted, by legal proceedings, to have it judicially determined, that the liability under the bond given by the plaintiff in error has ceased and determined. No action has been instituted in which the county of Hawaii and the plaintiff in error have been made parties. The plaintiff in error was not obligated to institute such proceedings to have itself relieved from liability on the bond. This was a burden which the defendant in error assumed under the terms of the contract.

There can be no adjudication in this proceeding that the bond given the county of Hawaii is no longer in force and effect, or that it be delivered up and canceled. The plaintiff in error is constantly exposed to this claim of the county of Hawaii. It may be called upon to answer in an action until the statute of limitations runs against the alleged claim. In its protection against such a hazard to it, it provided the terms of the contract under which the bonds were pledged. We cannot take away the protection which it thus accorded to itself by the mutual consent of the parties. The contract between the parties must be the jurist's guide. Any hardship which might result to either party cannot vary the contract. Cook v. Casler, 76 App. Div. 279, 78 N. Y. Supp. 661. A determination cannot be reached by this court, in the absence of the county of Hawaii being a party to the action, which will operate to relieve the surety from the liability on the bond, and thus afford an answer to the claim which is made by the surety company that it may still suffer loss by reason of the undertaking. To take away the collateral security which the plaintiff in error now holds would be tantamount to permitting a breach of the contract under the terms of which it entered into the obligation to indemnify the county of Hawaii.

Judgment reversed.

WARD, Circuit Judge (concurring). I concur in the judgment of the court, but upon a different ground, namely, that the liability of both principal and surety on the bond given to the county of Hawaii became absolute August 1, 1915. The Act of Congress of August 1, 1912, c. 270, 37 Stat. 243, which conferred the franchise upon the association to build the railway, provided among other things that construction should begin within one year after the passage of the act, viz. August 1, 1913, and that two miles of the railway should be completed and equipped for the transportation of passengers within two years

after such commencement, viz. August 1, 1915. It further required that a bond in the sum of $5,000, conditioned for the completion, etc., of the two miles of railway, should be given by the association receiving the franchise to the county of Hawaii within 90 days after the passage of the act.

October 24, 1912, this bond was given, the United States being no party to it. Nothing whatever was done by the association prior to August 1, 1915. The Act of August 1, 1912, was twice amended by Congress (Act July 25, 1914, c. 208, 38 Stat. 555; Act Aug. 7, 1916, c. 275, 39 Stat. 438), so as to extend the time for commencement of construction and of completion of two miles of the railway to August 1, 1920. While these acts prevented forfeiture of the franchise by the government before that time, they did not mention the bond in question, and in no way affect its terms. Therefore in my opinion liability on the bond became complete August 1, 1915.

FIRE ASS'N OF PHILADELPHIA v. MECHLOWITZ et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 175.

1. **Trial ⇐177—Motion for directed verdict not irrevocable consent to submission of facts to court.**
   That both parties move for a directed verdict does not amount to a submission of questions of fact to the court, which precludes a party, on denial of his motion, from insisting by appropriate motion on submission of the case to the jury.
2. **Trial ⇐139(1)—Rule governing direction of verdict stated.**
   A plaintiff is entitled to a directed verdict only when, giving defendant the benefit of every inference that can be fairly drawn from the evidence, it is insufficient to authorize a verdict in his favor.
3. **Insurance ⇐668(13)—Direction of verdict error, where credibility of witness is involved.**
   In an action on an insurance policy, where the amount of the loss was in issue and depended on the interested testimony of a plaintiff, both as to the quantum of goods destroyed and their value, the credibility of such witness was eminently for the jury, and, although uncontradicted by direct testimony, it was error to direct a verdict for plaintiff for the full amount shown by his testimony.

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

Action by Philip Mechlowitz and others against the Fire Association of Philadelphia. Judgment for plaintiffs, and defendant brings error. Reversed.

Plaintiffs below (Mechlowitz) insured goods (woolens, silks, and the like) suitable for making garments, belonging to them and situate in the shop or workroom of a contractor who manufactured clothing for their account. There were several policies covering this fire risk, but as this suit is a test one we may speak (as have counsel) as if one policy represented the entire insurance. The whole amount of insurance was $20,000. The complaint in ordinary form asserted that the fire loss was upwards of $21,000, and therefore demanded judgment for the insured amount, with interest. The answer denied that

the loss or damage was as above stated, and as a separate defense asserted fraud on the part of Mechlowitz, vitiating the entire policy.

Of the testimony it is enough to say that, viewed most favorably for the plaintiffs, it tended to show that they had delivered at the contractor's workroom, where the fire occurred, goods substantially of the value asserted in the complaint. There was no direct evidence that all of the goods so delivered were on the premises at the time of the fire, and the plaintiffs' case as put depended almost wholly upon the credibility of the principal plaintiff. Defendant introduced evidence tending directly to contradict plaintiffs as to the sound value of some of the salvaged goods; but there was very little salvage. Some testimony was also given for defendant of admissions prior to the fire concerning the value of the goods subsequently consumed inconsistent with the evidence given by the plaintiff aforesaid.

When the evidence closed, the plaintiffs moved for a direction for the full amount of the policy, on the ground that "no proof has been introduced which would justify the defense that a fraudulent claim was presented, and no proof has been presented by the defendant which would justify any diminution of the amount of the claim of the plaintiffs." Defendant moved "to dismiss the complaint on the ground that the plaintiffs have not established a cause of action," and on some further grounds presently immaterial.

The trial judge held in substance that there was no evidence of fraud, and directed a verdict for the face of the policy, with interest, whereupon defendant by its counsel excepted to the direction and moved "that this case be submitted to the jury." This motion the court overruled, and granted an exception. To the judgment on the verdict as directed defendant took this writ.

Fox & Weller, of New York City, for plaintiff in error.

John Bogart, of New York City (George Gordon Battle, and I. Maurice Wormser, both of New York City, of counsel), for defendants in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). It is urged that the proceedings at the close of evidence in the court below amounted to a request by both parties for a directed verdict, and therefore the final action of the trial court was a conclusive finding of fact, if there was any evidence tending to support it.

[1] It is also said that, since the plaintiff in error did not ask to go to the jury on some particular question of fact, the exception taken is worthless. There has been considerable difference of opinion over this question of practice, both in the courts of the United States and those of the state of New York. It may be true that the rule as stated in Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654, and in Bowers v. Ocean, etc., Corp., 110 App. Div. 691, 97 N. Y. Supp. 485, affirmed 187 N. Y. 561, 80 N. E. 1105, is consistent with the argument of defendants in error; but, for this court, Empire State, etc., Co. v. Atchison, etc., Co., 210 U. S. 1, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70, is ruling authority, and under that decision the motion of the attorney for plaintiff in error was sufficient to preserve whatever rights his client had. With even greater distinctness the matter has been settled the same way in New York by Brown Paint Co. v. Reinhardt, 210 N. Y. 162, 104 N. E. 124. This court arrived at the same conclusion in Sigua Iron Co. v. Greene, 88 Fed. at page 210, 31 C. C. A.

477. See, also, Sampliner v. Motion, etc., Co., 259 Fed. at page 154, 170 C. C. A. 220.

We have treated this matter of practice as if it were true that both parties did move for directed verdicts; the plaintiff did so, but the defendant merely moved to dismiss the complaint; i. e., for a nonsuit. The difference is obvious and material. But we have ruled upon the question argued.

[2] The substantial point before us is whether the trial judge was justified in directing a verdict for the plaintiff. The rule of directed verdicts is, in the courts of the United States, usually put as requiring a direction when a verdict, if rendered the other way, would necessarily be set aside. Patton v. Railway, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Randall v. Baltimore, etc., Co., 109 U. S. at page 482, 3 Sup. Ct. 322, 27 L. Ed. 1003. The rule has usually been stated when the defendant had the direction, but the rule is not different when plaintiff prevails; for it is said that plaintiff should have the directed verdict when "giving the defendant the benefit of every inference that could have been fairly drawn from the evidence, written and oral, it was insufficient to authorize a verdict in his favor." Marshall v. Hubbard, 117 U. S. at page 419, 6 Sup. Ct. 806, 29 L. Ed. 919. The reason of any rule on this subject is stated in North Penn., etc., Co. v. Commercial Bank, 123 U. S. at page 733, 8 Sup. Ct. 269, 31 L. Ed. 287:

"It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way."

See Baldwin v. Jardine, etc., Co., 261 Fed. at page 865, and cases cited.

[3] Applying these considerations to the case at bar, it must be remembered what were the issues created by the pleadings, and to which the material and relevant evidence was necessarily directed. They were, first, whether the plaintiffs below had been guilty of fraud in effecting or attempting to collect the insurance; and, second, what was the money value of plaintiff's loss?

One point was as much in issue as the other, and both were questions of fact normally for the jury. That the question of fraud was much more important than that of value is of no consequence. The jury was as much entitled to pass on a minor as on a major point; and it did not follow at all, that if no proof of fraud was adduced, the plaintiffs below were entitled to collect the face of the insurance policy. The policy was not a valued one, and the insured were required by the terms of their contract affirmatively to prove, not only that they had a loss, but what loss they had, and it was for the jury to reduce that loss to dollars and cents.

To support the verdict reliance is placed upon the statement of law made in Second National Bank v. Weston, 172 N. Y. at 258, 64 N. E. 952:

"Where * * * the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor in its nature surprising or suspicious, there is no reason for denying to it conclusiveness."

The statement is true, but, like many other truths, must be applied according to the circumstances.

In this case we refrain from expressing opinion as to whether there was any evidence sustaining the defense of fraud; but we are compelled to hold that, where the assessment of damages depends upon the interested testimony of a plaintiff, both as to quantum of goods destroyed and the value of such goods, the credibility of the witnesses, without whose evidence the plaintiffs made out no case at all, is eminently for the jury.

In Craft v. Northern, etc., Co. (C. C.) 62 Fed. at page 739, affirmed 69 Fed. 124, 16 C. C. A. 175, it is said to be the province of the jury to pass upon the credibility of all witnesses whether they are contradicted or not; and while a witness is presumed to speak the truth, the manner in which he testifies and the character of his testimony are sufficient to overcome that presumption. (This language, although quoted in part from the Code of Oregon, is but declaratory of historic law.) We held in Sigua Iron Co. v. Greene, supra, that the testimony of a party on a material issue, though uncontradicted, should be submitted to the jury, if his adversary so requests.

The matter is well summed up in Toledo, etc., Co. v. Connolly, 149 Fed. 398, 79 C. C. A. 218. There the trial judge had been requested to charge almost in the language of Second National Bank v. Weston, supra. The court did so, but—

"applying it to the case in hand, reminded the jury that a witness might be contradicted, not simply by a witness swearing to the opposite, but by the improbability of his story, and by anything, either in the testimony as given or in the circumstances of the case presented, which in the judgment of the jury tended to discredit his statements."

The court added:

"Common sense is to be applied here as everywhere; and no technical rule of law harnesses your judgment or controls your common-sense view, of what is the truth, when it comes from the witness stand."

We think this well put, and in this case there was direct contradiction of the principal witness for plaintiffs below as to the value of the salved goods; and there were some conspicuous absences from the witness stand of men shown to be in court, and whose probable knowledge of the quantity of goods actually on the fire-damaged premises should have been superior to that of any one who testified for the insured. Under such circumstances, the credibility of plaintiff's testimony was for the jury, and it was error to order a verdict.

We have discussed the rule of directed verdicts, as being a legal question on which opinion has varied. But, as this cause must be tried again, we point out that plaintiffs below, in order to prove that they had lost by fire certain goods on the premises of another, largely, if not wholly, relied upon introducing in evidence against the insurer the receipts of their contractor. Such receipts were strong evidence as between Mechlowitz and his contractor, but are not evidence (so far as this record shows) as against the insurer. They should not have been admitted.

Judgment reversed, with costs, and new trial awarded.

CHARLEY TOY et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 144.

1. **Criminal law ⟸620(1)—Indictment for concealing opium may be tried with one for "manufacturing" same.**
   An indictment under Act Jan. 17, 1914 (Comp. St. §§ 8800–8801f), for concealing smoking opium illegally imported, and one under Act Jan. 17, 1914 (Comp. St. §§ 6287a–6287f), for illegally manufacturing smoking opium, manufacturing being there defined so that it may consist of mixing yen shee, or the residue of smoked or partially smoked opium, with other smoking opium, may be properly consolidated and tried together under Rev. St. § 1024 (Comp. St. § 1690), allowing it where there are several charges against a person for the same act or transaction, or for two or more acts or transactions of the same class of offenses, as by the same act of illegal manufacture by mixing there may be a concealing of smoking opium illegally imported.
2. **Poisons ⟸9—Evidence held to show manufacture of smoking opium.**
   Evidence on prosecution under Act Jan. 17, 1914 (Comp. St. §§ 6287a–6287f), for illegal manufacture of smoking opium, *held* to warrant finding of manufacture.
3. **Poisons ⟸2—Congress under commerce clause may make possession of opium presumption of guilt.**
   Congress had power, under the power accorded it by the Constitution to regulate foreign commerce, to create the presumption contained in Act Jan. 17, 1914, § 2 (Comp. St. § 8801), making it unlawful to receive or conceal imported opium, knowing it to have been illegally imported, and declaring possession of such opium shall be deemed sufficient evidence to warrant conviction, unless explained to the satisfaction of the jury.
4. **Poisons ⟸9—Single penalty only for manufacturing smoking opium, though statute violated in different ways.**
   Under Act Jan. 17, 1914 (Comp. St. §§ 6287a–6287f), by section 1 declaring that no person shall engage in manufacture of smoking opium, who is not a citizen and who has not given bond, and section 2, declaring that every manufacturer thereof shall keep books and render returns, and section 5, declaring a minimum penalty for each and every violation of the preceding sections, there can be only one penalty for a violation of a section, though it be violated in different ways.

Ward, Circuit Judge, dissenting in part.

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

Charley Toy and Lee Gip were prosecuted by the United States, and convicted under two indictments, one for concealing smoking opium, the other for manufacturing smoking opium, and they bring error. Modified and affirmed.

Frank Hendrick, of New York City, for plaintiffs in error.

Francis G. Caffey, U. S. Atty., of New York City (John E. Joyce, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The defendant in error has asked for, and has been granted, a reargument on this writ of error, appealing

from a judgment of conviction of the crime of concealing smoking opium and manufacturing smoking opium. We heretofore reversed the judgment of conviction, for the reason that, as announced in the opinion filed, error was committed by the trial court in placing the plaintiffs in error on trial on two indictments charging inconsistent offenses, and further that it was incumbent upon the government to prove that the opium in question was in fact imported. We held, in effect, that the presumption created by the statute did not relieve the government from the necessity of offering proof of illegal importation.

The first indictment, filed April 23, 1918, charged the plaintiffs in error with a violation of the Act of February 9, 1909, as amended by the Act of January 17, 1914 (section 8374, Barnes' Federal Code, 35 Stat. 614, 38 Stat. 275 [Comp. St. §§ 8800–8801f]), concealing smoking opium. This statute makes it an offense, after April 1, 1909, to import into the United States opium in any form, or any preparation or derivative thereof, providing that the opium, or preparation or derivative thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes, and this only under regulations which the Secretary of the Treasury is authorized to prescribe. When so imported, it is subject to the duties which are or may thereafter be imposed by law.

In the second indictment, filed June 26, 1918, under which the plaintiffs in error have been convicted, they are charged with manufacturing smoking opium in violation of the Act of January 17, 1914 (38 Stat. 277 [Comp. St. §§ 6287a–6287f]). This indictment consists of three counts. The first count charges engaging in the manufacture of smoking opium when the plaintiffs in error were not citizens of the United States; the second count charges that the plaintiffs in error were engaged in manufacturing smoking opium without giving a bond required by the Commissioner of Internal Revenue; and the third count charges the manufacture of opium without keeping books, and rendering returns of the materials and products, as required by the Commissioner of Internal Revenue. After conviction, the plaintiffs in error were sentenced, under the first indictment, to two years in the Maryland prison, and, under the second indictment, to pay a fine of $10,000 on the first, second, and third counts, making a total of $30,000. They thereafter sued out this writ of error.

The plaintiffs in error were found in a room on the sixth floor of No. 25 Pell street, New York City, on the night of April 3, 1918. A police officer came to the door, which was opened by Toy. In his hand at the time was a tin of smoking opium. The plaintiff in error Gip was seated at a table in the room rolling opium toys in packages. The testimony is that his hand smelled of the odor of opium. On the table were 124 toys containing smoking opium. The officer found a wash basin containing a quantity of gum opium in the room. He placed this opium in four bottles. There were some other receptacles containing smoking opium and a quantity of yen shee, and some empty receptacles and small tin cans which had contained opium. A metal needle, three knives, a wooden stock, a copper funnel, a basin, a small gas stove and tubing, and a weighing scale were also found. The room

used by the plaintiffs in error was single and unattached. There were no articles of furniture, other than a table and chair. The plaintiffs in error had not provided a bond or obtained a permit, as required by the internal revenue officer of the district, to permit them to engage in the manufacture of smoking opium under the statute. The quantity of opium above referred to is the entire lot which was found in possession of the plaintiffs in error and taken from them. They were not citizens.

[1, 2] In view of the enactment of Congress (Act Jan. 17, 1914, c. 10, 38 Stat. 277), we think it was not inconsistent or erroneous to try the plaintiffs in error on both indictments at one time. In United States v. Shelley, 229 U. S. 239, 33 Sup. Ct. 635, 57 L. Ed. 1167, it was held that the mere mixing of smoking opium with the residue of opium that had been smoked and heating the same is not the manufacture of opium for smoking purposes, within the meaning of Act Oct. 1, 1890, c. 1244, 28 Stat. 620. But it will be observed that, after the decision in the Shelley Case, Congress passed the act of January 17, 1914, which reads as follows:

"Every person who prepares opium suitable for smoking purposes from crude gum opium, or from any preparation thereof, or from the residue of smoked or partially smoked opium, commonly known as yen shee, or from any mixture of the above, or any of them, shall be regarded as a manufacturer of smoking opium within the meaning of this act." 38 Stat. 277, c. 10 (Comp. St. § 6287a).

Under the facts above disclosed, a jury was justified in saying that the plaintiffs in error were preparing smoking opium, or opium suitable for smoking, when they were detected. It appears from the statute quoted that the manufacture of smoking opium may consist of admixing yen shee with other smoking opium, or it may consist of any other preparation of crude gum opium. One who thus mixes these ingredients becomes a manufacturer of smoking opium, and it is thus evident that the same smoking opium may be the subject of more than one preparation for smoking purposes. As before related, the plaintiffs in error, when arrested, were found to have crude gum opium, also smoking opium and yen shee. It was evident, from what was found in the room and all the surrounding circumstances, that the plaintiffs in error were engaged in mixing these ingredients. Thus the jury could say they were engaged in the manufacture, as prohibited by the statute.

The first count of the indictment charges concealment of smoking opium. Since the manufacture was unlawful, the plaintiffs in error, by the same acts and course of conduct, did conceal yen shee and the other ingredients which went to make up their smoking opium, and which they used in their process, and thus were not only guilty of the crime of concealing smoking opium, but also of the crime of manufacturing smoking opium. The jury was justified in finding this from all appearances. Because of this manufacturing statute, to which our attention has been called on the reargument (the act of January 17, 1914), we are of the opinion that the indictments were properly consolidated and tried together. Several charges against the plaintiffs in

error for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses, may be properly tried together, where two or more indictments have been found and afterwards consolidated. Section 1024, Rev. Stat. (Comp. St. § 1690).

[3] On the trial, the presumption which is created by section 2 of the act of January 17, 1914, was relied upon. It provides as follows:

"*Penalty for Unlawful Importation—Possession as Evidence.*—If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding $5,000 nor less than $50 or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." Comp. St. § 8801.

The court below, in the charge to the jury, stated that—

"There is a presumption of law that any smoking opium found in the United States after July 1, 1913, will be presumed to have been imported into the United States after April 1, 1909."

The act of January 17, 1914 (38 Stat. 275), prohibits the importation of smoking opium without exception after April 1, 1909. Section 2 makes it unlawful to receive or conceal imported opium after importation, knowing it to have been imported contrary to law. It provides that possession of imported opium shall be deemed sufficient evidence to warrant conviction, unless the defendant explains the possession to the satisfaction of the jury. Section 3 (Comp. Stat. 1916, § 8801a) provides that after July 1, 1913, all smoking opium within the United States is presumed to have been imported after April 1, 1909, and hence contrary to law, and the burden is upon the accused to rebut the presumption. Ng Choy Fong v. United States, 245 Fed. 305, 157 C. C. A. 497; Id., 245 U. S. 669, 38 Sup. Ct. 190, 62 L. Ed. 539; Gee Wee v. United States, 250 Fed. 428, 162 C. C. A. 498; Id., 248 U. S. 562, 39 Sup. Ct. 8, 63 L. Ed. 422; United States v. Yee Fing (D. C.) 222 Fed. 156; United States v. Johnson (D. C.) 228 Fed. 251.

The act of February 9, 1909 (chapter 100, § 2, 35 Stat. 614), provides that—

"Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." Comp. St. § 8801.

The defendant in error relies upon this presumption. It submits proof of the fact that opium was found in possession of the plaintiffs in error. The illegal importation is established by the presumption thereof from showing such possession. Luria v. United States, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. Ed. 101. A presumption of one fact

from evidence of another does not constitute a denial of due process of law, or a denial of equal protection of law, if it appears that there was some causal connection between the fact proved and the ultimate fact presumed, and if the inference of one fact from proof of another shall not be so unreasonble as to be a purely arbitrary mandate. There is no vested right to have one's controversies determined by existing rules of evidence. But these rules affect the remedy, and are subject to modification and control by the Congress, and the changes which are enacted may lawfully be made applicable to existing causes of action. Webb v. Den, 17 How. 576, 15 L. Ed. 35; Thompson v. Missouri, 171 U. S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204. The statute raises a presumption of fact. It is the presumption of one fact based upon another proven fact; that is, the presumption of importation arising from the proven fact of possession. The majority of the court are of the opinion that the jurisdiction of the court over the subject-matter may be established by such proof and presumption thus created. We think that Congress had power to create the presumption under the power accorded to it by the Constitution to regulate foreign commerce. In Gee Woe v. United States, 250 Fed. 428, 162 C. C. A. 498, the court treated this act as a regulation of foreign commerce prohibiting the importation of smoking opium, and to make possession of smoking opium, after the date fixed, evidence tending to show that it was imported contrary to law and known to be so by the offender. We think Congress had the undoubted power to create such a presumption.

[4] The statute provides that a minimum penalty of $10,000 shall be imposed for each and every violation of the prohibited act. Section 1 (Act Jan. 17, 1914) covers the offense charged in the first and second counts of the indictment, to wit:

"Neither of the said defendants at the time and place aforesaid being a citizen of the United States," and "did engage in the manufacture of smoking opium without giving the bond required by the Commissioner of Internal Revenue."

Section 2 covers the third count, which charges:

"Did engage in the manufacture of smoking opium without keeping books and rendering returns of the material and products, as required by the regulations of the Commissioner of Internal Revenue."

We are of the opinion that there is a minimum fine of $10,000 for every violation of the section and this does not permit the imposition of two minimum fines for violating the same section in two different ways. We think that a fine of $10,000 should be imposed for guilt as found in the first and second counts of the indictment, and $10,000 for guilt as found and as charged in the third count.

Judgment of conviction as to the first indictment is affirmed and as to the second is modified, making a total fine of $20,000.

WARD, Circuit Judge (dissenting). I dissent from the opinion of the court as to the indictment for concealing imported smoking opium under Act Jan. 17, 1914, § 3. The judicial power of the United States is defined by section 2, art. 3, of the Constitution as follows:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

The authority of Congress to enact the law is derived from its constitutional power to regulate foreign commerce. But opium can be and has been produced in the United States, and may in the future be produced commercially. Congress has no power to enact this law as to such opium. The remarks of Mr. Justice Holmes in United States v. Jim Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, are very applicable to this situation.

The jurisdiction of the federal courts is not presumed, but must be pleaded and proved, and I think it cannot be proved by a statutory presumption. Could Congress by a general statute establish jurisdiction in all cases brought in federal courts, unless the presumption of jurisdiction were rebutted by the defendant; or, to put a specific case, the Constitution having limited jurisdiction to suits between citizens of different states, could Congress establish jurisdiction by presumption, unless the defendant rebutted the presumption? If the defendant put the jurisdiction in issue, and there was no proof of the fact at the trial, other than the presumption, it seems to me the judgment would be invalid.

THE NO. 25.

(Circuit Court of Appeals, Second Circuit. April 6, 1920.)

No. 72.

1. **Collision ⇐100(2)—Steam vessels meeting in fog; failure to observe rules.**
   A collision on Hudson river in a dense fog, between a steamship going down and a car float alongside a tug passing up, *held* due solely to the fault of the steamship in failing to go at moderate speed and to stop her engines on hearing the fog signals of the tug somewhere ahead, as required by article 16 of the Inland Rules (Comp. St. § 7889); the tug having obeyed such rule by stopping her engines at once on hearing the fog signals of the steamship.
2. **Collision ⇐104—Violation of rule raises presumption of liability.**
   When a vessel disregards a rule of navigation, she has the burden of showing that her disobedience did not contribute to the injury which followed.

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

Suit in admiralty for collision by the Booth Steamship Company, Limited, owner of the steamship Denis, against the New York Central

tug No. 25; New York Central Railroad Company, claimant. Decree for respondent, and libelant appeals. Affirmed.

The libelant is a corporation existing under the laws of the kingdom of Great Britain and Ireland.

Haight, Sandford, Smith & Griffin, of New York City (Henry M. Hewitt, and James McKown, Jr., both of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This is a collision case, and the court below dismissed the libel. The libel was filed to recover damages sustained by the Booth Steamship Company, Limited, as owner of the steamship Denis, against the New York Central tug No. 25.

[1] On January 15, 1918, the steamship Denis left Hoboken at 9:30 a. m. bound for Brooklyn to take on cargo. She had been in dry dock undergoing repairs and was light. The vessel was assisted out into the river by two tugs, which stayed with her until she got into midstream, and was proceeding down the Hudson river under her own steam, at full speed, and in charge of a pilot. The wind was light, and was blowing from the north, the tide was running strong flood, and the weather was hazy; there being patches of fog coming from the ice drifting in the river.

The steamship ran into a patch of fog when about in the vicinity of Twenty-Third street, when she was slowed down until the fog lifted, and then proceeded again at full speed. A short time later she ran into another patch of fog, and was again slowed down, until she was barely stemming the tide. The fog whistles were blown at regular intervals. The story of the steamship is that, shortly after entering this second patch of fog, a signal from a tow ahead was heard off the starboard side of the steamship, and the helm was put slightly to starboard. The fog had closed in so quickly that evidently the fog whistles of the vessels in the vicinity were all started about the same time, and the sound of whistles came from all over. The fog signal from the tow ahead was heard several times, and when it had drawn closer the engines of the steamship were stopped, and shortly thereafter New York Central tug No. 25, with a car float on either side, loomed up out of the fog off the starboard bow of the steamship. The steamship's engines were immediately put full speed astern, three blasts of the whistle were blown, and the wheel put to port; but the latter action had little or no effect, as the steamship lacked speed enough to give her steerage way. The tug and car floats came on, and the car float on the port side of the tug struck the starboard side of the stem of the steamer, doing considerable damage to the steamship, and breaking the lines between the port car float and the tug.

The No. 25 left the terminal of the Long Island Railroad at Long Island City about 8:30 a. m., with the New York Central float No. 15 on her port side and the New Haven car float No. 39 on her starboard

side, bound for Weehawken, N. J. Both car floats were loaded with cars. The tug rounded the Battery and proceeded up the Hudson river. When below Pier 10 fog set in, and the speed of the tug was at once reduced to half speed. When near Chambers street fog whistles, consisting of one long and two short blasts, were blown at regular intervals, and the lookout was stationed on the car float. The story of No. 25 is that about this time the fog whistle of a steamer was heard up the river. The engines of No. 25 were immediately stopped, and a sharp lookout was kept for vessels. The fog whistles of a steamer were heard several times, and indicated to those in charge of the navigation of the tug that a steamer, which subsequently proved to be the Denis, was approaching from about a point off the port bow.

It appears that at 10:05 the engines of the Denis were slowed down to half speed ahead in consequence of running into a patch of dense fog. At 10:06 her speed was increased to full speed ahead, and she began blowing her fog signal. At 10:24 her speed was again reduced to half speed, after hearing forward of her beam a fog whistle, consisting of one long and two short blasts. The loom of a tug with car floats on either side, which subsequently proved to be the New York Central tug No. 25, was then seen by those aboard the Denis about a point on the steamer's starboard bow.

It appears from the log of the Denis that the loom of No. 25 and her tow was observed at 10:27, and at 10:29 the bow of the Denis came into collision with one of the floats which the No. 25 had in tow; the respective points of contact being the inboard forward corner of the port car float and the starboard side of the stem of the steamship.

We are satisfied that the blame for this collision rests on the Denis, in that it violated article 16 of the Inland Rules, which reads as follows:

"A steamship 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 the danger of collision is over."

The rule was made a part of the international code adopted by Act of Congress of August 19, 1890, 26 Stat. 320 (Comp. St. § 7837 et seq.). It became effective on July 1, 1897, by the President's proclamation. 29 Stat. 885. It was adopted to prevent collisions at sea. But Congress has also made the rule applicable for harbors, rivers, and inland waters by the Act of June 7, 1897, 30 Stat. 99, U. S. Comp. Stat. § 7889.

In Lie v. San Francisco & Portland Steamship Co., 243 U. S. 291, 296, 37 Sup. Ct. 270, 272 (61 L. Ed. 726) the court, commenting upon rule 16, said:

"The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator discretion as to what shall be 'moderate speed' in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a

fog renders it not necessary to dwell upon the purpose and obvious wisdom of this second paragraph of the rule."

In the Chattahoochee Case, 173 U. S. 540, 548, 19 Sup. Ct. 491, 494 (43 L. Ed. 801), in considering what constitutes moderate speed, the court said:

"No absolute rule can be extracted from these cases. So much depends upon the density of fog and the chance of meeting other vessels in the neighborhood that it is impossible to say what ought to be considered moderate speed under all circumstances. It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law."

In The Umbria, 166 U. S. 404, at page 417, 17 Sup. Ct. 610, at page 615 (41 L. Ed. 1053), the court, after reviewing the English and American cases, said:

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill, until the course of each was definitely ascertained. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerageway."

The subject was elaborately considered recently by the Circuit Court of Appeals in the First Circuit in The Sagamore, 247 Fed. 743, 159 C. C. A. 601. In The Lepanto (D. C.) 21 Fed. 651, 659, Judge Addison Brown said:

"Just at what point a steamer in a fog, on hearing another's whistle, is bound to stop and reverse, or how the master is to know when that is 'necessary' under the rule, is, to some extent, doubtless, a question of practical judgment. A steamer is not bound to stop and reverse at once, without reference to how distant the whistle may be, or may appear to be. Where the whistle is certainly distant, and no danger can be incurred by delay, immediate stopping is certainly not necessary; but if it be near, or appear to be near, she is bound, at her peril, to do so. The Frankland, L. R. 4 P. C. 529, 534; The Kirby Hall, 8 Prob. Div. 71. If uncertain, she must slacken, or stop and reverse. The George D. Fisher, 21 How. 1, 6; Peck v. Sanderson, 17 How. 178, 181. For her conduct in this respect a vessel must, prima facie, be held to answer according to the event. It is always safe to stop and reverse; at least, as regards the charge of fault. If she does not stop and reverse, when it is shown by the event that by doing so the collision might have been avoided, she must establish a clear justification for her course or be condemned. The Khedive and The Voorwarts, 5 App. Cas. 876, 890, 908. 'The rules are applicable from the time the necessity for precaution begins, and continue so long as the means and opportunity to avoid danger remain.' New York, etc., v. Rumball, 21 How. 372, 384. The whistles, or horns with mechanical appliances, required by the new regulations (article 12), are designed to make it certain that the signals shall be heard at a sufficient distance to render it possible in all cases for steamers to be stopped before coming in collision, if both vessels observe the rules, and have been previously going at 'moderate speed'; and no steamer's speed can be held 'moderate' that does not admit of her coming to a full stop within her share of the distance that separates her from another, after the latter's whistle is audible."

The Denis, as clearly appears, did not "go at a moderate speed" through the mist and fog as the rule requires, but proceeded at full

speed until the fog signals of the No. 25 were heard. The master of the Denis testified that after he heard the whistle from the tug forward of the beam of his boat he continued ahead without stopping his engines, and that he did not stop his engines until he saw the loom of the floats. The following is an excerpt from the record:

"Q. You did not stop your engines when you heard the whistles of this tug ahead of you? A. Not at once.

"Q. And you heard the whistles several times before you stopped? A. I couldn't say how many times we heard those particular whistles, there were so many around.

"Q. Don't you know the rules provide that when you hear a fog whistle of a steamer forward of your beam that you must stop your engines? A. I do not know what the rule in New York Harbor is, inland navigation.

"Q. Don't you know that that same rule is one of the International Rules? A. No; I have a local pilot in the port; I am guided by him.

"Q. Don't you know that it is the same rule on the high seas as in New York Harbor that prevails? A. The rule states that nothing in these rules shall interfere with any special authority given in inland navigation."

The evidence shows on the other hand that tug No. 25 obeyed the rule, and that she stopped her engines the moment the signals of the steamship were heard ahead of her beam. Her captain testified as follows:

"Q. How long had you been sounding your fog whistle when you heard the fog whistle of the steamer? A. Why, I should suppose about three or four minutes; I blew my whistle quite a long while before I heard his.

"Q. Before you began to blow the fog whistles I presume you were going full speed ahead? A. No, sir; we were traveling under slow bell.

"Q. When did you start with a slow bell? A. Off Pier 10, North River.

"Q. Why did you do that? A. I took the precaution in running into a fog.

"Q. Was it as far down as Pier 10 that the fog began to set in? A. No, sir; it was hazy, but not but what you could see quite a distance on both sides. * * *

"Q. So you continued under a slow bell from off Pier 10 until somewhere about Pier 20, or a little above, and then you heard the whistle or a fog whistle of a steamer dead ahead? A. Yes, sir.

"Q. So that when you heard the whistles your engine was stopped? A. Yes, sir.

"Q. Why did you stop them and when? A. We stopped our engines down off the ferry—the Erie Ferry—just as soon as I heard the fog whistle ahead."

That the Denis was in fault, and that the tug was not in fault, appears beyond doubt.

[2] When a vessel disregards a rule of navigation, she has the burden of showing that her disobedience did not contribute to the injury which followed. The Supreme Court stated the rule in The Pennsylvania, 19 Wall. 125, 136 (22 L. Ed. 148), as follows:

"The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

The burden of proof which rested on the Denis has not only not been met, but the evidence indicates that, if she had stopped when she merely slowed, the collision would not have happened.

Decree affirmed.

HINES, Director General of Railroads, v. JASKO.

(Circuit Court of Appeals, Third Circuit. June 23, 1920.)

No. 2530.

1. **Trial ⇐251(8)—Question submitted must be within issues.**
Where the negligence declared on is not established by the proofs, it is error to submit the case to the jury on any other issue.

2. **Master and servant ⇐137(5)—Railroad not under duty to safeguard yard employés passing between standing cars.**
That, in placing cars not then in use on standing tracks in a freight yard, spaces were sometimes accidentally left between them, *held* not to impose on the railroad company the duty of safeguarding employés, who voluntarily and without necessity used such openings as passageways.

In Error to the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

Action by Palina Jasko, administratrix of the estate of Joseph Jasko, deceased, against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed.

Frederic B. Scott, of New York City, for plaintiff in error.

Frank M. Hardenbrook and Charles M. Egan, both of Jersey City, N. J., for defendant in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case Palina Jasko, administratrix of Joseph Jasko, brought suit and recovered a verdict against the Director General, operating the Delaware, Lackawanna & Western Railroad. The cause of action was alleged negligence in operating said railroad, which caused the death of Joseph Jasko, an employé. On entry of judgment on such verdict, the defendant sued out this writ of error.

The facts in the case were that decedent was employed as a car inspector in the Hoboken freight classification yards of said railroad. He was familiar with such work and its dangers, having been engaged in it for some years. On the evening of his death, he in company with Schwartz, a fellow workman, was inspecting and repairing a freight car laden with interstate freight, which stood on freight track 24. In making such repairs he had occasion to use a wrench and bolt, which were in a toolhouse which stood on the farther side of track 26, and about a car length to the eastward. To get these articles, Jasko left his companion, Schwartz, standing by the car on track 24, crossed over track 25, which was empty, and passed over track 26, through an opening about a yard wide between two cars standing on said track

26. This was the last seen of him alive. He evidently walked eastward along the side of track 26, got the wrench and bolt from the toolhouse, and was returning the same way across the opening between the two cars on track 26. Just then Schwartz, his companion, heard the noise of the two cars coming together and coupling, and a cry from Jasko. Crossing over, Schwartz found Jasko, with his lantern, the wrench, and the bolt, on the ground, with injuries which resulted in his death.

The alleged negligence of the defendant, as stated in the eighth paragraph of the amended complaint, was:

"That at said time and place the said railroad company, by its agents, servants, and employés, and without regard for the safety of plaintiff's intestate, negligently caused certain other cars, without any engine attached thereto, to be shunted or kicked against the standing cars between which plaintiff's intestate was compelled to pass as aforesaid, and to violently collide with and strike the same, and without any bell, whistle, or signal of any kind being given to plaintiff's intestate of the movement of said cars, and at which time the plaintiff's intestate was in the act of passing between the said cars as aforesaid."

The further cause in the second amendment, or clause 8½, to wit:

"That at said time and place the defendant omitted its aforesaid duties, in that it neglected its custom and duty to have a man ride on the foremost end of the car so shunted or kicked as aforesaid, to control it with hand brakes, and prevent it from striking with unusual and unnecessary force the car with which it came in contact."

[1] At the conclusion of the plaintiff's testimony, a motion for a nonsuit was made, the denial of which motion is now, inter alia, assigned for error. Referring, first, to the question as to what way or ways were open for Jasko to go from his car to the toolhouse, the facts are these:

Directly opposite where he and Schwartz were was the opening, about a yard wide, through which he passed and was killed. To the westward there was no opening in the cars on the track for ten car lengths. To the eastward of the opening, either two or three cars stood. Then came another opening of about a yard or a yard and a half, to the east of which stood a single car. Beyond that point the track was open. These openings between the cars were all accidental. On that point the proofs are by Schwartz:

"Q. And you told us just a minute ago some times the cars are all closed up and coupled together, and sometimes they are open? A. Yes. Q. And it all depends upon the train operations that are carried on in the yard on this and other tracks? A. Yes, sir. Q. And the openings are in one place to-day, in one part of the yard, and the next day they are in some other part of the yard? A. Yes, sir."

He further testified:

"Q. How long did you say you had been working in that yard? A. Over five years. Q. And do you know whether it was the custom in vogue in the yard to leave open spaces between lines of standing cars? A. He says there were pretty nearly always there were spaces between the cars; that track was used for cars they had no billings for, and they used to shift cars in there."

The place that Jasko crossed on track 26 was the shortest way to reach the toolhouse, but not the only way. In that regard Schwartz testified:

"Q. And was that the most direct way for him to reach this tool box from the point where he was, or was there a different way he could have gone? A. There was another way to go, but it would take a great deal longer."

He further said:

"Q. You testified yesterday, I believe, that in order to reach this tool box, or the way to reach this tool box, the most direct way, put the question, to reach this tool box, was to go through this opening between the cars, and if he hadn't used the opening he would have had to go a long ways around; ask him how far around Jasko would have had to have gone to reach this tool box, had he not used this opening between the cars? How far around he would have to go? A. Three car lengths he would have to walk. Q. And how would he have got across, if he had gone down three car lengths? A. He would have to cross track 26. Q. You say he would have had to go down three car lengths to have gone across to the tool box; ask him if that is right? A. Yes, sir."

From this it is clear that he could have crossed the track at the next opening, that is, eastward of the three cars, where he would also have had a narrow opening between those cars and the one beyond him, or, if he had passed around the last-named car, he would have had an entirely clear track. Such being the situation, and Jasko having evidently chosen to go through the opening directly opposite, and having been injured in doing so, do the proofs show the negligence alleged in the declaration, which, as we have seen, in substance was the shunting or kicking of the car west of the opening against the three cars east of it. Was the colliding car unattached to an engine, and did the road fail to have a man on it to control it with hand brakes and prevent it from striking with unusual or unnecessary force the car with which it came in contact?

A careful examination of the proofs satisfied us that they did not support the negligence charged. The only witness on that point was Schwartz, the companion of the decedent, who, as we have seen, stood at the car on track 24, which was about three car lengths directly north and opposite the crossing. The testimony of Schwartz is clear that the car, which was pushed in and caught Jasko, was not shunted or kicked in, but, on the contrary, was under control of an engine, and moved back in answer to the signal of the conductor, who was on the same side of the backing train of ten cars and within view of Schwartz. In that regard Schwartz's testimony is:

"Q. What caused those cars to come together over this open space, if he knows? A. The cars were pushed together and coupled. Q. What pushed them together, if you know? A. The engine, that was drilling these empty cars, was pushing them down the track. * * * Q. Did you see any one on the ground adjoining where these cars were that had bumped into the other cars? A. All I saw was the conductor giving the signal. Q. Where was this conductor, on the train or on the ground? A. He was on the ground. Q. And he signaled to what train and what engineer, if he knows; whom did he signal to? A. He was giving the signal to the engineer to push the cars down. Q. And as he gave this signal to the engineer, what did the engineer do, so far as he knows, or what movement did the cars make, if any? A. He pushed those cars. * * * Q. What caused these cars to come to-

gether over this open space, if he knows? A. The cars were pushed together and coupled. Q. What pushed them together, if you know? A. The engine, that was drilling these empty cars, was pushing them down the track."

As to the force with which they came together, Schwartz's testimony was:

"Q. At the time these cars were being pushed together by the engine, did you hear anything? A. I heard then the cars bumped together. * * * Q. Did you notice with what force, if any, the cars struck the standing car? A. They must have hit pretty hard, because you could hear a loud noise. Q. Well, what noise was it he heard? A. He heard a noise when the cars bumped together."

From this testimony it is clear, first, that the decedent could, if he had seen fit, have had a clear passage across track 26, a few car lengths to the eastward of where he crossed; second, that where he did cross was an optional and not a compulsory path in the performance of his work; third, that the colliding car was not kicked or shunted against the standing car at that opening; fourth, that the draft of cars was being backed under the control of an engine, under the signal of a conductor near the rear end of the train, and there is no proof that such backing was other than the usual in such operations. Such being the proofs in the cause, it is clear that the negligence with which the defendant was charged in the declaration, was not established by the proofs.

The negligence declared on not having been established by the proofs, it was, under the authorities (Excelsior v. Sweet, 59 N. J. Law, 441), error to submit the case to the jury on any other issue. But, in view of the fact that the case was by the charge submitted on an issue not pleaded, we will, for present purposes, assume that such issue was declared on, and inquire whether the proofs were such as showed negligence on the part of the defendant.

[2] This additional charge of negligence, as stated in the charge, is:

"That very often openings between cars were permitted to exist there in that yard, throughout the yard, and that it was a custom of yard employés to pass through these in and about their work; that that had been for years."

But one witness, Schwartz, testified in that regard, and his proof was that—

"There were pretty nearly always spaces between the cars. * * * It is just as it happened; sometimes the cars will couple up; other times they will shove them in there, and they will stay that way separated. * * * Whenever there are openings between cars, the employés, even from the docks, pass through between those cars."

His further testimony was:

"Q. And you told us, just a minute ago, sometimes the cars are all closed up and coupled together, and sometimes they are open? A. Yes. Q. And it all depends upon train operations that are going on in the yard, on this and other tracks? A. Yes, sir. Q. And the openings are in one place to-day, in one part of the yard, and the next day they are in some other part of the yard? A. Yes, sir."

In our judgment, this testimony did not show that uniformity, certainty, or continuity which establish a custom. Manifestly, the open-

ings between the cars were not designed, and such as happened were unintentional, accidental, and were not left in order to furnish a passageway for any one. When it is considered that such openings are a necessary incident to the operation of such a yard, it cannot be said that their existence implies an invitation to use them as a passageway, and that the railroad has, by reason of such accidental spaces, undertaken to safeguard an employé who voluntarily and without necessity chooses to use them. And, apart from this, no one has suggested how, in any practical way, the complicated work of a shifting yard could be workably carried on and trains made up, if the duty was placed on the railroad of placing trainmen in all positions where yard employés, approaching from either side, such numerous accidental openings, could be warned and stopped. Yet this is the warning duty the trial judge erroneously, as we think, placed on the railroad in his charge, when he said:

"If that custom existed as alleged, it was the duty of this defendant company to give reasonable warning or notice of some reasonable kind to employés passing or about to pass, through these openings between these cars, in going to and about their work, of the movement or contemplated movement of the cars near these openings or gaps, in other words, movements of the cars toward closing the opening between them."

The judgment below must therefore, in any aspect of the case, be reversed, and the cause remanded to the court below for further proceedings.

HINES, Director General of Railroads, et al. v. KNEHR.

(Circuit Court of Appeals, Third Circuit. June 23, 1920.)

No. 2541.

Master and servant ⊂=137(2)—Railroad negligent in allowing cars to run down grade unattended.

A railroad company *held* liable for injury to an employé, working in freight yards at night, who was struck by a draft of cars which, contrary to the rules, were allowed to run down a grade with no one in charge and without lights.

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Action by Harry J. Knehr against Walker D. Hines, Director General of Railroads, and the Pennsylvania Railroad Company. Judgment for plaintiff, and defendants bring error. Affirmed.

John A. Hartpence and Vredenburgh, Wall & Carey, all of Jersey City, N. J., for plaintiffs in error.

Edward J. McCrossin, of New York City, and Harry R. Cooper, of Belmar, N. J., for defendant in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

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

BUFFINGTON, Circuit Judge. In the court below the plaintiff, Knehr, an employé of the Pennsylvania Railroad Company, brought suit against the Director General, who was operating said road, to recover damages for personal injury sustained through alleged negligent operation of the railroad by the defendant. He recovered a verdict, and, judgment having been entered thereon, the defendant sued out this writ of error. No principles of law are involved, and the sole question is whether there was evidence of negligence which justified submitting the case to the jury.

The proofs tended to show that the plaintiff was working at night in a gravity freight classification yard. In the operation of such a yard, the freight cars were brought by an engine to a "hump" or peak in the yard, from which elevation they descended by gravity and were switched to appropriate tracks. The plaintiff was a number snatcher, and his duty was, as the cars passed, to take their numbers, and record them, and the switch tracks to which they went.

The negligence charged in the declaration was that the defendant permitted a draft of cars to run down from the hump at great speed, with no one in charge thereof and without lights, and to strike the plaintiff without warning. The proofs, which we have fully examined, tended to make good this charge, and without entering into detail we may say they were to the effect that, on the night of the accident, three loaded freight cars, which were in charge of one of the defendant's employés, were, contrary to the rule, allowed by him to go down the hump with no one in charge. There was no light upon them, and no warning of their approach was given to the plaintiff. At the time the latter was trying to find, from their lights, what switches were open and would receive oncoming cars. To do so he was kneeling alongside the rail, and by sighting along it, he was able to learn the color of the controlling switch lights, and thereby determine in what track the next car would run. While so working, and without warning, in the absence of any light on the cars, and without any one being in charge, and contrary to orders, a draft of three unattached, unmanned, unlighted, and invisible loaded cars, traveling at high speed, came down the hump grade, struck, and injured him. We think all the elements of liability, the orders of the railroad to its employé, his disregard thereof, the proper performance of duty by the plaintiff, and the careless performance of his by the employé of the defendant who had charge of this draft of cars, were shown to an extent that warranted and indeed compelled, the submission of the cause to the jury.

Such being the fact, the judgment below is affirmed.

ERIE R. CO. v. HEALY.

(Circuit Court of Appeals, Third Circuit. June 23, 1920.)

No. 2542.

Master and servant ⇐137(6)—Yardmaster's injuries by switched car held not due to negligence.

The death of a yardmaster, who, while standing between two tracks in the yards, was struck by a car shunted upon one of the tracks behind him, *held* not due to negligence of the railroad company, where men cried out to him, which was the only method of warning shown to have been used in the yards.

In Error to the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

Action by Charlotte Healy, administratrix of the estate of John A. Healy, deceased, against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Collins & Corbin, of Jersey City, N. J. (George S. Hobart, of Jersey City, N. J., of counsel), for plaintiff in error.

George E. Cutley and Alexander Simpson, both of Jersey City, N. J., for defendant in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case Charlotte Healy, administratrix of John A. Healy, who was an employé of the Erie Railroad Company, brought suit against that company to recover damages for its alleged negligence, which, she contended, caused Mr. Healy's death. So far as here pertinent, the alleged negligence as stated in the declaration, was that the railroad "caused to be propelled against the body of said John Healy a freight car, without giving him any warning of the approach thereof," and the question before us, therefore, is whether there was such an absence of proof on that issue that the court below should have granted the defendant's motion for a compulsory nonsuit.

No principles of law are concerned; the question is wholly one of fact, namely, the presence or absence of proof warranting a submission of the case to the jury. We here note the plaintiff originally brought her suit and recovered a verdict in the Supreme Court of New Jersey. On review of the case, the Court of Errors and Appeals of that state held a nonsuit should have been entered, reversed the case, and granted a venire de novo. Instead of availing herself of the second trial thus granted, with an opportunity to produce any available additional proof, the plaintiff discontinued her action in the state court and brought suit in the court below.

We have carefully examined the proofs in the latter case, and find they were, so far as substance is concerned, the same as those passed upon by the Court of Errors and Appeals. That court's discussion of the facts and its conclusions commend themselves to us, and as a dis-

cussion by this court would simply be an effort to state the same things in different language, we restrict ourselves to adopting as the opinion of this court the opinion of the Court of Errors and Appeals as reported in 91 N. J. Law, 325, 102 Atl. 629, which is as follows:

"This is a fact case. The only question we need consider is whether there should have been a nonsuit for failure to prove negligence on the part of the defendant. The decedent was, and had long been, the yardmaster of the defendant's freight yard, known as the Croxton Yard. He was standing between two tracks at the time a car was being switched on one of them. The engine had been cut loose and the switch turned, so as to send the car on a different track from that taken by the engine. The decedent had his back turned; men cried out to him, and he seems to have made some movement, but not enough to escape being struck by a portion of the car and thereby thrown under a train passing on the next track. There was evidence that it was customary for the men to holloa as a warning, and no other warning is shown to have been in use. The testimony is that several men holloaed, and there is an absence of evidence that no one holloaed. In view of the fact that the only system of warning in vogue in the yard was followed, we are unable to find any proof of negligence. The decedent must be presumed to have known the custom, and he seems to have had power as yardmaster to command the men. It is suggested that the warning was not given as soon as it should have been. There is an absence of testimony to that effect, and in view of the fact that the men had the right to rely on the decedent exercising due care, and on his changing his position if he was too near the track, a change that meant a shift of very few inches, we think the warning came as soon as any one had reason to think there was danger. It is very different from a case where one is on the track. There should have been a nonsuit. The judgment must be reversed and the record remitted, to the end that there may be a venire de novo."

With our minds addressed to the facts and the applicable law, we distinguish the instant case (where the shunted car was in the care of a brakeman) from two cases where opinions are before us and in which we file concurrent opinions, namely, Hines v. Knehr, 266 Fed. 336, where the shunted cars were not in the care of a brakeman, and Hines v. Jasko, 266 Fed. 340, where cars were not shunted, but where the injury resulted from the colliding of a made-up train with another car, the movement being effected by an attached engine.

The judgment below is reversed, and the case remitted for further proceedings.

JACOBSON et al. v. PANAMA R. CO.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 209.

1. Salvage ⇐38—Award to crew within discretion of court.
An allowance to the crew of a salving vessel of one-fourth of the award of $2,000, for releasing a steamship stranded on a reef, the work consisting chiefly in lightering her cargo and afterward reloading the same, the greater part of the work being done by others than the crew, *held* within the discretion of the court, where the sea was calm and the services attended by no danger.

2. Salvage ⇐18—Common ownership of vessels does not deprive crew of right to pay for salvage services.
That both salving and salved vessels were being operated by the Emergency Fleet Corporation *held* not to deprive the crew of the salving vessel of the right to compensation for salvage services.

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

Suit in admiralty by Edward Jacobson and others against the Panama Railroad Company. Decree for libelants, from which they appeal. Affirmed.

Silas B. Axtell and Arthur Lavenburg, both of New York City, for appellants.

Richard Reid Rogers, of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The libelants were members of the crew of the steamship Neptunas. Suits were brought by the officers and members of the crew of this steamship for salvage services to the steamship Panama on July 1 and 2, 1918, when the Panama went aground at Rochelois Reef on June 29, 1918. This is about 50 miles west of Port au Prince and about 10 miles from the island of Haiti. The District Judge awarded $2,000 to the steamship, $500 of which was to be paid to the entire crew of the ship Neptunas. About 19 members of the crew were represented by the proctor for the present appellants, and 9 other members of the crew were represented by another proctor. Each proctor instituted separate suits. They were consolidated and tried together.

[1] The appellants contend that the allowance to the members of the crew was inadequate for the services performed. The place where the vessel went aground was on a soft bottom of coral sand, and the record indicates there were no rocks within 500 feet. Where this reef is located, Gonaives Channel, there is an inland sea. It was about 7 miles from land on either side. When she grounded, she was drawing about 22½ feet of water and was about one-third of her length from the bow ground, and about 20 feet of water under her bow. The colonel in charge of the Marine Corps Station at Port au Prince sent the Potomac to her relief, for the purpose of taking off some of her cargo. On the same day, the ship Gorgas, of 4,564 gross tons and

owned by the appellee, appeared in the vicinity and stood by until 4:15 in the afternoon, when it was decided to transfer the cargo from the Panama to lighters brought to the point by the Potomac. This course was selected, rather than transferring it to the Gorgas. The weather was clear during the time she was grounded, and according to Capt. Stone, of the Gorgas, she was not in danger of any passing storms. The Potomac was a powerful steam tug, and she brought with her a 250-ton lighter for the purpose of relieving the ship of her cargo. The log of the Neptunas records the following happenings:

"Monday, July 1, 1918, 4:45 p. m., hauled fast alongside stranded steamship Panama.
"6 p. m., commenced taking cargo; A–B's and ordinaries of Neptunas working cargo on steamship Panama.
"4 to 8 p. m., light airs; choppy seas; fine and clear.
"July 2, 1918. All day alongside steamship Panama.
"Remarks: 12 to 4 a. m.
"12, knocked off for lunch; 1 a. m., turned to, attempted to haul Panama off, without success.
"3 a. m., knocked off.
"4 to 8, light breezes; choppy seas; calm.
"7 a. m., turned to and lightening steamship Panama.
"A-B's and ordinaries from Neptunas working on steamship Panama.
"8-12, light airs, calm sea; fine and clear.
"12 to 4, calm, cloudy, and hazy.
"4 to 8.
"4:30 p. m., knocked off shifting cargo.
"4:35 p. m., full speed astern; Panama sliding off.
"4:45 p. m., hauled clear of Panama.
"4:50, full ahead for Port au Prince.
"Fine and clear; calm, smooth sea.
"8 to 12.
"11:15 p. m., half ahead.
"11:20, let go anchor Port au Prince. Light easterly air; choppy sea; fine and clear.
"July 3, 1918.
"At Port au Prince and alongside steamship Panama.
"The day began fine and clear; light southeasterly breeze.
"6:50 a. m., shortened up.
"7 a. m., anchor up, slow ahead.
"7:20 a. m., stopped.
"7:25 a. m., full astern.
"7:30, all fast alongside S. S. Panama.
"Crew employed painting side.
"3:30 p. m., commenced discharging cargo into S. S. Panama.
"1 a. m., knocked off discharging.
"The day ends fine and clear; light southwesterly breeze."
(It is noted that this log contains an inaccuracy, in that the entry of "1 a. m." does not apply to this day. It really applies on the following day commencing at midnight.)
"July 4, 1918, alongside of S. S. Panama, Port au Prince.
"1 a. m., knocked off discharging. This day begins fine and clear; light southeasterly airs.
"10:30 a. m., finished discharging. All cargo received at Rochelois Reef returned to S. S. Panama."

There is some conflict in the testimony as to just what the members of the crew of the Neptunas did, but it is clear that the Neptunas carried about 26 stevedores, not members of the crew, and that most of the work of transferring the cargo of the Panama to the Neptunas

was performed by these men, who were paid for their services, as well as by other stevedores who were brought out from Port au Prince. The members of the crew performed what, apparently, was their usual service under the direction of the captain of the Neptunas, except that 8 members of the crew came out and were put to work, some upon winches, and others upon two cranes, one working forward and one aft. They were engaged for from 5 to 13½ hours. They were paid at the rate of 60 cents an hour for this service; this in addition to the regular pay they received as members of the crew, and the record indicates that but one of the appellants performed such service. This was Boatswain Knudsen. An examination of the names, as shown by Exhibit B, demonstrates this.

The learned counsel for the appellants criticizes the findings of fact below, but upon examining this record with care we find no inaccuracy in the finding of any fact set forth in the assignments of error. The first assignment has to do with the service performed by the Neptunas. The Neptunas was of considerably lighter draft than the Panama, and it may be that she did assist in backing off with her, but at no time did she actually tow or attempt to tow the Panama. Lines connecting the Neptunas and the Panama were not towing lines, and they could not withstand any great strain, nor were they adapted for towing purposes.

On July 2 there appears in the log an entry showing an attempt made to haul the Panama off without success. The substantial work of getting the ship off was performed in unloading the cargo by the Potomac. The finding of fact of the District Judge as to storms of any violence, which he stated were rare at the place where the Panama went aground, is of no importance. The testimony, however, does indicate that people familiar with the locality discussed the Rochelois Reef as a place of refuge and safety in case of storm. It also appears that there is no record of severe storms. The testimony is ample that the weather was fair at the time the ship was aground. The service did not involve any danger, and it took but a short time.

It is fair to consider the value of the property in peril, the degree of peril, and the value of the property employed by the salvor, the risk of life or property incurred, the skill and dispatch shown in rendering the services, together with the foresight and skill used in the preparation to render it, the time consumed, and the labor performed by the salvor. The Blackwall, 10 Wall. 1, 19 L. Ed. 870. The courts do not desire to award so little as to discourage salvage aid, nor so much as to encourage unnecessary and extravagant statement of service. The No. 92, 252 Fed. 118. All these matters are within the sound discretion of the District Judge, who hears the facts and sees the witnesses. It is for him to correctly find the facts, and it is only if the evidence indicates an abuse of discretion that this court interferes. The Kanawha, 254 Fed. 762, 166 C. C. A. 208.

[2] The Neptunas was controlled by the Emergency Fleet Corporation, and both vessels were considered government ships, appropriated exclusively to public service. But, even though there was common ownership by the United States, this has been held not enough to de-

prive the master and crew of the salving vessel of compensation for salving services. Rees v. United States (D. C.) 134 Fed. 146. The members of the crew had an independent right accorded them by law for compensation for salvage. They are entitled to a maritime lien as protection. The New Orleans (C. C.) 23 Fed. 909. They may therefore maintain this action in personam to the extent of their lien for their services in connection with the Neptunas' services to the Panama. An allowance of one-fourth of the award of $2,000 to the crew is not such an abuse of discretion as would warrant our modifying the decree below.

Decree affirmed.

PLEWS v. BURRAGE.

(Circuit Court of Appeals, First Circuit. July 2, 1920.)

No. 1464.

Injunction ⇐26(6)—Equity without jurisdiction of suit to establish res judicata constituting defense at law.

A defendant in an action at law in a federal court, relying upon res judicata, has a complete and adequate remedy by pleading it as a defense, and cannot maintain a suit in equity, based thereon, to enjoin the law action.

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

Suit by Albert C. Burrage against Arthur S. Plews. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 260 Fed. 1018.

Sherman L. Whipple, of Boston, Mass. (Alexander Lincoln, of Boston, Mass., on the brief), for appellant.

Boyd B. Jones, of Boston, Mass. (Henry F. Hurlburt and Philip N. Jones, both of Boston, Mass., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. Plews appeals from a final decree of the District Court for the District of Massachusetts enjoining him from prosecuting his action at law brought in said District Court against Burrage in August, 1918. The facts now material may be briefly stated:

In September, 1910, and January, 1911, by correspondence Burrage agreed to pay Plews 5 per cent. of all profits which might accrue to Burrage out of the acquisition by him of copper properties brought to his attention by Plews. This agreement is called the Plews commission note. Plews brought his suit at law on this commission note, alleging performance on his part, fiduciary obligation on the part of Burrage to disclose facts peculiarly within his knowledge as to the acquisition and value of such properties, and fraudulent concealment of such facts, with a resultant right in Plews to recover 5 per cent. in

stock or money of very large profits. Burrage thereupon brought this bill in equity, alleging that Plews had given Louis Ross an option on his commission note for £500; that Ross had assigned this option to Burrage, who had taken it up, paying the £500, thus acquiring all Plews' rights therein; that subsequently Ross had brought suit on behalf of himself and Plews on said commission note in the Massachusetts state court (233 Mass. 439, 124 N. E. 267), there disposed of by final decree for Burrage. Burrage sets up this decree as res adjudicata of the cause of action in Plews' suit at law. He alleges that this Ross-Plews suit, tried with another suit brought by Ross against Burrage solely in his own behalf, occupied in trial and arguments about 135 days, and involved Burrage in expenses of over $20,000 for master's fees and stenographers' bills, besides fees for his own counsel. Burrage therefore asserts it to be unjust and inequitable that he should again be vexed and harassed by the prosecution of another suit on the Plews commission note. Plews moved to dismiss this bill, alleging:

(1) Want of equity;

(2) Complete and adequate remedy at law;

(3) Lack of identity between the cause of action in the Massachusetts court and the one sued upon in the District Court; and

(4) That Plews was not a party to the Massachusetts suit.

This motion was overruled, and Plews was temporarily enjoined. Subsequently he filed an answer, admitting certain facts and denying others. Burrage then filed motions to strike out certain parts of the answer for insufficiency, and for final decree. These motions were allowed, and a final decree entered, permanently enjoining Plews from prosecuting his action at law, and adjudging the decree in Burrage's behalf in the Massachusetts court to be final and conclusive against all rights now claimed by Plews.

Learned counsel have argued elaborately, orally and on briefs, the question as to whether the final decree in the Massachusetts court does or does not conclude all Plews' rights. Burrage strenuously contends that the causes of action are identical; that, if not identical, by amendment the cause of action now sued upon might and should have been included in the former suit; and that therefore Plews is now barred. Plews contends that the causes of action in the two suits are in essence different; that he discovered facts of controlling importance only at the trial of the Ross-Plews suit; that Ross was Burrage's agent in obtaining from Plews the option on his commission note; and that Plews was, in giving said option and in the subsequent transfer to Burrage, the victim of fraudulent concealment by Burrage.

It is not the present province of this court to determine the issue of res adjudicata, for we are of opinion that the District Court erred in denying the defendant's motion to dismiss on the ground of adequate and complete remedy at law. The sole basis of equitable jurisdiction is the contention that, because of the length and expense of the trial in which this issue is alleged to have been determined in the state court, Burrage is entitled to resort to equity, instead of pleading res adjudicata in his answer to Plews' suit at law and there trying out

that issue. On analysis, Burrage's proposition is that by proceeding as plaintiff, and not as defendant, and thus reversing the order of trial, he may avail himself more conveniently and promptly of the defense of res adjudicata than by the customary method of pleading it in his answer in the law suit.

Even if true in fact, which is far from clear, we think this proposition is not sound in law. R. S. § 723 (Comp. St. § 1244), provides:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

This, of course, is but declaratory of the usual rule. Compare So. Pacific R. R. v. United States, 168 U. S. 1, 55, 18 Sup. Ct. 18, 42 L. Ed. 355, and cases cited; United States v. Bliss, 172 U. S. 321, 19 Sup. Ct. 216, 43 L. Ed. 463; Gray v. Coan, 36 Iowa, 296.

No case is cited, and we know of no case, which, under comparable conditions, lends any support to the proposition that a party relying upon res adjudicata has not a complete and adequate remedy by pleading this defense in a suit at law. It is not, and clearly it cannot be, contended that such defense cannot in the suit at law be pleaded as an absolute bar, nor that, when so pleaded, it will not be supported by exactly the same evidence requisite in the present suit in equity.

At just what stage of the trial of the law suit, and in exactly what form, this issue should be submitted for determination, it is not for this court in this case now to attempt to determine. Whether, when presented, the issue of res adjudicata will involve only a pure question of law to be determined by the court, or will involve a question for the jury, we cannot now know. Compare Harlow v. Bartlett, 170 Mass. 584, 591, 49 N. E. 1014; 23 Cyc. p. 1539, and cases cited under note 19; also 23 Cyc. p. 1543, and authorities cited.

If this issue should prove to involve a question of fact, on which the parties may have a constitutional right to a jury trial, the present attempt to assert equity jurisdiction would, if allowed to succeed, complicate—not simplify—the litigation. See, also, Foye v. Patch, 132 Mass. 105, and cases cited.

It is enough to observe that the District Court, sitting as a court of law, has large and flexible powers in adapting its machinery and procedure to the speedy and economical determination of the controlling issues in any law suit. This proposition is well illustrated by a very recent decision of the Supreme Court. In re Petersen, 253 U. S. —, 40 Sup. Ct. 543, 64 L. Ed. —, decided June 1, 1920; Peterson v. Davison (D. C.) 254 Fed. 625. In this case the Supreme Court has just held that the District Court has inherent power to appoint an auditor with a view to simplifying the issues to a jury. This had long been held in this circuit. Fenno v. Primrose, 119 Fed. 801, 56 C. C. A. 313. Compare Vermeule v. Reilly (D. C.) 196 Fed. 226; United States v. Wells (D. C.) 203 Fed. 146.

It is common practice in every court of law to frame special issues for a jury, and it is elementary that the order in which the evidence shall be adduced and the issues determined at the trial is largely within the discretion of the trial judge. Plews has in his law suit no ab-

solute and uncontrollable right to proceed with lengthy evidence, which may thereafter appear to be entirely immaterial, if Burrage's defense of res adjudicata is sustained.

The fact that under Massachusetts Revised Laws, c. 173, § 20, special pleas in bar are abolished, does not leave the District Court under compulsion to try at length issues which the defendant's answer will warn the court may prove to be entirely immaterial.

This case involves no multiplicity of suits. It may involve only the single question of res adjudicata. The fact—if it be a fact—that there may be a possible strategic advantage to Burrage in trying this issue in equity, rather than at law, does not show that his remedy at law is not plain, adequate, and complete within the meaning of the authorities, or warrant this court in attempting to deprive Plews of his right to a jury trial.

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 appellant recovers his costs of appeal.

TREDWELL v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 6, 1920.)

No. 1765.

1. **Larceny ⟸30(1)—Indictment held to sufficiently describe property.** ...
An indictment charging in several counts the larceny at different times of quantities of nitrate of soda *held* to sufficiently describe the property.

2. **Embezzlement ⟸13—Larceny ⟸15(3)—Appropriation of property, after rightful possession has ended, larceny, and not embezzlement.**
Where defendant, employed as a stevedore to unload nitrate owned by the government, from vessels and load it into cars for further shipment, after it was so loaded caused certain of the cars to be billed to private consumers, to whom he sold the contents, his offense was larceny, and not embezzlement.

3. **Larceny ⟸15(1)—Conversion by bailee, pursuant to prior intention, larceny.**
If, at the time of lawfully coming into possession of property of another, the one to whom the property is intrusted has the intention of appropriating it to his own use, the crime thus committed is larceny.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Larceny.]

4. **Embezzlement ⟸11(1)—Conversion by bailee.**
Where one comes lawfully into possession of property, and afterwards and while it is in his possession forms and carries out the purpose of appropriating it to his own use, the crime thus committed is embezzlement.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Embezzlement.]

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk.

Criminal prosecution by the United States against W. B. Tredwell. Judgment of conviction, and defendant brings error. Affirmed.

Certiorari denied 253 U. S. ——, 40 Sup. Ct. 587, 64 L. Ed. ——.

Harry K. Wolcott, of Norfolk, Va. (H. L. Lowry and Wolcott, Wolcott, Lankford & Kear, all of Norfolk, Va., on the brief), for plaintiff in error.

Hiram M. Smith, U. S. Atty., of Richmond, Va., for the United States.

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

KNAPP, Circuit Judge. In an indictment containing 31 counts the above-named plaintiff in error, herein referred to as defendant, was charged with stealing, at various times stated, a large quantity of nitrate of soda belonging to the United States. At the trial, and after the evidence was all in, the prosecution of 12 counts was abandoned, with the consent of the court; on the remaining counts a general verdict of guilty was returned by the jury.

[1] The assignments of error present but two questions. It is argued in the first place that the court should have sustained a demurrer to the indictment, on the ground that in none of the counts was the property alleged to have been stolen described with such certainty as to inform defendant of the precise charge he was called upon to meet, or to protect him from subsequent prosecution for the same offense. We are unable to sustain the contention. Each count of the indictment is in the ordinary form of an indictment for larceny. It sets out the time and place of the alleged theft, the kind of property taken, the amount of the same, and its value; and this we think was sufficient. Indeed, the brief of defendant fails to indicate in what manner, or by what terms of identification, the property in question might have been more accurately described. The character of the transactions in which defendant engaged, and the numerous acts of wrongdoing of which he was accused, entitled him, as may be conceded, to a bill of particulars, which was furnished, showing that the nitrate was contained in bags, that it came to Norfolk in certain vessels, was imported by certain importers, and loaded upon certain cars; but the absence of these particulars did not make the indictment defective, since each count contained a sufficient charge of larceny. The demurrer was properly overruled.

The other question is based on the refusal of the trial court to direct a verdict for defendant; the contention being that the government failed to prove a case of larceny, though it may have proved a case of embezzlement. The facts in this connection are briefly these:

In the summer and fall of 1918 the United States was importing large quantities of nitrate of soda from Chile through the port of Norfolk, Va., for use in various munition factories. This nitrate came by vessel to Norfolk, where it was unloaded and placed in cars on the tracks of the Norfolk & Western Railway. The contractors engaged to perform the transportation service employed defendant, who was a stevedore, to unload the nitrate from the vessels, reload it into the cars, and bill the cars to the munition plants as directed by the Ordnance Department. What the defendant did, as the government claims and

the jury must have found, was to bill a number of cars to certain fertilizer companies and other consumers, to whom he sold the nitrate through a Norfolk broker. In the instances in which this was done he sent fictitious bills of lading to the officers in charge of the munition plants, thus apparently complying with the directions of the Department, though of course the diverted nitrate never reached its proper destination. This being the method of operation, it is claimed that the property came lawfully into the possession of defendant under his employment by the contractors, and therefore it was not larceny, but embezzlement, if he appropriated some part of it to his own use. He invokes the ruling or definition of the Supreme Court in Moore v. United States, 160 U. S. 268, 16 Sup. Ct. 294, 40 L. Ed. 422, as follows:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted, or into whose hands it has lawfully come, and it differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking."

[2] The first answer to the contention is this: Granted that defendant had lawful possession of the nitrate for the purposes of his employment, we think it clear that such possession ceased when the loading of the cars was completed, and that the property then passed into the possession of the railroad company. When he thereupon caused it to be billed to his own customers, instead of the munition plants, his diversion of the property was in substance a felonious taking of it from the railroad company, and this brought his act within the accepted definition of larceny. There was evidence to the effect that defendant, as agent of the contractors and with the government's consent, had the custody of the nitrate for the government up to the time it was delivered to the railroad, and that he was the agent of the railroad in loading it into the cars. Therefore, when the nitrate was placed in the cars, it was in the custody and possession of the railroad, and under control of defendant as the railroad's agent, and not as the government's agent. It follows that his conversion of the nitrate at any time after that was not the embezzlement of property which he held for the government, but the stealing of government property in the hands of the railroad.

[3, 4] There is another and equally conclusive answer. Where one comes lawfully into the possession of property, and afterwards and while it is in his possession forms and carries out the purpose of appropriating it to his own use, the crime thus committed is the crime of embezzlement; but if, at the time of getting possession lawfully, the one to whom property is intrusted has the intention of appropriating it to his own use, the crime thus committed is the crime of larceny. This is the distinction which seems to be drawn by the Supreme Court in Grin v. Shine, 187 U. S. 181, 196, 23 Sup. Ct. 98, 47 L. Ed. 130, where the subject is discussed and a number of authorities cited. Moreover, the opinion indicates that this is the meaning to be imputed to Moore v. United States, supra.

In the light of this authority it is enough to say that the jury were amply warranted in finding an intention on the part of the defendant, at the time the nitrate came into his custody, to appropriate some portion of it to his own use. The number of his fraudulent transactions, the period of time during which they were carried on, and other circumstances of record, evidence a carefully matured plan for robbing the government. Having that purpose in mind when he commenced unloading the nitrate, his disposal of it to private purchasers for his own benefit was justly charged to be the crime of larceny, of which he was convicted.

Affirmed.

THE LEXINGTON.
THE JAMES LOGAN.

(Circuit Court of Appeals, Second Circuit. April 6, 1920.)

Nos. 154, 155.

Collision ⇐98—Meeting steam vessels; refusal to concur in proper passing signals.

A collision on Hudson river in the evening between a steamer passing down and a steam lighter passing up *held* due solely to the fault of the lighter in twice crossing the steamer's proper passing signals and persisting in a course across the steamer's bows at full speed until collision.

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

Suits in admiralty for collision by Frederick A. Verdon and others, owners of the steam lighter James Logan, against the steamer Lexington, the Colonial Navigation Company, claimant, and by Frank W. Highberger against the Logan, with the Lexington, impleaded. Decrees holding the Logan solely in fault, and libelants appeal. Affirmed.

Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellants.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Frederick Pennell, both of New York City, of counsel), for appellee Colonial Nav. Co.

Before ROGERS and MANTON, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge. These suits grew out of a collision in the Hudson River on November 17, 1917, which resulted in the sinking of the steam lighter James Logan within 10 or 15 minutes of the collision. The first of these suits was brought by the libelant Verdon, as owner of the steam lighter James Logan, against the steamer Lexington, for damages sustained by reason of the sinking of the James Logan. Damages in the sum of $45,000 were asked. The second of the suits was brought by the libelant Highberger, the owner of the

Logan's cargo, against the James Logan, and the Lexington was impleaded under the Fifty-Ninth rule. The two cases were tried together below, and were disposed of in one opinion. They will be so disposed of in this court. The court below dismissed both the libel and the petition against the Lexington, and held the Logan solely at fault.

The Lexington is a steel screw passenger and freight steamer, 246 feet long and 46 feet beam, and makes regular trips between New York and Providence. The James Logan was a steam lighter about 109 feet long and had on board a cargo of 1,247 bundles of wire rods weighing 98,913 gross tons. On the day in question, and at about 5:22 p. m. the Lexington left her berth at Pier 39, New York, on her trip to Providence. The weather was fair, tide ebb, and the wind was light. Her master was in the pilot house, with the first and second pilots and two quarter masters. A competent lookout was stationed on the bow and regulation lights were set and burning brightly. On her way down the river she kept about 1,000 feet off the New York piers. When she was just above Franklin street she exchanged signals of two blasts with the tug New York Central No. 27, which had a car float made fast on each side and came out from the side of Pier No. 23, Franklin street. The Lexington slowed, and then stopped her engines, for No. 27 to cross her bow.

When No. 27's starboard car float had cleared the Lexington's bow, the Lexington observed a little on her port bow, nearly head and head, the red light and staff light of the Logan, about 1,500 feet down stream, and blew a signal of one blast, and ported her helm. The Logan crossed the Lexington's one blast with two blasts. The Lexington slowed her engines, repeated her signal of one blast, and hard aported her helm. The Logan again crossed the Lexington's one blast with two blasts, and the Lexington immediately reversed her engines full speed and sounded three blasts of her whistle, indicating that her engines were going full speed astern. The Logan sheered to port across the Lexington's bow, closing in her red light, and opening up her green. The Lexington's stem struck the Logan's starboard side, a little forward of amidships, cutting into the Logan below the water line, so that she sank. The Lexington stood by and offered assistance, but the crew of the Logan was taken off by the tug Cornelius Van Cott.

At the time of the collision the Lexington was headed diagonally downstream toward the ferry slip of the Central Railroad of New Jersey on the Jersey side, and the Logan was headed diagonally upstream toward the Lackawanna or Erie ferry slip on the New Jersey side. The collision occurred at 5:33 p. m., Lexington's time. The Lexington had been making about 8 miles through the water, but by reversing she got off her headway, so that she was going only with the tide at the time of collision. The Logan, which had been making about 8 miles through the water, at no time backed her engines, and was going at that speed when the two vessels came together.

The Logan left Communipaw, Jersey City, bound for Pier 56, North

River, and took a course across the river towards the New York shore. Her original story, it appears in the libel, was that when about opposite Pier 19 a tug with a car float crossed her bow, coming from the New York shore; that over the car float she saw the range lights of the Lexington; that as soon as the car float cleared she saw the Lexington's green light; that the Lexington blew the Logan two whistles, which the Logan answered with two and starboarded; that, when about 300 or 400 feet off, the Lexington sheered to starboard, showing both lights; that the Logan repeated her two whistles, which the Lexington answered with two, and followed a moment later with one, whereupon the engines of the Logan were stopped, but the Lexington's stem struck the Logan's starboard side, a little forward of amidships causing an immediate sinking. The master of the Logan admitted that, when the Logan opened up to the Lexington, the Logan was showing the Lexington her red light.

The Logan's story involves, as the court below pointed out, the remarkable assertion that the Lexington not only did the wrong thing, but said by her whistles that she would do the right thing, which right thing she herself proposed by blowing the first two-blast signal, and then instantly did exactly the opposite thing, and wantonly ran down the Logan. The story is not credible, and we are unable to accept it. We do not believe that the Lexington blew a two-blast signal. The captain of the Lexington denies the story, and he is fully corroborated. The Logan's story is outside the bounds of any possible credence, and the testimony of some of the Logan's witnesses seems to us ridiculous.

It is not necessary to review in this opinion the testimony in detail. That was very carefully done in the court below, and we concur fully in the conclusions which were reached respecting it.

The decree is affirmed, with costs.

GRAY v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. July 6, 1920.)

No. 2538.

1. **Disorderly house ⇐16—Evidence of general reputation admissible.**
In a prosecution for keeping a bawdyhouse within the prescribed distance from a military camp, testimony that the place had the general reputation of being a bawdyhouse *held* admissible.

2. **Criminal law ⇐789(2)—Instructions as to reasonable doubt approved.**
Instructions explaining reasonable doubt *held* not erroneous.

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

Criminal prosecution by the United States against Anna Gray. Judgment of conviction, and defendant brings error. Affirmed.

J. Washington Logue and John R. K. Scott, both of Philadelphia, Pa., for plaintiff in error.

Robert J. Sterrett and Charles D. McAvoy, both of Philadelphia, Pa., for the United States.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and ORR, District Judge.

BUFFINGTON, Circuit Judge. The defendant was convicted in the court below of keeping a bawdyhouse within 10 miles of a military camp, in violation of orders of the Secretary of War issued in pursuance of section 13 of the Act of May 18, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2019b). We have examined the proofs, and we feel they sustain the verdict.

[1] Criticism is made of certain language of the judge's charge quoted in the margin,[1] bearing on hearsay evidence as to the defendant's house having the reputation of being a bawdyhouse. Clearly, under the authorities, the judge was warranted in so holding. Commonwealth v. Sarves, 17 Pa. Super. Ct. 407; Commonwealth v. Murr, 7 Pa. Super. Ct. 391.

[2] Further complaint is made of his instruction as to reasonable doubt. We think the language of the judge, which is printed in the margin,[2] was well considered and clearly and properly stated, and it

[1] "First, as to the character of this house: Ordinarily, as you all know, hearsay evidence is not admitted in the trial of cases. It is not considered reliable evidence, for the reason among others, that the best evidence, as we call it, of whether a thing is true or is not true is not whether somebody or many people say it is true or is not true; but it is the testimony of the person who knows the fact from which the existence of the offense may be determined. But upon the question as to whether or not a given place is maintained and kept going as a bawdyhouse, there is an exception to that rule, and you may hear and consider and be convinced, if it otherwise satisfies your judgments, by evidence of that kind, although it is hearsay evidence. In other words, you may establish the existence of the fact of there being such a place by the other fact that it has the general reputation of being a house of that character. That is evidence from which you may be satisfied that the house was that description of house. That exception to the general rule is partly due to the exigencies of the case. The law recognizes that you cannot get first-hand evidence of the character of a house of that kind, because you cannot compel the proprietor of it to confess that it is a house of that character; neither can you compel, nor can you expect to be able to get, the frequenters of that house to come here and say what was going on in that house within their knowledge. As sensible men you can understand that difficulty. If you were required to have flat first-hand testimony, as I will call it, of what is going on in houses of this kind, you never could get legal evidence of its existence. Therefore the law permits, in cases of this kind, evidence to go to the jury of the reputation of the house, and that means that the house may have a reputation, precisely as a man has a reputation. He may have the reputation of being a good man or a bad man, a wise man or a foolish man, an honest man or a dishonest man, and you can infer what he really is from the evidence of what his real character is that you have in his reputation."

[2] "Now, you want to know what is a reasonable doubt within the meaning of the law. What does the law mean by that? The best idea that you can get of it, aside from any formal stereotyped definition, is this: We all know we have beliefs or convictions, or we reach conclusions; we have judgments about certain things, and those convictions, those beliefs, those conclusions,

helpfully aided the jury in arriving at its verdict. Complaint is also made that the court did not confine itself to a categorical affirmance of that part of the defendant's fourth point that, where there were "two constructions, or two conclusions, either of innocence or guilt, the jury must acquit," but, after affirming, went on to illustrate to the jury what the point meant. We find nothing in the explanation which in any way minimized or detracted from the affirmance of the point which the judge gave, and therefore what additional remarks were made in no way prejudiced the defendant's case.

Finding no error in the record, and feeling the defendant was properly convicted and sentenced for her part in aiding in debauching men in military camps, the record is remitted to the court below to enforce its sentence.

In re C. JUTTE & CO.

Appeal of GRIBBLE et al.

(Circuit Court of Appeals, Third Circuit. July 8, 1920.)

No. 2566.

Bankruptcy ⇐72(1)—Corporation held not subject to involuntary adjudication; "engaged principally in mining and mercantile pursuits."

A corporation chartered, inter alia, for mining and dealing in coal, and which for a time engaged in such business, but which for more than two years had neither mined nor purchased coal, but was engaged solely in transporting coal for others, *held* not subject to adjudication as an involuntary bankrupt, under Bankruptcy Act, § 4b, as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797, as a corporation "engaged principally in * * * mining or mercantile pursuits."

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

In the matter of C. Jutte & Co., alleged bankrupt, E. B. Gribble and

those judgments, vary in strength. Sometimes your conviction is so strong that you feel justified in saying, 'Why, that is the truth of this case, and I am absolutely sure of it.' That is your state of mind. Understand, you may be wrong. There is always the possibility of error in human affairs. There is always a theoretical doubt about the correctness of any conclusion to which you come. No matter how sure you may be in your minds, there is always the possibility, at least a theoretical possibility, that you may be wrong. The law does not mean that kind of a doubt, or that kind of a possibility. The appeal is to your own state of mind. How do you feel about it? Do you feel that strength of conviction, so that you are justified in saying to yourselves, 'Now, I think that is right; and I have no reasonable doubt about it in my mind.' You catch the point. Bear in mind, it is not mere doubt, as I have said—not only the mere theoretical doubt to which I have referred, and the law does not say merely a doubt, but it is a reasonable doubt. If it is reasonable, it is founded upon something, and if the question is raised as to there being a reasonable doubt, you ask the question of yourself, 'What reason is there to doubt? Why should any reasonable man have a doubt about the correctness of the conclusion to which he may come?' If you are able to say that you have that degree of assurance that you are right, a feeling of that strength that you are right, that is the degree of the conviction of the truth and correctness of the conclusion reached which the law requires."

another appeal from a decree dismissing an involuntary petition. Affirmed.

See, also, 258 Fed. 422, 169 C. C. A. 438.

A. Devoe P. Miller, of Pittsburgh, Pa. (George D. Wick and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., of counsel), for appellants.

Robert J. Dodds, of Pittsburgh, Pa., for appellee.

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

PER CURIAM. The 1903 amendment extended the bankrupt law to corporations "engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits," and this case turns on the question of fact whether C. Jutte & Co., alleged bankrupt, a Pennsylvania corporation, was engaged principally in mining and trading in coal. If it was so engaged, then the decree below dismissing the petition in bankruptcy, based on a finding by the court that it was not so engaged, was in error, and should be revised. The court below, in an opinion the pertinent parts of which are printed in the margin,[1] dis-

[1] "The corporation in this case resists the motion for adjudication, because it claims to have been engaged principally in the transportation of coal for other parties, and not engaged principally in mining and trading in coal, as averred in the involuntary petition.

"The charter of the corporation recites that said corporation 'is formed for the purpose of mining coal, and the manufacture of coke therefrom, with the right to mine, manufacture, sell, or dispose of either in crude or manufactured form, such fire clay and other minerals as may be incidentally developed, and the transaction of such other business as may be necessary to properly carry out the objects and purposes of the company.' The corporation began business in 1901, and continued in business, so far as appears, until the involuntary petition was filed. The evidence shows that the business carried on by it in its early history was principally that of mining coal, in addition to which it was engaged in the business of transporting coal for others. The greater volume of its business at the start was the mining of coal; whereas for a period of over two years prior to the filing of the petition its business was wholly that of a transportation company. Its receipts from the transportation business increased from $20,181.72 in 1902, to $174,246.74 in 1905, for which year its receipts from transporting coal for others were at the maximum. After 1904 the company had no receipts from coal mined. After 1905 the company had no receipts from coal purchased and sold. Its receipts from transportation were $116,997.35 in 1906, $134,789.10 in 1907, and $4,198.99 in that portion of 1908 prior to the filing of the involuntary petition. For the first three years its gross receipts from mining coal and from transporting coal for others was $248,968.63, while the gross receipts from the purchase and sale of coal during the same time were $191,948.07, which included the cost of towing the 95,353 tons represented by such receipts to the points of sale from the mines where purchased. Information as to such cost does not appear to have been given, except that in the case of coal sold at New Orleans it amounts to nearly $1 per ton. As the evidence fairly shows that much of said coal was towed for long distances, to points such as Louisville and New Orleans, such gross receipts should be greatly diminished with a result in favor of the equipment for transportation. During the next three years, beginning with 1904, the evidence shows that the gross receipts from the business of transporting coal for others were $450,491.06, while the gross receipts from coal mined and from coal purchased and sold during the same period were only $247,484.86. The number of tons purchased and sold during this period was 119,300, and the cost of towing

cussed the facts in detail, and we avoid needless restatement by reference to its opinion. An examination of the proofs leads us to the same conclusion as the court below.

We therefore adopt its views, and affirm the decree based on such conclusion.

LOOSCHEN LAND & BUILDING CO. et al. v. MILSON.

In re LOOSCHEN PIANO CASE CO.

(Circuit Court of Appeals, Third Circuit. July 3, 1920.)

No. 2520.

Bankruptcy ⇐288(1)—Court without summary jurisdiction to determine adverse claim.

A court of bankruptcy *held* without summary jurisdiction to determine that the property and capital stock of a second corporation was the property of the bankrupt corporation, and to order them turned over to its trustee over objection of the corporation and its stockholders.

Petition for Review from the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

In the matter of the Looschen Piano Case Company, bankrupt; Thomas H. Milson, trustee. From an order of the District Court, the Looschen Land & Building Company and others appeal. Reversed.

See, also, 259 Fed. 931; 261 Fed. 93.

William B. Gourley and Albert Comstock, both of Paterson, N. J., for appellants.

George D. Hendrickson, of Jersey City, N. J., and Horton & Tilt, of Paterson, N. J., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and ORR, District Judge.

the same was included in the gross receipts last mentioned, which must be considered at least as giving volume to the general transportation business of the company. In 1904 there was no mining carried on by the corporation after May 15th, prior to which there had been mined in that year 10,413 tons only, from which the gross receipts were $9,003.60. The involuntary petition was filed April 6, 1908. Prior to that date, for almost four years, therefore, no mining was carried on by the corporation, and for two and one-quarter years the corporation had not sold purchased coal. Yet the corporation during those periods was engaged actively in transporting coal for others and was receiving large returns therefrom. * * *

"It was first by the amendment of 1903 that the provisions of the Bankruptcy Law were extended to corporations engaged principally in mining. This corporation, prior to the amendment of 1903, was exempt from the provisions of the Bankruptcy Law. By ceasing to be engaged in the mining pursuit after the amendment of 1903 was passed and engaging principally in the business of transportation it seems to have remained still in the exempt class. * * * Believing that the susceptibility of a corporation to bankruptcy depends on the business it actually transacts, and not on the business it is empowered by charter to do, as seems to be the result of the reasoning in the cases of In re New York and Westchester Water Co. (D. C.) 98 Fed. 711, affirmed by the Court of Appeals of the Second Circuit, in Re Morris, 102 Fed. 1004, 43 C. C. A. 91, and Kingston Realty Co., 160 Fed. 445, 87 C. C. A. 406, the court must find that the corporation in this case should not be adjudicated a bankrupt."

BUFFINGTON, Circuit Judge. In the court below the Looschen Piano Case Company, a corporation of New Jersey, was adjudged bankrupt, and Thomas H. Milson was in due course elected trustee. Thereafter said trustee presented to the court below a petition, alleging that the property, assets, and effects owned by the Looschen Land & Building Company, another corporation, which was not in bankruptcy, was in fact the property of the bankrupt company, and praying that such property of the Land & Building Company should be turned over to the petitioner as trustee of the estate of the Looschen Piano Case Company, and that the holders of the stock of the Land & Building Company be required to deliver to the trustee of the bankrupt corporation their stock certificates in the Land & Building Company.

To this petition the Land & Building Company and the several stockholders individually answered, denying the ownership by the bankrupt company of the property of the Land & Building Company, alleging the bankrupt had never owned such property; that it had never conveyed it to the Land & Building Company, but that the latter company had title to and owned the real estate; that it was leased to the bankrupt and other tenants on rental; that none of the stock of the Land & Building Company was owned or controlled by the bankrupt corporation. By their answer, which was special, and their petition to dismiss, the respondents challenged the right of the court to proceed by petition as a step in the bankruptcy before it, and asserted, and have since continued to assert, a right to have the claim in question adjudicated in an independent plenary suit.

Over this protest, the case was proceeded with, testimony was taken before the referee, findings made by him, and a decree entered directing the Land & Building Company to turn over all its property, accounts, and papers to the trustee, to execute deeds and assignments to vest the fee of its real estate in the bankrupt's trustee, and the several stockholders of the Land & Building Company ordered to transfer their stock in such company to the trustee. On consideration of this order by the District Court, it was affirmed. Thereupon this petition to revise was taken to this court.

The case has had our careful consideration, and we have reached the conclusion that the situation, readily distinguishable from that in Re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530, was one where the respondents were entitled to a plenary suit for the determination of their rights. In so holding, we deem it proper to say that we are in no way challenging or qualifying the right of the bankrupt court to proceed by its own incidental bankruptcy process in the many claims made in bankrupt estates, where the property of, or what at one time was the property of, the bankrupt, is found to be in the hands of third parties. The extent to which this power is exercised is well illustrated in Re Rieger, Kapner & Altmark (D. C.) 157 Fed. 609, where the commission and selling partnership, which was in bankruptcy, had as part of its assets a manufacturing corporation, and was the substantial owner of its stock. There the receivership of the partnership bankruptcy was extended to this subsidiary corporation, to whose property or substantial stock there was no other claimant.

But the present case has elements different from that case, and we do not regard it as decisive of the state of facts here involved. The facts and situation of the present case are such as in our judgment made the case one where a plenary action was the proper remedy. As such action will no doubt be brought, we deem it proper to abstain from any present discussion of the facts, and upon them, and as to whether any error in point of fact was committed by the referee or the court below in deciding the case, we express no present opinion. Having decided the jurisdictional question before us, and held the case was one for a plenary action, we leave the issue to that trial, unhampered by any present views.

The cause will therefore be remanded to the court below for further action in accord with this opinion.

CONKLIN v. GUARANTY TRUST CO. OF NEW YORK.

In re MORTON TRUCK & TRACTOR CO.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 236.

Banks and banking ⇐154(5)—Allegation of general deposit not supported by proof of special deposit.

An action by a trustee in bankruptcy against a bank to recover the balance of what was alleged to be a general deposit made by bankrupt, subject to its check, *held* not sustained by evidence that the deposit was special, and withdrawals therefrom were to be made only by checks countersigned by a third party.

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

Action at law by Job J. Conklin, trustee in bankruptcy of the Morton Truck & Tractor Company, against the Guaranty Trust Company of New York. Judgment for defendant, and plaintiff brings error. Affirmed.

The defendant here and below is a well-known banking company, and was sued by the plaintiff to recover the undrawn balance of a deposit account held by the Guaranty Company at the time of the bankruptcy of the Morton, etc., Company. The portion of the complaint material on this writ is the following allegation:

"That at divers times prior to its adjudication in bankruptcy as aforesaid the said Morton Truck & Tractor Company, Incorporated, delivered various sums of money to the defendant which it received on deposit and agreed to repay to the said Morton Truck & Tractor Company, Incorporated, or to its order on demand."

The answer need be considered no further than the first defense, which denied absolutely the above-quoted allegation.

Wilder, Ewen & Patterson, of New York City (John Ewen, of New York City, of counsel), for plaintiff in error.

Stetson, Jennings & Russell, of New York City (William C. Cannon

and Harold W. Bissell, both of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The simple theory of the complaint is that the bankrupt in whose shoes the plaintiff trustee stands, had a general deposit in defendant's bank, wherefore the relation between himself as trustee and the defendant was that of debtor and creditor, and further that the debt was (as specifically pleaded) payable on demand.

That under the general issue defendant could show that such was not the contract is well established. Milbank v. Jones, 141 N. Y. at page 345, 36 N. E. 388. Consequently it was properly proved that when the deposit account, to recover the balance of which this action was brought, was created, it was specifically agreed between the depositor, the bank, and a corporation known as Gaston, Williams & Wigmore, that said account should be drawn against only by checks signed by the depositor and countersigned by Gaston, Williams & Wigmore. It further appeared that this contract had never been varied, and the account had been diminished only by checks bearing the countersignature required, but that the plaintiff trustee had demanded and sued for the balance of account without ever endeavoring to get the countersignature or other consent of Gaston, Williams & Wigmore.

There is some testimony in the bill of exceptions tending to show why this countersignature was required. While we think the testimony satisfactorily evidences the fact that the Gaston signature or consent to withdraw was the only security or safeguard that the trust company had or has for a guaranty which it extended when the bankrupt corporation made a certain contract, we regard all this evidence as immaterial. The plaintiff has mistaken his remedy; his bankrupt never was a general depositor in the Guaranty Trust Company; it never had any right to withdraw said deposit on demand; its right was special, and such withdrawals could only be had with the consent of Gaston, Williams & Wigmore, evidenced by their countersignature or its equivalent.

Doubtless such countersignature or consent could not be withheld for unlawful or frivolous reasons, but that question was not and could not be presented in this litigation. The trial court was therefore right in refusing recovery; but it was a mistake to enter judgment in the form before us. It was directed that "defendant have judgment against the plaintiff upon all the issues in this action," etc. But plaintiff should not be precluded from bringing, if necessary, another suit, in which the position, right, interest, or duty of Gaston, Williams & Wigmore can be ascertained and adjudicated. In this action no such procedure was possible, and indeed plaintiff objected throughout the trial to all the evidence tending to explain why he could not recover in this suit, and why (perhaps) he ought to recover in another.

In view of the possibility, if not probability, of another trial or further proceedings in this matter, we may say that the Russian gov-

ernment has not had, and has not claimed, any interest in this deposit after it received the defendant's guaranty that the moneys would be applied to the expenses of manufacturing under a certain contract between the bankrupt and a Russian "purchasing commission." The foregoing is, of course, strictly limited to the record on this writ.

The judgment below is modified, so as to direct a dismissal of the complaint, but not on the merits, or words to that effect, and, as modified, affirmed, without costs in this court.

ROSEMARY MFG. CO. v. HALIFAX COTTON MILLS, Inc.

(Circuit Court of Appeals, Fourth Circuit. April 6, 1920.)

No. 1755.

Equity ⇐297—Granting or refusing leave to file supplemental bill discretionary.

Granting or refusing leave to file a supplemental bill is usually in the discretion of the trial court, and where its order refusing such leave is not an adjudication of the merits, but leaves it open to complainant to obtain such adjudication by a new bill, it will not be reversed by the appellate court.

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

Suit by the Rosemary Manufacturing Company against the Halifax Cotton Mills, Incorporated. From an order refusing leave to file supplemental bill, complainant appeals. Affirmed.

W. W. Dodge, of Washington, D. C. (Robert Fletcher Rogers, of New York City, and Caskie & Caskie, of Lynchburg, Va., on the brief), for appellant.

Melville Church, of Washington, D. C., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. Plaintiff appeals from an order of the District Court refusing leave to file a supplemental bill. The suit is for infringement of reissued patent No. 12159; the claim being in substance for a combination of Jacquard mechanism with a power loom. The decree of the District Court holding the patent invalid was affirmed by this court (257 Fed. 321, 168 C. C. A. 405), for the reason that the claim was for any combination, and not for a specific combination invented by the patentee. Thereafter the plaintiff as owner of the patent entered a disclaimer of "combination, however effected," and of the three claims in the original patent, except when the combination embodied certain specific features set out; the combination actually worked out by Paterson, the patentee. Thereupon plaintiff filed his petition in this court, setting out the disclaimer, and asking, among other things, leave to file a supplemental bill in the District Court. In response to this petition the court by order gave permission to plaintiff to apply to the District Court for leave to file a

supplemental bill, and authorized the District Court to entertain the petition and permit the cause to go to trial thereon. The District Court refused the application for leave to file the supplemental bill, saying its refusal was "mainly because of its belief that the accomplishment of plaintiff's assignor [the patentee] does not show invention."

Granting or refusing leave to file a supplemental bill is usually in the discretion of the trial court, and not reversible on appeal, except for abuse of discretion. Mexican Central Railway Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; Berliner Gramophone Co. v. Seaman, 113 Fed. 750, 51 C. C. A. 440. The trial court will be considered to have abused its discretion when the appellate court is clear in its conviction that the action of the trial court was based on a material error of law, or will result in denial of a fair trial in a matter of consequence for which the moving party can have no adequate redress in another proceeding.

If the District Court in the case before us had refused to allow the supplemental bill to be filed solely on the ground that the device in the suit did not show invention, and the plaintiff had no other remedy, we think the order would be appealable. It is not appealable, because there is a clear implication in the order that there were other reasons for the refusal, and because the plaintiff has filed a new bill setting up the patent under which its rights may be as fully asserted as under the proposed supplemental bill. In this view the mere statement in the order that the main reason of the District Court for refusing the motion was that the patent as presented in the supplemental bill does not show invention is not an adjudication of that point or of the merits in any respect.

Affirmed.

DODGE SALES & ENGINEERING CO. et al. v. FIRST NAT. BANK OF PITTSTON et al.

In re EXETER MACH. WORKS.

(Circuit Court of Appeals, Third Circuit. June 28, 1920.)

No. 2514.

Bankruptcy ⇐467—Determining value of security held by creditor.

Finding of the District Court, confirming that of a referee fixing the value of collateral held by creditors of a bankrupt, for the purpose of determining the amount of their provable claims, affirmed.

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

In the matter of the Exeter Machine Works, bankrupt. The Dodge Sales & Engineering Company and others appeal from an order of the District Court, allowing claims of the First National Bank of Pittston and others. Affirmed.

Henry C. Quinby, of New York City (L. J. Luce, of New York City, of counsel), for appellants.

W. L. Pace and H. L. Mahon, both of Pittston, Pa., for appellee First Nat. Bank of Pittston.

Mulford Morris and A. L. Williams, both of Wilkes-Barre, Pa., for appellees Luzerne County Nat. Bank and others.

P. F. O'Neill, of Wilkes-Barre, Pa., for appellee Safe Deposit Bank of Pottsville.

Wm. W. Hall, of Pittston, Pa., for appellee People's Union Bank of Pittston.

B. W. Davis, of Wilkes-Barre, Pa., for appellee Deposit & Savings Bank of Kingston and another.

Chas. A. Shea, of Brookline, Mass., for appellee First Nat. Bank of Nanticoke.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. In the bankruptcy of the Exeter Machine Works and in the distribution of its assets it appeared that certain creditors held notes secured by collateral in the shape of second mortgage bonds of the company. Question having arisen as to the value of such collateral, and what credit should be given therefor, on proof of such claims, the court below referred the matter to the referee, who took testimony at great length and determined and reported the amount of such allowance in the several reports, audits, etc., in the case. Indeed, the whole controversy finally narrows down to a question of alleged error in the value to be given to these collateral bonds as credits.

While the court below held the case was not properly before it, because there was no petition to review, it nevertheless considered it on its merits, and on such consideration agreed with the referee. We have followed the same course, and assuming for present purposes the case is also properly before us, we have considered the case de novo, and find no ground warranting us in convicting the court below of error. We therefore limit ourselves to announcing our decision, without discussing the proofs and findings, which, as we have said, are set forth at length in the reports, audits, and orders in the record.

As a large sum of money is tied up by the pendency of this appeal, we direct the mandate be sent down without further delay to the court below for further proceedings.

BIG VEIN POCAHONTAS CO. v. MARYLAND CASUALTY CO.

(Circuit Court of Appeals, Fourth Circuit. April 21, 1920.)

No. 1785.

Principal and surety ⇐190(3)—Casualty company, which paid judgment, entitled to enforce it against insured for excess above policy.

That a casualty insurance company, which assumed the defense of an action against insured for death of an employé, refused a settlement of the claim for less than the sum finally recovered, *held* not to debar it from enforcing the judgment, which it had paid as surety in supersedeas bond against insured for the excess over the amount of its policy.

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

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke.

Suit in equity by the Big Vein Pocahontas Company against the Maryland Casualty Company. Decree for defendant, and complainant appeals. Affirmed.

Robert R. Carman, of Baltimore, Md. (Barnes Gillespie, of Tazewell, Va., and James T. Carter, of Baltimore, Md., on brief), for appellant.

D. Lawrence Groner, of Norfolk, Va., for appellee.

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

ROSE, District Judge. Below the plaintiff was appellant, and the defendant appellee. They will be so designated in this opinion. The former operated a coal mine; the latter writes employers' liability insurance. It insured the plaintiff to the amount of $2,500 against death claims, and undertook to defend at its own cost a suit therefor.

One Repass, while working in plaintiff's mine was killed. A suit followed. Defendant conducted the defense, and a judgment was rendered against plaintiff for $7,000. A writ of error to this court was sued out; defendant becoming surety on the supersedeas bond then given. The judgment below was affirmed. The defendant paid it, took an assignment of it, and undertook to force plaintiff to repay to it the excess over the $2,500 for which the defendant was bound by its policy.

Plaintiff thereupon filed this bill to compel defendant to enter the judgment paid and satisfied, on the ground that defendant, before the original suit was tried, knew that it was one which might well be lost, and, if it was, the judgment in all probability would exceed $2,500; that it had a chance to compromise the case for $3,000; that it attempted to coerce the plaintiff to contribute more than $500 of this sum, so that it would escape some part of its legal liability for $2,500. Upon the refusal of the plaintiff to submit to this unfair exaction, it declined the offer of settlement, and the subsequent judgment for $7,000 was the proximate result of its so doing. There is no suggestion of any lack of care, skill, or vigor in the defense that was made.

Plaintiff's case rests upon the assertion that there was an attempt to force it to bear some part of defendant's liability. The evidence fails to show that the defendant tried to do anything of the kind. It follows that the decree below, dismissing the bill, must be affirmed.

VERE v. BIANCHI et al.

(Circuit Court of Appeals, First Circuit. July 3, 1920.)

No. 1425.

Courts ⇐438—Federal District Court for Porto Rico held without jurisdiction in action by foreign subject; citizenship of defendants not appearing.

Under Jones Act March 2, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3803a et seq.), the federal District Court for Porto Rico is without jurisdiction of an action by citizen of France residing in Porto Rico against residents of the island; there being no allegation or proof that the parties on either side were citizens or subjects of a foreign state not domiciled in Porto Rico, or that they are citizens of a state, territory, or district of the United States not domiciled in Porto Rico.

In Error to the District Court of the United States for the District of Porto Rico; P. J. Hamilton, Judge.

Action by Charles Vere against Francisco Bianchi and others. Judgment for defendants, and plaintiff brings error. Judgment vacated, and case remanded to the District Court of the United States for Porto Rico, with directions to dismiss for want of jurisdiction.

Hamilton Rogers, of New York City (Willis Sweet and Miles M. Martin, both of San Juan, P. R., and Hugo Kohlmann and Henry A. Stickney, both of New York City, on the briefs), for plaintiff in error.

Benjamin F. Norris, of New York City (Cay. Colly Cuchi, of San Juan, P. R., and Phelan Beale, of New York City, on the brief), for defendants in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This action was brought May 28, 1917, in the District Court of the United States for Porto Rico. In the complaint it is alleged that the plaintiff is a citizen of the republic of France now residing in Porto Rico, and that the defendants are residents of Porto Rico. There are no allegations or proof that the parties on either side of the controversy are citizens or subjects of a foreign state or states not domiciled in Porto Rico, or that they are citizens of a state, territory, or district of the United States not domiciled in Porto Rico, and in the absence of such allegations or proof in actions brought since the enactment of the Jones Act on March 2, 1917 (39 Stat. at Large, 951, 965 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3803a et seq.]), the requisite diversity of citizenship to confer jurisdiction on the federal District Court for Porto Rico is wanting. Porto Rico Railway Light & Power Co. v. Diaz Mor, 253 U. S. ——, 40 Sup. Ct. 516, 64 L. Ed. ——, decided by the Supreme Court June 1, 1920.

The judgment of the District Court of the United States for Porto Rico is vacated, and the case is remanded to that court, with directions to dismiss the same for want of jurisdiction; the defendants in error to recover their costs in this court.

BURGESS BATTERY CO. v. SOLAR LIGHT CO. (HEINRICH ELECTRIC NOVELTY CO., Intervener).

(Circuit Court of Appeals, Second Circuit. March 3, 1920. On Motion for Rehearing, April 12, 1920.)

No. 161.

1. **Corporations ⇐616—In view of statute providing for settlement of affairs of dissolved corporation by directors, president was without power to convey property.**
   Under Act April 21, 1896 (P. L. N. J. p. 295), § 54, providing that on dissolution of a corporation its directors shall be trustees to settle its affairs, with power to sell and convey its property, where the charter of a corporation had been declared repealed by the Governor pursuant to statute, a subsequent assignment of a patent by its president, purporting to act in its behalf, *held* void, and the assignee *held* chargeable with notice of its invalidity.
2. **Patents ⇐202(2)—Assignee by unrecorded assignment entitled to show invalidity of subsequent assignment.**
   Where a corporation had sold and assigned a patent, but the assignment had not been recorded, the assignee, as equitable owner, *held* entitled to show that a subsequent assignment by its president after its dissolution was void.
3. **Patents ⇐328—774,749, for portable electric light, valid and infringed.**
   The Gill patent, No. 774,749, for a portable electric light, *held* not anticipated, valid, and infringed.

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

Suit by the Burgess Battery Company against the Solar Light Company, wherein the Heinrich Electric Novelty Company intervened. Decree for complainant, and defendant and intervener appeal. Modified, by directing decree for intervener.

William F. Nickel and Drury W. Cooper, both of New York City, for appellant Solar Light Co.

Wood, Cooke & Seitz, of New York City, for appellant intervener.

Pennie, Davis, Marvin & Edmonds, of New York City (Arba B. Marvin and W. B. Morton, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. [1] The first question which arises is as to title, viz. whether the patent belongs to the plaintiff Burgess Company, or to Heinrich Electric Novelty Company, which has been permitted to intervene.

November 15, 1904, letters patent 774,749, for a portable electric light, issued to Edwin R. Gill, assignor, to Electric Contract Company, a corporation of New Jersey. March 16, 1907, the Electric Contract Company assigned the patent to Gustav P. Heinrich. April 7 Heinrich assigned it to the Heinrich Electric Novelty Company. These two assignments were not recorded, and are therefore void as against any assignee from the company who was a bona fide purchaser without notice.

January 6, 1909, the Governor of New Jersey by proclamation (P. L. N. J. 1909, p. 557) in accordance with chapter 187, Laws of 1896, and chapter 259, Laws of 1905, declared the charter of the Electric Contract Company to be repealed. In 1909 Armstrong, who had been president of the company, paid its debts and became its only creditor. February 26, 1918, Armstrong, as president, assigned the patent to Edwin R. Gill. March 6, 1918, Gill assigned it to Warren D. House. March 9, 1918, House assigned it to the plaintiff, Burgess Battery Company.

March 4, 1919, the Burgess Battery Company filed this bill against the Solar Light Company for infringement. April 5, 1919, the Solar Light Company answered. July 3, 1919, the cause came on for trial, and the Heinrich Electric Novelty Company was allowed to intervene and claim ownership of the patent; the rights of the parties generally to be settled in this suit.

The District Judge said as to the assignment by Armstrong in the name of the Electric Contract Company:

"In my judgment, under Armstrong's testimony he had the full control of all the property of this concern. Now, of course, this was not property of the concern, because it had already been disposed of in any strict sense of the word. The power of disposition of any thing that belonged to the concern was really in Armstrong. He was the equitable owner of the property. He was the president; had been the president. As far as anybody had any authority, he had the authority to dispose of it in winding it up. It was within the power of the corporation. Even though it was defunct, it had something over which it had control. There was property right to it. It is true it is a wrongful act to sell it after it had been disposed of before, but that is a matter for the state to deal with; that is not a question that is to be considered in this connection, in my judgment. I do not think that the fact that the company had been proclaimed defunct, non-existing, would affect the prima facie right of the president in the winding up to dispose of it; at least not as to third persons, and at least not as against other third persons claiming rights. Prima facie possession rests in them. It may be subject to defeasance by the corporation, by the state; but I do not think the transaction is a nullity."

This amounts to saying that by paying the company's debts Armstrong became the equitable owner of the company's property. Assuming this to be so, he did not become owner of this patent, because it belonged to the Heinrich Novelty Company, and Armstrong at that time knew it. Paying the company's debts did not make him the company, or give him any authority to act for the company, which he did not otherwise have. When Armstrong made the assignment, the company, if it existed at all, existed only to be wound up for the benefit of creditors under section 54 of the act of New Jersey of April 21, 1896 (Session Laws, page 295), which reads:

"Upon the dissolution in any manner of any corporation the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and properties shall enable them; they shall have power to meet and act under the by-laws of the corporation and, under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, and may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of said property."

If Armstrong remained president of the company for 11 years after its charter was repealed, the directors also remained directors, and no reason appears why the statute should not have been complied with.

[2] It is insisted that only the company or its stockholders can object and that the Heinrich Company has no standing to do so. If the Electric Contract Company had any interest which was affected by the assignment to Gill, this would be so; but neither it nor its stockholders had any such interest. The Heinrich Company, which is injured, should be allowed to show, if it can, that Armstrong's assignment is invalid. To deny this right on the ground that the Electric Contract Company, which has no interest whatever, does not complain would be inequitable in the highest degree.

The president of the company has, as such, no right to sell the company's property. Cook on Corporations, § 716:

"*President—His Power to Contract for the Corporation.*—The president of a corporation has no power, by reason of his office alone, to buy, sell, or contract for the corporation, nor to control its property, funds, or management. His duty is merely to preside at meetings of the board of directors, and to perform only such other duties as the by-laws or resolution of the board of directors may expressly authorize. This is a rule established by the great weight of authority.

"The board of directors may of course expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other director. This question has frequently been before the courts, and many decisions have been rendered in regard to it. A large number of the cases are given in the notes below.

"The question seems to have arisen in many forms, and the great weight of authority holds that a president has no inherent power to represent or contract for the corporation. His duties are confined to presiding and to voting as a director. The fact, however, that he is almost always the corporate officer who is directed to sign the corporate contracts that have been authorized by the board of directors has led to an enlargement of his importance as a corporate officer. Hence the rule has arisen in New York that a contract, which apparently is a corporate contract, being signed by the president, is presumed to be a corporate contract until the want of authority of the president is shown by the corporation. * * *"

Accordingly, when the Burgess Company took title to the patent, depending on Armstrong's assignment as president of record in the Patent Office, it took the risk of his authority to make it. There was nothing whatever to show such authority, except his own statement to that effect in the acknowledgment. We think the assignment was a nullity.

But, if the assignment were to be held merely voidable, it seems to us that the Burgess Company was put upon inquiry so as not to be without notice. These facts were disclosed by Gill to Mr. Marvin, who was attorney for both House and the plaintiff, viz.: That Armstrong said he owned the patent, that no papers could be found, that there was no corporate seal to put on the assignment, and that the company had been out of business a long time. The least examination would have shown that Armstrong, as president, had no authority to make the assignment, because there had been no meetings of the board of

directors since 1907, and there could have been no resolution authorizing him to make the assignment.

[3] Coming to the merits: Only claim 4 is in issue, which reads:

"In a portable electric light, a lamp-supporting head having a concave reflecting top and a lamp socket therein a removable thrust block fitting within said head and against said reflecting top, an aperture in said block, a lamp fitting in said socket and into said aperture, and a spring carried by said block adapted to press against one terminal of said lamp."

The specification (lines 75–90) explains the purpose, as follows:

"As shown in Fig. 1, when the spring *17* has been flattened to a certain point by pushing home the battery cells, the edge of the top cell comes against the under side of the block *15*, and further compression of the spring *17* is thus prevented. This provision accomplishes two objects. It prevents the possibly excessive compression of the spring *17* from injuring the battery cells by pushing in the carbon electrode, and it prevents the full pressure of the confined cells from being brought under circumstances of excessive strain upon the lamp terminal."

We agree with the District Judge that Gill did make an invention, viz. a shock absorber for portable electric lights by means of a thrust block around the fragile lamp, which would transmit any shock to the casing, and so save the lamp. This was not anticipated by any patent cited. The two chiefly relied upon by the plaintiff are Vetter and Fenner. In Vetter any shock would be transmitted to a helical spring, and from it, if violent enough, directly to the bottom of the lamp; there being no thrust block to transmit the shock to the casing. Fenner does not carry the batteries in a cylinder with the lamp, and neither the specification nor claims describes a shock absorber device.

As to infringement, the defendant accomplishes exactly the same results with differences which are equivalents. It has a helical spring, instead of the flat spring. Its lamp-supporting head is in two portions, instead of one, held in place by the lens and its attaching rings; no new result being obtained. It has in place of the patentee's block a metal cylinder, which transmits any shock to the casing around the lamp, just as the patentee's thrust block does.

The court below is directed to enter a decree in favor of the intervener, the Heinrich Electric Novelty Company, instead of the Burgess Battery Company, and, as so modified, the decree is affirmed.

On Motion for Rehearing.

PER CURIAM. The court below found that the patent was valid and infringed, and that the Burgess Battery Company, plaintiff, was the owner of it. We affirmed the decree, except as to title, holding the patent belonged to the Heinrich Electric Novelty Company, and not to the plaintiff.

At the trial all parties agreed that the Heinrich Company might intervene. Regular practice required that it should define the purposes of its intervention, either in a bill or in an answer. This, however, was waived, and the order for intervention entered upon consent of the parties in the course of the trial prescribed that the order should "have the same force as if the said Heinrich Electric Novelty Company

upon such intervention had served upon the parties hereto an answer or other pleading herein." Now, either an answer or a bill filed by the intervener would certainly have been to the effect that the patent was valid and infringed as against the defendant, and that the intervener was the owner of the patent as against the plaintiff. We must give to these informal proceedings the effect which the parties intended them to have. That effect, we think, was that all questions between them should be settled in one suit. As evidence of this on the part of the defendant, Solar Light Company, it may be noted that it offered in evidence the assignments of the patent to the intervener, and its brief in this court concluded with language which shows that it expected all disputes to be settled in this cause:

"If the patent were valid, and if the defendant has infringed it, it would nevertheless be entitled to have this suit dismissed upon the ground of a manifest defect in title. Notwithstanding that defect, however, since both the parties in question have joined in the attack upon the defendant, it is promotive of justice to have the merits of the case, which are plain, adjudicated in favor of the defendant, so that it may not hereafter be subjected to a second suit by other claimants under the patent. This course was taken in this court in a similar situation, in Vose v. U. S. Metal Products Co., 219 Fed. 747, at page 750, 135 C. C. A. 445."

The court below is directed to enter a decree that the patent is valid and infringed by the defendant, and that the Heinrich Electric Novelty Company is the owner of it, entitled to an interlocutory decree for an injunction and accounting against the defendant, with half costs of both courts to the defendant against the plaintiff, the Burgess Company.

Motion denied.

JENNISON-WRIGHT CO. v. HEMPY.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1920.)

No. 3319.

1. **Patents ⇐168(2)—Acquiescence in rejection of claim immaterial, unless claim issued includes defendant's device.**
   Under usual conditions, acquiescence in the rejection of a claim by the Patent Office is of no importance, unless the court is called on to determine whether the claim as issued has a scope sufficiently broad to include defendant's somewhat variant device.

2. **Patents ⇐328—Claim for wooden pavement void for want of invention.**
   The Jennison patent, No. 1,061,296, for a wooden pavement, consisting of wood paving blocks with a spacing projection extending in the direction of the grain along the vertical side of the block, *held* void for want of invention; such spacing projection having been used on clay and brick paving blocks, and the only specific advantages of the patentee's pavement being those inherent in the material selected.

3. **Patents ⇐21—Change of material not patentable.**
   A mere change of material is not patentable.

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Suit by the Jennison-Wright Company against George L. Hempy. From a decree dismissing the bill, plaintiff appeals. Affirmed.

A. M. Allen, of Cincinnati, Ohio, and Ralph Emery, of Toledo, Ohio, for appellant.

Edward Rector, of Chicago, Ill., for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. The appellant, as owner of the patent in suit, appeals from a decree dismissing an infringement bill on patent No. 1,061,296, granted to Jennison May 13, 1913, for a wooden pavement. The second claim sufficiently indicates the subject-matter involved. It is:

"The combination with a wood paving block, provided with an integral wood projection extending in the direction of the grain of the block along a vertical side of the block, of a second block spaced from the first by the said projection."

If, as is claimed, the defendant uses the identical construction, the validity of the patent is the only thing involved. A wooden block pavement should be laid with the end of the grain at the top, and properly spaced to permit filling the interstices; each block should also be capable of expansion without distorting or "buckling" the pavement. Plaintiff's "integral wood projection" or rib, running with the grain, serves as an index, facilitating laying the block with the grain vertical, and also serves as a spacer in the laying operation. It is also said that this rib will crush, with relative ease, in case of block expansion, thereby permitting adjacent blocks to fill the intervening space, and that, in spite of such crushing, the rib and the adjacent portions of the block will have sufficient elasticity to resume in part their original shape when contraction later occurs. It is denied that these elements of usefulness exist in more than negligible form; but, for present purposes, we assume that they carry substantial utility.

[1] In his original application, Jennison asked for a claim on a paving block with a "crushable spacer." This being rejected upon reference to a brick of similar form with a similar rib or spacer, which the Patent Office considered crushable, he amended so as to claim a paving block with a "fibrous, crushable spacer." This was again rejected, both because he was attempting to describe his invention by adjectives, and because of the existence of wooden block pavements having a horizontal wooden strip interposed as a spacer between adjacent rows of blocks. He then formulated his claim as it was issued. It is evident that the specific form of spacer finally described in the issued claim is crushable in the sense in which Jennison uses the word, and is fibrous, and the case is therefore one where, having made a broad claim and then having accepted a narrower one, the patentee would not be permitted to expand his claim as issued, so as to have the broader scope which he once abandoned; but, since we assume that the defendant uses the exact and specific form to which the patentee limited himself, there is no occasion to resort to the rules of estoppel by Patent Office proceedings, or to place any dependence upon those rules in reaching a conclusion. Under all usual conditions, acquiescence in the rejection of a claim is of no importance, unless the

court is called upon to determine whether the claim, as issued, has a scope sufficiently broad to include defendant's somewhat variant device. Baltzley v. Spengler Co. (C. C. A. 2) 262 Fed. 423, 426, — C. C. A. —.

[2, 3] However, we do not find this Patent Office history wholly irrelevant. It emphasizes the fact that whatever special utility is attributable to the precise form and location of the spacing rib, as described in the claim and as compared with former known structures, is due to the inherent qualities of wood as compared with baked clay. There were earlier clay or brick paving blocks of substantially the same form. Wooden paving blocks were in common use; it was known that they should be set with the grain vertical; an integral spacing rib would naturally be made with the grain parallel with the grain of the block—indeed, it might be difficult to make it in any other way; and this made the rib vertical, just as were the spacing ribs of the clay block. Because the wooden block and the rib were fibrous, with corresponding grain, the rib would crush or sink into the block with comparative ease, and there would be a measure of elasticity tending to return the parts to their original shape. These things would not be true of the brick of similar shape; but these results come from the known qualities of wood. All the specific advantages which the patentee, at the end of his course in the Patent Office, found himself relying upon were merely those which were inherent in the selected material itself; and those qualities of wood were familiar to all. We think the case is a plain one for the application of the rule that a mere change of materials is not patentable; because, after all is said, it remains clear that Jennison did nothing else. There is rather close analogy to the facts involved in Brown v. District of Columbia, 130 U. S. 87, 9 Sup. Ct. 437, 32 L. Ed. 863, and in Pressed Steel Co. v. Brownell & Co. (C. C. A. 6) 123 Fed. 86, 59 C. C. A. 216; and the situation is practically parallel to that discussed by the Second Circuit Court of Appeals in N. Y. Belting & Packing Co. v. Sierer, 158 Fed. 819, 86 C. C. A. 79, where rubber tiles of smooth, rectangular form had been well known (as wooden paving blocks of that form had been), and tongue and groove tiles of a pottery material were also known, and the patentee made a rubber tile in the tongue and groove form of the old pottery material. This was held not to involve invention.

Appellant relies especially upon Frost Co. v. Cohn (C. C. A. 2) 119 Fed. 505, 56 C. C. A. 185. This may be easily distinguished. Clamping studs of the shape and for the purpose shown had been made of metal, and yet it was held to be invention to make one of the same shape out of rubber. If it had been old to make these studs out of rubber in other forms and shapes, the patent, clearly, would not have been sustained; but what impressed the court as deserving was the thought that rubber could be used at all in that association and for that purpose. To make the present case parallel, it would have to be supposed that wooden paving blocks had never been used at all, and that would put a very different aspect on the matter.

The decree is affirmed.

I. T. S. RUBBER CO. v. UNITED LACE & BRAID MFG. CO.

(District Court, D. Rhode Island. June 11, 1920.)

No. 111.

Patents ⇐328—Reissue 14,049, for rubber heel, valid and infringed.

The Tufford reissue patent, No. 14,049, for a resilient heel lift having its body portion of concavo-convex form on every line of cross-section, should be construed with reference to form and function of the structure shown. As so construed, claims 5, 6, and 7 *held* not anticipated, valid, and infringed.

In Equity. Suit by the I. T. S. Rubber Company against the United Lace & Braid Manufacturing Company. Decree for complainant.

Lyman & McDonnell, of Providence, R. I., Charles A. Brown, of Chicago, Ill., and F. O. Richey, of Elyria, Ohio, for plaintiff.

Oliver Mitchell and Joseph T. Brennan, both of Boston, Mass., for defendant.

BROWN, District Judge. The bill charges infringement of reissued letters patent No. 14,049, January 11, 1916, to John G. Tufford, for "resilient heel." Claims 5, 6, and 7 are in issue:

"5. A heel lift of substantially nonmetallic 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.

"6. A heel lift of substantially 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; said lift being provided with nail-receiving openings located near the center thereof.

"7. A heel lift of substantially resilient material comprising a body portion, the attaching face of which is concave and the tread face of which is convex on every line of cross-section and normally held in such form by its own inherent resiliency; the concave attaching face lying entirely below a plane passing through the rear upper edge and the breast corners of the lift, whereby to cause the entire margin of said lift to exert a uniform pressure on the heel of a shoe when said lift is positioned on the heel and the convex tread face thereof depressed to flatten said lift."

The defendant's heel is described in letters patent No. 1,266,578, May 21, 1918, to Gambino, assignor to defendant, for "rubber lift for boots and shoes."

The plaintiff states that the defendant's commercial heels are not in exact accordance with the Gambino patent, since the breast edge is arched, though shown straight in the Gambino patent.

The Tufford patent in suit has been sustained by the Circuit Court of Appeals of the Sixth Circuit. Fetzer & Spies Leather Co. v. I. T. S. Rubber Co., 260 Fed. 939; United States Rubber Co. v. I. T. S. Rubber Co., 260 Fed. 947. The first of these decisions approves and adopts, with some reservations, the opinion of Judge Westenhaver in the District Court.

Since the hearing in the present case counsel have presented a further decision of that court, dated March 2, 1920, in the case of

Elyria National Rubber Co. v. I. T. S. Rubber Co., 263 Fed. 979, reversing an order for preliminary injunction, and further considering the Tufford patent in suit.

The defense in the present case is based upon prior art publications, under Rev. Stats. U. S. § 4886 (Comp. St. § 9430).

The principal publications relating to what are termed "concavo-convex" heels are prior patents, Ferguson, 638,228, 1899; Nerger, 661,129, 1900; Wolf, 653,161, 1900; Corman, 745,793, 1903; Hale, 740,124, 1903.

The defendant states that neither the Wolf nor Corman patents were before the court in any previous case, and that, while the Hale patent was set up in the United States Rubber Co. Case, it was not noticed in the opinion. The Ferguson and Nerger patents, however, have received the most careful consideration of the courts of the Sixth Circuit throughout all the litigation. The Hale patent was cited by the examiner in the Patent Office.

The Circuit Court of Appeals for the First Circuit had before it plaintiff's patent for a mold in I. T. S. Rubber Co. v. Panther Rubber Co., 260 Fed. 934, 938, reversing the decree of the District Court, 253 Fed. 63.

There also has been other litigation, but in view of the full discussion in the cases above referred to it seems unnecessary to consider it.

It appears in evidence in the present case, as in former cases, that Tufford conceived the idea of constructing a spherical concavo-convex heel. He nailed a flat sheet of rubber to the top of a round or globular type of wooden newel post, and cut out and fashioned a heel lift, which, when free from the stress which held it to the wood, assumed the shape described in his specification in the words:

"Owing to the curvature of the concave attaching face of the lift, the rear upper edge and breast corners of said concave attaching face are disposed in a plane above the upper side edge and the breast edges of the lift."

The corresponding feature of Tufford's molds is pointed out in the opinion of the Circuit Court of Appeals in I. T. S. Rubber Co. v. Panther Rubber Co., 260 Fed. 934, 939:

"The edges of the opposing surfaces at every point are concavo-convex."

Tufford's adoption of the spherical form for a rubber lift, intended to be flattened and held flat to the heel, shows clearly his conception of utilizing the retractive force of his material to secure a firm attachment to the heel. He chose a form requiring great pressure to expand it to fit a flat surface, in order to utilize a proportionately great retractive force of the flattened arches of resilient material. The effort of the flattened resilient material to regain its normal shape was strongly exerted upon the edges of the heel at all points—at the breast edge as well as at the side edges—thus effectively sealing all the seams.

In defendant's brief it is said:

"The writers and Mr. Livermore entertain the opinion that the advance of Tufford, if any, was in the production of a spherical concavo-convex heel, a

peculiarity of which is that, when shaped to heel form, the sides and breast would be arched and a three-point first contact developed."

The claims in suit, when read as descriptive of such form, are not anticipated by any of the prior art publications upon which defendant relies.

In construing the claims of the patent we should bear in mind that they are not intended to describe merely shape or form, but a structure of resilient material as it appears before application to the performance of its function, and that performance of function is the patentee's main object. We should read the words of the claims primarily as descriptions of a mechanism rather than as descriptive of a peculiarity of shape, irrespective of the functions to be performed. As the specification shows clearly that the form and the resilient quality of the material are to co-operate in the performance of a definite mechanical function, after the described form has been distorted and flattened by nailing the lift to a heel, it is evident that a mere comparison of forms before attachment should not necessarily be conclusive in determining the question of infringement.

The plaintiff's and defendant's structures must be compared in respect to their similarity in mode of operation and performance of their intended functions.

A like comparison should be made of the prior art structures with those of plaintiff and defendant, rather than a mere comparison of form before application.

The words of the claims also should be read primarily as words of description of a mechanism, rather than as words of limitation to any special peculiarity of form, which is nonessential to the performance of the intended function. It would be a narrow construction of the claims to limit them to the feature of a three-point first contact, or strictly to a form which, like Tufford's, was a true section of a hollow sphere.

It cannot be believed that the claims were allowed by the Patent Office, after repeated rejections, merely because of the distinction of a three-point contact before the attachment of the lift. It is manifest that they were allowed because the patentee was able to establish both structural and functional differences between Tufford's lift and the prior art structures cited against him. The file wrapper shows that throughout the application proceedings the patentee insisted upon and emphasized functional differences rather than mere differences of shape.

The principles relating to the interpretation of claims, discussed in the opinion of Judge Putnam in the leading case of Reece Button-Hole Machine Co. v. Globe Button Hole Co., 61 Fed. 958, 10 C. C. A. 194, forbid us from construing these claims merely as descriptive of form. Winans v. Denmead, 56 U. S. (15 How.) 330, 14 L. Ed. 717.

The spherical form, with its three points higher than any others, was distinguishable from the prior art devices, in which all of the edges were in the same plane, as in Ferguson, or in which all edges but the breast edge were in the same plane, as in Nerger, not only by the three-point contact, but principally by the curvature of the face

described in the claims as a "concavo-convex form on every line of cross-section," and described in plaintiff's brief as "arched from the center in all directions towards the edge." When a face of this shape was flattened by a strong pressure, which also flattened the convex back, the retractive effort of the resilient material to regain its shape was exerted upon every part of the edge. The inward pull against all the outer edges was strong, and sufficient to hold the lift in position on the heel until it could be further secured by nailing. It could then be securely and permanently attached to the heel without the use of cement, an important practical advantage. The spherical form, which is perhaps best adapted to perform this function, is capable of considerable modification without destroying or substantially impairing Tufford's mode of operation.

Even if the form should be so modified as to bring all the edges into the same plane, while still retaining enough of the concavo-convex form on every line of cross-section to perform the function of sealing the breast edge as well as the side edges, the substance of the Tufford invention would still be employed. If the changes in the form which the lift assumes before attachment do not substantially effect the mode of operation during and after attachment, they should be regarded as nonessential changes.

The words "concavo-convex form on every line of cross-section" —i. e., longitudinal as well as lateral—relate to features essential to the performance of functions. The three-point first contact is, as defendant states, a peculiarity of the true spherical construction; but the pressure required to flatten the arched edges between these three points is comparatively slight, and the retractive effort of the material in an effort to regain the three-point form, seems of slight practical consequence in comparison with the performance of the function of sealing the edges by flattening the arches which radiate from the center in all directions towards the edges.

Even if the Gambino patent and the defendant's commercial heel dispense with the arches between Tufford's three points of first contact, they do not escape infringement thereby, if they adopt that feature of construction which is the operative mechanical feature which seals the breast edge as well as the side edges.

I do not recall that in the file wrapper proceedings the patentee insisted that the three-point first contact was in itself of functional consequence, or that the pressure required to bring these three points into the same plane, or the retractive effort resulting therefrom, was relied upon to seal the edges. It was said in the Patent Office, as in the specification:

"Owing to the curvature of the concave attaching face of the lift, the rear upper edge and breast corners of said concave attaching face are disposed in a plane above the upper side edges and the breast edges of the lift."

This descriptive statement of three extreme boundary points of the curved face I am unable to regard as a limitation, using that term in the sense that it is ordinarily used in the law of patents. The described concavo-convex form on every line of cross-section may still exist, though these boundary points are cut off. Obviously the inven-

tion is in what lies beneath the plane of these upper boundary points.

In United States Rubber Co. v. I. T. S. Rubber Co. (C. C. A.) 260 Fed. 947, the question of the construction of the claims in suit was regarded as "a serious question," but was decided in favor of the plaintiff's contention that the side edges are not a part of the face.

In considering whether the expression, occurring in the claims in suit, "the concave upper face lying entirely below a plane passing through the rear upper edge and breast corners of the lift," is broader than the expression used in claim 10, "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," each claim must be read in connection with the specifications and drawings, and we should not lose sight of the fact that in the specification (page 2, col. 2, lines 91–105) both of these expressions are used after the preceding words:

"By references to Figs. 2 and 4 of the drawings it will be seen," etc.

Both are descriptions of what is disclosed in Figs. 2 and 4, which is one thing, and not two different things. This shows, as it seems to me, that as used in the specification they are alternate descriptions of the same, and not of different, breadth.

The argument that through a comparison with claim 10 the claims in suit are to be broadened, and to be so read as to exclude the side edges from the face, seems to me artificial and unsatisfactory, and to require that we should give different meanings to phrases which the specification uses as alternative descriptions of the structure showing the drawings. It does not seem to me essential to make this distinction in order to preserve the substance of the invention which Tufford made.

The question of infringement in this case seems to be not a verbal question, but a substantial question. The main distinction from the prior art stated in the claims is in the words "concavo-convex on every line of cross-section," interpreted by reference to verbal descriptions and drawings of the special spherical form adopted by Tufford, with the addition of a further description of that special form by reference to the location of the face with reference to the plane of three points.

After reading the file wrapper there can be no doubt that Tufford throughout the proceedings insisted upon functions and operative effect rather than upon mere form as the substance of his invention.

I find no reason for holding him estopped from claiming that his patent is infringed by the adoption of his new mode of operation in a form changed only in features nonessential to the performance of function. With due respect to the opinion in U. S. Rubber Co. v. I. T. S. Rubber Co. (C. C. A.) 260 Fed. 947, 950, it does not seem to me necessary, in order to avoid the appropriation of the substance of Tufford's invention, to make a distinction in claims between the location of the upper face and the location of the upper edges. It seems to be sufficient to say that the claims in suit describe Tufford's embodiment of his invention and are infringed by any lift embodying the sub-

stance of that invention, though in nonessential particulars the form may be changed.

Tufford's structure seems to be distinguishable from the prior art, in that it relies upon the flattening of the longitudinal arch or arches of a spherical concavity, and upon the corresponding retractive action of his resilient material to seal the breast edge of the lift.

Nerger's central location of his nails or screws shows the extent to which he relied upon retractive action of a flattened arch of resilient material to seal the side edges; but he also seems to rely upon this central attachment by nails or screws to hold the breast edge of his lift in contact with the heel.

Hale's patent, No. 740,124, discloses the conception of forming a dish-shaped lift, by inserting in a cavity cut out from a flat piece of rubber, backed by canvas, "to limit the expansion of the rubber plate on the under side," a piece of leather larger than the cavity, in order to exert a side pressure in all directions, and thus to cause the surrounding material to curve or belly outwards. While this might give longitudinal arches, as well as lateral arches, so that, where the whole lift was flattened, the area of contact would be increased at the marginal edges, I find no sufficient disclosure of a conception of using the strong retractive force of flattened arches of resilient material to seal all the edges. His use of leather and canvas in his combination seems to indicate the contrary. The leather is to put pressure upon the rubber, and the canvas is to prevent expansion of the rubber plate on the under side, and the lift will be subjected, not only to these strains, but to the pressure necessary to flatten the lift. Hale's lift seems to be an impractical combination, involving a mode of operation substantially different from that of Tufford's heel, even if it can be described as concavo-convex on every line of cross-section before application to the heel.

In considering claim 7, due weight must be given to the expression "normally held in such form by its own inherent resiliency." Ferguson uses a spring plate to "assist in imparting the desired curvature to the rubber." Wolf's holding plate is an essential and dominant feature of his invention. Nerger uses a spring plate with lateral arms, which performs not merely the function of washers, but serves also as a spring clamp or bearing portion. Tufford's conception avoided the need for such devices, since by adopting the spherical form for a lift intended to be flattened, and to seal the edges through the effort of the resilient material to regain its normal form, he relied upon, and utilized, the retractive quality of his material to the best advantage. This, in my opinion, was a true inventive conception. It not only dispensed with impractical and detrimental features expensive and difficult to manufacture, but made a unitary structure which better utilized the inherent resiliency of the material to perform functions which prior inventors thought made metallic reinforcement desirable, if not necessary. It was a change which was, however, something more than the mere omission of metallic reinforcement. Tufford's change to the spherical form, whereby he increased the grabbing action of the edges all around the lift, must be regarded as an improvement over those

forms of rubber lifts which are merely concavo-convex in lateral cross-section. The use of such earlier forms of lifts, without reinforcing spring plates, but merely with washers of the ordinary type, would not, in my opinion, infringe the Tufford patent, nor embody the substance of Tufford's inventive conception.

In U. S. Rubber Co. v. I. T. S. Rubber Co. (C. C. A.) 260 Fed. 947, 950, the court said of so-called U. S. Co. lifts:

"We must therefore classify defendant's lifts with Tufford, rather than Nerger," finding in the infringing device a "central depression in 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."

A like comparison of the exhibits in the present case leads to the conclusion that in respect to the means for sealing the breast edge the defendant's lifts bear a closer resemblance to Tufford than to Nerger, or other devices of the prior art.

The defendant's showing of the prior art, as represented in the publications, does not, in my opinion, require us to hold the claims in suit void for noninvention, nor fully support its contention that its structure is derived from the prior art without infringement upon Nerger.

Though the structures involved in the case are simple, and their mode of operation not difficult to understand, the case presents questions of infringement by no means free from difficulty. If we treat the claims merely as verbal descriptions of form, and accept the defendant's contention that it "is charged only on shape claims," then there is great force in its argument that the defendant's lift, with edges all in the same plane, or so nearly so that only a very slight pressure, developing no retractive effect is required to flatten the breast edge, and with an attaching face of irregular form, with a central cavity and with flattened surfaces at different angles, is not concave at all. If, however, we read the words of the claims, in connection with the specification and drawings, as descriptive of an operative device designed to utilize the resiliency of flattened arches to exert pressure to seal all the edges, and in the light of the evidence that this was accomplished so effectually as to dispense with the use of cement and to greatly facilitate the attachment and adherence of the lift to the heel, and compare the thing claimed with the defendant's lift in respect to their substantial identity as operative devices, we must, I think, find infringement.

It appears that the defendant, in advertisements to the trade, has called its lift "true concavo-convex," and described its inner surface as "concave," and claimed for it the advantages of ease of attachment without cement, and tight fit of the edges, which are improvements which Tufford brought into the art.

I am of the opinion that claims 5, 6, and 7 of the Tufford patent in suit are valid and infringed, and a draft decree may be presented accordingly.

SCOTT & WILLIAMS, Inc., v. ARISTO HOSIERY CO., Inc.

(District Court, S. D. New York. May 4, 1920.)

1. **Patents ⊂=313—Invalidity must be clear on face of patent to warrant dismissal.**
   A motion to dismiss a bill for infringement on the ground that the patent is void on its face, if really arguable, must be denied.
2. **Patents ⊂=328—No. 1,233,714, for stockings, not void on its face.**
   The Scott patent, No. 1,233,714, for a seamless knit stocking having a structural variation of the knit fabric at the back resembling a seam in appearance, *held* not void on its face, either for want of invention or utility or for deception.
3. **Patents ⊂=123—For imitation construction not necessarily invalid as deceptive.**
   Where a patentee contributes a new construction, whereby an imitation is made, it cannot be presumed that the purpose of the imitation is to deceive, and indeed an imitation may be of great utility.

In Equity. Suit by Scott & Williams, Incorporated, against the Aristo Hosiery Company, Incorporated. On motion to dismiss bill. Denied.

Emery, Booth, Janney & Varney, of Boston, Mass. (F. L. Emery, of Boston, Mass., of counsel), for the motion.

Howson & Howson, of New York City (Charles Neave and Hubert Howson, both of New York City, of counsel), opposed.

MAYER, District Judge. The motion is to dismiss the bill on the ground that the patent (No. 1,233,714, granted to Scott on July 17, 1917) is void on its face. It is contended that the patent is void (1) for want of invention; (2) for lack of utility; (3) because deceptive on its face.

The specification reads in part:

"My invention relates to circular knit or seamless stockings having therein an imitation of some of the characteristic appearances of straight or flat-fashioned and seamed stockings. The improvements of recent years in the manufacture of circular knit seamless stockings have made them desirable articles of wear, but there still exists in the minds of some conservative purchasers a habit of choice in favor of the type of stocking having a seam at the back of the leg, which prejudice is not based upon any present advantage or merit in the seamed stockings, however great such advantage may have been at past times. Unthinking purchasers still depend upon superficial characteristics of the once superior sort of stocking to indicate to them a desirable article of purchase, without examining the stocking for the other structural features upon which a more intelligent choice might be based. Such persons usually prefer, when they can be induced to make a decision on their respective merits, that type of stocking having no seam at the back, which has manifest advantages as an article of wear. The existence of a large body of prejudice of this sort in the minds of the public unfairly militates against the sale of circular knit articles of hosiery. One purpose of my present invention is to provide in such hosiery an imitation of the superficial appearance of the stockings of the other type, so that circular knit stockings made according to my invention will not be unfairly associated in the minds of such purchasers with a crude and inferior class of goods, but may be taken upon their relative merit as garments. One of the appearances, the absence of which leads the uninformed public to believe the stocking is an inferior stocking, is a mark at the

back of the leg incidental to making on a flat-fashioning or straight machine, caused by the transfer of loops of one wale to loops of an adjacent wale. In the usual article these marks occur at the back of the leg above the ankle, on either side of the seam marking the back central line of the stocking. When finished for sale, such full-fashioned stockings are folded on the line of the seam, and the mark of these transfers is conspicuous and distinctive."

The claims are:

"1. A seamless stocking having therein at the back of the leg a structural variation of the knit fabric of which it is composed, imitating the narrowing marks occurring in seamed or other narrowed stockings.

"2. A seamless stocking having a tapered leg having the same number of needle wales therein throughout and separated structural marks occurring in the same needle wale on each side of and near the central back line of the stocking at the tapered portion only thereof.

"3. A seamless stocking having a tapered leg, a mock seam at the back of the leg, and separated marks imitating transferred narrowings at either side of the mock steam in said tapered portion.

"4. A seamless stocking having a tapered leg and tuck-stitch marks separated in the direction of the length of the stocking occurring in the same needle wale on each side of the central back line of the stocking at the tapered portion."

1. Want of Invention.

[1] A motion to dismiss on the face of letters patent is very much like a motion at law to dispose of a pleading because frivolous. If the motion is really arguable, it must be denied. In Mallinson v. Ryan (D. C.) 242 Fed. 951, the mere inspection of a design patent was all that was necessary. See, however, Bayley & Sons, Inc., v. Blumberg, 254 Fed. 696, 166 C. C. A. 194.

[2] The specification here sets forth, inter alia:

"At the back of the leg, and at the location of this taper, and preferably in the same needle wales, 4, lying a fixed distance from and on each side of the central back needle wale, 5, on which the stocking is folded when finished and ready for sale, I form during manufacture marks, 6, preferably separated as shown, of a different texture from the remainder of the fabric, as made, for instance, by transferring loops from one needle wale to an adjacent needle wale, or by making a drawstitch or group of drawstitches, or by a tuck stitch extending over two or more courses. I prefer the latter structure, which is illustrated in Fig. 2, etc. (lines 80–94)."

The foregoing talks of structure in terms of art, and therefore, whether claim 1, which refers to a "structural variation of the knit fabric," sets forth a claimed invention is a question of fact. Whether the patent is or is not for an aggregation cannot be surely gathered from the face of the patent itself. Beer v. Walbridge, 100 Fed. 465, 40 C. C. A. 496; Stillwell v. McPherson, 183 Fed. 586, 106 C. C. A. 354; Kimball v. Noesting, 262 Fed. 148, —— C. C. A. ——.

2. Want of Utility.

The bill of complaint alleges (1) extensive use; and (2) that defendant has "made, used, and sold the improvements described in and claimed in said letters patent." Further, it might well be that the seamless stocking here concerned is useful, both from the standpoint of economy in manufacture and comfort and convenience to the wearer. See, also, Magic Ruffle Co. Case, 2 Fish. Pat. Cas. 330, Fed. Cas. No. 8,948.

3. Deception.

[3] This point is linked to some extent with point 2, supra. Defendant's counsel have quite aptly contended that the patent discloses, not a mere imitation, but a new construction, whereby an imitation is made. A careful reading of the specification shows that one of the important objects sought to be attained is that—

"Circular knit stockings made according to my invention will not be * * * associated * * * with a crude and inferior class of goods, *but may be taken on their relative merits.*" (Italics mine.)

It cannot be assumed that the dealer will palm off the goods as having a seam when they are seamless. The argument, colloquially stated, must be assumed to be.

"Here is a seamless stocking, with an imitation of the seam to which you have been accustomed; but, from the standpoint of material, make, and wear, it is as good or better than the stocking with a seam."

If the dealer deceives by statement, or by some tricky method of sale, then he who is injured may have a cause of action. But where a patentee contributes a new construction, whereby an imitation is made, it cannot be presumed, at the threshold, that the purpose of the imitation is to deceive. Indeed, imitations may prove of great utility. They may serve the public just as acceptably and effectively as the real article at less cost.

A striking illustration is Oriental Tissue Co. v. Dejonge, 218 Fed. 170–173, 134 C. C. A. 50. No one is concerned if the gold leaf effect on the cover of a law book is accomplished by imitation gold leaf instead of real gold leaf. So, also, in Simplex v. Renfrew, 221 Fed. 637, 137 C. C. A. 361; Id., 250 Fed. 863, 163 C. C. A. 177, where the ingenious inventor devised a sample card which effectuated a substantial saving over the old sample method of "swatches" of goods. See, also, Denton v. Fulda, 225 Fed. 537, 140 C. C. A. 521; Proctor & Gamble v. Berlin, 256 Fed. 23, 167 C. C. A. 295.

I have not overlooked Rickard v. Du Bon, 103 Fed. 868, 43 C. C. A. 360, which, it seems to me, is quite distinguishable from the case at bar.

The motion is denied, with leave to defendant to answer within 20 days.

In re WELBORNE.

Claim of LITTHAUER.

(District Court, S. D. New York. April 24, 1920.)

1. **Bankruptcy ⟸330—Statement of claim under oath is prima facie proof of validity.**
   The statement under oath of a claim against a bankrupt makes a prima facie case, and if it conforms to the requirements of the statute and is not objected to proves the claim, and if objected to it still is prima facie proof of the validity of the claim.
2. **Bankruptcy ⟸330—Procedure on supplementary proof of claim.**
   Where a claim as filed was not sufficiently specific, and to save time the referee permitted claimant to supplement it by oral testimony, which supported the claim, such testimony will be regarded as written into the claim and as making a prima facie case.

In Bankruptcy. In the matter of Walter E. Welborne, doing business as Welborne & Co., bankrupt. On review of order of referee disallowing claim of Edward L. Litthauer. Reversed.

Archibald Palmer, of New York City (C. Edward Benoit, of New York City, of counsel), for claimant.

John L. Lyttle, of New York City, for bankrupt.

MAYER, District Judge. This is a review of an order of the referee disallowing Litthauer's claim. The procedure before the referee brings up an important question of practice.

Under date of March 12, 1919, Litthauer filed with the referee a claim for $1,875.65. Attached to the claim, and apparently as a part thereof, was the following in the nature of attempted detailed information:

"50 per cent. of profits made in sales by the above-named bankrupt to the Submarine Boat Company, Wright-Martin Airplane Company, New York Shipping Board, Federal Shipbuilding Company, Navy Department, in accordance with terms of agreement between the bankrupt and said Edward L. Litthauer, $1,875.65."

It will be noted that the claim does not set forth whether the agreement was written or oral, nor does it give any information as to the amount of profits upon each sale, nor the date of the sale. The proof of claim as filed was insufficient, and upon objection could have been properly disallowed.

The bankrupt offered a composition of 60 per cent. to his creditors, and that offer of composition was confirmed by order of this court. The result is that the bankrupt is necessarily interested in seeing that only just and proper claims are allowed against him.

His attorney moved for a bill of particulars, which the attorney for claimant did not furnish, and the failure so to do, so far as can be gleaned from the record, was because such was not the correct procedure. Thereupon the referee concluded that the particulars of the claim could be supplemented by the oral testimony of the bankrupt, and that such course was preferable to taking an adjournment

for the purpose of furnishing a bill of particulars. The claimant thereupon testified to an oral agreement with the bankrupt, which in substance and effect was that the bankrupt had agreed with claimant to give him 50 per cent. of the profits on sales made by him and to allow him $40 a week as expense account. It can readily be seen that in a case of this kind it is difficult for a claimant, without access to the books of the bankrupt, to prove what the profits on the sales were, and therefore to prove what 50 per cent. of said profits was.

The claimant testified that one Ennis, who was the manager of the bankrupt, gave him a memorandum, which is set forth in detail (at page 12 of the typewritten minutes), noting the profit on various sales, which profit aggregated $3,589.34. At an adjourned hearing the original claim was reduced by the claimant to $1,515.85.

Ennis was called by the claimant, but, owing to various objections to proffered testimony, not much light was thrown on the situation. The bankrupt's former attorney was also called, and his testimony was properly taken, because the transactions to which he referred were not solely between his client and himself, but in the presence of a third party, to wit, the claimant. He testified to certain conversations and transactions, which need not be referred to, but which showed at least that Litthauer had come into business contact with the bankrupt. At the conclusion of the testimony of Litthauer, Ennis, and the bankrupt's former attorney, a motion was made on behalf of the bankrupt to strike out all the testimony of Litthauer on the ground that it had not been connected. This motion was granted, and thereupon a motion was made to dismiss the proof of claim on the ground "that no contract whatever has been proven." This motion was also granted, and the claim dismissed.

[1] The proper procedure in respect of allowing or disallowing claims has long been settled in this district. In the case of In re Sumner (D. C.) 101 Fed. 224, Judge Thomas pointed out that the "statement under oath," referred to in section 57a of the Bankruptcy Act (Comp. St. § 9641), "is at once the claimant's pleading and his evidence, and makes for him a prima facie case." Collier states:

"A claim proven as required by the act should be received and filed by a referee receiving it, and amounts to a prima facie case, thus proving the debt for all purposes in the proceedings, unless objected to or continued for consideration. * * * Even if objected to, the sworn proof of claim is prima facie evidence of its validity. * * *" Collier on Bankruptcy (11th Ed.) p. 783.

Remington (2d Ed.) p. 594 et seq., is to the same effect. See, also, In re Shaw (D. C.) 109 Fed. 780; Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584; Matter of McIntyre & Co., 174 Fed. 627, 98 C. C. A. 381; In re United States Wireless Telegraph Co. (D. C.) 201 Fed. 445.

[2] In the case at bar, the orderly procedure would have been to require the claimant to amend his proof of claim to the extent necessary to conform with the Bankruptcy Act and rules; i. e., to make clear upon the face of the claim at least the nature of the agreement. As, however, the referee, in order to save time which might have

been lost by an adjournment, permitted the claimant to supplement the defects of the claim by oral testimony, this testimony will be regarded as written into the claim, and as now constituting the claimant's claim. As such, the claim in accordance with settled authority "amounts to a prima facie case." I do not need to determine how much in money the claimant has shown, because that will be a matter for consideration hereafter.

Upon the record before me it is impossible to understand upon what theory the claim was disallowed. Counsel for the bankrupt suggested in argument that the referee did not believe there was any agreement between the claimant and the bankrupt, and that this belief was due to the fact that there were some inconsistencies in the claimant's testimony. I am unable to find any serious inconsistencies in this testimony, and on the record as it now stands the claimant is entitled to something. The oral agreement which he testified he made with the bankrupt is the kind of agreement which business men frequently make with each other. The fact that claimant did not make a demand while the bankrupt was away, and during the 60 or 90 days period of credit upon which the goods were sold, is not at all strange. The case is very much as if a court refused to send a case to the jury, even though there was some evidence to support a plaintiff's claim. A judge or referee, as the trier of the facts, is only justified in discarding uncontested testimony, where that testimony is so unusual and extraordinary as to be manifestly inconsistent with truth. No such situation is presented by this record.

The claim is therefore sent back for further hearing, and the procedure will be as follows: The testimony already in will be accepted as prima facie evidence of the claim. The bankrupt may then offer such proof as he may be advised. The bankrupt may, of course, further examine Litthauer, Ennis, or Lamison as he may be advised, and each side may offer such evidence of persons or documents as it may be advised. The referee will then report upon the merits. He will satisfy himself as to whether the claimant has any claim, and, if so, for what amount.

In the circumstances, I think it will be advisable to send the matter to another referee, and to that end I designate Referee Olney to hear the claim in accordance with these instructions.

CUTLER v. CUTLER-HAMMER MFG. CO.

(District Court, D. Massachusetts. February 3, 1920.)

No. 1138.

Corporations ⇐642(4½)—Corporation held to have been doing business within state, notwithstanding claim that business belonged to subsidiary.

A foreign corporation, which had filed notice of withdrawal from business within the state, and created a subsidiary corporation of the same name to do business therein, but which conducted all its dealings with the local agent of the subsidiary corporation directly, and not through the officers of subsidiary, is present within that state and district, and may there be served with process, though on its books it recorded the business done with the agent as business of the subsidiary.

At Law. Action by Henry H. Cutler against the Cutler-Hammer Manufacturing Company. On plea in abatement. Plea adjudged bad, with leave to answer over.

James E. Young, of Boston, Mass., for plaintiff.

Choate, Hall & Stewart and Charles O. Pengra, all of Boston, Mass., for defendant.

MORTON, District Judge. The issue of fact tendered by the plea in abatement was by agreement of parties heard by the court on depositions and oral testimony. The decisive question is whether the defendant corporation was so present within this district as to be subject to suit here. It it was, service could be made upon it in the manner provided by the state statutes, and was so made.

The facts are as follows: The defendant is a Wisconsin corporation It is of substantial size, and manufactures a line of electrical goods which are sold pretty broadly throughout the country. It organized as a subsidiary a New York corporation of the same name—for I regard the use of the word "The" as part of the corporate name, and the difference between "Manufacturing" and "Mfg." as unsubstantial—to act as its selling agent in New York and New England. Up to the time when this was done, the defendant itself had maintained an office in Boston, and had filed the required power of attorney with the commissioner of corporations in Massachusetts. After the New York corporation was organized, the defendant revoked its own power of attorney, and the subsidiary filed one and complied with the Massachusetts requirements of foreign corporations doing business in this state. I see no reason to doubt that it was the intention to have the defendant corporation withdraw from business here, and to leave that business in charge of the New York corporation; and I see nothing fraudulent or improper in the plan, except, perhaps, the confusion likely to arise from the identity of names between the principal and the agent.

The real question is whether, in spite of an intention to the contrary, the defendant has in fact continued to do business here. At the time when the present action was begun the lease of the Boston

office was in the name of the New York corporation, and Mr. Foote, the manager of the office, was appointed by the New York corporation. He in turn selected the subordinate employés, about a dozen in number. Foote's salary was paid by the defendant, and so were all other expenses of the office. Some of the employés were paid by check direct from Milwaukee, and some by Foote with money sent from there. The stationery and supplies, except those bought locally, were furnished by the defendant. General direction and control of the office was exercised by the defendant's sales manager, Mr. Stevens, who gave instructions to Foote. The policy of the Boston office was determined by the defendant's directors. Except the appointment of Foote, there is no evidence of any act of control by the New York corporation over the Boston office. It was operated as if it were an office of the defendant. Foote reported all sales to the defendant, and remitted to it all collections which he received. Bills for goods made at the defendant's factory, and sold through the Boston office, were sent out by the defendant. Foote did not have authority to enter into contracts for the defendant, nor, so far as appears, for the New York corporation. His duty was to forward orders for acceptance. Nor did he have power to adjust claims.

There was kept at the Boston office a considerable stock of goods, from which Foote was authorized to make sales, and did make sales from time to time. The money so obtained was forwarded to the defendant. Foote also furnished men to do repair work, and the defendant rendered bills for such services on memorandum from Foote. In the advertising matter put out by the defendant, it referred to the Boston office as its office, and it made the same statement in letters which it sent to prospective customers. It is true, as the defendant says, that for present purposes its presence within this jurisdiction cannot be founded upon an estoppel, and that this case is not the same as one in which a party to a contract made here was endeavoring to bring suit. But where the facts concerning a business office leave it in doubt whether A. did business there, his statement that he did so may be very significant.

On the facts stated it would ordinarily be held that the defendant corporation was so present as to be subject to suit. The defendant contends, however, that it is relieved from that liability by the arrangement between it and the New York corporation. That arrangement is testified to have been as follows: All the expenses of the Boston office paid by the defendant were charged to the New York corporation; all receipts by the defendant from the Boston office were credited to the New York corporation; all the goods sent by the defendant to the Boston office for sale were billed to the New York corporation; and, speaking generally, as between the defendant and its subsidiary, the Boston office was treated as belonging to the latter. The management and control were exercised by the defendant, according to the testimony, because it was cheaper and better to concentrate all the bookkeeping and financing of the entire organization in a single office. If this evidence be accepted, the defendant argues that the business in Boston was really the business of the New York

corporation, so that the defendant itself was not present here, and had no representative on whom process could be served.

The arrangement claimed by the defendant to exist between the two companies is entirely oral; no written evidence of it is produced. The goods sent to the Boston office by the defendant were marked with its name, or at least they were not so marked as to indicate to Foote that they belonged to the New York company. The fire insurance policies on them are not produced. I doubt whether Foote understood that they were goods of the New York company. They were treated as if they belonged to the defendant.

I see no reason to doubt that the accounts on the books were kept as the defendant contends; but it seems to me very doubtful whether the mere book entries were sufficient to transfer the title of the goods sent to Boston from the defendant to the New York corporation. The subsidiary seems to have amounted to little more than a bookkeeping arrangement. In my opinion, the defendant was doing business at the Boston office, and Foote was its representative in charge of that business.

Upon all the evidence, I find and rule that the defendant was present and doing business at the "Boston office," so called, that Foote was its representative in charge of that business, and that due and sufficient service of process in this action was made upon it.

Plea in abatement adjudged bad, with leave to answer over.

DAMPSKIBS ACTIESELSKABET SANGSTAD et al. v. HINES, Director General of Railroads.

(District Court, D. Massachusetts. March 17, 1920.)

No. 1652.

1. **Shipping ⇐179—Time required for overdue docking held not deductible from demurrage for repairs made necessary by accident.**
   Though the time within which a vessel was to be dry-docked under the charter had expired before the accident, and the repairs to the mast made necessary by the accident could have been made while the vessel was in dry dock, the reasonable time for dry-docking is not to be deducted from the time required for the repairs to the mast, which were necessary before the vessel started a voyage which the charterer intended to make and did make before vessel was placed in dry dock.

2. **Shipping ⇐179—Necessary demurrage for time required for repairs due to accident not reduced by making other repairs at same time.**
   Demurrage for the time required for necessary repairs to a vessel's mast will not be reduced because, during the same time, other repairs, not made necessary by the accident, and which could have been made while the vessel was taking on or discharging cargo, were made.

In Admiralty. Libel by the Dampskibs Actieselskabet Sangstad (Sangstad Steamship Company) and others against Walker D. Hines, Director General of Railroads. Decree directed for libelants.

Storey, Thorndike, Palmer & Dodge, of Boston, Mass., for libelants.

Henry F. Hurlburt and Hurlburt, Jones & Hall, all of Boston, Mass., for respondent.

MORTON, District Judge. In view of the stipulation of the parties as to evidence, the motion to recommit the assessor's report is denied.

The other questions arise on the libelant's exceptions to the assessor's report. The principal question, and the only one which has been argued, relates to the amount of damages allowed as demurrage; the other items are not objected to.

The libelant claims 8½ days demurrage at the rate found by the assessor, viz. $1,875 per day. This is the time which the steamer was actually out of service at Boston for repairs to the mast, and which was necessarily required for such repairs. The assessor allowed only 3 days of it for the following reasons: By the charter party the steamer was to be dry-docked every 6 months. She was last dry-docked before the accident on July 28th. As the accident happened on February 14th, dry-docking was then overdue. It usually consumed 2½ days of the steamer's time. The assessor seems to have ruled, in effect, that the owners should have dry-docked the steamer and in connection therewith have made the repairs on the mast, which would have saved 2½ days' lost time; his view being, as I understand it, that the dry-docking had to be done anyway, and the vessel had to be laid off for that purpose in the immediate future, and that therefore the injury to the mast did not pro tanto necessitate lost time.

Deducting this 2½ days from the 8½ left 6 days, of which the assessor allowed only one-half for the following reason: While repairs to the mast were going on, the charterers made certain repairs of cargo damage; i. e., injuries to stanchions, rails, hatch combings, etc., caused by loading and discharging cargo. These repairs were not pressing, and could have been made without laying up the ship; but, as she had to be laid up to repair the mast, the charterers took advantage of the opportunity to make them at the same time. They cost more than the repairs to the mast. The respondent contends that such repairs had to be completed before the expiration of the charter party in August following, and that therefore they should be regarded as presently necessary work. The assessor found, however, that—

> "There was evidence to show, and I find and report that the cargo damages could be, and often are, repaired while a vessel is loading or discharging cargo, and that it was not necessary to lay her up to make those that were made in this case." Report, p. 7.

He nevertheless apportioned the 6-day period between the two sets of repairs and held the respondent liable only for one-half of it.

[1] That good judgment required the immediate repair of the mast, I have no doubt. It is the arm of the ship by which she lifts cargo and handles heavy weights. In large ports where the docks have discharging apparatus, the ship's derricks are often not required, but in many places there is no other way to load or unload. They ought to be kept ready for service. The Sangstad's subsequent course shows this. Proceeding from Boston to Norfolk or Baltimore, she there loaded cargo for Cuba, where she discharged it, it is said, by her own tackles—something which she could not have done if the repairs

on the mast had not been completed. It was after that voyage that she went into dry dock. The assessor finds that—

"The injury to the mast did not render the steamer unseaworthy or unfit to go to sea, but the mast was an important part of the ship's equipment that the charterer was entitled to the use of, and as I find, and report, made it reasonable, if not necessary, to have it repaired immediately" (sic). Report, p. 6.

Undoubtedly a vessel ought not to be allowed to make a direct profit out of an award for an accident, but I do not think that the owners or charterers of the Sangstad were bound to modify their future plans concerning her in order to give the respondent the benefit of this rule. If they needed the mast at once for the contemplated voyage, which was the fact, and did not intend to dry-dock the vessel until after that voyage was completed, they had a right to make the repairs at once, and the respondent must pay for the time lost. The 2½ days was, in my opinion, improperly deducted from the demurrage time.

[2] As to the apportionment of the 6 days between the cargo repairs and the mast repairs: As above observed, there is no question but that the entire time (8½ days) was required for the repairs to the mast. The assessor has expressly found that the cargo repairs could have been made without withdrawing the vessel from service.

"They did not require the laying up of the steamer at the time, but properly could have been deferred to a later time, either when the ship was in dry dock or when she was loading or discharging and engaged in profitable use." Report, p. 7.

Clearly they were not pressing, nor immediately required. This being so, I do not think that the case comes within any of the authorities which have been relied upon by the respondent.

In my opinion the entire time occupied by the repairs on the mast ought to have been compensated for. In so far as the assessor has found and ruled to the contrary, the libelant's exceptions to his report must be sustained. The libelant may present a decree.

THE MILLINOCKET.

(District Court, E. D. New York. June 22, 1920.)

1. Maritime liens ⇐65—Claim of reliance on third person for payment an affirmative defense as respects burden of proof.

An answer of a subcharterer to a libel filed against a ship for coal delivered on board, that the subcharterer had entered into a charter party on the vessel with a third person by which the latter was to pay for coal, and that libelants had been informed thereof, was an affirmative defense, of which the burden of proof was on the subcharterer.

2. Maritime liens ⇐29—Libelants, dealing personally with third person in furnishing coal, could not assert lien.

In a proceeding against a ship to recover for coal delivered on board, facts *held* to justify a finding that libelants dealt with a third person personally, and did not rely on the credit of the ship, so that libelants could not assert a lien.

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3. Maritime liens ⊂⊃40—Coal furnishers' lien on vessel held waived.

In a proceeding against a ship to recover for coal delivered on board, court *held* justified in holding that any lien against the ship had been waived by libelants' attempt to collect from a third person, who was a party to a charter party on the vessel, before seeking payment elsewhere.

4. Maritime liens ⊂⊃30—Furnishers of coal, notified of charter party, had no lien on vessel.

Furnishers of coal on board a vessel, after notice of the terms of a charter party requiring one not the owner to pay for all coal, were not entitled to a lien upon the vessel.

In Admiralty. Libel by H. F. Willfuehr and H. Willfuehr, copartners doing business under the name and style of the American Fuel & Shipping Company, against the steamship Millinocket, her engines, boilers, etc. Libel dismissed.

Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for libelants.

Leo H. Healy, of New York City (Duncan & Mount and Joseph K. Inness, all of New York City, of counsel), for claimant.

GARVIN, District Judge. [1] This libel was filed against the Millinocket to recover for coal delivered to and placed on board that steamship October 14, 1919. Delivery and price are not in dispute. The answer of Harriss, Magill & Co., Incorporated, alleges that, at the time the coal was ordered and delivered, Harriss, Magill & Co., Incorporated, as subcharterers, had entered into a charter party on the vessel with one Crotois, by which the latter was to pay for all bunker coal supplied to the boat, and that when the coal was ordered the libelants had been informed that Crotois alone was liable therefor. Thus an affirmative defense is raised, and the burden of proof is on the claimant. Three witnesses, none of whom apparently have any interest in the outcome, testified that the facts were made known clearly to libelants when the coal was ordered. Two witnesses, both in the employ of the libelants, deny that such statements were made. The argument of libelants is that the testimony of these two is more convincing than that of the other three, because it is unlikely that coal to such an amount would have been sold upon the responsibility of Crotois alone (who was not known to the libelants), and without recourse to the boat, particularly in view of the fact that the demand for coal was general, and there was no necessity whatever for taking any risk by a sale to one of uncertain responsibility.

[2] On the other hand, it is pointed out that the bunkering contract obligated the libelants to bunker all vessels "belonging to, operated, or chartered by Frederick E. Crotois." I think this indicates that the libelants were prepared to deal with Crotois personally, and, taken in connection with the testimony, justifies a finding that the claimant has sustained the burden of proof. Any significance that may be claimed from the fact that the name of the vessel is typewritten first in the bills for coal, as supporting the contention that the credit of the vessel is relied upon, is offset by the action of the libelants in seeking payment from Crotois before any attempt was made to collect from the

owner. All acts and circumstances must be considered. The Lucille (D. C.) 208 Fed. 424. Upon this finding, no lien upon the vessel can be asserted. The Kate, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; The Sylvan Glen (D. C.) 241 Fed. 731; The South Coast, 247 Fed. 84, 159 C. C. A. 302; The Oceana (D. C.) 233 Fed. 139.

Two other questions are involved: First, did the libelants waive their lien against the boat by their subsequent conduct? Second, if such lien was not waived, did it attach, irrespective of the agreement made by which Crotois alone was to be liable?

[3] The first question need not be decided, in view of the finding of fact that the libelants were notified that the coal was to be paid for by Crotois and that they were informed of the charter party; but it should be observed that, if a decision were necessary, the court would be fully justified in holding that the lien had been waived by libelants' attempt to collect from Crotois before seeking payment elsewhere. The Eastern (D. C.) 257 Fed. 874. The case is not in conflict with The William B. Murray (D. C.) 240 Fed. 147, and The Hattie Thomas (C. C. A.) 262 Fed. 943. In neither of the latter cases was a charter party involved, nor was the Hattie Thomas Case intended, I take it, to overrule The Eastern.

[4] Finally, it is asserted that libelants had a lien, even if they were notified that the boat was under charter. Coyle v. North America S. S. Corp. (C. C. A.) 262 Fed. 250, and The South Coast, originally decided in the Northern District of California, and reported at 233 Fed. 327, are relied upon in support of this contention. In the Coyle Case the libelant did not know the terms of the charter party, and in the case of The South Coast the charter party was so drawn as to seem rather to concede authority to the charterer to bind the vessel. These cases cannot be held to overrule the well-settled law applicable to the action at bar.

The libel must be dismissed.

In re LOMBARDY INN CO., Inc.

(District Court, D. Massachusetts. December, 1919.)

Bankruptcy ⇐391(3)—Referee may temporarily enjoin action of ejectment by landlord of bankrupt.

A referee *held* to have properly made an order temporarily enjoining prosecution of an action of ejectment previously commenced by the landlord to recover possession of premises in possession of bankrupt and in which it was conducting its business when the petition in bankruptcy was filed.

In Bankruptcy. In the matter of the Lombardy Inn Company, Incorporated, bankrupt. On review of order of referee, temporarily enjoining prosecution of ejectment in state court. Affirmed.

The following is the opinion of Referee Olmstead:

This was a petition to review an order entered by me on this 12th day of December, appointing Augustus T. Beatey, Esq., receiver of said estate, to-

gether with authority to carry on the business. Immediately after said appointment, while Mr. Richard W. Hale, counsel for the landlord, Mr. Samuel D. Elmore, counsel for the debtor corporation, and Mr. Francis R. Mullen, counsel for creditors, were present, a petition was presented by Mr. Beatey, the receiver, requesting that the landlord be enjoined from interfering with the court's custody and the prosecution of a suit of ejectment in the municipal court of the city of Boston. The counsel for the landlord contended that his client did not have actual possession of the premises, but only a "right of possession." I find as a fact that at the time the petition in bankruptcy was filed the Lombardy Inn Company, Incorporated, was actually in possession of the premises and conducting the business, that the custody of the business, according to the rule laid down in Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224, passed into the possession of the court, and that the debtor's business is now held and maintained by the receiver as the officer of the court.

In order, therefore, that the court's custody and possession might not be interfered with I ordered the receiver, in accordance with section 11b of the Bankruptcy Act (Comp. St. § 9595) to appear in the suit pending in the state court and defend the interests of the estate, and in order to protect those interests and preserve the court's custody I entered a temporary restraining order in accordance with the practice heretofore followed and the doctrine laid down in Chambers, Calder & Co. (D. C. R. I.) 3 Am. Bankr. Rep. 537, 98 Fed. 865, 867. See In re Crawford, Plummer Co. (D. C. Mass.) 42 Am. Bankr. Rep. 92, 253 Fed. 76, affirmed as Gardner v. Gleason (C. C. A. 1st Cir.) 43 Am. Bankr. Rep. 644, 259 Fed. 755, 170 C. C. A. 555.

While the referee, under General Order 12, subd. 3 (89 Fed. vii, 32 C. C. A. xvi) may not "enjoin any court or officer of the United States or of a state," the practice in this district, following the instructions of Hon. Francis C. Lowell, has been to enjoin the parties where necessary. In re Roger Brown & Co. (C. C. A. 8th Cir.) 28 Am. Bankr. Rep. 336, 196 Fed. 758, 762, 116 C. C. A. 386; In re Dana (C. C. A. 8th Cir.) 21 Am. Bankr. Rep. 683, 167 Fed. 529, 93 C. C. A. 238. The petition for review states that "there is an error of law apparent on the record in that the referee interferes with jurisdiction already taken of the subject matter by the municipal court prior to adjudication." My answer to this contention is that no state court, although proceedings for ejectment were pending, has acquired any actual possession of the premises, and that the District Court's actual possession and custody of the bankrupt's premises attached as of the filing of the petition in bankruptcy. Fairbanks Shovel Co. v. Wills, 240 U. S. 642, 649, 36 Sup. Ct. 436, 60 L. Ed. 841, 36 Am. Bankr. Rep. 754. And the said question, together with the pleadings, is certified to the judge for his opinion thereon.

Francis R. Mullin, of Boston, Mass., for receiver.

Hale & Dorr, of Boston, Mass. (Richard W. Hale, of Boston, Mass.), for petitioner for review.

MORTON, District Judge. At the time when the receiver in bankruptcy was appointed he found the bankrupt still in possession of the premises, claiming to hold under a written lease. The lessor, alleging a breach of condition, had already instituted ejectment proceedings in the state court. The learned referee temporarily enjoined the prosecution of these proceedings to give the receiver time to turn around. The premises are a hotel of some 30 rooms and a restaurant having a substantial business of its own.

In holding that the receiver should not be immediately turned into the street, but should have an opportunity to look things over and decide whether or not to defend the ejectment case and try to retain the lease for the benefit of the estate, and in staying the ejectment

proceedings for that purpose, it seems to me that the learned referee was right. Under the circumstances a high degree of diligence will be required of the receiver; and after a reasonable time has elapsed the lessor can move to vacate the restraining order.

Order of referee affirmed.

THE CEYLON MARU.

THE JEANETTE SKINNER.

(District Court, D. Maryland. June 21, 1920.)

1. **Shipping ⊂⊃3½, New, vol. 8A Key-No. Series—Liability in rem attaches to government ship.**
   A ship may be held liable for a collision, which occurred while she was owned by the government and operated by its employés for its public military purposes, if the court has jurisdiction.

2. **Shipping ⊂⊃3½, New, vol. 8A Key-No. Series—Court has jurisdiction of government owned ship in collision prior to use in merchant service.**
   Under Shipping Act, § 9 (Comp. St. § 8146e), a government owned ship in the merchant service, or a privately owned ship, is not immune from arrest by reason of a collision occurring while the ship was owned by the government and operated by its employés for its public military purposes; Act March 9, 1920, § 4, relieving private owner of any hardship.

3. **Shipping ⊂⊃3½, New, vol. 8A Key-No. Series—Statute waiving immunity from arrest of government owned ship not strictly construed.**
   While it is the duty of the courts to see to it that the operations of the sovereign shall not be hampered by the seizure of its property, nor shall it, without its consent, be subject directly or indirectly to suits, there is no reason why such legislation as Shipping Act, § 9 (Comp. St. § 8146e), waiving immunity of a government owned ship from arrest, should be narrowly construed; such statutes being remedial, and entitled to a fair and liberal interpretation.

4. **Collision ⊂⊃73—Incumbent on ship, colliding with anchored ship, to show cause of failure of steering gear to work.**
   Where there was a collision with an anchored ship, it was incumbent on the moving ship to show what was the cause of the failure of her steering gear to function, or what were all the possible causes, if there were more than one, and to prove that no precautions reasonably requirable of her would have prevented its or their operation.

5. **Collision ⊂⊃69—Anchored ship not required to figure out all possibilities suggested by unexpected movements of colliding vessel.**
   An anchored ship, not otherwise in fault, is not to be held blameworthy because those in charge of her do not instantly figure out all the possibilities which, upon calm reflection, might be suggested by unexpected movements of a vessel approachng them; unusual quickness of apprehension not being required, but the exercise of reasonable care and skill being sufficient.

6. **Collision ⊂⊃69—Anchored ship must hold place until doubt as to action of approaching vessel is cleared.**
   It was the business of an anchored vessel to hold its place, so long as there was any doubt as to what an approaching vessel might do.

7. **Collision ⊂⊃69—Anchored vessel not at fault for not letting out chain on approach of colliding vessel.**
   An anchored vessel *held* not at fault for failure instantly to pay out chain on the approach of a vessel whose steering gear would not work.

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8. Collision ⊂=69—Anchored vessel need not keep men standing by ready to pay out chain at moment's notice.

An anchored vessel is not required to contemplate the probability of the steering gear of another ship failing to work, so as to cause a collision, and is not required in broad daylight, as well as at night, or in a thick fog, and at all times, in calm as well as in stormy weather, to keep officers and men standing by ready to pay out chain at a moment's notice.

In Admiralty. Suit by the Nippon Yusen Kabushiki Kaisha, owner of the Japanese steamship Ceylon Maru, against the steamship Jeanette Skinner. Decree for the former.

Burlingham, Veeder, Masten & Fearey, of New York City, and George Weems Williams, of Baltimore, Md, for libelant.

Samuel K. Dennis, of Baltimore, Md., for respondent.

ROSE, District Judge. On the 2d of November, 1918, there was a collision between the American steamship Jeanette Skinner and the Japanese steamship Ceylon Maru. For brevity they will be called the Skinner and the Ceylon. The Skinner was then a Shipping Board ship, and still is. She was in charge of a naval crew, and for some months preceding the day named she had been in government service, engaged in transporting military supplies to the army in France. When she struck the Ceylon, she was homeward bound in ballast. Upon her arrival in this country she went into dry dock, and, the Armistice having intervened, she was, on coming out, assigned to carry food products to Europe for account of the Swiss government. While so employed, she was arrested in this case.

For reasons stated in an opinion heretofore filed (The Jeanette Skinner [D. C.] 258 Fed. 768), it was held that at the time she was seized by the marshal she was solely employed as a merchant vessel, and that under the authority of The Lake Monroe, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962, she was not immune from ordinary process upon a libel in rem against her. The question was then reserved as to whether she could be held liable for a collision which occurred while she was owned by the government and operated by its employés for its public military purposes.

[1] On her behalf it is now argued that no liability in rem ever attaches to a ship belonging to the government for anything she does while in its public service. What Chief Justice Waite said, while on circuit, in The Fidelity, 8 Fed. Cas. 1189, No. 4,758, fully sustains this contention. But the Supreme Court in Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, explained that what was decided in that case was merely the application of the exception to the mode of execution of a judgment or decree against a municipal corporation, and then went on to say that in the admiralty law the existence of that exception in all cases had been denied, citing a case from this district. Oyster Police Steamers of Md. (D. C.) 31 Fed. 763. It expressly declined to pass upon which of the conflicting conclusions on this point was the correct one. The Siren was cited (7 Wall. 153, 19 L. Ed. 129), and the English cases analyzed, and it was

then declared that the English law, in harmony with the maritime law of this country, held that the fact that the wrong had been committed by a public vessel of the crown afforded no ground for contending that no liability arose because of the public nature of the ship, although it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given. It said that the public nature of the service upon which the vessel was engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, when the court has jurisdiction. In The Siren, supra, the libel was in rem.

The language of the Supreme Court is so clear that it does not seem that it is open to two constructions, and such clearly was the opinion of the judges who sat in The Florence H. (D. C.) 248 Fed. 1012, The Gloria, 267 Fed. 929, Samuelson v. The F. J. Luckenbach, 267 Fed. 931 (both of the last-mentioned cases having been decided in the Southern district of New York), and The City of Philadelphia (D. C.) 263 Fed. 234.

[2] On behalf of the Skinner the further contention is made that, were it not for section 9 of the Shipping Act of 1916 (Comp. St. § 8146e), it would not be possible to enforce any lien against her in rem while she remained, as she still is, government property. It is said that the immunity there waived is limited to causes of action which arose while she was employed as a merchant ship. It is argued that the principal reason why the section in question subjected government owned ships, while operated for mercantile purposes, to the laws, regulations, and liabilities governing merchant vessels, was to protect privately owned craft from unfair competition. That is doubtless true, yet The Siren, supra, and Workman v. New York City, supra, hold that the liability was incurred when the tort was committed, even although the ship was then immune from arrest, and that but for such immunity it was enforceable against her. Now section 9 expressly subjects government owned ships, when they are operated as merchantmen, to the laws governing merchant ships, and those laws, as interpreted in The Lake Monroe, supra, and other cases, include liability to admiralty process, so that, a maritime lien in rem existing, and the only objection to its enforcement having been government ownership, and the law having provided that that immunity shall no longer exist when the ship is used as a merchant vessel, it would seem to follow that she must now answer for a tort alleged to have been committed by her while engaged in army service.

[3] A good deal is said, both in The Fidelity, supra, and in the brief of the government proctors in this case, as to the difficulties which may arise if a public ship of the United States be sold to private individuals, and while in the possession of the latter proceedings are taken to subject her to liabilities incurred while she was government owned. Provision seems to have been made for such cases by section 4 of the Act of March 9, 1920, which provides that if a privately owned vessel, not in possession of the United States, is arrested or attached upon any cause of action arising from previous possession, ownership, or operation of such vessel by the United States, it shall be released without

bond or stipulation, upon the suggestion by the United States that it is interested in such cause, desires such release, and assumes liability for the satisfaction of any decree. While it is the duty of the courts to see to it that the operations of the sovereign shall not be hampered by the seizure of its property, nor shall it, without its consent, be subject directly or indirectly, to suits, there is no reason why such legislation as that found in section 9 of the Shipping Act of 1916 shall be narrowly construed. Such statutes are remedial, and are entitled to a fair liberality of interpretation.

It must be held that, if the Skinner was to blame for the collision, in whole or in part, she must answer in these proceedings. Attention must therefore be directed to the circumstances of the mishap.

In October and November, 1918, the Ceylon was under charter to the Quartermaster's Department of the United States Army. On October 15th, while at Bordeaux, influenza having broken out on board, she was ordered to drop down the stream, and on the latter day she anchored in the Gironde river, about a mile and a half off Trompelcupe, paying out 45 fathoms of chain. There she remained until after the collision. At 6 a. m. on November 2 the Skinner, after delivering a cargo of war material, left Bordeaux in ballast on her return voyage to this country. A few minutes after 8 on the same morning she ran into the Ceylon, seriously damaging both ships.

The Skinner's story is that she was coming down the center of the channel, moving over the ground at from 9 to 10 knots an hour; to avoid the Ceylon, she tried to make a slight change in course, but found that her steering gear would not work, and although her engines were reversed, and her anchor dropped, she could not be stopped in time to keep her from striking the other ship.

The Skinner was equipped with a Lidgerwood hydraulic telemotor steering system. She says it was in perfect order when she left the United States for France; that it worked satisfactorily all the way over; that it was overhauled at Bordeaux, some new washers being supplied, and was put in good condition; that during the two hours which elapsed between her departure from Bordeaux and her getting close to the Ceylon it promptly responded to every demand made upon it; that immediately after the collision it was again inspected, and nothing was found wrong with it; and that on her subsequent westward voyage over the Atlantic to this country it gave entire satisfaction, as it has ever since.

The Ceylon produced a witness thoroughly familiar with the construction of the Lidgerwood system. He says that at times the wheel and rudder may not conform, but, when this happens, they can, within 15 seconds, be brought into perfect adjustment by the simple expedient of putting the wheel into a midship position, conforming to that of the rudder.

It may very well be that those on the Skinner's bridge did not know what to do under such circumstances, either because they had never been told, or because, when the first trouble occurred, they became excited, as the evidence shows some of them certainly did, and in consequence lost their heads. Other more serious things may, of course,

have happened to the system; but, if they had, they would not have righted themselves as in the Skinner's case, if they ever existed at all, the testimony shows they must have done.

The officer at the time on her bridge, and in charge of her navigation, had the rank of "reserve ensign" in the navy, but his prior nautical experience in a responsible position had been very limited. His evidence, as it appears in the deposition filed herein, does not give an impression of any great competency. Nobody on the bridge, except the pilot, knew anything of French. His English was limited to "port" and "starboard," and a few such phrases. The brief for the Skinner says that, when the steering apparatus failed to work, he became so wild in his actions that his excitement should have been noticed, even on the Ceylon. The ensign in command, in his haste to sound the danger signal, broke the bell cord. According to his testimony, it may have been chafed, but it was wire.

[4] It was incumbent upon the Skinner to show what was the cause of the failure of the steering gear to function, or what were all the possible causes, if there were more than one, and then to prove that no precautions reasonably requirable of her would have prevented its or their operation. No explanation of what was wrong with the steering gear has been attempted, and because we do not know what was wrong with it, if anything was, we do not know that with care all trouble might not have been avoided. The Merchant Prince, [1892] L. R. Probate Division, 188; In re Reichert Towing Line, 251 Fed. 214, 163 C. C. A. 370; The J. Rich Steers, 228 Fed. 319, 142 C. C. A. 611. The Skinner has failed to make out a case of inevitable accident, even if she had promptly done all that she should after the discovery that her steering apparatus was out of order. In point of fact, however, nothing was done for a considerable period after both ensign and pilot knew the ship was out of hand.

The ensign in charge himself testified that, according to the record he claims to have made at the time, he did not order the Skinner's engines reversed until two minutes after she had failed to respond to the wheel, and, when he gave the order, it was then, as he recognized, too late to prevent the collision by anything that could be done on his ship. Another witness for the Skinner makes this interval three times as long, and its chief engineer says he was inspecting the packing of the stern gland, and that the collision took place just when the engines started to reverse. The anchor was not dropped until after the order had been given to put the engines hard astern, but then her headway could not be checked, and her stem cut through the side of the Ceylon at a point about 10 feet abaft the latter's bow, and went 5 or 6 feet into the hold. The fault of the Skinner is manifest.

It is said that, even so, the Ceylon was also to blame. It is suggested that she was anchored at an improper place. She had been in the precise spot for 18 days, while many ships, including the Skinner, inbound and outbound alike, had safely passed her without, so far as appears, any of them having in the slightest degree been incommoded, or without anybody making a complaint.

The witnesses from the Ceylon say there was a quarter of a mile of

water on one side, and three-quarters of a mile on the other. Those from the Skinner were subsequently examined. They do not specifically contradict this assertion, contenting themselves in saying in general terms that the river was there narrow, but refraining from giving any precise figures as to its width.

The conclusive answer to all contentions that the Ceylon was in a place which made her a danger to other ships is given by the fact that the master of the Skinner, after he saw the Ceylon, left the bridge and went to his own room. He obviously did not think her presence confronted his ship with any difficult problem of navigation.

The contention is, however, very earnestly made that the Ceylon could have avoided the collision by paying out more anchor chain, that she had time enough to do so after she saw that the Skinner was out of control, and that she is answerable for not doing it. As the Skinner struck the Ceylon only 10 feet abaft her stem, it is of course true that, had the Ceylon dropped back 40 or 50 feet, there would have been no collision. It is equally established that a strong ebb tide was running at the time, which would have rapidly carried her back, had her cable permitted.

[5-7] The testimony from the Ceylon impressed me very favorably. There was no attempt on the part of the witnesses from it to minimize the distance the Skinner was from them at the time she did the various things testified to. The fact that she blew three whistles to indicate that she was backing cannot be fairly said to have constituted any warning to them. Danger signals might have. They were not sounded, because, as already mentioned, the whistle cord broke. The dropping of the anchor, which followed, might have seemed to them to show that she had reversed her engines to facilitate her being brought up by her anchor; that is to say, they may have supposed that for some reason of her own she wanted to stop.

It is strongly urged in the brief of the learned proctors for the Skinner that, if this had been her purpose, she would have first turned around and headed to the strong tide which was running. Even so, a ship not otherwise in fault is not to be held blameworthy because those in charge of her do not instantly figure out all the possibilities which upon calm reflection might be suggested by the unexpected movements of a vessel approaching them. Men are not to be held liable for not possessing unusual quickness of apprehension. All that can be required is the exercise of reasonable care and skill. It was not until those on the Ceylon understood, or should have understood by the exercise of those attributes common to skillful and prudent seamen, that the Skinner was out of control, that there was any occasion for changing its position in the slightest. As an anchored vessel, it was the business of the Ceylon to hold its place so long as there was any doubt as to what the Skinner might do, and it was not until the latter was noticed dragging her anchor that the first officer of the Ceylon, then on its bridge deck, felt called on to act. I do not think that he is chargeable with not having divined earlier so unusual a condition of things. He then rapidly started to go from the bridge to the

well deck to pay out chain, but before he could get there the collision took place.

[8] The suggestion that the Ceylon was required to contemplate the probability of something of this kind happening in broad daylight, as well as at night, or in a thick fog, and at all times, in calm as well as in stormy weather, to keep officers and men standing by, ready to pay out chain at a moment's notice, may be dismissed as exacting a standard of vigilance for which there is no warrant. Before it can be required, there must be notice of some conditions out of the ordinary, which make such a precaution one that an ordinarily skillful and prudent mariner would take. The cases relied on by the Skinner do not, it is believed, lay down any more exacting rule, although under the facts of some of them the anchored ship was properly held liable for failure promptly to pay out chain.

It follows that the Skinner must he held solely to blame. A decree in accordance with the conclusions herein set forth may be presented for signature.

J. W. RINGROSE CO. v. W. & J. SLOANE.

(District Court, E. D. Pennsylvania. July 2, 1920.)

No. 5672.

1. **Evidence ⟸71—Mailed letter presumed to have been received.**
   A letter duly mailed is presumed to have been received.
2. **Evidence ⟸54—Presumption cannot be based on presumption.**
   While it will be presumed that a letter duly mailed was received, yet, where such letter was relied on as giving notice of an agent's act, the further presumption of ratification by failure to disaffirm within a reasonable time cannot be indulged in, for that would result in a presumption on a presumption.
3. **Evidence ⟸397(2)—Parol evidence is inadmissible to vary written contract.**
   Where a contract is reduced to writing, it will be presumed to contain the terms agreed upon, except in cases of fraud, accident, or mistake; and where a contract as to compensation of a sales agent after telephone communication was reduced to writing, the writing will be presumed to contain all of the terms.
4. **Contracts ⟸9(1)—Agreement to "afford protection" to sales agent held too indefinite for enforcement.**
   Where plaintiff, which had acted as agent for the sale of a fabric used for lining of horse blankets, and had induced the government to accept the same, after negotiations received from defendant an agreement to afford protection of 10 per cent. of the cost to plaintiff, such agreement, which did not show whether the 10 per cent. was as a profit on sales or as a commission or compensation, was too indefinite for enforcement; the relation of the parties not clearly appearing.

At Law. Action by the J. W. Ringrose Company against W. & J. Sloane. On motion to take off nonsuit. Motion denied.

See, also, 262 Fed. 545.

Murdoch Kendrick, Paxson Deeter, and John C. Bell, Jr., all of Philadelphia, Pa., for plaintiff.

F. B. Bracken, of Philadelphia, Pa., and Seldon Bacon, of New York City, for defendant.

THOMPSON, District Judge. The plaintiff claims upon an alleged contract with the defendant, under which the plaintiff was to have the exclusive sale or agency for 36" MS fabric to be used for linings for horse blankets, and if the defendant quoted any outside parties on the fabric, it would afford the plaintiff a protection of 10 per cent. to its cost to the plaintiff as a profit, and if any outside parties requested quotations, the defendant was to refer them to the plaintiff. If the terms of the contract are found in the letters offered in evidence by the plaintiff, with the parol testimony, the above are the material terms on which the plaintiff relies.

The plaintiff, through its treasurer and general manager, Mr. Lyman, offered evidence of a conversation between the witness and Mr. Gardner, as salesman of the defendant corporation, over the telephone, to the effect that Mr. Lyman had told Mr. Gardner:

"Inasmuch as we had to put in a great amount of missionary work in originating this lining and promoting the sale of it to the government and the contractors, we should put something in writing to substantiate our verbal or oral agreement to the effect that we were to have the exclusive sale or agency of this lining, and they were to refer all inquiries to us, and in the event of their being asked to quote any one directly, and doing business with them directly, that they were to add a protection profit of 10 per cent., to be paid to us as our commission or compensation for our work in the matter.

"By Mr. Kenurick: Q. Was anything else said at that time? A. He said that that was perfectly agreeable to him, and to write him a letter in sum and substance, which he would acknowledge.

"Q. Did you write a letter the next day? A. I did; yes, sir. I wrote a letter that day.

"Q. That day? A. Yes; right after our telephone conversation; yes, sir."

The plaintiff relies for proof that the letters of March 13, 14, and 15, 1918, in connection with the telephone conversation between Mr. Lyman and Mr. Gardner, constitute a contract between the plaintiff and defendant upon the following contentions:

[1] That the letter of March 13th was mailed, addressed to the defendant at New York City; that the letter in question, having been regularly deposited in the mails, addressed to the defendant, is presumed to have been received by it (Whitmore v. Insurance Co., 148 Pa. 405, 23 Atl. 1131, 33 Am. St. Rep. 838); that the letter of March 14th to the plaintiff, with the defendant's name, "W. & J. Sloane," in typewriting at the foot, and signed "W. D. Gardner," together with the fact that the defendant never disaffirmed the authority of Mr. Gardner to make the agreement, constituted a confirmation and ratification of the alleged contract made by him, and the defendant, having notice through the letter of June 13th of the telephone conversation between Mr. Lyman and Mr. Gardner, is bound by that conversation to explain the meaning of the alleged ambiguity of the contract as shown by the letters.

[2] The plaintiff relies upon the rule laid down by Justice Miller in Indianapolis Rolling Mill v. St. Louis, 120 U. S. 256, on page 259, 7 Sup. Ct. 542, 544 (30 L. Ed. 639), where he said:

"The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that if they had the right to disaffirm it they should do it promptly, and if after a reasonable time they did not so disaffirm it a ratification would be presumed."

The ratification of the unauthorized acts of an agent arises upon a presumption from a course of conduct based upon notice of what the agent has done. It should be borne in mind that there is nothing in the evidence to show directly authority in Gardner to make any such contract; he being merely a salesman of the defendant. The plaintiff must therefore rely first upon the presumption, afforded by the mailing of the letter, that the defendant had notice of the contents of the letter, and under that presumption of notice that it had notice of Gardner's answer. Notice to the defendant is therefore the essential fact upon which the plaintiff must rely for the second presumption that, because it did not disaffirm Gardner's action, it ratified it. We have therefore a presumption of ratification depending, not upon a fact, that is, direct proof of knowledge by the defendant of Gardner's acts, but depending upon the presumption that they had such knowledge.

In the case of Manning v. Insurance Co., 100 U. S. 693, at page 698 (25 L. Ed. 761), Justice Stronge said:

"The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Remarking upon this subject in United States v. Ross, 92 U. S. 281, 284, we said: 'Whenever circumstantial evidence is relied upon to prove a fact the circumstances must be proved, and not themselves be presumed.' Referring to the rule laid down in Starkie on Evidence, page 80, we added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Evid. 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. Douglass v. Mitchell, 35 Pa. St. 440.'"

Applying these principles to the evidence in the present case, it is apparent that the plaintiff failed in its proof of the alleged contract in two particulars: (1) It failed to prove the authority of Gardner to bind the defendant; and (2) it failed to prove ratification of his acts through notice to the defendant and its failure to disaffirm.

[3, 4] Moreover, upon the face of the alleged written contract, it must, in my opinion, be construed, as construed at the trial, if it is binding at all, as a promise to protect the plaintiff by adding to the cost at which it was to sell to the plaintiff a profit of 10 per cent. in selling to outside parties, and also to refer any outside parties to the plaintiff. There is nothing upon the face of these letters which makes the contract ambiguous in the sense contended for by the plaintiff; that is to say, there is nothing in the letters which contains any indication that the defendant agreed to pay anything to the plaintiff. The parol evidence as to the conversations over the telephone would not, therefore, explain the meaning of an ambiguity as to what the obligation of the defendant was if it made quotations or sales to outside parties, but if left to the jury would be evidence to vary its terms and make it an obligation to pay instead of an obligation to protect. One of the strongest presumptions in the law, of the greatest safety

to the business world in relation to contracts, is that, when parties have put an agreement in writing, the written instrument is presumed to contain the terms to which they have agreed, except in cases of fraud, accident, or mistake. There is nothing to show that an agreement to pay 10 per cent. to the plaintiff was left out of the letters through mistake. The letter of March 13th was written deliberately, according to Mr. Lyman's testimony, for the purpose of putting the understanding between the parties in writing. The present attempt is by introduction of his recollection of what was said over the telephone to put a different term into the alleged contract.

Going into the terms of the contract as deduced from the letters and taking the conversation over the telephone into consideration in determining them, they are still vague and indefinite. What, under its terms, were to be the reciprocal obligations of the parties? Mr. Lyman says:

"We were to have the exclusive sale or agency of this lining," and "they were to add a protection profit of 10 per cent., to be paid to us as our commission or compensation for our work in the matter."

It is not clear whether the plaintiff was to be the agent of the defendant, or its factor, or a purchaser of the merchandise, or whether it was to be paid the 10 per cent. as a profit upon its sales as a purchaser, or as a commission or compensation, either as the defendant's agent or as its factor. There is no time stated, either in the letters or in the oral testimony, during which the uncertain relations between the parties were to continue, although it does appear that the "work in the matter," for which the commission or compensation, it is claimed, was to be paid, was the work done in the past in originating the lining and promoting the sale of it to the government and the contractors.

Under all the terms contended for by the plaintiff, is there any duty or obligation resting upon it, which the defendant could enforce in case of an alleged breach by the plaintiff? I fail to see that there are any mutual obligations, or that there is any consideration moving from the plaintiff. On the whole, the terms of the alleged contract are, in my opinion, too indefinite and uncertain to be enforced. Butler v. Kemmerer, 218 Pa. 242, 67 Atl. 332; Briggs v. Morris, 244 Pa. 139, 90 Atl. 532.

The motion to take off the nonsuit is denied.

CHARLESTON-ISLE OF PALMS TRACTION CO. v. SHEALY et al.

(District Court, E. D. South Carolina. June 29, 1920.)

No. 207.

1. **Carriers ⇐12(9)—Law fixing maximum rates part of franchise.**
Where the law at the time a railroad company is chartered fixes maximum rates which the company may charge, that law enters into and becomes a part of its franchise, and it is not authorized to exceed such rates, because under them it cannot operate, except at a loss.

2. **Carriers ⇐12(5)—Public service corporation not required to operate at continuing loss.**
The public cannot require of a public service corporation the continued operation of its property under rates which would afford, not only no adequate return on the capital invested, but would entail a large continuing loss and the eventual exhaustion of the entire capital.

In Equity. Suit by the Charleston-Isle of Palms Traction Company against Frank M. Shealy, James Cansler, and H. H. Arnold, constituting the Railroad Commission of South Carolina, S. M. Wolfe, Attorney General of South Carolina, and others. Decree for complainant.

M. Rutledge Rivers, of Charleston, S. C., for complainant.

S. M. Wolfe, Atty. Gen., A. M. Lumpkin, of Columbia, S. C., and B. A. Hagood and Lee Royall, both of Charleston, S. C., for defendants.

SMITH, District Judge. The original bill of complaint in this case was filed on the 18th day of March, 1919, against the defendants, the members of the Railroad Commission of South Carolina. By an order of this court filed the 15th of April, 1919, the complainant was ordered to amend the bill of complaint by suitable allegations, so as to make the mortgagee a party thereto, and the amended bill was filed on the 22d of April, 1919, adding as defendants the Baltimore Trust Company, the Charleston Consolidated Railway, Gas & Electric Company, and the Charleston Consolidated Railway & Lighting Company. The additional defendants having appeared duly and filed their answers to the bill of complaint, and all the defendants having answered, the return of the Railroad Commissioners to the rule being taken and treated as their answer, and the cause being at issue, an order of reference to take the testimony was made, and the special master has filed his report, with all the testimony, and the cause was thereupon called for hearing. By a written stipulation filed on the 4th day of May, 1920, it was stipulated and agreed on behalf of all the counsel in the cause that the cause should be submitted to the court for decision without oral argument, and the cause has been by the court fully considered, upon all the papers in the cause, the testimony, and the exhibits.

From all the testimony it appears that the complainant, the Charleston-Isle of Palms Traction Company, was chartered under the laws of South Carolina on the 7th day of January, 1913. This charter was

issued under the provisions of article 3, chapter 47, Code of Laws of South Carolina 1912 (Statutes at Large of South Carolina, vol. 28, p. 973). Thereafter the Charleston-Isle of Palms Traction Company, by deed dated March 15, 1913, purchased from the Charleston Consolidated Railway, Gas & Electric Company and Charleston Consolidated Railway & Lighting Company certain property of the latter companies, consisting of railways and railway routes owned by the Charleston Consolidated Railway, Gas & Electric Company, and by that company leased to the Charleston Consolidated Railway & Lighting Company, and under such lease operated by the last-named company from Mt. Pleasant to the Isle of Palms, in the county of Charleston, including two ferryboats, known as the Lawrence and the Sappho, which were operated from Central Wharf, in the city of Charleston, to the wharf at the foot of Hibben street in the town of Mt. Pleasant, together with certain parcels of real estate and wharves and wharf sites, cable and pole lines, and the rights, franchises, and privileges for the transaction of business in the town of Mt. Pleasant, and also certain tools, chattels, machinery, and equipment and other personal property, all more particularly mentioned and described in the deed of conveyance which is recorded in the office of the registrar of mesne conveyances for Charleston county, in Book R, No. 26, p. 236.

This property so conveyed constituted a line of transportation from the city of Charleston to the Isle of Palms, a summer resort on the sea beach about seven miles from Charleston. The line was one formed by the conjoint service of a ferry and railroad from the city of Charleston. Passengers and freight were carried over by the ferryboats to the town of Mt. Pleasant, and were transported from the town of Mt. Pleasant by a street railway, or railroad propelled by electricity, to the Isle of Palms. The consideration of the purchase was $250,000, none of which was paid cash, but all of which was included in a bond dated March 15, 1913, from the Charleston-Isle of Palms Traction Company to the Charleston Consolidated Railway, Gas & Electric Company and the Charleston Consolidated Railway & Lighting Company, for $250,000, payable on the 15th day of February, 1918, with interest thereon at the rate of 5 per cent. per annum, payable semiannually, which bond was secured by a mortgage of even date covering all the purchased property.

At the time of the sale of this property it was included in a mortgage from the Charleston Consolidated Railway, Gas & Electric Company to the Baltimore Trust & Guarantee Company, trustee, dated February 23, 1899. The Baltimore Trust & Guarantee Company, trustee, was the mortgagee under this mortgage for a large amount, which covered all of the property of the Charleston Consolidated Railway, Gas & Electric Company, which mortgage contained a provision that the mortgagee could at the request of the mortgagor, for a consideration, release parts of the mortgaged property. The Baltimore Trust Company became the successor as trustee of the Baltimore Trust & Guarantee Company. The Charleston Consolidated Railway & Lighting Company had leased this property from the Charleston Consolidated Railway, Gas & Electric Company, and by an act of the General

Assembly of the state of South Carolina, approved February 12, 1913 (28 Stat. p. 3), the Charleston Consolidated Railway, Gas & Electric Company was authorized and empowered to sell, assign, transfer, and convey the property above described as sold to the Charleston-Isle of Palms Traction Company. In the sale to the Charleston-Isle of Palms Traction Company, the mortgagee, the Baltimore Trust company, as trustee, agreed that upon the payment of the sum of $250,000, which the Charleston Consolidated Railway & Lighting Company undertook and agreed, when paid, to pay over to the Baltimore Trust Company, as trustee, that the Baltimore Trust Company, trustee, would thereupon accept the same in full consideration for the properties so sold, and would thereupon release the said properties from the lien of said mortgage.

It appears from the testimony that the property so sold, and which had been operated by the Charleston Consolidated Railway & Lighting Company (being known as that portion of its property called the Seashore Division of said company), and formerly constituting the Charleston & Seashore Railroad, has been operated always at a loss. The new purchaser, the Charleston-Isle of Palms Traction Company, went into possession and proceeded to operate the property, and has operated it ever since, but under the testimony it has been operated and is still continuing to be operated by them at a large annual loss; that is to say, the evidence shows that the receipts from operation are wholly insufficient to pay the costs of operation, including therein the costs of proper maintenance. In addition thereto, interest has been paid in part only upon its first mortgage, and it appears that the complainant, Charleston-Isle of Palms Traction Company, in 1916, borrowed in cash from the Charleston Consolidated Railway & Lighting Company the further sum of $17,000, and executed for it its bond in that amount, payable one year from said date, with interest at 6 per cent. per annum, and secured the same by a second mortgage of the property. This second mortgage is now due and payable, and no interest has been paid thereon; so that there is due to the Charleston Consolidated Railway & Lighting Company the principal of the two mortgages, with accumulated interest, together with sundry accounts and interest on unpaid accounts for electric current, an amount aggregating on May 1, 1919, the sum of $321,031.50, and on May 1, 1920, the total sum of $332,162.17.

After careful consideration of the whole testimony, the court concludes and finds as a conclusion of fact that the property has been and is now being operated at an annual loss. Not only can no dividends be paid upon the stock, nor interest be paid upon the purchase money and other mortgages, but the actual proceeds from operation are insufficient to pay the costs of operation, together with the costs of a proper maintenance. This bill of complaint was filed by the complainant in an alternate aspect, for the purpose:

First. Of obtaining a decree of court allowing them to charge an increased rate of transportation. It appears that during the latter part of February, 1919, the defendants, who are the Railroad Commission of the state of South Carolina, advised the complainant that the rates

being then charged by them were not in accordance with the order of the said Railroad Commission, made October 2, 1918, regulating rates which could be charged by the complainant, and thereupon filed their order requiring the complainant to conform with the terms of the order of the commission numbered 172, of October 2, 1918, fixing the maximum charge the complainant could demand and receive for passengers under the law of the state, and directed the Attorney General to take proper proceedings to enforce that order.

Second. If the court held that the increased rates of compensation for the transportation of freight and passengers could not be charged, so as to reasonably insure the receipt of a sufficient income to maintain and operate the property and pay a fair return on the value of the investment, then that the complainant be permitted to cease the operation of the line, yield up its franchises and privileges, liquidate its property, and apply the proceeds to the payment of its mortgages and its other debts, and distribute any surplus among its stockholders.

The bill of complaint alleges that the property has been operated at a large financial loss, and it is impossible to continue to operate it at the rates allowed by the Railroad Commission, save at a continuing loss, and prays that the court will decree that the rates now being charged by the complainant are reasonable and proper, and absolutely necessary to enable the complainant to continue further operation of the company and obtain any result at all from the property, or that, if in the opinion of the court this relief cannot be given to the complainant, then praying that this court will permit the complainant to abandon the operation of its property and to sell its entire property, with a right to remove the same.

The answers of the lien creditors, the Charleston Consolidated Railway & Lighting Comany, the Charleston Consolidated Railway, Gas & Electric Company, and the Baltimore Trust Company, trustee, simply submit their rights to the court, asking, however, that if the court shall permit the complainants to stop the operation of the property that the same may be dismantled and sold and the proceeds applied to the liquidation, first, of the mortgaged indebtedness thereon; and, secondly, to the general creditors of the Charleston-Isle of Palms Traction Company.

The defendants the Railroad Commission of the state of South Carolina submit that the rates of compensation for the operation of a railway corporation, such as the complainant, are fixed by law and cannot be increased, whether it is sufficient to pay the costs of operation or not, and further that the complainant is under obligation to continue the operation of its property under the law, whether at a loss or not, and, if at a loss, until the whole property, whether mortgaged or nonmortgaged, be exhausted, to pay the costs of operation.

[1] The charter of the Charleston-Isle of Palms Traction Company expressly declares that it shall be entitled to all the rights, powers, and privileges, and subject to all the limitations and liabilities, of railroad corporations embraced in the general railroad law, being chapter 49, Code of Laws 1912, as well as any acts now existing or hereafter to be passed regulating the duties, privileges, and liabilities of railroad

companies. By section 3260 of the Code of Laws of South Carolina 1912, which section is a part of article 8 of chapter 49, it is provided that the rate for passengers on all railroads to which the provisions of that chapter should apply should not exceed three cents per mile for every mile traveled, and this provision of law was of force at the time that the complainant was chartered, and it purchased the property and accepted the privileges and the duties of operation.

Under the principles decided by the Supreme Court of the United States, in the case of Columbus Railway, etc., v. City of Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, it would appear as a conclusion of law that, where the law at the time of the chartering of a railway company declares and specifies what shall be the maximum rates that such railway so chartered shall be permitted to charge, that law enters into and is a part of the franchise, and that the company is not authorized to exceed that rate because the operation of its property may not be profitable under this maximum rate, and may exceed in loss or cost of operation what the company expects. It is found, therefore, as a conclusion of law, that the complainant is not authorized to charge a higher rate of transportation than the maximum amount allowed by section 3260 of the Code of Laws of South Carolina 1912, nor are the defendants the Railroad Commission authorized to permit it.

[2] In the case of public service corporations, however, where there is no specified contract upon the point, the public is not authorized to require the continued operation by the public service corporation of its property and franchises under rates which would afford, not only no adequate return for the capital invested, but rates which would mean a large continuing loss and the eventual exhaustion of the entire capital invested. Denver v. Denver Union Water Co., 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649; Detroit United Ry. v. Detroit, 248 U. S. 429, 39 Sup. Ct. 151, 63 L. Ed. 341. As, therefore, the evidence is that, this property can only be operated, so as to perform the duties imposed upon the complainant by its charter, at a continuing loss, there is no power in the public under the state of facts existing in this cause to compel it. The corporation is authorized to abandon and return to the state its charter, franchises, and privileges, and to cease operations, to liquidate by realizing upon what property it may possess (excluding its franchises and public privileges), and pay the proceeds to the parties entitled to receive the same.

It is therefore ordered, adjudged, and decreed that the complainant has no right or power to continue to charge the rate of compensation charged by it at the time of the filing of the bill of complaint, or any amount in excess of that fixed by law and specified in the order of the defendant the Railroad Commission, dated October 2, 1918.

It is further ordered, adjudged, and decreed that the defendants the Charleston Consolidated Railway & Lighting Company, the Charleston Consolidated Railway, Gas & Electric Company, and the Baltimore Trust Company, trustee, have 30 days from the filing of this decree in which to apply for a decree of strict foreclosure, and to have all the mortgaged property turned over to them, with the rights, powers,

and privileges of the defendant the Charleston-Isle of Palms Traction Company to operate the same according to law.

It is further ordered, adjudged, and decreed that, if neither of the said defendants the Charleston Consolidated Railway & Lighting Company, the Charleston Consolidated Railway, Gas & Electric Company, or the Baltimore Trust Company, trustee, shall within 30 days as aforesaid apply for a decree of strict foreclosure, and to have the mortgaged property turned over to them, or either of them, or any assignee of them, or either of them, to operate as aforesaid, then any party hereto may apply for, or the court may render, a final decree, directing the complainant, Charleston-Isle of Palms Traction Company, to cease all further operations of the property, and for the appointment of a receiver to take possession of and keep all the mortgaged property of the complainant, Charleston-Isle of Palms Traction Company (excluding all its corporate and public franchises and privileges), without operating the same in any wise as a public carrier, and for a sale of all said property in such manner and in such parcels and on such terms as the court shall therein direct, and for the application of all the proceeds thereof to the costs and expenses of these proceedings and of such receivership, and then to the creditors thereto entitled.

WESTINGHOUSE ELECTRIC & MFG. CO. v. BROOKLYN RAPID TRANSIT CO. et al.

Petitions of GARRISON.

(District Court, S. D. New York. May 17, 1920.)

Nos. 48, 78.

1. **Street railroads ⇐49—Construction of lease.**
   Two clauses of a long-term lease of a street railroad system—(1) that on expiration or termination of the lease, lessor should pay lessee the actual cost of additions to the property and equipment made by lessee; and (2) that on its termination by breach by lessee a guaranty fund placed in trust by lessee "shall at once become the sole and absolute property of the lessor, and shall be paid * * * to the lessor, * * * not by way of penalty, but as liquidated and stipulated damages"—are to be construed together; and on insolvency of lessee and return of the property, lessor *held* not entitled to immediate transfer to it of the guaranty fund, regardless of its liability under the first clause, it being the intention of the parties to assure such fund to lessor, to the exclusion of claims of other creditors of lessee.

2. **Damages ⇐81—Stipulation in lease of street railroad for liquidated damages for breach valid.**
   A provision of a long-term lease of a street railroad system, that in the event of its termination by breach by lessee a guaranty fund provided by lessee should become the property of lessor as stipulated and liquidated damages, *held* valid and enforceable.

3. **Set-off and counterclaim ⇐35(1)—Claim capable of exact determination not unliquidated.**
   Under a provision of a lease of street railroad lines, that on expiration or other sooner termination of the lease lessor should pay the "actual cost" of improvements made by lessee, and which also provided a fund

to be paid lessor as liquidated damages, in case it was terminated through breach by lessee, where lessee became insolvent and surrendered the property, the actual cost of improvements made to that time is capable of exact ascertainment, and the claim therefor is not unliquidated, in such sense that it may not be set off against such fund.

4. Courts ⇐264(3)—**Court has jurisdiction to determine controversies incidental to its receivership.**

The agreement of parties and the order of the court pursuant to which its receiver for the insolvent lessee surrendered street railroad property to the lessor *held* to vest the court with jurisdiction to determine all controversies arising out of such surrender or under the lease.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Brooklyn Rapid Transit Company and others. In the matter of petitions of Lindley M. Garrison, receiver, for instructions. Order entered.

See, also, 256 Fed. 456, 465.

For brevity the Brooklyn City Railroad Company will be referred to as Brooklyn City; the Brooklyn Heights Railroad Company, as Brooklyn Heights; Brooklyn Rapid Transit Company, as B. R. T.; and the Equitable Trust Company, wherever convenient, as the Equitable.

Carl M. Owen, of New York City, for receivers of Brooklyn Heights R. Co. and of Brooklyn Rapid Transit Co.

William D. Guthrie, of New York City, William N. Dykman, of Brooklyn, and Howard Van Sinderin, of New York City, for Brooklyn City R. Co.

Murray, Prentice & Howland, of New York City (Charles P. Howland, of New York City, of counsel), for Equitable Trust Co.

John L. Wells, of New York City, for committee of bondholders under Brooklyn Rapid Transit mortgage of 1895.

Stetson, Jennings & Russell, of New York City (Allen Wardwell, of New York City, of counsel), for Guaranty Trust Co.

Wingate & Cullen, of New York City (T. Ellett Hodgskin, of New York City, of counsel), for People's Trust Co.

Brower, Brower & Brower, of Brooklyn, N. Y. (George E. Brower, of Brooklyn, N. Y., of counsel), for Kings County Trust Co.

Cravath & Henderson, of New York City, for Central Union Trust Co. of New York.

Rushmore, Bisbee & Stern, of New York City, for committee of stockholders.

Scott, Gerard & Bowers, of New York City, for committee of bondholders.

MAYER, District Judge. By petition, verified December 1, 1919, Lindley M. Garrison, as receiver of Brooklyn Heights, set forth the following:

That pursuant to the Brooklyn City and Brooklyn Heights lease (referred to infra) what is known as the guaranty fund was provided; that the guaranty fund consisted of various securities, in the petition set forth, deposited with Guaranty Trust Company, Brooklyn Trust

Company, the People's Trust Company, and Kings County Trust Company; that there was addressed to the receiver a letter from the People's Trust Company, dated October 15, 1919, and there was also addressed to the receiver a letter from Guaranty Trust Company, dated October 21, 1919. The letter from the People's Trust Company concluded as follows:

"You are respectfully requested, as receiver of the Brooklyn Heights Railroad Company, to advise the People's Trust Company of the course you desire it should take in respect to the demands which are above stated."

The letter from Guaranty Trust Company stated inter alia:

"We hereby advise you that request has been made of us by the Brooklyn City Railroad Company to apply the interest of the guaranty fund now in our possession as the same shall accrue and be collected, or so much of the principal of the said guaranty fund as may be proper for the following purpose."

The demands referred to in these two letters as having been made, respectively, by the People's Trust Company and Guaranty Trust Company, were for the payment of various taxes, and the payment of "the quarterly rental to October 1, 1919, amounting to $300,000; the Brooklyn Heights Railroad Company now being in default in the payment of the same." The point of these demands, information in regard to which was thus formally communicated to the receiver of Brooklyn Heights by the trust companies, was that Brooklyn City was treating the situation as the owner of the guaranty fund, entitled presumably to have such disposition made thereof as the Brooklyn City would require. The petition of the receiver of Brooklyn Heights concluded with the following words:

"Wherefore, in view of the demands made by these letters, and of the conflicting rights with respect to said guaranty fund, and other questions which may arise concerning the same, your petitioner prays that he may receive the instructions of the court in the premises."

This application came on to be heard on December 22, 1919. It is unnecessary to set forth in detail the proceedings upon that date, and the observations of court and counsel, all of which have been accurately transcribed and are fully contained in the record. Suffice it to say that it was clearly the intent of the parties, as well as the understanding of the court, that the consideration of the subject-matter would be postponed "without prejudice to existing rights, * * * but without tribulations or penalties being visited on the trust company during the period of that adjournment." After various adjournments, agreeable to all concerned, the matter of the petition for instructions supra came on to be heard on April 10, 1920, and was argued upon that date, and arrangements made for the submission of briefs. While this application was sub judice an application was made by Lindley M. Garrison as receiver of the Brooklyn Rapid Transit for certain relief (to be referred to infra) upon the ground, inter alia, that B. R. T., subject to certain rights, is the owner of the fund in question.

It will conduce to clarity to take up the applications in sequence, so far as practicable, and likewise to discuss the events in sequence, so

far as practicable. Upon the argument on April 10, 1920, there was submitted by Brooklyn City a paper which it designated as "Answer of the Brooklyn City Railroad Company to the Petition of the Receiver of the Brooklyn Heights Railroad Company (Application No. 48) for Instructions with Respect to Certain Demands of the Guaranty Fund." The paper was verified on April 6, 1920, by Zerah E. Watson, secretary and treasurer of Brooklyn City, who states:

"I have read the foregoing answer, and know the contents thereof. * * *"

The paper commences:

"The answer of the Brooklyn City Railroad Company, answering the aforesaid petition, respectfully shows to this court as follows."

The answer, inter alia, alleges in the eighth paragraph that by reason of the default of Brooklyn Heights the guaranty fund—

"at once became the sole and absolute property of the lessor, not by way of penalty, but as liquidated and stipulated damages, and the trustee or trustees become forthwith obligated to pay and transfer the said fund, or any balance thereof, to the lessor, but the trustee or trustees have wholly neglected and refused to pay or transfer to the lessor any part thereof, although due demand in writing was made upon such trustees for such payment and transfer on or about December 24, 1919."

The answer of Brooklyn City concludes as follows:

"Wherefore your respondent, the Brooklyn City Railroad Company, prays that Lindley M. Garrison, as receiver of the Brooklyn Heights Railroad Company herein, be instructed in the premises as to said petition (Application No. 48) that neither he nor the said trust companies have any right, title, or interest in, or claim to, the said securities, and that accordingly this court decree that your respondent is entitled to the sole and absolute ownership and possession of the securities constituting the aforesaid guaranty fund, and that the trustees thereof, the Guaranty Trust Company, the Brooklyn Trust Company, the People's Trust Company, and the Kings County Trust Company, may be severally ordered and directed to deliver, pay, and transfer forthwith to your respondent all and singular the securities and bonds now on deposit with them, free and clear of any liens, incumbrances or claims of any sort or nature whatsoever; such delivery, however, to be without prejudice to the right or claim of your respondent to any deficiency between the real or actual value of said securities in the aggregate and the sum of four million dollars ($4,000,000), together with such further and other relief as to this court may appear just and equitable."

It will be noted, from the structure of the paper thus designated as an answer, that Brooklyn City not only submitted to the jurisdiction of the court upon this application, but asked for affirmative relief, in the same manner as would have been consistent with an original bill or with an answer under equity rule 30 (201 Fed. v, 118 C. C. A. v), had the application by the Receiver of Brooklyn Heights been a formal bill of complaint.

In the same proceeding Equitable filed what it designated as a "Petition of the Equitable Trust Company of New York for Leave to Intervene and Become a Defendant and to File an Answer and Cross-Bill." The petition referred, inter alia, to paragraph X of the Brooklyn City lease, and alleged on information and belief that the Brooklyn City was indebted to the Equitable as trustee in the amount of $13,-

125,059.75, or in some larger sum, by reason of extensions, etc., made under paragraph X. The petition further averred:

"That the securities comprised in said guaranty fund are, to the extent of their value and to the extent that they may be declared to be the property of the Brooklyn City Railroad Company, assets of the Brooklyn City Railroad Company available in payment pro tanto of the indebtedness due your petitioner, and that said guaranty fund and the securities comprised therein should be held by the several trustees thereof until the final adjudication of this court in the premises, or be delivered by said several trustees to Lindley M. Garrison, as receiver herein, to be by him held until such final adjudication.

"Your petitioner avers that unless it be permitted to intervene in this suit, and set up a defense and claim relating to said guaranty fund, any disposition thereof will be greatly to your petitioner's detriment and injury, and in violation of its rights as the holder and owner as trustee of the claim against the Brooklyn City Railroad Company for $13,135,059.75 under paragraph X of said lease of February 14, 1893."

To the petition was attached a proposed answer and cross-claim, and the petitioner concluded with the usual prayer for intervention, requesting that it be made a party defendant, and that leave be granted to file an answer and cross-claim in the form proposed. The relief asked for in the proposed answer and cross-claim is as follows:

"(1) That each of the trust companies holding some portion of said guaranty fund be directed to transfer the same to the receiver of the Brooklyn Heights Railroad Company, and that said receiver be directed to hold said guaranty fund until the further order of this court.

"(2) That the amount of the indebtedness of the Brooklyn City Railroad Company to this defendant as holder of a claim against said Brooklyn City Railroad Company, pursuant to the provisions of paragraph X of said lease of February 14, 1893, be adjudicated and determined, and that the matter be referred by this court to a special master for the purpose of determining the amount of such indebtedness.

"(3) That upon the coming in of the report of such special master fixing the amount of such indebtedness the receiver or other holder or holders of said guaranty fund be directed to dispose of the securities composing the same for the best possible price and in such manner as may be hereafter determined by this court, and that this court direct the net proceeds of such sale or sales to be paid to this defendant as trustee, to be held for the benefit of the bondholders of the first mortgage of the Brooklyn Rapid Transit Company, or to be credited by it upon the amount of indebtedness owed to it as trustee by the Brooklyn City Railroad Company as aforesaid.

"(4) That this defendant have such other, further, different, and general relief as may be just and equitable."

To the petition of the Equitable, Brooklyn City filed "Answer of the Brooklyn City Railroad Company to the Petition of the Equitable Trust Company of New York in the Matter of the Petition (Application No. 48) of the Receiver for Instructions with Respect to Certain Demands as to the Guaranty Fund." In the body of this paper, said paper is described as the "Answer of the Brooklyn City Railroad Company to the Petition of the Equitable Trust Company of New York Herein." The verification by Mr. Watson, dated April 6, 1920, sets forth: "I have read the foregoing answer. * * *" The answer in brief denies the various allegations of the petition of the Equitable and concludes with the following prayer:

"Wherefore your respondent prays that the petition of the Equitable Trust Company of New York herein be in all respects denied, and that an or-

der be entered herein denying its application to intervene as a party defendant in this suit, or to file an answer and cross-claim therein, and for such other and further relief as may be just and proper in the premises."

Thereafter under date of April 10, 1920, the court made an order which was filed April 12, 1920, the ordering part whereof is as follows:

"Ordered, that said petition be and the same is hereby granted, and that the petitioner, the Equitable Trust Company of New York, be permitted to intervene in the above-entitled cause, and to file an answer and cross-bill in the form attached to the above petition."

Answering the petition of the receiver of Brooklyn Heights, the Guaranty Trust Company filed a paper which is designated as an answer in the verification of one of its officers, and said paper concluded as follows:

"Wherefore Guaranty Trust Company of New York prays that it may receive the instruction of this court as to what disposition it should make of the said securities now in its hands as depositary, and further that said funds be charged with the lien, in favor of Guaranty Trust Company of New York, for its charges and expenses as depositary of the said fund."

A position similar to that of the Guaranty Trust Company was taken in open court by the People's Trust Company, Brooklyn Trust Company, and Kings County Trust Company, but no papers have been filed by them.

From the foregoing papers and statements in open court it is clear that the trust companies, which are depositaries, are willing to submit to the jurisdiction of this court, and have so submitted, so far as the controversy concerns them. It is similarly clear that the Equitable, as trustee, has willingly submitted to the jurisdiction of this court. It is equally clear that Brooklyn City did not specially appear nor challenge the jurisdiction of the court in relation to application No. 48. Counsel for Brooklyn City applied by letter, dated April 21, 1920, "for leave to file in the above matter, application No. 48, an additional affidavit * * * of Watson," and such affidavit was received and is a part of the record. This affidavit is verified April 20, 1920, and does not raise any question of jurisdiction.

The situation, therefore, after all of the papers in application No. 48 were before the court, was as follows: The receiver had asked for instructions; Brooklyn City had asked for affirmative relief in respect of the disposition of the fund in question; the custodians of the fund have asked the court for instructions in respect thereof; Equitable had answered the petition of the receiver and by way of cross-claim had asked for affirmative relief; and thus there were before the court all those who at that time seemed necessary for the disposition of the controversy. However, as later appeared, the receiver of the B. R. T. claims the fund by virtue of certain transactions subsequent to the making of the lease. It also seems that the B. R. T. receiver claims to be the owner of what is called the construction account and that the guaranty fund (in so far as concerns the interest of B. R. T. therein) and the construction account are pledged, and that certain liens are or will be asserted in favor, not only of the Equitable mortgage, but also

in favor of the B. R. T. first and refunding mortgage and B. R. T. consolidated and refunding mortgage of June 1, 1918.

The claim of some millions of dollars arising under paragraph X of the lease is familiarly spoken of as the construction account. Whether out of this somewhat complicated situation the Brooklyn Heights receiver has any interest, legal or equitable, either in the guaranty fund or the construction account, is not clear, and obviously cannot be determined on the record as it now stands.

By petition verified April 26, 1920 (known as application No. 78), Lindley M. Garrison, as receiver of B. R. T., applied to the court for the following relief:

"(1) That the court adjudge that the Brooklyn City Railroad Company is not entitled as against the Brooklyn Rapid Transit Company to the possession of said guaranty fund, unless and until, among other things, it shall have paid the amount due to the Brooklyn Rapid Transit Company or your petitioner, as receiver thereof, with respect to the use of said cars, or with respect to any other existing claim or demand of the Brooklyn Rapid Transit Company, or your petitioner as receiver thereof, against the Brooklyn City Railroad Company.

"(2) That the court direct that the various trust companies, who, as trustees, are in the possession of portions of said guaranty fund, shall deliver the same into the custody of the court, or shall hold the same subject to the order and direction of the court in this case.

"(3) That the court direct the Brooklyn City Railroad Company to take no action or proceeding with respect to the said guaranty fund, except only such as may be permitted by this court.

"(4) That the court grant such other relief in the premises as the court may deem proper."

Paragraph 1 of the prayed for relief may be promptly disposed of as between the receiver of the B. R. T. and the Brooklyn City; the court having decreed that the title to certain cars is in the receivers of B. R. T. and that Brooklyn City shall pay reasonable compensation for the use of said cars. This part of the controversy must be considered disposed of as between the B. R. T. receiver and the Brooklyn City, and should not confuse any issues in respect of the guaranty fund questions, nor in respect of the construction account questions, as between the B. R. T. receiver and Brooklyn City. The remaining prayers of the petition, however, in conjunction with the petition itself, bring up some of the important questions here to be considered.

In respect of application No. 78, Brooklyn City has appeared specially, and has denied the jurisdiction of this court to make any order against it. Brooklyn City asserts that this court has neither power nor jurisdiction to impress any lien upon the securities constituting the guaranty fund, nor power or jurisdiction to direct the trust company custodians to deliver the securities to the custody of the court, nor to hold them subject to the order and direction of the court, and further the court has neither power nor jurisdiction to direct the Brooklyn City to take no action or proceeding with respect to the guaranty fund, except only such as may be permitted by the court.

[1] Passing for the moment questions of jurisdiction, which the applications and various papers and proceedings in connection therewith have developed, it is desirable to ascertain the rights of the

Brooklyn City as lessor and Brooklyn Heights as lessee under the lease of 1893, so far as relates to paragraphs X and XXXIX. These read as follows:

"X. The lessor further covenants and agrees that in the event of the expiration of this lease, or other sooner termination thereof, it will pay to the lessee the actual cost of all property, extensions, branches, additions, improvements, and equipments, made, acquired, and paid for by said lessee out of its own funds, for use in connection with the operations of the railroads of the lessor, less the cost of such part thereof as was required to preserve said railroads, extensions, additions, improvements, and equipments in good repair and serviceable condition, and less the cost of such part thereof as was necessary to preserve and secure efficiency in the operation of said railroad."

"XXXIX. The lessee further covenants and agrees that in the event of the termination of this lease by reason of any breach, default, or omission on its part in the performance of either or any of the covenants on its part to be kept and performed, the said guaranty fund of four million dollars ($4,000,000) deposited with the said trustee, or any balance thereof, shall at once become the sole and absolute property of the lessors, and shall be paid and transferred by said trustee or trustees to the lessor, its successors or assigns, not by way of penalty, but as liquidated and stipulated damages; and it is mutually agreed that, if this lease shall terminate otherwise than on account of the breach, default, or omission of the lessee, then the said four million dollars ($4,000,000), or any balance thereof, shall be paid to the lessee."

The lease was dated February 14, 1893. It was for 999 years, and covered an extensive system of street surface transportation. It contemplated, of necessity, that during this long period of time there would be extensions, branches, additions, improvements, and equipments made and added by the lessors. The lease contemplated the usual alternatives: (a) Continued operation by the lessee, with the attendant payment of rental and the fulfillment of other obligations; or (b) cessation of operation and termination of the lease, with accompanying results.

It is difficult to read this lease and arrive at conclusion that its vital covenants were to be independent of each other. In respect of paragraph X it will be noted that the obligation of the lessor to pay to the lessee the actual cost of all property, extensions, etc., arose only "in the event of the expiration of this lease, or other sooner termination thereof." Obviously, so long as the lessee paid the rent and fulfilled the obligations of the lease, it could not call upon the lessor to pay for what the lessee had put into the property under paragraph X; but the clear intent of the parties was that, when the lease expired or was sooner terminated, the lessor under paragraph X was obligated to pay to the lessee the actual cost of all property, extensions, etc., for the simple reason that on such termination of the lease the lessor presumably would receive back its property, with added benefits.

This actual cost item of paragraph X might in the course of years reach a very substantial amount. Indeed, it is fair to assume that in a lease of this character and of such long duration the parties contemplated that the sums expended under paragraph X might aggregate a very large amount. The claim is that the amount of this construction account is some millions of dollars. Whether this claim is good or bad is at this stage of the controversy immaterial. It is enough that the claim is in excess of the guaranty fund, and it must be as-

sumed that, when the parties executed and delivered the lease, it was contemplated that claims arising under paragraph X might equal or exceed the amount of the guaranty fund.

[2] In order to afford proper protection to the lessor, paragraph XXXIX was inserted in the lease. It is plain that, if the lessor were called upon to sue for damages caused by a breach, which eventuated in the termination of the lease, it would be a matter of the greatest difficulty to prove such damages. This difficulty is inherent in a lease of this character, and paragraph XXXIX is so drawn that I am fully satisfied that the amount therein stipulated is to be regarded, not as a penalty, but as liquidated and stipulated damages. Sun Printing Association v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; Wise v. United States, 249 U. S. 362, 39 Sup. Ct. 303, 63 L. Ed. 647.

The interesting question of construction which arises revolves around the words "shall at once become the sole and absolute property of the lessor, and shall be paid and transferred by said trustee or trustees to the lessor. * * *" It is the contention of Brooklyn City that the intent and result of this clause is to vest title in the lessor immediately upon the termination of the lease, if such termination is by reason of the breach of the lessee. According to Brooklyn City, when the lease in the case at the bar terminated, the custodians were obligated forthwith to turn over the securities, upon the theory that the property belonged under paragraph XXXIX ex proprio vigore to Brooklyn City. It will be noted, however, that the words "at once" do not apply to the words "shall be paid and transferred," unless it can be said that the words "at once" relate to all of the words which follow them, down to and including the word "damages."

I think the words "at once" are limited to the words "become the sole and absolute property of the lessor." But I do not place my conclusion on the mere collocation of words, nor on so narrow a ground. It seems to me that this language was not intended to require the immediate transfer of the guaranty fund to the lessor, but was intended to earmark and characterize the fund as against creditors or other claimants who would be entitled to share in the fund, if its title had not been carefully safeguarded. In other words, if this clause had merely stated that the $4,000,000 were to be regarded as liquidated damages, and not as penalty, then the Brooklyn City would have no greater rights in the disposition of this fund than any other creditor of the Brooklyn Heights similarly situated, and in such event the only value of the provisions would have been to fix the damage; but the fund itself would have been available for distribution to creditors other than the Brooklyn City to such extent and in such manner as the assets of the Brooklyn Heights might be marshaled and distributed.

It is fair to assume that it was contemplated by the parties that the lease would not be terminated by breach unless the Brooklyn Heights found itself financially incapable of carrying out its covenants. In such event the Brooklyn City wished to be certain that this fund would be so circumstanced that it alone would have resort thereto, free of claims of any other creditors. But I am unable to conclude that it was intended between the parties that the fund provided for under

paragraph XXXIX was to be paid over forthwith by the custodians, if claims under paragraph X were outstanding at the time of the termination of the lease. Both paragraphs speak as of the date of expiration or earlier termination of the lease. Neither the guaranty fund under paragraph XXXIX nor the construction account under paragraph X was payable prior to the termination of the lease. The rights under both paragraphs were to spring up at the same time. The lessee was to be reimbursed "actual cost" under paragraph X, no matter what the cause of termination. It was not to be penalized, even though it flagrantly breached the lease; for the construction account was to be paid, either in event of expiration "or other sooner termination" of the lease —i. e., a sooner termination for any reason.

[3] But it is said that the claim under paragraph X was unliquidated and might take years to liquidate, and that it cannot be assumed that the parties intended that the payment over of the guaranty fund should be delayed until the construction account was liquidated. The claim under section X is quite different, as regards liquidation, from the kind of claims referred to in cases like Matter of Coatsworth, 160 N. Y. 114, 54 N. E. 665, and Tallman v. Coffin, 4 N. Y. 134. In these cases it is the "value" of the improvements on the termination of the lease which is to be ascertained.

By virtue of paragraph X, the obligation of the lessor is to pay the "actual cost" of the improvements, etc. Such cost is capable of exact ascertainment as of the date of termination of the lease, and quite unlike the damages recoverable in tort or for certain kinds of breaches of contract. The point is that whether a claim is unliquidated in the sense that its amount is not agreed upon between the parties is here immaterial. The test is whether the claim may be ascertained with reasonable certainty as of a fixed day. Robinson v. United States, 251 Fed. 461, 466, 163 C. C. A. 637; Faber v. City of New York, 222 N. Y. 255, 118 N. E. 609. In this case, looking at the instrument alone, it is plain that the "actual cost" was capable of ascertainment as of a fixed day, and the fact that the parties differ as to the amount of the claim does not change the nature of the claim.

If there were no controversy as to the "actual cost" under paragraph X, can it be assumed that the parties intended that the guaranty fund could be paid over to the lessor forthwith by the custodians while the lessee would be compelled to sue, or wait for the payment to it of the sums it had expended for the "actual cost" of improvements, etc., which had enhanced the value of the lessor's property, and which might be equal to or in excess of the amount secured by the guaranty fund? Further, there is no evidence that the custodians accepted the guaranty fund under any obligations to pay over other than that expressed in paragraph XXXIX, as that obligation, so far as concerns the custodians, may be construed, looking to the paragraph alone.

Paragraph XXXIX is not an independent covenant in the sense considered in Matter of Coatsworth, supra. In that and similar cases the doctrine is that the lessee cannot withhold possession of the demised property until the lessee's improvements are paid for. In the case at bar, this doctrine might have been invoked, if the lessee had not sur-

rendered possession of the property until its claim under paragraph X had been paid, but no such procedure was adopted. I am of opinion, therefore, that, reading the lease as one instrument, its covenants are interrelated, and that it was not intended that as between the parties, or those succeeding to their title or rights, the claims under paragraph X should not be set off against the fund covered by paragraph XXXIX; in other words, that while the amount covered by paragraph XXXIX is ascertained, it is to be regarded as between the parties merely as a credit as against the amount, if any, due under paragraph X.

But, even treating the covenants as independent, the policy of the law has developed, so as to allow counterclaims in the same suit between the same parties, even though such counterclaims are independent, and do not arise out of the same transaction. Rolling Mill Co. v. Ore & Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565; United States Trust Co. v. Western Contract Co., 81 Fed. 454, 26 C. C. A. 472; Equity Rule 30 (201 Fed. v, 118 C. C. A. v); Vacuum Cleaner Co. v. American Rotary (D. C.) 208 Fed. 419.

All of the foregoing has been set forth to explain the instruction to the receiver hereinafter given. In the present state of the applications, it is plain that the situation is much confused. While answers and cross-claims have been interposed, these were all interposed on application for instructions; i. e., application No. 48 was so called, and application No. 78, while not so called, is such in effect. No bill of complaint in the true or technical sense has been filed. To decide that the subject-matter is in orderly fashion before the court, so that the court can make a binding adjudication, would set a precedent which would probably not only not stand on review, but which might tend to deprive the court of the assistance which it has received, and which has been freely given on applications for instructions, and which the court deems of great service in the many problems and complexities of the administration of these receivership estates.

The rights and title of the B. R. T. and of the Brooklyn Heights receiver, of the Brooklyn City, of the Equitable and other pledgees, and the duty of the custodians, should be determined in a litigation commenced and continued with pleadings in usual fashion. When such pleadings shall have been framed, and all necessary parties shall have been made parties to the litigation, the issues will be made, testimony taken, if necessary, and all concerned will be so positioned that any one aggrieved can seek a review of any judgment or decree, as the case may be.

[4] Such action or suit, whether begun by the Brooklyn City, or any one else, should be brought in this court. This was the clear intention when the arrangements were concluded (after many conferences between counsel and also with the court) whereby the lessor's property was turned back to it by the receiver of Brooklyn Heights. It was realized that there were many questions then known, as well as others which might thereafter arise, which could not be disposed of in the limited time within which the parties sought to bring about practical operation of the Brooklyn City without interruption of public service.

The receiver arranged to afford every accommodation available in the way of cars, employés, equipment, etc., to enable the Brooklyn City to operate at the earliest feasible moment after the default in the payment of rent on October 1, 1919. The spirit and intent of the parties was expressed by the court in its memorandum of October 16, 1919.[1]

See, also, order of October 20, 1919.[2]

The parties themselves agreed in paragraph twelfth of the agreement between the receiver of Brooklyn Heights and Brooklyn City as follows:

"Twelfth. It is recognized that, within the time available to the parties in the preparation of this agreement, it is impossible to foresee and provide for all of the matters incident to the delivery and surrender of possession to the City Company of its property, and the furnishing of adequate equipment,

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[1] Memorandum.

The situation is such that from the practical standpoint, because of lack of funds, it becomes necessary that the receiver of the Brooklyn Heights Railroad Company no longer operate the lines covered by the Brooklyn City Railroad Company lease. Counsel for the Brooklyn City Railroad Company insists that, in view of nonpayment of rent and taxes, the property must be delivered by the Brooklyn Heights Railroad Company, or its receiver, to the Brooklyn City Railroad Company.

Under sections 3 and 7 of the decree signed herewith, the court intends that said decree herewith made shall be without prejudice in the fullest sense of the term as in said decree provided. The receiver, in his desire to protect his trust, is concerned as to whether or not it is necessary at this time to make a demand and tender a deed. Whether such requirement is necessary or not need not now be passed upon by the court; but the court, in order to preserve all the rights existing at and prior to the time the order is made, and as a matter of precaution, has directed the receiver to make the demand of the total sum alleged to be due, without at this time detailed particulars, and to tender a deed good and sufficient to convey to the Brooklyn City Railroad Company, its successors and assigns, all of the right, title, and interest of the lessee company in and to any additional property referred to in paragraph III of the decree, free and clear of all incumbrances.

I doubt whether it is necessary to tender such deed at this time under paragraph 24 of the lease, but I order the receiver to make the tender, so as to safeguard against any questions upon this point. I am confident that, when the time comes to determine the right of the parties, any court which will be called upon to deal with the subject-matter will consider all the facts and circumstances and the situation as it really existed when the necessities of the situation required the court to order the receiver not to pay rent and taxes, and to cease operation, and to cause the delivery of possession of the property to the Brooklyn City Railroad Company.

[2] Order.

The matter of the application of Lindley M. Garrison, receiver (No. 47), for instructions respecting various affairs of the Brooklyn Heights Railroad Company, came on further to be heard at this time, and was argued by counsel, and upon consideration thereof it was ordered, adjudged, and decreed as follows:

That the receiver is authorized to tender to the Brooklyn City Railroad Company, subject to any lien thereon, as property coming within the description of paragraph III of the previous order herein under this application, the 499 cars constituting the cars purchased by the proceeds of certificates of indebtedness No. 159, issued by the Brooklyn Heights Railroad Company to Transit Development Company, under date of July 1, 1918.

The court hereby reserves all other matters and things respecting this order for disposition pursuant to further hearing and the orders of this court.

facilities, power, etc., for the operation of the properties of the City Company; and it is intended that this agreement shall be subject to modification in any particular by agreement among the parties, without thereby modifying or abrogating the balance of the agreement, and in the event of the failure of this agreement to dispose of any of the incidental matters affecting the delivery of possession to the City Company, with necessary facilities, equipment, power, etc., for operation, and the inability of the parties hereto to agree respecting the same, the same shall be determined by the court."

The order of October 16, 1919, provided as follows:

VII. This court reserves the right and retains power and jurisdiction to determine any and all rights, claims, liens, or demands which the Brooklyn City Railroad Company, the Brooklyn Heights Railroad Company, and its receiver, their respective successors or assigns, or any trustee, or any other person or corporation, may have one against the other, or against any of said property, or of any lien in respect thereof. Any party in interest, however, may apply to the court for further directions, including application for leave to bring such suit or proceedings as the party may be advised in any other court of competent jurisdiction."

See, also, paragraph X.

The comprehensive nature and purpose of the order are manifested by the reference to "any trustee, or any other person or corporation." In view of the order and agreement supra, and the proceedings under application No. 47, it is unnecessary to discuss the effect of the appearance of Brooklyn City in application No. 48. Although see Camp v. Boyd, 229 U. S. 530, 551, 552, 33 Sup. Ct. 785, 57 L. Ed. 1317; McGowan v. Parish, 237 U. S. 285, 297, 35 Sup. Ct. 543, 59 L. Ed. 955; Henry L. Doherty & Co. v. Toledo Railways & Light Co. (D. C.) 254 Fed. 597; Hume v. City of New York, 255 Fed. 488, 166 C. C. A. 564; Peirce v. New York Dock Co. (C. C. A. 2d Circuit, March 11, 1920) 265 Fed. 148. But, as in application No. 78 there has been special appearance, and as the B. R. T. receiver may claim the construction account, as well as the guaranty fund, the proceeding is too informal and too confused upon which any one should attempt to predicate a decree.

The court, however, considers that it has, and therefore retains, jurisdiction of any controversy arising out of the lease, and it regards the answer of Brooklyn City, application No. 48, as in harmony with the intent of the parties under the agreement of October 16, 1919, and as in harmony with the order of October 15, 1919. So far as concerns the receiver, his duty is, of course, to safeguard the interests of his trust; but that duty does not require him to advance any claim nor interpose any defense which he may deem or be advised is untenable.

Neither the court nor the receiver can have any desire to do other than expedite the determination of the questions involved, to the end that Brooklyn City shall obtain the fund as speedily as possible, if it is entitled thereto. On the other hand, it is the duty of the receiver to ascertain the merits of the claim for the construction account, and to prosecute or assist in prosecuting this claim for the benefit of those entitled thereto. If, as contended by Brooklyn City, the claim is unjust in whole or in part, the facts will in due course appear. If, however, it should appear that the claim is a just one, in whole or in part, and if it may be set off against the guaranty fund, it is the plain duty of

the receiver to take or assist in taking such steps as shall prevent Brooklyn City from obtaining the guaranty fund, and enjoying at the same time, without payment, the benefits which have accrued under paragraph X.

The controversy under paragraph X can, I am sure, be much simplified by conference and agreement. Disputed question can be promptly submitted and promptly disposed of. Therefore the instructions to the receiver under both 48 and 78 are as follows:

"(1) Not to contest the proposition that the damages under paragraph XXXIX are liquidated.

"(2) To ascertain the merits of the claim under paragraph X as speedily as possible, and, if satisfied that the claim is meritorious, in whole or in part, to prosecute or assist in prosecuting said claim.

"(3) To take such steps, or assist in taking the same, as shall prevent the payment over of the guaranty fund until in any event the construction account claim shall have been adjudicated.

"(4) To press such other contentions as he may deem proper.

"(5) To apply for further instructions from time to time, as he may be advised."

In respect of all others interested, it will, of course, be understood that the court does not assume to instruct nor advise them as to the nature of the proceedings to be brought, nor as to the contentions to be advanced. Any one interested may advance such contention as he pleases, whether consistent with this opinion or not, save, however, that any suit or proceedings, for the reasons stated, supra, shall be brought in this court. In respect of the jurisdictional question, the court understands from the papers and proceedings (as distinguished from the argument) that no one has raised any question of jurisdiction in respect of application No. 48, and that no question of jurisdiction has been raised in respect of application No. 78, except by the Brooklyn City.

I am entirely clear as to the protection intended to be afforded to the custodians pending the decision on application No. 48, but as, of course, any stipulation heretofore made will be observed, I shall not volunteer; but I shall be glad to settle the matter, if there is any difference of opinion, as to the purpose and meaning of the proceedings on December 22, 1919, in this regard.

I have not discussed the question of surrender by agreement, as distinguished from termination by breach, nor other questions which might suggest themselves; for whatever questions may be involved should come to issue on pleadings, upon which a final disposition, clearly capable of review, may be had.

Settle order on five days' notice.

UNITED STATES v. DAVENPORT et al.

(District Court, W. D. Texas, Del Rio Division. June 5, 1920.)

No. 11.

1. **Courts ⇐337—Scire facias on bond governed by rules of civil procedure of the state.**
A bail bond is a contract between the sureties and the government, and an action to enforce it is a civil action, in which the law is not required to be construed strictly, as in a criminal proceeding, and the sufficiency of the procedure is to be determined by the laws of the state.

2. **Bail ⇐84—Defenses to scire facias on bond limited by statute.**
Under Vernon's Ann. Code Cr. Proc. Tex. 1916, art. 500, enumerating defenses which may be made to scire facias on a bail bond, which governs in the federal courts in that state, that the principal defendant is innocent, or the indictment defective, or barred by limitation, is no defense.

3. **Bail ⇐58—General description of offense on bond sufficient.**
A bail bond or recognizance before a United States commissioner need only describe the offense charged with sufficient particularity to identify the case and to inform the principal and sureties of the obligation to be assumed.

4. **Bail ⇐58—In scire facias on bond, general description of offense charged sufficient; "recognizance."**
A "recognizance" in a criminal case is a judgment confessed of record, and a proceeding by scire facias after forfeiture is merely to confirm such judgment and the prior proceedings, and the charge against the principal need be described only sufficiently to identify the case.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Recognizance.]

5. **Bail ⇐58—Statement of offense charged sufficient.**
A recital in a recognizance and judgment of forfeiture thereon that the principal was charged with having embezzled funds of a national bank, of which he was cashier, in violation of Rev. St. § 5209 (Comp. St. § 9772), *held* to show that a criminal offense was charged under the statute; for, although said section, as amended by Act Sept. 26, 1918, § 7 (Comp. St. Ann. Supp. 1919, § 9772), deals only with "any officer * * * of any federal reserve bank or of any member bank," every national bank was required by the Federal Reserve Act to become a member of the reserve bank for its district.

6. **Embezzlement ⇐4—Elements of offense.**
The word "embezzle" has a technical significance, and conveys the idea of wrongful appropriation of the property of another by one intrusted with it, or who has possession of it under some trust duty or office, and the word of itself implies a fraudulent and unlawful intention on the part of the person charged (citing Words and Phrases, Embezzle—Embezzlement.)

Scire facias by the United States against J. C. Davenport and others. On exceptions to writ. Overruled.

Hugh R. Robertson, U. S. Dist. Atty., of San Antonio, Tex.
Levy Old and W. D. Love, both of Uvalde, Tex., for defendants.

WEST, District Judge. This suit is based upon the bail bond of F. J. Rheiner, principal, together with record forfeiture appearing by a judgment nisi entered March 20, A. D. 1919, in the criminal case. Rheiner's sureties, defendants in this scire facias proceedings, respond to the writs issued. By general and special exceptions they question

the legal sufficiency of the bond and judgment. To properly estimate the force of these exceptions it seems necessary to insert in full a copy of the bond and of the record of judgment nisi. The first day of the March term, A. D. 1919, of the court was March 17th. It will be noted that the judgment of forfeiture was taken on March 20, 1919, a day of the regular term; the grand jury having returned an indictment against the principal, Rheiner, and the case formally docketed. The bail bond and judgment nisi are as follows:

The Bond.

"United States of America, Western District of Texas, Del Rio Division.

"Be it remembered, that on this 1st day of February, A. D. 1919, before me, C. W. Hartup, a United States commissioner for the Western district of Texas, Del Rio division, personally came F. J. Rheiner, principal, and J. C. Davenport, F. N. Davenport, B. M. Davenport, and T. J. Martin, sureties, and jointly and severally acknowledged themselves to owe the United States of America the sum of seven thousand and five hundred ($7,500) dollars, to be levied on their goods and chattels, land and tenements, if default be made in the condition following, to wit:

"The condition of this recognizance is such that, if the said F. J. Rheiner, principal, shall personally appear before the District Court of the United States in and for the Western District of Texas, on the first day of the March term, 1919, to be begun and held at the city of Del Rio, Texas, at 9 o'clock a. m., and from time to time thereafter to which the case may be continued, and then and there answer the charge of having, on or about the 7th day of December, A. D. 1918, within said district, in violation of section 5209 of the Revised Statutes of the United States, unlawfully, willfully, and fraudulently made false entries in the books of the Uvaide National Bank, of which said bank he, the said F. J. Rheiner, was then and there cashier, said bank being an association incorporated and operating under and by virtue of the national banking laws of the United States of America; and it is further alleged that the accused did forge the names of certain depositors of said bank, and otherwise did misapply and embezzle the moneys, funds, and credits of the aforesaid bank, and then and there abide the judgment of the said court, and not depart without leave thereof, then this recognizance to be void; otherwise, to remain in full force and virtue. [Signed] F. J. Rheiner. J. C. Davenport. F. N. Davenport. B. M. Davenport. T. J. Martin.

"Taken and acknowledged before me on the day and year first above written. C. W. Hartup, United States Commissioner as Aforesaid. [Seal.]"

The Judgment Nisi.

"The United States v. F. J. Rheiner, Principal, and J. C. Davenport, F. N. Davenport, B. M. Davenport, and T. J. Martin, Sureties. March 20, 1919. No. 207.

"This day this cause was called for trial, whereupon came the United States, by their district attorney, but the defendant F. J. Rheiner failed to appear, and thereupon his name was three times distinctly called at the door of the courthouse, and a reasonable time given him after such call was made in which to appear, yet the said defendant came not, but wholly made default; and now J. C. Davenport, F. N. Davenport, B. M. Davenport, and T. J. Martin, sureties on the recognizance of said F. J. Rheiner, being also three times called and commanded to bring the body of their principal, the said F. J. Rheiner, came not, but made default.

"And it appearing to the court that the defendant F. J. Rheiner, as principal, together with J. C. Davenport, F. N. Davenport, B. M. Davenport, and T. J. Martin, as sureties, did on, to wit, the 1st day of February, 1919, enter into a recognizance before C. W. Hartup, United States commissioner for the Western district of Texas, at Eagle Pass, Texas, payable to the United States of America, in the penal sum of seven thousand five hundred ($7,500.00) dollars, conditioned that the defendant F. J. Rheiner should make his personal appearance before the District Court of the United States in and for the

Western District of Texas on the first day of the March term, 1919, to be begun and held at the city of Del Rio, Texas, at 9 o'clock a. m., and from time to time thereafter to which the case might be continued, and then and there to answer the charge of having, on or about the 7th day of December, A. D. 1918, within said district, in violation of section 5209 of the Revised Statutes of the United States, unlawfully, willfully, and fraudulently made false entries in the books of the Uvalde National Bank, of which said bank he, the said F. J. Rheiner, was then and there cashier, said bank being an association incorporated and operating under and by virtue of the national banking laws of the United States of America, and of having forged the names of certain depositors of said bank, and otherwise misapplied and embezzled the moneys, funds, and credits of said bank, and then and there abide the judgment of said court, and not depart without leave thereof.

"It is therefore considered by the court that the United States of America is entitled to a forfeiture of said recognizance, and it is ordered, adjudged, and decreed by the court that the United States of America have and recover of and from the said F. J. Rheiner, as principal, the sum of seven thousand five hundred ($7,500.00) dollars, and in like manner that the United States of America do have and recover of and from the said J. C. Davenport, F. N. Davenport, B. M. Davenport and T. J. Martin, as sureties, jointly and severally, the sum of seven thousand five hundred ($7,500.00) dollars, and that this judgment will be made final, unless good cause be shown at the next term of this court why the said defendant F. J. Rheiner did not appear.

"It is further ordered that capias issue for the defaulting defendant, and that scire facias issue to said sureties, and that this cause be and the same is hereby continued." Volume A, p. 528, Minutes.

[1] The exceptions to the sufficiency of the record are as follows: Failure to show (1) that a criminal prosecution was pending against the principal; (2) that an examination by an officer duly authorized to admit to bail had been held; (3) that the principal was bound to appear before said court "to answer the accusation against him"; (4) that there was a finding of probable cause to believe that the defendant principal was guilty of any offense; and (5) that the bond, in requiring the principal to appear and answer a charge of "having violated section 5209 of the Revised Statutes of the United States" (Comp. St. § 9772), does not define any criminal offense.

The objections are more appropriate to testing the sufficiency of an indictment than that of proceedings for recovery of a penalty incurred under a formal contractual obligation to the United States. The issues are measured by the terms of the bond and the recitations of the judgment nisi. There seems no reason for a strict or highly technical construction of law in favor of defendants. This action does not involve the guilt or innocence, conviction or acquittal, of any one. It is not a criminal case. The bail bond is a contract between the sureties and the government. Upon the failure of the principal to appear the sureties become debtors. U. S. v. Sanges, 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445; U. S. v. Zarafonitis, 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290.

[2] Where an offender has been bailed agreeably to the usual mode of process of the laws of the state where the offense is charged to have been committed, the laws of that state are to be looked to to determine the sufficiency of the procedure taken. Rev. St. U. S. § 1014 (Comp. St. § 1674). The Texas statute provides specific exclusive defensive causes which must exist to avoid final judgment on the scire facias. Article 500, vol. 2, Vernon's Crim. St. 1916. This statute was enacted for the

purpose of confining a surety's defense to a scire facias on a forfeited bail bond or recognizance to one of the reasons enumerated and to prevent any inquiry as to the guilt or innocence of the principal defendant or of the validity or invalidity of the indictment. McCoy v. State, 37 Tex. 219. That the indictment is defective, or the principal defendant innocent, is not a defense, see other Texas cases: Jones v. State, 15 Tex. App. 82; Hester et al. v. State, 15 Tex. App. 418; Martin et al. v. State, 16 Tex. App. 265; Langan v. State, 27 Tex. App. 498, 11 S. W. 521; State v. Cocke, 37 Tex. 155; State v. Rhodius, 37 Tex. 165; State v. Ake et al., 41 Tex. 166 and also the following federal court cases: U. S. v. Reese, Fed. Cas. No. 16,138; U. S. v. Evans (C. C.) 2 Fed. 147; Hardy v. U. S., 71 Fed. 158, 18 C. C. A. 22; U. S. v. Graner (C. C.) 155 Fed. 679.

[3] That the offense charged against the principal defendant is barred by the statute of limitations cannot be interposed by sureties on a recognizance. The undertaking of the sureties was to answer for their principal's appearance. Whether the offenses with which he is charged were barred by lapse of time could only be determined in the prosecution against him. A commissioner of the United States Circuit Court is expressly authorized by statute (Rev. St. U. S. § 1014) to take bail for the appearance for trial before the proper court of one charged with crime against the United States. U. S. v. Dunbar, 83 Fed. 151, 27 C. C. A. 488; U. S. v. Sauer (D. C.) 73 Fed. 671.

The liability incurred by the bail in the recognizance of their principal, Rheiner, is not limited to that which appertains to the use of the word "surety." Ordinarily it implies an obligation to pay a money indebtedness of the principal upon his default. The bail or sureties in a recognizance in a criminal proceeding are obligated to produce the body of their principal before a court having jurisdiction to try the offense at the time, place, etc., set forth in the recognizance or bail bond, as it is indiscriminately termed; failure to do so mulcts the bail in the sums of money specified. Mr. Justice Field, in U. S. v. Reese, 27 Fed. Cas. 749, No. 16,138, supra, speaking to the question of the surrender by sureties of their principal, says:

"In the theory of the law [the principal] was in their custody, as jailers of his own choosing, subject to be surrendered at any moment. If they failed to exercise their power over him, they must bear the responsibility attached to the position they voluntarily assumed."

Conforming to the trend of authority quoted, the expression of the United States Circuit Court of Appeals, Seventh Circuit, in U. S. v. Du Faur, 187 Fed. 812, 109 C. C. A. 572, is apt:

"A recognizance is a contract of record, and scire facias is an action on that contract as made. Beyond this the court will not look. No inquiry will be made into antecedent proceedings by the court passing on the scire facias. Indeed, the sureties would be estopped from denying the legality of such proceedings. This follows from the very nature of the contract. It is a court record. It imports verity. Upon production it proves itself. It is not to be disputed. Any other practice would allow the obligor and sureties to decide upon the necessity for an appearance—an impossible view. The obligation imposed by the contract was to appear, and not depart without leave of court, as well as to answer the specific charge. Such a bond would not be discharged by quashing the indictment. Neither can it be avoided by the suggestion

that the statute, under which the charge was made, has been declared unconstitutional."

The exceptions demand a strict construction of the allegations in the "complaint" as of right. No such strictness is required in the proceeding before the United States commissioner for commitment or bail. It is said in Southworth v. United States, 151 U. S. 179–184, 14 Sup. Ct. 274, 276 (38 L. Ed. 119):

"It is sufficient, if the complaint is full enough to clearly inform the defendant of the offense with which he is charged. * * * If such proceedings were to be subjected to the rigid rules of criticism, and all the constituent elements of the offense required to be set forth in the affidavit * * * with certainty, the administration of the criminal law would be greatly embarrassed. * * *"

And to the same effect is the language used in Barrera's Sureties v. State, 32 Tex. 644–650.

Describing in a recognizance or bail bond the offense of which the principal is charged is for the purpose of identifying the case and to inform the principal and sureties of the obligations to be assumed. U. S. v. Zarafonitis, 150 Fed. 100, 80 C. C. A. 51, 10 Ann. Cas. 290. The defendants in this (a civil) action are requiring a higher degree of certainty than in a criminal proceeding, where doubts are uniformly resolved in favor of the defendant. To comply would require the plaintiff to plead the evidence. In Hollister v. U. S., 145 Fed. 781, 76 C. C. A. 345, where a demurrer was interposed to the sufficiency of the scire facias proceeding upon a forfeited recognizance, a case in point, it is said:

"There is no doubt of the proposition, contended for by defendants' counsel, that there must have been some criminal charge exhibited against Waugh; that the same must have been pending against him at the time of the forfeiture of the recognizance; that the recognizance must have been made matter of record, etc.; but all such matters are evidential in their character. The record, when offered to prove the case, must disclose them, or the case fails; but to hold that any of them must be averred in detail in the declaration is to hold that plaintiff must plead his evidence, instead of the ultimate facts on which recovery is based. We think the declaration was sufficient as against the general demurrer."

[4] A recognizance in a criminal case is a judgment confessed of record, and a proceeding thereon by scire facias after forfeiture is merely to confirm such judgment. U. S. v. Taylor (D. C.) 157 Fed. 718; Ewing v. U. S., 240 Fed. 241, 153 C. C. A. 167. Enough has been stated to show that the terms of the bail bond and the recitals in the judgment are sufficiently definite to fully apprise defendants of the cause of action which they are called upon to meet. This is so, because there is no suggestion from defendants that they lack information operating to their prejudice.

The foregoing remarks and the rulings in U. S. v. Zarafonitis, 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290, dispose of the incidental points against defendants' contentions. It should be noted that the decision by Circuit Judge Pardee of this (Fifth) circuit in the last-named case construing very nearly identical questions in a scire facias

proceeding upon a forfeited bail bond, appealed from Texas, is an authority binding upon this court.

[5] The fifth and sixth special exceptions declare that the court lacks jurisdiction because the bond and judgment nisi fail to show that the principal was charged with having committed any offense against the laws of the United States, and particularly that section 5209 of the Revised Statutes, which the principal is charged to have violated, does not define any criminal offense. It is conceded that such an offense must so appear or the court would be without jurisdiction.

The Texas statute (Laws 1899, p. 111, amending article 321, Sayles'), being article (3) 309 of the Code of Criminal Procedure of 1895 provides that the bail bond will be sufficient, "if the defendant is charged with an offense that is a felony, that it state that he is charged with a felony; if the defendant is charged with a misdemeanor, that it state that he is charged with a misdemeanor." The Court of Criminal Appeals of Texas holds that either this must be done or the specific offense be stated. Anderson v. State, 201 S. W. 994. The grade of the offense not being given, how specific must the offense be stated? The question narrows to whether the language used in describing the offense set out in the bond and judgment does or does not specify an offense against the laws of the United States. This language is as follows:

"* * * Then and there to answer the charge of having, on or about the 7th day of December, A. D. 1918, within said district, in violation of section 5209 of the Revised Statutes, unlawfully, willfully, and fraudulently made false entries in the books of the Uvalde National Bank, of which said bank he, the said F. J. Rheiner, was then and there cashier, said bank being an association incorporated and operating under and by virtue of the national banking laws of the United States of America; and it is further alleged that the accused did forge the names of certain depositors of said bank, and otherwise did misapply and embezzle the moneys, funds, and credits of the aforesaid bank."

This language is separable into four distinct charges against Rheiner, the principal: (1) Making false entries; (2) forging the names of depositors; (3) misapplying and (4) embezzling the bank's moneys, funds, and credits. Note that the date of the commission of these offenses is "on or about December 7, 1918." Prior to the amendment of September 26, 1918, section 5209 formed a part of the national banking laws, and reads, eliminating unnecessary verbiage, as follows:

"Every * * * cashier * * * of any association, who embezzles * * * or willfully misapplies any of the moneys, funds, or credits of the association, * * * or who makes any false entry in any book, * * * of the association with intent, in either case, to injure or defraud the association, * * * shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The section as quoted was in effect at the time of the passage of the Federal Reserve Act of December 23, 1913 (Comp. St. § 9786), and remained so until September 26, 1918, when section 5209 was amended (see section 9772, U. S. Comp. St. Ann. Supp. 1919, vol. 2, p. 2249) to read, immaterial verbiage excluded, as follows:

"Any officer * * * of any federal reserve bank, or of any member bank as defined in the act of December 23, 1913, known as the Federal Reserve Act, who embezzles * * * or willfully misapplies any of the moneys, funds or

credits of such federal reserve bank or member bank, * * * with intent in any way to injure or defraud such federal reserve bank or member bank, * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof * * * shall be fined not more than $5,000, or shall be imprisoned not more than five years, or both, in the discretion of the court."

The material change made by the amendment is to substitute for the words "national banks" or "association" the words "federal reserve bank" or "member bank," and for the word "cashier" "any officer" is substituted. The penalty was changed.

The defendants assert that the making of the false entries, the embezzlement, and the misapplication of the funds cannot constitute an offense without specifically averring the fraudulent intent; that being an ingredient specifically required by section 5209, originally and as amended, or by charging an offense by name. If any one of the four separable charges covered by the blanket charge made in the bond and judgment is specified to be an offense against the laws of the United States, the complaint would be sufficient. Disregarding, then, all except the offense of embezzlement, and bearing in mind that strictness of construction is not to be applied in suits of this character, it appears that all of the constituent elements of this offense are not required to be set forth. Southworth v. United States, 151 U. S. 179, 14 Sup. Ct. 274, 38 L. Ed. 119; United States v. Zarafonitis, 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290; McCoy v. State, 37 Tex. 219, and other Texas cases and federal cases cited supra.

[6] Embezzlement was a crime known to the common law, and was classed as a felony of the same grade as larceny. 4 Bl. Comm. 231; United States v. Cadwallader (D. C.) 59 Fed. 677. The word "embezzle" is constantly used in the Criminal Code of the United States. It has a technical significance, and conveys the idea of wrongful appropriation of the property of another by one intrusted with it, or who has possession of it under some trust duty or office. 3 Words and Phrases, p. 2354. The word "embezzle" of itself implies a fraudulent and unlawful intention on the part of the person charged. No one can "lawfully" or "honestly" embezzle money or other property, and hence the use of the word "embezzle" in an indictment against an employé of the Post Office Department, charging him with embezzling and secreting valuable letters, is sufficient to charge the offense; it is not necessary to allege that the same was done with fraudulent intent. United States v. Atkinson (D. C.) 34 Fed. 316. A fraudulent intent may be presumed from the criminal act done. 1 Bishop's Criminal Procedure, §§ 278–290. The word "embezzle," as used in section 5209, Rev. St., or the words "steal, take, and carry away," as used in the common law, have a technical meaning. They do not, therefore, of themselves, fully set forth every element of the offense charged. United States v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520.

The Texas statute, supra, holds a declaration on a forfeited appearance sufficient if it states that the principal is charged with a felony. Here the principal is charged with having committed an offense by name, to wit, embezzlement, a crime known to the common

law as a felony. Authorities supra. He is specifically charged "that in violation of section 5209 of the Revised Statutes of the United States unlawfully, fraudulently and willfully," etc., which statute, notwithstanding its declaration that the crime defined is a misdemeanor, has been held to be one for which an infamous punishment may be awarded, thereby fixing its grade as that of felony. (In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409; Folsom v. United States, 160 U. S. 121, 16 Sup. Ct. 222, 40 L. Ed. 363; Sheridan v. United States, 236 Fed. 309, 149 C. C. A. 437; also section 335, Penal Code, defining felony (Comp. St. § 10509). So that by the common law, and by force of the very statute referred to, the offense is declared to be a felony.

In these circumstances can it in reason be asserted that the defendant sureties were not informed of the fact that their principal was charged with having committed a felony? The record warrants the conclusion that the requirements of the Texas statute had been substantially complied with in that particular. These authorities hold (1) that in a proceeding of this character it is not necessary to allege all the elements of the offense; (2) that it is not necessary to allege that the funds, moneys, and credits were embezzled "with intent to defraud"; (3) that "embezzlement" is a crime so named at common law of the grade of felony, and so declared by statute, all contrary to defendants' contentions.

Bearing in mind that the date of the alleged offense was December 7, 1918, the defendants contend that national banks, since section 5209 was amended, September 26, 1918, as such have no relation to the offenses denounced by the section 5209, unless connected by some certain allegation that the particular national bank is a member of a federal reserve bank; that this is a jurisdictional fact, essential to give vitality to any action on the part of either the United States commissioner in taking the bond or this court in awarding judgment. A comparison of section 5209 before and after its amendment discloses that its effect was merely to add to its present designation "national bank" that of a member of a "federal reserve bank." This amendment should be considered in connection with the Federal Reserve Act of 1913, and it be remembered that this "crimes" section of the national banking laws remained in effect until late in 1918. The act of 1913 (section 2, par. 6) required all national banking associations, within one year after the passage of the act, to become a member bank of the federal reserve, or its rights, privileges, and franchises "shall be thereby forfeited," so that, if the defendant's position be correct, there were no crimes acts relating to federal reserve or member banks until nearly five years after the passage of the original act.

The broad purpose of the Federal Reserve Act was to incorporate under federal control, as members of federal reserve banks, all national banks, as well as banks other than national banks. By force of the law all national banks, though still national banks, are members of federal reserve banks. National banks cannot exist and continue to operate alone as such within one year after the passage of the Federal Reserve Act of December, 1913, because of the mandate of the statutes. If, therefore, in the month of December, 1918, the records show that

"the Uvalde National Bank was an association incorporated and operating under and by virtue of the national banking laws of the United States of America, and of which the said Rheiner (the principal) was then and there the cashier," the defendants are informed that the Uvalde National Bank, since it is operating at that time, must at that time also be a member of a federal reserve bank. Section 5243, Rev. St. U. S. (Comp. St. § 9835), prohibits the use of the title "national" by any bank not organized under the national currency laws. Section 5154, Rev. St. U. S., as amended by the Federal Reserve Act of December, 1913 (Comp. St. § 9694), provides that banks organized under the general laws of the United States shall have all the rights and powers as those prescribed by the Federal Reserve Act. The record is silent as to when the Uvalde National Bank was organized and incorporated. If subsequent to the Federal Reserve Act, it would by force of the act be a member bank.

The recognized rule of presumption, "where an act * * * done [the Uvalde National Bank is "operating" subsequent to a prohibited date] can only be done legally after the performance of some prior act [becoming a member of a federal reserve bank] proof of the latter ["operating" after prohibition] carries with it the presumption of the due performance of the prior act [becoming a member]." United States Bank v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552; Knox County v. Ninth National Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93. The application of this rule adds nothing to the force of the statute, but warrants a holding that the Uvalde National Bank is a member of a federal reserve bank may be conclusively presumed.

Mr. Justice Van Devanter, in Great Northern Ry. v. United States, 155 Fed. 948, 84 C. C. A. 93, while sitting as a Circuit Judge, citing many authorities, held that where an act is amended "so as to read as follows," as is the case in the amendment of section 5209, or is reenacted with changes, so much of the act amended as is omitted is repealed, thus becoming a substitute for the original, which then ceases to have the force of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in a later statute is to be regarded as if first enacted therein.

It may also be observed that offenses committed prior to the repeal are to be regarded as unaffected by the repeal, and subject to prosecution, unless an express prohibition is included in the reenactment. The government, in its proof of the commission of crime as to dates, is not limited to the exact dates mentioned in the charge, but may within the discretion of the court, and within reasonable limits, introduce evidence of the commission of offenses for a period of time as far back as the bar of the statute of limitations would permit. Applying this rule to the date and the offense charged, it is entirely permissible for the government to introduce evidence of the commission of offenses under section 5209 as having been committed prior to the date of the amendment of September 26, 1918.

The discussion of the interesting questions involved in a proper consideration of the exceptions has drawn this opinion out to an unwarranted length. It might, perhaps, have sufficed to say in answer that

the defendants' propositions are untenable solely upon the authority of the Zarafonitis Case, supra.

The general and special exceptions will be overruled, and a formal order to that effect will be entered in due course.

UNITED STATES ex rel. YONICK v. BRIGGS.

(District Court, W. D. Pennsylvania. June 19, 1920.)

1. **Courts ⟸366(1)—State decision as to the constitutionality of the state statute binding on federal court.**
   A decision of the highest court of the state, upholding the validity under the state Constitution of a state statute, is binding on the federal courts.

2. **Jury ⟸21(3)—Act relating to delinquent children not invalid, as denying right to trial by jury.**
   Act Pa. April 23, 1903 (P. L. 274), giving the juvenile court jurisdiction of dependent and neglected children, and allowing the commitment of such a child without trial by jury, is not in violation of Const. U. S. art. 3, § 2, par. 3, providing that the trial of all crimes except impeachment shall be by jury, for the state, in caring for delinquent children, merely exercises its right of parens patriæ.

3. **Constitutional law ⟸83(1)—Infants ⟸12—Delinquent child act held not to invade the right to be secure in person.**
   Act Pa. April 23, 1903 (P. L. 274), giving the juvenile court jurisdiction of neglected and dependent children under the age of 16, is not invalid in taking away the right of people to be secure in their houses, etc.

4. **Habeas corpus ⟸17—Federal courts will not grant writ, unless applicant is held in custody in violation of the federal Constitution; "due process."**
   Under Rev. St. § 753 (Comp. St. § 1281), federal courts will not grant a writ of habeas corpus to secure the release of one held in custody by state officials, unless he is held in custody in violation of the federal Constitution, and if the conviction in the state court is based on a law not repugnant to the Constitution, habeas corpus will not lie unless jurisdiction is lacking; notice and hearing according to established procedure being sufficient due process to give jurisdiction.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

5. **Jury ⟸21(3)—Delinquent children, who had reached 16, not entitled to jury trial, where court had secured jurisdiction before that time.**
   Though Act Pa. April 23, 1903 (P. L. 274), giving the juvenile court jurisdiction over minors under 16, makes no provision for jury trials, a delinquent child of whom the juvenile court has already taken jurisdiction is not, on reaching 16, entitled to jury trial; it appearing that he was first arrested on a larceny charge and committed as a delinquent, but that the criminal charge was never tried, etc., and hence he cannot obtain release from commitment on habeas corpus issued out of the federal court.

At Law. Petition by the United States, on the relation of Mary Yonick, for writ of habeas corpus against Franklin H. Briggs, to secure the release of George Yonick, a minor. Petition denied, and the minor remanded.

E. L. Kearns and George P. Henning, both of Pittsburgh, Pa., for petitioner.

E. Z. Smith and John D. Evans, both of Pittsburgh, Pa., for respondent.

THOMSON, District Judge. The writ in this case was issued on the petition of Mary Yonick, a citizen of the state of Galicia, now a resident of Pittsburgh, which avers that her minor son, George Yonick, who was born in Pittsburgh, Pa., is now of the age of 16 years, and that he was committed on April 15, 1918, to the care and custody of Franklin H. Briggs, superintendent of Thorn Hill School, by commitment of a judge of the county court of Allegheny county, claiming to have jurisdiction as a juvenile court; the commitment setting forth that the said George Yonick was a delinquent. The petition alleges that he is unlawfully restrained, held, and detained by the superintendent of said school, and his personal liberty taken away, without due process of law, and that said child was not a delinquent at the time of his commitment; that the act of assembly of Pennsylvania, giving authority to a judge of the juvenile court to commit a child without trial by jury, violates paragraph 3 of section 2 of article 3 of the Constitution of the United States, which provides that "the trial of all crimes, except in cases of impeachment, shall be by jury"; that the acts of assembly creating the juvenile court of Allegheny county, Pa., are unconstitutional, in that they take away the right of the people to be secure in their persons, houses, etc.; that the juvenile court has jurisdiction only of children under the age of 16 years, and that, now that the said minor has arrived at the age of 16 years, he is entitled to a trial by jury.

[1-3] Act April 23, 1903 (P. L. 274), "defining the powers of the several courts of quarter sessions of the peace, within this commonwealth, with reference to the care, treatment and control of dependent, neglected, incorrigible and delinquent children, under the age of sixteen years," and providing for the means in which such power may be exercised, was before the Superior Court, and by appeal to the Supreme Court, of Pennsylvania, in the case of Commonwealth v. Fisher, 27 Pa. Super. Ct. 175, and 213 Pa. 48, 62 Atl. 198. In that case the constitutionality of the act was attacked from every quarter, and its legality was sustained in both appellate courts. Those decisions of the highest courts of the state are binding upon the federal tribunals. The court there held that the right of trial by jury is not invaded by the act in question, and that there is no trial for any crime; that the very purpose of the act is to prevent a trial, though, if the welfare of the public requires that the minor shall be tried, power is not taken away from the quarter sessions by the express provisions of section 11. The act was well justified by the Supreme Court, when it said:

"There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered."

The constitutionality of the act being thus upheld, we turn to the facts of the case to determine if the relator's constitutional rights have been invaded. The record of the proceedings of the court under which the child is restrained, was offered in evidence. From this record we find that on September 17, 1913, the said George Yonick was arrested on an information charging him with larceny from a railroad car. It appears that, after hearing by the juvenile court, he was returned to his home on probation; that in 1916, on petition of the probation officer, setting forth that relator and his brothers were dependent and neglected, the children were again brought before the juvenile court, and after hearing were committed to the Allegheny county home finding department. About two months later, on further consideration by the court, George Yonick and two of the other children were released from the home finding department and returned to their mother, under the supervision of the probation officer. On May 23, 1918, George Yonick was again before the court charged as a delinquent, and upon hearing was committed to the Thorn Hill School, where he is still detained. Afterwards, on the 15th of August, 1919, a petition was presented on behalf of the said George Yonick, setting forth certain facts, with the prayer that a hearing be given, agreeably to the act of assembly, to determine why the order committing the said George Yonick should not be revoked and the minor returned to his home. It appears that a hearing was had upon said petition, but as yet the court has rendered no decision thereon.

[4, 5] From this record we see that the minor is in custody by virtue of the order of a court of competent jurisdiction. He was never tried upon the charge of larceny, for which he was originally arrested. The subsequent steps taken before the juvenile court were to save him from this criminal trial. His present commitment is on the ground of delinquency, which in the act means any child, including incorrigible children, who may be charged with the violation of any law of the commonwealth or the ordinance of any city, borough, or township. In the case of Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969, the Supreme Court discusses very fully and with great clearness, the question of deprivation of liberty without due process of law, the meaning of the constitutional provision, and the proper mode of procedure, where the citizen claims his constitutional rights have been invaded. That case holds that under the terms of section 753 of the Revised Statutes (Comp. St. § 1281), in order to entitle the applicant to relief under the writ of habeas corpus, it must appear that he is held in custody in violation of the Constitution of the United States; that he cannot have relief on habeas corpus, if he is held in custody by reason of conviction upon a criminal charge before a court having jurisdiction over the subject-matter of the offense, the place where it was committed, and the person of the prisoner; that, if the proceedings in the courts of a state are based on a law not repugnant to the federal Constitution, and conducted according to the settled course of procedure under the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure,

this is "due process of law" in the constitutional sense; and, finally, that habeas corpus will lie only where the judgment under which the party is detained is shown to be absolutely void for want of jurisdiction in the court, either because such jurisdiction was absent in the beginning, or was lost in the course of the proceedings.

Here, undoubtedly, the court had jurisdiction for the humane purpose of saving the child from trial and perhaps conviction on a criminal charge, which otherwise might have resulted in imprisonment as a convict. There is no evidence that he, or any one for him, demanded at any time a trial by jury. The act in question, and the proceedings under it, when regular, are but the exercise by the state of its supreme power over the welfare of its children, acting as parens patriæ, when the natural parents have shown themselves unwilling or unable to properly care for them. The court having original jurisdiction of the child, I do not find that such jurisdiction was lost during the course of the proceedings. Under the Juvenile Court Acts (P. L. 1915, p. 652), a party who feels aggrieved by the judgment of the court may have an appeal to the Superior Court of Pennsylvania. Under the liberal procedure in habeas corpus, a person in custody pursuant to the judgment of the state court may have judicial inquiry in the federal courts into the very truth and substance of the causes of his detention, and, if necessary, to look beyond the record sufficiently to test the jurisdiction of the court under whose order he is restrained. In other words, the record can be attacked if in any way it fails to set forth the truth. Here no such testimony was offered, and hence the correctness of the record must be assumed.

Being unable to find that the restraint of the minor is in violation of his rights under the Constitution of the United States, the minor must be remanded; and it is accordingly so ordered.

THE VIRGINIA.

Petition of HINES, Director General of Railroads.

(District Court, D. Maryland. June 23, 1920.)

1. **Shipping ⊂=210—Value of cargo claims on account of wreck to be paid in full, passengers being satisfied by solvent owner.**
   On petition of federal Director General of Railroads and of steamship company for limitation of liability on account of loss of a steamer, and her cargo and others, *held* that, the company being solvent, the claims of passengers are to be paid by the company, and that, the value of the ship at the end of her voyage exceeding the aggregate amount of cargo claims, they are to be paid in full therefrom.

2. **Shipping ⊂=167(2)—Limitation of liability embodied in tariff duly filed binding on passengers.**
   Steamship company's limitation of liability on account of checked baggage, embodied in tariff duly filed with Interstate Commerce Commission, *held* binding on passengers in case of loss by wreck.

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3. **Shipping ⟸167(1)—Passenger could not recover for articles lost through wreck not in class of baggage.**
No recovery can be had by a passenger on a wrecked steamship for lost articles not included within necessary baggage and effects which a traveler may be expected to carry with him, though the steamship company's limitation of liability on checked baggage had no application to unchecked baggage, or to clothing or other articles on the person.

4. **Shipping ⟸167(1)—Steamship company not liable for large sums carried by passenger, or for articles not for personal use.**
A steamship company will not be liable for loss through wreck of large sums exceeding what a traveler reasonably may be expected to carry, or for merchandise not intended for personal use.

5. **Shipping ⟸167(1)—Steamship company liable for photographer's extra lens.**
Newspaper photographer, sent to take troop pictures, could recover of steamship company for loss by wreck of extra lens for camera carried by him, because he could not tell in advance precise focal length he would need.

6. **Shipping ⟸167(1)—Steamship company liable to passenger for Liberty bonds lost in wreck.**
A steamship passenger should be permitted to recover for loss by wreck of Liberty bonds in a limited amount carried with him almost of necessity to escape rent of a safety vault consuming the interest return, though a carrier ordinarily is not liable for loss of securities.

In Admiralty. In the matter of the petition of Walker D. Hines, Director General of Railroads, and of the Baltimore Steam Packet Company, for limitation of liability on account of loss of steamer Virginia, her cargo, et al. Subsidiary questions of liability disposed of.

George Weem Williams and L. Vernon Miller, both of Baltimore, Md., for petitioner.

George Forbes, James W. Dennis, John H. Skeen, William D. Roycroft, Eli Frank, Frank, Emory & Beemokes, and George T. Mister, all of Baltimore, Md., for claimants.

ROSE, District Judge. In this case it has already been held (264 Fed. 986) that the petitioners are entitled to the benefit of section 4283 of the Revised Statutes (Comp. St. § 8021) as against cargo owners, but not as against passengers. Some resulting and some subsidiary questions are still to be disposed of.

Rights of Cargo Claimants.

The appraised value of the wreck was but a small fraction of the total proved claims, but it largely exceeds the aggregate of those for lost cargo. The petitioners say that the cargo owners must accept in settlement of their demands that percentage to which they would be entitled if the passengers could not look to anything other than the value of the wreck; that is to say, if it be assumed, for illustration and for that purpose only, that what will be left of the net value of the charred hull after salvage, costs, etc., have been paid, will be $20,000, and that there is $5,000 due to cargo owners, and $95,000 to passengers or $100,000 in all, the former will be entitled to but $1,000,

or one-fifth of their losses, because the available fund is only one-fifth of the claims entitled to share in it. To this the shippers reply:

> Not so. You are solvent, and you are bound to pay the passengers in full, and must do so, and you cannot, as against us, assert that their claims are limited, when in point of fact the court has decided that they are not.

No reported case, dealing with this precise point, has been brought to my attention. If the petitioners were insolvent, the passengers would be doubtless entitled to share in the proceeds of the res; but that would be their right, and not that of the shipowners.

[1] In the instant case, the right of the petitioners to require the passengers to look solely to the fund has been denied. The prayer of their petition is to limit liability as to such claims has been rejected. There is authority in the decided cases, as in logic, that as to the passengers' claims a dismissal of the petition should follow. It has not been necessary to decide whether such order should be made or not, and the decree to be passed herein will adjudicate those claims, and decree that the petitioners shall pay them; but that is in virtue of a stipulation among the parties that as all the claims were maritime in their nature, and within the jurisdiction of the admiralty, those interested in their prosecution need not add to the costs and multiply papers by instituting separate suits upon each of them, but that the claims already filed in the limited liability proceedings shall be treated as if they were separate libels originally independently filed, but for convenience of trial consolidated with these proceedings. The substantial rights of the parties, however, are not affected by this agreement, sensible and practical as it is. So far as I can ascertain, the ordinary practice here and in other districts is that seamen's wages which are not subject to limitation are paid by the shipowners, and are not taken out of the value of the ship. It would seem that the claims of passengers in this case shall be treated in like manner. As the value of the ship at the end of her voyage exceeds the aggregate amount of cargo claims, they will be paid in full.

Limited Recovery for Checked Baggage.

[2] Some of the baggage lost was checked. In such cases, by the tariff of the steamship company, duly filed with the Interstate Commerce Commission, liability was limited to $100 per ticket. Such limitation is binding and must be enforced. Boston & Marine R. R. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593.

Hand Baggage and Articles Worn by the Passengers.

[3] The $100 limitation has no application to hand baggage not checked, or to clothing or other articles worn on the passenger's person. Hasbrouck v. N. Y. Central, 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912D, 1150; 5 R. C. L. 208. But no recovery can be had for any articles which are not included within the necessary baggage and effects which a traveler may be expected to carry with him.

[4] A steamship company will not be liable for large sums of money, exceeding in amount that which, under all the circumstances, a wayfarer may be expected to take with him, or for merchandise not intended for personal use. If a general ruling shall not suffice, a more specific determination will have to be made in particular cases.

Photographer's Camera and Extra Lens.

[5] One of the claims is in right of a photographer, who was sent by a newspaper to take pictures of troops returning to this country. Not knowing in advance under what conditions the pictures would have to be taken, he had with him an extra lens of different focal length from that in his camera, so that, if necessary, he might substitute one for the other. It has been held that an artist may recover for an easel taken on a sketching tour. Merrill v. Grinnell, 30 N. Y. 609. And an army surgeon, traveling with his troops, is entitled to take his surgical instruments with him, and to be reimbursed for them if they be lost in consequence of the negligence of the carrier. Hannibal R. R. v. Swift, 79 U. S. (12 Wall.) 262, 20 L. Ed. 423. The photographer and his lenses come within the same principle.

Liberty Bonds.

[6] A few of the claimants carried Liberty bonds on their person or in their hand baggage. Ordinarily valuable securities are not among the things which a passenger can reasonably be expected to carry on his journey. In the absence of special circumstances, the carrier is not liable for their loss, even though it may be the result of the negligence of its employés, as distinguished from the latter's fraudulent conversion or theft.

There is no reason why an exception should be made of Liberty bonds of a worth exceeding a narrowly limited sum. On the other hand, it is not possible to close our eyes to the fact that very many people own bonds, which in each individual case do not exceed the value of a few hundred dollars. Many of them never held any securities of any kind before and have none other now. They cannot afford to keep a safe deposit box for the storage of securities, the annual interest on which ranges from $1.75 to $8 or $9. When they move about, they must almost perforce take their bonds with them. If so, should not the latter be held to be among the things which the necessity or reasonable convenience of the traveler justifies him in carrying with him?

MORRILL v. McINNES.

(District Court, E. D. Pennsylvania. June 29, 1920.)

No. 4788.

1. **Sales ⇐174—Breach of condition precedent justifying refusal to deliver.**
Under a series of contracts for sale of iron by defendant to plaintiff, to be delivered on board ship for foreign shipment, which required plaintiff to establish an irrevocable credit against which defendant could draw for the price on presenting ocean bills of lading and invoices, where the master of a ship refused to issue bills of lading without prepayment of the freight, which defendant was compelled to pay and in consequence the credit was insufficient, defendant *held* justified in refusing to make further deliveries unless plaintiff made the credit sufficient to cover both price and freight, or otherwise provided for payment of the freight.

2. **Sales ⇐62—Contract to assure payment for all not met by assurance of payment for part.**
A contract to assure a seller of payment for all he is to deliver is not fulfilled by assurance of payment for part only.

At Law. Action by Thomas Morrill against Charles E. McInnes, individually and trading as Charles E. McInnes & Co. On motion by plaintiff for new trial. Denied.

Biddle, Paul & Jayne, of Philadelphia, Pa., for plaintiff.

Hubert J. Horan, Jr., and Owen J. Roberts, both of Philadelphia, Pa. (Walter S. McInnes, of Philadelphia, Pa., of counsel), for defendant.

DICKINSON, District Judge. [1] The action was for a breach of a contract to deliver. The defendant was called upon to have manufactured, or in some way to provide himself with, the subject-matter of the contract and deliver f. a. s. for foreign shipment. There were a number of transactions—seven in all—and six contracts relating to them. The contracts varied in some of their details, but there was a substantial family likeness, and to bring the consideration of the merits of the cause within manageable limits it was agreed that the variations might be ignored and one contract treated as typical of all. This typical contract was that the plaintiff should provide an irrevocable confirmed credit to assure to plaintiff payment for what he delivered and a vessel to which the delivery was to be made. The defendant was to deliver f. a. s. receiving an ocean bill of lading, on which and his invoice he was to receive payment from the bank or express company with whom the credit had been established.

When the contract came to be performed, this obstacle was encountered: When the plaintiff had arranged with the bank or express company to establish a credit (even if he did so), the master of the ship demanded prepayment of freight before he would issue an ocean bill of lading. Without this the defendant could not get his money. This forced him to advance the freight, and, as a consequence, the credit was insufficient. The defendant complained of this, and asked the plaintiff to either arrange with the ship, so that the ocean bill of lading might issue without the payment of freight, or to establish a credit

which would cover both invoice and freight. No satisfactory arrangement was made, and finally the defendant refused to make deliveries.

The plaintiff then brought suit; the defense being a denial of the obligation to deliver, unless the contractual assurance of payment had been given. The court charged the jury that plaintiff could not recover for a failure of the defendant to perform, unless the precedent conditions of such performance had been met by the plaintiff. One was the establishment of the required credit. Some of the contracts called for "confirmed irrevocable credits"; some for "credits as usual."

The first point now made by the plaintiff is that these "usual" credits meant the kind of credits which were established in the transactions which the parties had previously had, and that the trial judge had ignored the significance of such transactions. However this may be, no appellate use can be made of the point in face of the stipulation of the parties that the contracts might be treated as if they all read "irrevocable confirmed credits." (See charge of the court.)

The next complaint is that the trial judge erred in instructing the jury that the plaintiff could not complain of the refusal of the defendant to deliver, unless these credits had been established, and that defendant could not be compelled to sell on the unsupported credit of the plaintiff, not having contracted to so sell. The complaint, as we understand it, is not of the legal doctrine laid down, but that the court had the wrong concept of what the plaintiff had done and failed to do. This question of performance was treated in the charge as a question of fact, and it was left to the jury to determine. In this we as yet see no error.

The third complaint is to the part of the charge relating to ocean freights. Here again the complaint is, not to the construction given by the court to this part of the contract, which was that the plaintiff was bound to provide the ship and pay the freight, or, at least, that the defendant was not bound to pay the freight, but the plaintiff was not required to either provide the ship or pay the freight until defendant was ready to deliver. No such complaint is made, because the trial judge in this accepted the plaintiff's reading of the contract. The complaint is that the charge (although not so intended) conveyed to the jury the thought that the plaintiff was bound to establish a credit to take care both of the invoice and the freight as soon as the order for the goods was given.

We have attentively reread the charge with this complaint in mind, but do not find it to be justified. It is true that at first the assurance of the payment of invoice and freight are treated as one; but the jury were expressly and several times told that this was merely to present the general thought, which was subject to qualification, and the qualification was subsequently made by distinguishing between the invoice and the freight payment with respect to the time when provision was required to be made for the payment of each.

The fourth complaint is that the defendant assumed to cancel the contract, not because the plaintiff had refused to provide in advance for the payment of the invoice, but because he would not provide in advance for the payment of all the freight, and that the jury

should have been told such cancellation was unjustified in fact and law. This complaint is well founded only in a sense. The jury were told in effect that failure to provide for payment of the invoice justified a refusal to deliver, and that the plaintiff was also bound to provide a ship from which, on delivery, the defendant could get an ocean bill of lading, and, if this was necessary in order to have the bill of lading, to arrange for or prepay the freight. The jury were not told that defendant could demand a credit covering freight, but that he had agreed that plaintiff might provide in this way for the freight. They were further told that the defendant could refuse to deliver only if the plaintiff had refused to give the assurance of payment called for by the contract, and even if thus justified in refusing to deliver, if he refused on other grounds, he was held to the grounds he had selected, and must stand or fall with them. We see no error in this of which the plaintiff can rightfully complain.

[2] The fifth complaint is with respect to the "indivisibility" of the iron contracts. The question is whether, under a contract to sell and deliver 1,000 tons of iron, the vendee can demand delivery of 500 tons, or whether the vendor is supported in his refusal to deliver part by saying, Take all for which you contracted, or get none. The real question is one even more easily answered. It is whether a contract to assure payment of what is to be delivered under a contract which calls for a deposit of $10,000 is met by a deposit of $5,000. We adhere to the view expressed to the jury that a contract to assure to the defendant payment for all he is to deliver is not fulfilled by assuring payment of part.

The final complaint is of that part of the charge which was directed to the measure of damages. The effort made was to distinguish between the obligation, which did not rest upon the plaintiff, to accept of the substitution of a new contract with a defaulter for the old contract on which he had defaulted, and the obligation, which did rest upon him, to supply himself with that for which the contract called at the lowest price for which he could secure it. This distinction may not have been happily expressed, but we think the jury grasped it. The industry of counsel for the defendant has brought to the support of the charge the case of Lawrence v. Porter, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167, in which the same distinction is made.

The instant case was as well and as fairly tried as any case could possibly be. However much the counsel for plaintiff may deplore the loss of the verdict, it was beyond cavil through no fault which could be attributed to him. He has presented the appellate features of his case with the same conspicuous fairness and ability with which the case was tried, but the court remains unconvinced of error.

The motion for a new trial is discharged, and leave is granted to enter judgment, with costs, on the verdict; the judgment, for definiteness of date, to date from such entry.

PHILLIPS v. CARTER et al.

In re L. CARTER CO.

(District Court, S. D. Georgia, E. D. July 20, 1920.)

Bankruptcy ⟸175—Transfer by bankrupt not subject to attack by subsequent creditors.

A transfer of property by a corporation to its principal stockholder *held* made in good faith and for full consideration received by the corporation in payment of its indebtedness, and not subject to attack by the trustee in bankruptcy of the corporation, representing creditors who became such after the transfer.

In Equity. Suit by R. L. Phillips, trustee in bankruptcy of the L. Carter Company against L. Carter, the Pickens Company, and the Jesup Banking Company. Decree for complainant in part.

C. B. Conyers and Krauss & Strong, all of Brunswick, Ga., and J. R. Thomas, of Jesup, Ga., for trustee.

Leon A. Wilson, of Waycross, Ga., and Max Isaac, of Brunswick, Ga., for defendants.

BEVERLY D. EVANS, District Judge. The L. Carter Company, a corporation engaged in mercantile and real estate business, about the beginning of the year 1913 was very much involved in debt, owing approximately $110,000, of which $47,763.58 was due to L. Carter, its president and largest stockholder. At a meeting of the directors, held on January 9, 1913, to consider the financial condition of the company, a proposition was made by L. Carter that, if the company would convey to him certain land at stated valuations, he would agree to discharge his debt and personally indorse for approximately the remainder of the corporation's indebtedness; that he would endeavor to get a loan on the land as security, and use such portion of the money obtained on the loan as might be necessary to pay off the indebtedness for which he became personally liable, taking the corporation's note for such amounts as he might pay. This proposition was accepted by the directors, and the vice president was authorized to execute the necessary deeds, which was done the next day. The aggregate value of the land was agreed upon to be $34,580, the valuations being made by Directors Gurr and Colvin.

On May 19, 1913, Broadhurst and others filed a petition to have the L. Carter Company declared an involuntary bankrupt. An act of bankruptcy was alleged to have been the foregoing transfers. The Carter Company defended. Pending this proceeding a stockholders' meeting of the L. Carter Company was held, on July 8, 1913. At this meeting the action of the directors at the meeting of January 9, 1913, were approved and confirmed. The involuntary bankruptcy proceeding of Broadhurst and others was dismissed by them on September 25, 1913.

In January, 1914, L. Carter proposed to the Pickens Company to sell the land conveyed to him by the L. Carter Company and certain

personal property. This proposition was in writing, and was considered by the directors of the Pickens Company at a meeting held on January 24, 1914. At this meeting, on motion of Broadhurst (one of the plaintiffs in the abandoned bankruptcy proceeding), the directors accepted Carter's proposition, which was to sell certain described land, valued at $108,670, and 21 mules, 2,000 bushels of corn, wagons, etc., valued at $6,600—total, $115,270—on the following terms: He was to give for this property $115,500; $75,000 in 12 notes, of $6,250 each, one payable each year, and each bearing 8 per cent. interest, and $40,500 in stock of the Pickens Company (the charter of the company having been just amended, allowing an increase of capital stock). At a stockholders' meeting, held on February 23, 1914, the action of the directors was approved, and provision made for the consummation of the transaction. The details of consummation were left by Carter to Gurr (who managed the L. Carter Company), to be carried out according to Carter's proposition. The deeds were made by Carter to the Pickens Company, and stock of the Pickens Company to the amount of $40,500 was issued, some to Carter and some, at his direction, to members of his family; but the notes, instead of being made to Carter, were made payable to the L. Carter Company. Gurr hypothecated four of the notes with the Jesup Banking Company as collateral to certain debts of the L. Carter Company, due that bank and the Bank of Odum. These notes were afterwards discounted and the funds paid out on the indebtedness of the L. Carter Company, and the balance placed to its credit and checked out by it. The remaining eight notes, of $6,250 each, were left with the Jesup Banking Company for safekeeping. These were afterwards given to L. Carter, who surrendered them to the Pickens Company, taking notes for like amounts payable to himself.

Subsequently, on the ——— day of January, 1915, an involuntary petition in bankruptcy was filed by Gordon & Co. and others against L. Carter Company. This company was adjudicated a bankrupt on January 30, 1915. The estate was administered by a trustee, who was discharged June 16, 1916. The case was reopened by order of court, and a new trustee was elected. The foregoing facts developed on the hearing of a bill which was filed by the new trustee on May 7, 1918.

After carefully examining the evidence, I am fully convinced that the various transfers were executed in good faith. The defendant L. Carter was the principal stockholder of the L. Carter Company, a corporation which bore his name. He seems to have been ever ready to tide that corporation over its financial difficulties, lending to it his money and his credit at different times. When he took the deeds from the corporation, it was not so much an absolute sale as it was a vesting in him of the title to the land, that he might realize by sale or by hypothecation money with which to liquidate the corporation's indebtedness. He was embarrassed by the filing of an involuntary bankruptcy proceeding, attacking the transfer to him of this land. When the proceeding was dismissed, he succeeded in finding a purchaser. The sale of the land, together with certain personal property of his own, to the Pickens Company, was made in good faith and upon ade-

quate consideration, and in execution of the terms and conditions under which the title was vested in him. The evidence justifies the conclusion that Carter settled, by personal indorsement and by payment, the debts of the L. Carter Company, existing at the time of the transfers by the L. Carter Company to him and by him to the Pickens Company, and that these debts were sufficient to absorb the cash value of the consideration received from the Pickens Company. Only two creditors of the L. Carter Company, who were such at the time of these transfers, are still unpaid. One of them, H. Traub Sons, has been paid by accord and satisfaction since the filing of this suit, and the other, the Southern Cotton Oil Company, has not been paid. There is no evidence that the debts of other creditors, besides these, were in existence at the time of these transfers, or that at the time credit was extended they had no notice of the transfers, and were induced by fraud to extend credit on the faith of the ownership of the L. Carter Company. Under such circumstances, subsequent creditors cannot attack the transfers. Am. Trust & Savings Bank v. Duncan, 254 Fed. 780, 166 C. C. A. 226.

It appears that Carter indorsed the paper of L. Carter Company to the Southern Cotton Oil Company. The record discloses that the L. Carter Company was not released from its debt. This creditor has not surrendered its debt against the Carter Company. Some of the Pickens Company stock stands in the name of L. Carter, and there is also money due by the Pickens Company to Carter. These are equitable assets, which should be applied to the judgment of the Southern Cotton Oil Company against L. Carter Company and L. Carter, indorser, and a decree will be entered, subjecting these equitable assets to the payment of that judgment.

With reference to lot of land No. 141, I think the evidence clear that the trustee should not recover that lot.

Let a decree be entered in accordance with these findings.

SOCHIS et al. v. UNITED STATES.

(District Court, E. D. Pennsylvania. June 11, 1920.)

No. 6606.

1. **Courts ⇐518—District Courts and Court of Claims have concurrent jurisdiction, except as to amount involved.**
   In every cause of which the Court of Claims has jurisdiction, the District Courts have like jurisdiction, limited only in respect to the sum involved.

2. **Courts ⇐426—District Court has jurisdiction of claims for compensation for property requisitioned under war acts.**
   Under the war acts of Congress, conferring power to take possession of property of individual citizens for public purposes, and also giving the right to institute suits against the United States for compensation for property so taken, a District Court has jurisdiction of such a suit, provided the sum involved is within the prescribed limit.

At Law. Petition by Morris Samuel Sochis and Louis Lippenhals, trading as the National Dental Laboratory & Supply Company, against the United States. On demurrer to petition. Overruled.

Prichard, Saul, Bayard & Evans, of Philadelphia, Pa., for plaintiffs.
Charles D. McAvoy, U. S. Atty., of Philadelphia, Pa.

DICKINSON, District Judge. This proceeding, although in the form of a petition, is really an action at law to recover the damages sustained by the plaintiff through the exercise of the right of domain vested in and exercised by the defendant.

The question raised by the demurrer is the one of the jurisdiction of this court to judicially determine the cause. The practically wise thing is to have the question decided now, thus saving the parties the trouble, delays, and expense of trial, if the court has no authority to decide the question which the parties wish to have determined.

The general question of jurisdiction is Janus-faced. As affecting courts of the United States, two questions may be involved. One is whether the court as a court has jurisdiction, and the other is whether as a federal court it has jurisdiction. As the United States is a party, no question is raised with respect to the federal feature of the general question of jurisdiction. If the United States were not a party, but the defendant were a corporation, vested with the power of eminent domain, no doubt could arise as to the jurisdiction of a court to entertain an action brought to determine what should be recovered by way of compensation for property taken in the exercise of the right of eminent domain. As the United States is a party, the action, if any, may be brought in this court, if it can be brought at all. Again, as the United States is a party, no action can be brought unless the United States has consented to the bringing of the action, and then it must be brought in that tribunal and in that form which Congress may have prescribed as conditions of its consent to be sued.

There is no criticism of the form of procedure, and no denial that the United States has given to the plaintiff a right of action. The sole question is whether the United States has given its consent that the proceedings may be had in a District Court of the United States, or whether they have limited the right to bring proceedings to proceedings brought in the Court of Claims.

There are a number of different acts of Congress which directly or more remotely bear upon the question. The view we have taken of it renders it unnecessary to inquire into the phraseology of these different acts of Congress. That view is that the United States has recognized that citizens may have claims against the United States which, if against individuals, would properly be the subject of judicial inquiry and determination.

The United States has consented that in such cases it may be made a defendant, as if an ordinary citizen, and may be sued as such. The only privilege which it has reserved to itself is that it may be sued only in the Court of Claims, a court especially constituted and equipped for determining the justness of claims made against the United

States and holding its sessions at the seat of the government. The United States has further recognized, however, that there may be claims of a character and involving an amount such that it would be a hardship upon litigants to send them into the Court of Claims.

There are many and valid reasons supporting the decision of Congress to require claimants against the United States to go into the Court of Claims. There is at least the above suggested reason for having some exceptions to that general rule. All the purposes which Congress had in view were met by the general provision that the Court of Claims, and that court only, should have jurisdiction to adjudge claims against the United States, but that the District Courts should have a like jurisdiction up to a sum not exceeding $10,000.

[1] We are therefore justified in laying down as the first proposition that in every cause of which the Court of Claims has jurisdiction the District Courts have a like jurisdiction, limited only in respect to the sum involved or in controversy, and, of course, the amount of the judgment which can be rendered.

[2] When, therefore, in the different war measures enacted by Congress power was conferred to take possession of the property of individual citizens for public purposes, and the right to institute proceedings against the United States for compensation for the property taken was also given, Congress thereby gave its consent to such proceedings being instituted in those tribunals which Congress had already provided for the purpose, and had intrusted with power to determine the rights of the claimants and of the United States. This meant that proceedings might be instituted in the Court of Claims, and also that they might be instituted in any District Court of the United States, provided the sum involved did not exceed the limitation above named. This we believe to have been the intent of Congress, and to be also within the fair meaning of the terms in which Congress has expressed its intent.

Emphasis has been laid upon the fact that in some of these acts of Congress reference is made to the Court of Claims and the Court of Claims only. We do not think this in any way to qualify the intent of Congress. The reference to the court was a reference to the jurisdiction, and as the jurisdiction of the Court of Claims and of the District Court is in this respect concurrent pro tanto consent to the exercise of the jurisdiction of the Court of Claims is consent to the exercise of the jurisdiction of the District Courts, so far as the jurisdiction of the latter courts is concurrent with the jurisdiction of the former court.

The demurrer is overruled, with leave to the defendant to answer over.

ARZUAGA et al. v. ORTIZ.

(Circuit Court of Appeals, First Circuit. July 2, 1920.)

No. 1377.

1. **Master and servant ⟸250½—Statute of Porto Rico enlarging rights of employés does not exclude remedy under prior statute.**
   Employers' Liability Act Porto Rico March 1, 1902, is not a codification of the law on the subject of liability of masters for acts of employés, but an enlargement of the rights of employés, and the remedies thereby afforded do not exclude any right of action given by Civ. Code Porto Rico, §§ 1803, 1804.
2. **Master and servant ⟸179—Liability for negligence of servant under law of Porto Rico stated.**
   Under Civ. Code Porto Rico, §§ 1803, 1804, the owner or director of an establishment or enterprise is liable for damage caused by the negligence of his employés acting in the course of their employment, unless he shall prove as an affirmative defense that he took the care of a good father of a family to avoid the damage, not only in selection of his employés, but in superintending their work, which is a personal duty, and cannot be delegated to avoid liability; and this is so, whether the person injured is or is not an employé.
3. **Master and servant ⟸159—Fellow servant rule not in force in Porto Rico.**
   The fellow servant doctrine does not prevail in Porto Rico.

In Error to the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

Action by Antonio Ortiz against Pedro Arzuaga y Beraza and others, partners under the name of Sobrinos de Ezquiaga. Judgment for plaintiff, and defendants bring error. Affirmed.

Francis H. Dexter, of San Juan, P. R., for plaintiffs in error.

Hugh R. Frances and Frances & De Jesus, all of San Juan, P. R., for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is a writ of error from a judgment of the federal District Court for Porto Rico in an action of tort brought by Antonio Ortiz against a partnership doing business under the name of Sobrinos de Ezquiaga. The plaintiff is a resident and citizen of Porto Rico, and the defendants are subjects of his majesty the king of Spain. The action was brought November 8, 1916. In the court below there was a trial by jury, and a verdict for the plaintiff in the sum of $3,983.

In the amended complaint it is alleged that on the 6th day of December, 1915, the plaintiff, while acting as an employé of the defendants, under the control and direction of a superior officer employed by them, was severely and permanently injured by being crushed under a coal chute, which fell upon him while working with other employés of the defendants on the San Juan water front; that the coal chute fell upon the plaintiff (1) because of the negligent and careless manner in which the superior officer directed and superintended the

lowering of the chute for the purpose of unloading the coal from a schooner; (2) because the superior officer, in lowering the chute, did not use sufficient apparatus; and (3) that the defendants failed to furnish reasonably safe and suitable instrumentalities, tools, and work place for lowering the chute, or for putting it in a proper position for unloading the coal.

The defendants pleaded (1) a general denial; (2) that at the time of the accident the plaintiff was working under the direction and control of an independent contractor, Lino Fernandez, who furnished all the material and apparatus used in connection with the work; (3) that the plaintiff's injury was the direct result of his own negligence; (4) that the defendants, in the selection of Lino Fernandez, employed all the diligence of a good father of a family; (5) that the plaintiff's injury resulted from the negligence and carelessness of fellow servants; and (6) assumption of risk.

The plaintiff's evidence tended to show that he was injured by the falling of a coal chute on the 6th day of December, 1915, while he was engaged in the defendants' employ unloading coal from a steamer at San Juan; that at the time he was working under the direction of a superintendent, Lino Fernandez; that in the course of the work it became necessary to lower the chute, so that the coal would be delivered into the carts; that the chute at the upper end was attached to the ship by ropes, and at the lower end was supported by two posts nailed to the chute; that, while lowering the chute, one of the posts became detached, throwing the chute out of plumb; that at this time the lower end of the chute was so high above the ground that it could not be reached by the men, and it became necessary, in order to support it in an erect position, to procure a prop to put under it; that the superintendent caused a plank to be procured for this purpose, and told the plaintiff to place it beneath the chute and against the ground, and hold it there, which he did; that at this time other employés of the defendants were assisting, some of whom were holding up the chute with ropes from on board the ship; that it became necessary, in order to lower the chute further, to disengage the remaining post, which was attached to the chute by nails; that after the plaintiff had placed the timber beneath the chute as directed, and while he was holding it there, the superintendent, Fernandez, without warning him, ordered some of the men to pull off the remaining post, and as they responded to the order the chute fell and severely injured the plaintiff.

Errors are assigned to the admission of evidence, to the charge of the court to the jury, to the giving of certain requests of the plaintiff, and to the refusal to give certain requests of the defendants. The validity or invalidity of the rulings and requests depend upon the law of negligence of Porto Rico governing the rights and liabilities of parties standing in the relationship of employer and employé. Counsel have called our attention to the provisions of the Civil Code of Porto Rico, §§ 1803 and 1804, as applicable to the case. These provisions read in part as follows:

"Sec. 1803. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

"Sec. 1804. The obligation imposed by the preceding section is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible. * * * Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employés in the service of the branches in which the latter may be employed or on account of their duties. * * *

"The liability referred to in this section shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damage."

It appears that the Legislature of Porto Rico on March 1, 1902, passed an act "in relation to the liability of employers for injuries sustained by their employés while in their service," which was in force at the time this accident occurred and unaltered, except for the amendment of 1913 (Laws of Porto Rico 1913, Act No. 69), which did away with the limitation upon the amounts recoverable in the cases specified in sections 2 and 3 of the act. This act was not repealed, so far as the plaintiff's right of action is concerned, by the Porto Rico Workmen's Compensation Act (No. 19) of 1916, for sections 34 and 35 did not in terms repeal it, and all rights that had accrued under it were saved by (3093) section 386, of the Revised Statutes and Codes of Porto Rico, p. 587. Whether the act of 1902 may, in certain respects, be regarded as still in existence and applicable to causes of action arising since July 1, 1916, between employer and employé, in no way concerns the present inquiry. It may not, however, be amiss to say that the act of 1916 (Laws of Porto Rico 1916, Act No. 19) as amended in 1917 (Laws of Porto Rico 1917, Act No. 9) was elective as to both employer and employé (sections 23, 24); that the act of 1918 (Laws of Porto Rico 1918, No. 10) applies only to employers who employ three or more laborers (section 2); that section 21 of the act of 1918 does not apply to injuries by willful act or gross negligence of employer, if waived by workman; and that it is not improbable that the act of 1902 may be applicable in certain cases to accidents occurring since July 1, 1916.

[1] As the act of 1902 was in force at the time this accident occurred, the question is presented whether the remedy there provided for enforcing the rights and liabilities therein defined is the exclusive remedy, or only additional to that provided by sections 1803 and 1804 of the Civil Code; for, if it affords the exclusive remedy, then, inasmuch as section 6 of the act makes the right to bring suit conditional upon written notice of the time, place, and cause of the injury having been given to the employer within 30 days after the injury was received, and it nowhere appears in the record that such notice was given, the action cannot be maintained.

In Diaz v. Fajardo Development Co., 2 P. R. Fed. 152, and Colon v. Ponce & Guayana R. Co., 3 P. R. Fed. 367, Judge Rody, sitting in the federal District Court for the island, held that the remedy provided by the act of 1902 was exclusive, and that an action by an employé against his employer could not be maintained under the provisions of the Code above set forth. But an examination of the act and the sources from which it was taken leads us to believe that the conclusion of Judge Rody was erroneous, and that the act of 1902 was not a

codification of the law governing the rights and liabilities of employé and employer, but was intended rather to enlarge the rights of the employé, or, to express it a little differently, to take away certain defenses theretofore available to the employer.

The act of 1902 is in every material respect a copy of the act of Colorado of 1893 (Laws of Colorado, 1893, p. 129; 3 Mills Annotated Stat. p. 423, § 1511b), which was taken from the Massachusetts Employers' Liability Act of 1887 (St. Mass. 1887, p. 270; Revised Laws of Mass. 1902, c. 106, §§ 71–79; Colorado Milling & Elevator Co. v. Mitchell, 26 Colo. 285, 58 Pac. 28), which in turn was "copied verbatim, with some variation of detail, from the English statute" of 43 & 44 Vict. c. 42 (Ryalls v. Mechanics' Mills, 150 Mass. 190, 191, 22 N. E. 766, 5 L. R. A. 667).

Prior to the enactment of the law in Massachusetts, the English courts, in construing their act, held that it was not a codification of the common law regulating the rights and liabilities of the employé and employer, but an extension of the employé's common-law rights, and that clauses 1, 2, and 3 of section 1 did away with certain defenses of the employer, such as the assumption of risks incident to the business, including those arising from the negligence of fellow employés (Ryalls v. Mechanics' Mills, 150 Mass. 190, 191, 22 N. E. 766, 5 L. R. A. 667), and the Massachusetts and Colorado courts, prior to the re-enactment of the law in Porto Rico, reached the same conclusion, notwithstanding the common law regulating such rights in those states was not in all respects the same and differed somewhat from the common law of England (Ryalls v. Mechanics' Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; Colorado Milling & Elevator Co. v. Mitchell, 26 Colo. 285, 58 Pac. 28). See, also, Denver & R. G. R. Co. v. Norgate, 141 Fed. 247, 252, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981, 5 Ann. Cas. 448; Mellor v. Merchants' Mfg. Co., 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792; Coughlin v. Boston Towboat Co., 151 Mass. 92, 94, 23 N. E. 721; Clark v. Merchants', etc., Transp. Co., 151 Mass. 352, 24 N. E. 49; May v. Whittier Machine Co., 154 Mass. 29, 27 N. E. 768; Clare, Adm'r, v. N. Y. & N. E. R. R., 172 Mass. 211, 51 N. E. 1083.

Section 1 of the Colorado act of 1893 reads as follows:

"Where, after the passage of this act, personal injury is caused to an employé, who is himself in the exercise of due care and diligence at the time;

"(1) By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works and machinery were in proper condition; or

"(2) By reason of the negligence of any person in the service of the employer, intrusted with exercising superintendence whose sole or principal duty is that of superintendence;

"(3) By reason of the negligence of any person in the service of the employer who has the charge or control of any switch, signal, locomotive engine or train upon a railroad.

"The employé, or in case the injury results in death the parties entitled by law to sue and recover for such damages shall have the same right of compensation and remedy against the employer, as if the employé had not been an employé or in the service of the employer or engaged in his or its work."

The Supreme Court of Colorado, in Colorado Milling & Elevator Co. v. Mitchell, 26 Colo. 288, 58 Pac. 29, in construing this act, said:

"That the intent of the act is at most to abolish certain defenses in certain specified cases, and in such cases to impose a compensatory limitation of the right to sue, but in no manner to prejudice the common-law rights of employés, or to interfere with the enforcement of any right that the statute itself does not create."

And in Ryalls v. Mechanics' Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667, Judge Holmes, after reviewing the English cases construing the English act, said:

"But it would not need the aid of previous exposition to show that the main purpose of the statute, as the title intimates, is to extend the liability of employers in favor of employés, that it does not attempt to codify the whole law upon the subject, and that it leaves open some common-law defenses and some common-law liabilities. In view of these general considerations, we are to construe the statute liberally in favor of employés, and we ought to be slow to conclude that indirectly, and without express words to that effect, it has limited the workman's common-law rights most materially in respect to the conditions and time of bringing an action, and the amount which he can recover"

—and concludes:

"We are of the opinion that in those cases within the words of St. 1887, c. 270, § 1, cl. 1, in which the common law gives an employé a remedy, he still has a right to sue under the same conditions, and to recover damages to the same extent, as if the statute had not been passed."

In view of the apparent purpose of the act to enlarge the scope of the rights of employés and the limited number of instances covering the relation of employer and employé as to which the act applies, we have no hesitation in reaching the conclusion that the remédies afforded by it are not exclusive, and that whatever rights of action are accorded an employé by sections 1803 and 1804 of the Civil Code remain in full force.

[2] It remains to be considered what the rights of an employé are against his employer under the provisions of sections 1803 and 1804 of the Civil Code. These sections are a re-enactment of old provisions of the Spanish Civil Code. Section 1803 imposes liability upon all persons for their individual negligence, and section 1804 imposes liability upon certain persons for the negligence of their children, wards, and apprentices, and upon those owning or conducting an establishment or enterprise for the negligence of their employés. For example:

It makes the father, and, in case of his death, the mother, liable for damages caused by minors who live with them;

Guardians for damages caused by minors or incapacitated persons who are under their authority and live with them;

Owners or directors of an establishment or enterprise for damages caused by their employés in the service of the branches in which the latter may be employed or on account of their duties;

Masters or directors of arts and trades for the damages caused by their pupils or apprentices while they are under their custody.

It is, however, provided that the liabilities imposed by this section

(1804) shall cease if the person responsible therefor shall prove that he employed all the diligence of a good father of a family to avoid the damage.

Manresa in his Commentaries on the Civil Code, in speaking of the liability imposed by these provisions, says:

"That said liability ceases when the persons who are held liable according to section 1804 show that they used all the diligence of a good father of a family, and therefore a legal presumption is required by said section in regard to the liability of the persons referred to in said section, inasmuch as such is due to the relations, of authority or superiority, which they hold with the persons causing the injury. It is presumed by the law that the cause of said injury is charged upon them on account of their own fault or negligence, and they are considered as moral authors of said injury, in view of the fact that they did not take the care or superintendence necessary to prevent the causing of said injury resulting from the aforesaid fault or negligence; and this is also the view taken of the matter in the judgment of May 18, 1904, above cited, but said presumption which has been established by law is not an absolute one or juris et de jure, but juris tantum, and therefore is dissipated by adverse proof." 12 Manresa, 611.

It appears from the foregoing that the owner or director of an establishment or enterprise is liable for damage caused by the negligence of his employé, acting in the course of his employment, unless he shall prove, as an affirmative defense, that he took the care and superintendence of a good father of a family to avoid the damage, and that this is so whether the person injured is or is not an employé engaged in the same enterprise; also that the duty of the owner or director does not end with his having exercised the diligence of a good father in selecting his employés; that he must go further, and show that he exercised the required diligence in superintending the work of the establishment or enterprise in which his employés are engaged. This seems to be the view taken by the Supreme Court of the United States in Panama Railroad Co. v. Toppin, 252 U. S. 308, 40 Sup. Ct. 319, 64 L. Ed. ——, decided March 15, 1920.

In that case the court was construing article 2347 of the Civil Code of Panama and article 5 of the Panama Law, No. 62, of 1887, which contain similar provisions to those of sections 1803 and 1804 of the Civil Code of Porto Rico. Article 2347 of that Code provided:

"Every person is responsible not only for his own actions, for the purpose of making good the damage, but for the act of those who may be under his care.

"Thus, the father, and failing him the mother, is responsible for the acts of the minor children who live in the same house.

"Thus the tutor or guardian is responsible for the conduct of the pupil who lives under his protection and care.

"Thus the husband is responsible for the conduct of his wife.

"Thus the directors of colleges and schools respond for the acts of students while they are under their care, and artisans and empresarios for the acts of their apprentices and dependents in like cases.

"But this responsibility will cease if with the exercise of the authority and care which their respective characters prescribe for and confer on them they could not prevent the act."

Article 5 of Panama Law, No. 62, of 1887, provided:

"Railroad companies are responsible for the wrongs and injuries which are caused to persons and properties by reason of the service of said railroads

and which are imputable to want of care, neglect or violation of the respective police regulations which shall be issued by the government as soon as the law is promulgated."

In that case an engineer of the Panama Railroad Company, while operating an engine through the city of Colon, at a speed greater than that permitted by the police regulations of Panama, ran into the plaintiff while riding his horse, and, inasmuch as the railroad company had used due care in the selection of its engineer, one of its contentions was that it could not be held liable under the law of Panama for the injury caused by the negligence of the engineer. In reply to this contention, Mr. Justice Brandeis, in delivering the opinion of the court, said:

"This contention was made and rejected by the supreme court of Colombia in a case similar to the case at bar. Cancino v. Railroad of the North, decided December 16, 1897, XIII Judicial Gazette Nos. 652, 653. There suit was brought against the empresario of a railway to recover for the loss of a house by fire due to the negligent operation of a locomotive. The court rested the liability upon section 2347 of the Civil Code, declaring that all doubt as to the existence of the necessary dependency was removed by article 5 of law 62 of 1887, which 'without in any way mentioning the dependents, employés, or workmen of railway enterprises, makes their empresarios responsible for the damages and injuries which they may cause to persons or to property by reason of the service of the said roads.' The court continues: 'And there is not in the record any proof whatever that any care or precaution, either on the part of the empresario or the engineer, had been taken to prevent the fire, the proof that the empresario on his part had exercised much care in the selection of his employés not being sufficient in the opinion of the court, because the diligence and care here treated of, is that which ought to have been exercised in order to prevent an injury that could have been easily foreseen.' This case seems to overrule in effect the principal authority to which the plaintiff in error has referred us—in fact, it is not unlikely that such was the object of article 5 of law 62 of 1887."

[3] The duty of superintendence imposed upon the employer by the civil law is a personal duty, and, if he delegates it to an employé who is negligent in its performance, the employer will be liable. 2 Labatt, Master & Servant (Ed. 1904) § 877. The fellow servant rule of the common law is not recognized in any European country where the civil law prevails. Pollock says that the rule was forced by the House of Lords "upon the reluctant courts of Scotland to make the jurisprudence of the two countries uniform"; that "no such doctrine appears to exist in the law of any other country in Europe." Pollock on Torts (10th Ed.) p. 106; Labatt, Master & Servant (Ed. 1904) § 890; McNaughton v. Caledonian R. Co. (1857) 19 Sc. Sess. Cas. 2d Series, 271; Bartonshill Coal Co. v. Maguire (1858) 3 Macq. H. L. Cas. 266. It does not prevail in France (Dalloz, 1st partie, p. 271); nor in Italy, Switzerland, Germany, Austria, or the Province of Quebec (2 Labatt, Master & Servant [Ed. 1904] § 890; Boston & Maine R. R. v. McDuffey [Second Circuit] 79 Fed. 937, 25 C. C. A. 247); nor in Mexico (Mexican C. R. R. Co. v. Sprague, 114 Fed. 544, 52 C. C. A. 318; Mexican C. R. R. Co. v. Knox, 114 Fed. 731, 52 C. C. A. 21); and in no decision of the Supreme Court of Porto Rico to which our attention has been called or which we have been able to find is the existence of such a rule suggested. In Louisiana the courts have adopted the fellow servant rule in a modified way. If the negligence is that of a

superior servant—one having the direction and control of the servant injured—the master is held responsible for such negligence. But if the negligence is that of a servant not possessing such power of direction and control, he is regarded as a fellow servant whose negligence is assumed as a risk of the business. Weaver v. W. L. Goulden Logging Co. (1906) 116 La. 468, 40 South. 798. But even in Louisiana the plaintiff in this case would not assume the risk of injury due to the negligence of his superintendent, Fernandez.

We are not unmindful of the fact that in Brooks v. Central Ste. Jeanne, 228 U. S. 688, 33 Sup. Ct. 700, 57 L. Ed. 1025, the fellow servant rule was applied; but in that case it was not shown that, under the law of Porto Rico, the liability of a master for injury to a servant caused by the negligence of a fellow servant differed from the common law, and it appearing that the Act of March 1, 1902, above referred to, had been enacted in Porto Rico, the terms of which apparently presupposed the existence of the fellow servant rule, the Supreme Court assumed that the rule as to fellow servants was in force there. But, as above said, after the investigation we have been able to make, we are compelled to hold that the fellow servant rule does not prevail in Porto Rico; that the defense of the good father contained in section 1804 of the Code is the rule in force there, except as it may have been done away with in suits brought under the Act of March 1, 1902.

The first assignment of error has not been argued by the plaintiffs in error, and we regard it as waived. We fail, however, to see wherein the evidence was incompetent.

The second assignment concerns the charge of the court to the jury. The first matter complained of under this head is that part of the charge in which the court deals with the question whether Fernandez was an employé of Ezquiaga or an independent contractor. All we find it necessary to say about this is that the evidence bearing upon the question was conflicting, and the jury were instructed to consider the evidence and find whether Fernandez was acting in one capacity or the other, and that if they found he was an independent contractor the defendants would not be responsible. In this there was no error.

The next matter complained of relates to instructions of the court as to the meaning of the rule of the good father. The jury were instructed that, in order to find for the defendants under this rule, they must be satisfied that the defendants not only exercised the care of a good father in the employment of Fernandez as their servant or agent, but that they exercised like care in superintending the work which he and the other employés were engaged in. This matter has been above dealt with and the instructions were in this regard unexceptionable.

In the remaining matter under this assignment defendants complain that the court erred, in that it did not charge the jury that Fernandez was the fellow servant of the plaintiff, and that, if the plaintiff's injury was due to Fernandez' negligence, he assumed the risk and could not recover. The court in substance charged the jury that a man who takes employment in a business or enterprise does so subject to the ordinary risks of the business, but that Fernandez was not a fellow

servant, but was the head of this "particular job; that what he said had to be done," and that if he was negligent the plaintiff did not assume the risk, but that they could not charge the fault of Fernandez on Ezquiaga, "except under the particular circumstances I have mentioned"—meaning unless he was a superintendent of the defendants and they had failed to exercise the care and superintendence of a good father. This portion of the charge, if anything, was too favorable to the defendants, for the court told the jury that the plaintiff could not recover if his injury was due to the negligence of servants other than Fernandez who were engaged on the work at the time.

We have examined the instructions given to the jury at the request of the plaintiff and find nothing in them that calls for further consideration. We have also examined the requests for instructions submitted by the defendants which the court declined to give and are of the opinion that they were properly refused.

The judgment of the District Court is affirmed, without costs in this court.

LEHIGH COAL & NAVIGATION CO. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. May 25, 1920.)

No. 2136.

1. **Carriers ⇐38—Rate on coal held duly established rate, a departure from which violated Elkins Act.**
   Where the filed and published tariffs of a railroad company specified a rate of $1.55 per ton for coal between two points, but contained a footnote stating that under the terms of a lease of a railroad line from a coal company "a lateral allowance is made out of the herein named rates" to such company on coal shipped by it, the amount of the allowance not being stated, and in practice the company was charged with the named rate against which the allowance was credited, the specified rate of $1.55 per ton *held* the duly established rate for coal, whether shipped by such company or others, a departure from which is unlawful, under the Elkins Act (Comp. St. §§ 8597–8599), as amended by Hepburn Act June 29, 1906.

2. **Criminal law ⇐1189—Disputed question of fact cannot be finally determined by appellate court.**
   Whether evidence introduced by defendant in a criminal case establishes a defense, where a question of fact is involved, is for determination by the jury, and the erroneous striking out of such evidence does not warrant final disposition of the case by the appellate court, but requires its remand for a new trial.

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Criminal prosecution by the United States against the Lehigh Coal & Navigation Company. Judgment of conviction, and defendant brings error. Reversed.

See, also, 250 U. S. 556, 40 Sup. Ct. 24, 63 L. Ed. 1138; Central Railroad of New Jersey v. United States, 229 Fed. 501, 143 C. C. A. 569.

Henry S. Drinker, Jr., and A. M. Beitler, both of Philadelphia, Pa. (Wm. Jay Turner, of Philadelphia, Pa., of counsel), for plaintiff in error.

Henry S. Mitchell and Alexander H. Elder, Sp. Asst. U. S. Attys., both of Washington, D. C.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

WOOLLEY, Circuit Judge. This writ brought here for review a judgment of the District Court entered on the verdict of a jury finding the defendant guilty of knowingly accepting rebates from a duly established rate for the transportation of coal, in violation of the Elkins Act, as enacted in 1903 (32 Stat. 847 [Comp. St. §§ 8597–8599]), and as amended in 1906 (34 Stat. 584).

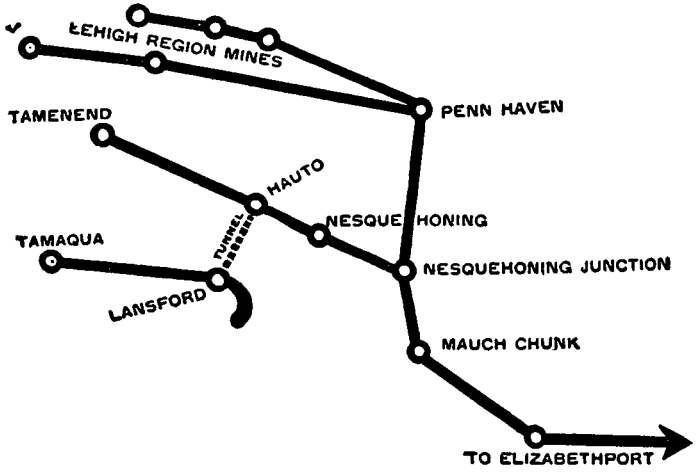
Aside from the primary question whether the tariffs established a basic rate, departure from which constitutes prima facie the offense of the statute, there arose in this case a question, stated broadly, whether the defendant could be acquitted on proof that it accepted the concessions in the honest belief that it was not disregarding but was in truth complying with entirely lawful provisions of the published tariffs.

The learned trial judge first admitted evidence of the defendant's good faith, but later struck it out on his interpretation that the statute allowed no such defense. Being in doubt about the matter and desiring instruction, we certified the question to the Supreme Court. The certificate was drawn by the late Judge McPherson. No more lucid or exact statement of the complicated situation out of which the question arose can, we think, be made. We shall, therefore, avail ourselves of it for the purposes of this opinion. For a recital in greater detail of the main facts of the case, reference is made to the opinion of this court in Central Railroad Co. of New Jersey v. United States, 229 Fed. 501, 143 C. C. A. 569:

"The foundation of the dispute is the tenth covenant of a railroad lease, or contract, between the Lehigh Coal & Navigation Co. as lessor (hereinafter called the Company), and the Central Railroad of New Jersey as lessee (hereinafter called the Central Railroad). In order to understand the situation, a preliminary statement in some detail is necessary: The Company, which is a miner and shipper of anthracite coal, was indicted, convicted, and fined, in the District Court for the District of New Jersey for accepting rebates and concessions from the Central Railroad in violation of the Elkins Act as amended in 1906. 34 Stat. 584. Each count of the indictment charged a separate offense substantially as follows: As a part of its interstate business, the Central Railroad carries anthracite coal in carload lots. Being subject to the Acts to Regulate Commerce, it filed tariffs and schedules with the Commission, showing its rates and charges for such carriage from the Pennsylvania field to points in New Jersey. During the period covered by the indictment—1912, 1913, 1914, and part of 1915—these tariffs were in force, and under them the Company shipped the carload described in the count from Nesquehoning colliery in Pennsylvania to a specified point in New Jersey. The rate named in the tariff thus became due and payable, but afterward the Company unlawfully and knowingly accepted a portion of such rate from the Central Railroad, so that the coal was carried at less than the rate, and the Company thus received the advantage of an illegal rebate. The indictment

did not charge discrimination. The Company pleaded not guilty, and the case went to trial. The following facts appeared without dispute:

"In March, 1871, the Company owned and operated the Lehigh & Susquehanna Railroad (not a separate corporation), a line running up the Lehigh River from Easton to Wilkes-Barre. The Company itself had built and was operating this line under special legislative authority giving it the powers of a common carrier thereon. It also owned the stock and was the lessee of the Nesquehoning Valley Railroad, a separate corporation, whose line ran from Nesquehoning Junction (a short distance above Mauch Chunk) westward to Tamanend. About half way along this road is Hauto, and at this point a tunnel was being built in 1871 to connect at Lansford with the tracks in the Panther Creek valley south of Nesquehoning. These tracks belonged to the Company, and their principal, if not their only, purpose was to serve its mines in that valley. Between Hauto and the Junction was the Company's Nesquehoning colliery, connected with the Nesquehoning railroad. These mines—at Nesquehoning and in the Panther valley—were and still are the nearest mines to New York bay, and they were the only mines at Nesquehoning or in the neighborhood of Hauto. Farther north in the Lehigh region were mines of other operators, and these were more distant from tide by, say, 10 to 40 miles. These other mines were reached by lateral roads that connected with the Lehigh and Susquehanna line at Penn Haven, several miles north of Mauch Chunk. At Penn Haven these lateral roads had an additional connection—with the Lehigh Valley Railroad, a separate carrier. The accompanying sketch will make the topography more plain:



"In March, 1871, the Company faced the following situation: Its prosperity depended in large measure on the revenue from its Lehigh and Susquehanna line, and this revenue in turn depended on the thru connections of the line at Easton on the Delaware River, the southern terminus. The value of these thru connections was threatened by certain arrangements among the connecting cariers, and mainly for this reason the Company's management decided to lease its railroad properties to one of the connecting carriers, namely, the Central Railroad. Accordingly they made the lease or contract of March 31, 1871, whose tenth covenant has given rise to the present controversy. To understand the covenant properly, other facts should be stated: Before the lease, the Company operated its own line (the Lehigh & Susquehanna) and carried its own coal thereon. Naturally, in leasing the line, it took into account the advantageous nearness of its mines to tide, and sought to insure favorable rates for the coal from these collieries. More precisely, the situa-

tion was this: Referring to the preceding sketch; if Hauto be taken as the end of the western arm of a Y, and Penn Haven as the end of the northern arm—both arms springing from Nesquehoning Junction—the arms will be found of nearly equal length; so that Hauto and Penn Haven are similarly placed for shipments to tide, each being 118 miles from the Bay—Nesquehoning colliery being a few miles nearer.

"At that time rates were calculated from Penn Haven as a base, or from Mauch Chunk as another base. The mines of the other operators that lay northward in the Lehigh region paid three rates; (1) A local or lateral charge to Penn Haven; (2) a charge from that point to Mauch Chunk; and (3) a charge from Mauch Chunk to tide. The charge from Penn Haven to Mauch Chunk had always been the same as the charge from the Company's mines to Mauch Chunk. But the lateral charges to Penn Haven from the mines of the other operators that lay northward of that point had varied from 28 to 72 cents, according to distance. The rate from Hauto to tide was the same as the rate from Penn Haven to tide—this of course being less than the rate from the mines north of Penn Haven, since these mines had to pay a lateral charge to Penn Haven. Nesquehoning colliery had the further advantage of a few miles over Hauto. This situation the 10th covenant was intended to preserve. As one consideration of the lease, the covenant put the Company's coal from Hauto and Nesquehoning on a different footing from the coal of the other Lehigh miners in the north, because the other miners were obliged to get their coal to Penn Haven and to pay the local or lateral rate to that point. The covenant provides, that—

"' * * * On coal delivered for transportation by (the Company) on sidings at the northern end of the Nesquehoning tunnel, the rates of transportation shall not exceed the rates charged at the same time from Penn Haven to the same points on coal from the Lehigh region, either by the (Central Railroad) or by the Lehigh Valley Railroad Company.'

"About 1878, the method of fixing rates was changed. Penn Haven and Mauch Chunk were no longer used as basing points, and the same rates were fixed for all the mines in the Lehigh region. But, in pursuance of the tenth covenant, the rate to be charged the Company was fixed at 86 per cent. of the rate charged to the other mines in the Lehigh region—the reason being that the distance to tide from Penn Haven, from Hauto, or from Nesquehoning, was 86 per cent. of the average distance from the other mines to the north. While this arrangement was in force, the Company paid a net rate calculated on the basis of 85 per cent. After 1887, the date of the first Act to Regulate Commerce [24 Stat. 379], this method of settlement was changed, and the Company paid, or was charged, the full tariff rate charged to the other Lehigh mines, but was repaid, or was credited with, 14 per cent. thereof—this being done under the obligation or the supposed obligation of the tenth covenant. Between 1887 and August, 1906, when the Hepburn Act went into effect, this arrangement for repaying did not appear in the tariffs filed by the Central Railroad with the Commission. But in August, 1906, and thereafter, the tariffs contained a footnote in the following form:

"'(4) In compliance with the tenth covenant of the lease from the Lehigh Coal & Navigation Company under which the Central Railroad Company of New Jersey operates the Lehigh & Susquehanna Railroad, a lateral allowance is made out of herein-named rates to the Lehigh Coal and Navigation Company on all anthracite coal originating on the latter's tracks in the Panther Creek, Nesquehoning, and Hacklebarnie Districts mined and shipped by it, when coming via the Hauto, Nesquehoning and Mauch Chunk gateways.

"'The covenant referred to is set forth in the lease of March 31, 1871, and recorded in Deed Book No. 262, Page 480, of Luzerne County, and Deed Book, No. 43, Page 339, of Lackawanna County, Pennsylvania.'

"This footnote is connected by the numeral (4) with the rate of $1.55 specified in the tariff as the rate from Hauto and Nesquehoning to Elizabethport, N. J.; but the footnote does not state how much the allowance is, nor does it furnish any mathematical basis for calculating the amount. All the anthracite coal tariffs filed with the Commission by the Central Railroad after 1906

(262 in number) contained this footnote. The allowance was 19.18 cents per ton, and this was credited in the monthly settlement of the Company's account with the Central Railroad, the credit being the point of the government's attack. The verdict covers 27 shipments of coal in prepared sizes from Nesquehoning colliery for reshipment at Elizabethport. The foregoing facts were either proved or stipulated, and it appeared also without dispute that during the years in question the Company's officers were familiar with the contents of the Central Railroad's tariffs, and knew that the allowance was being made and accepted. One of the Company's defenses was that it had not 'knowingly' accepted a rebate within the meaning of the Act—its contention being, that the allowance had been accepted in good faith, in the honest belief that the payment was justified by the tenth covenant, and also in the honest belief that the allowance was properly and legally noted and provided for in the filed and published tariffs.

"In support of this defense the Company offered evidence that would support the findings—

"(1) That in 1906, at the time the note was made part of the tariffs, the Company's officers were advised by the traffic officials of the Central Railroad, and also by the Railroad's President, by its Vice-President and General Counsel, and by its General Attorney, that the note had been made part of the tariffs in full compliance with the Act of 1906, and were advised also by them that, in view of the note having been made part of the tariffs, the payment and the receipt of the allowance would comply with the tariff and with the law; that the Company's officers trusted and relied upon the judgment of the officers of the Central Railroad.

"(2) That between 1906 and the date of the indictment 262 tariffs, all containing the note, had been filed with and accepted by the Commission.

"(3) That in 1908 the Company had been informed by the Central Railroad, that the Commission (acting by one of its important officials who was in charge of the subject of tariffs) had specifically approved the form of the tariff containing the note, in spite of the fact that the amount of the allowance had not been specified therein—the Commission having under consideration at the time the question whether the payment and the receipt of the allowance under the tariff and footnote were proper; that by reason of such information the Company had thereafter honestly believed that the receipt of the allowance was not in violation of the tariff or of the Act, but was in compliance therwith.

"(4) That examinations of the Company's books, records, and accounts, were made by the Commission's investigators in 1909, and that by reason of such examinations the Commission had been informed that the Company had received, and was receiving, the allowance, but did not object either to the form or to the substance of the practice.

"The Company's evidence concerning good faith was received under the government's objection, and the government offered evidence in contradiction thereof. At the close of the trial the court struck out all the evidence on this subject from the record, and refused to submit the question of good faith to the jury, holding that the Company's honest belief that the allowance was permitted by the tariffs and the footnote thereto could not affect the issue, for the reason that the Company knew the contents of the tariffs, and knew also that the allowance was actually made and received."

The errors which the defendant has assigned in its conviction for knowingly receiving transportation at less than the duly established tariff rate embody three distinct propositions of law:

(1) The tariffs in question did not establish a standard or basic rate, for departure from which a shipper could be held criminally liable.

(2) The question as to whether or not the defendant received transportation at a less rate than that for which it honestly believed the tariff made proper provision should have been left to the jury.

(3) The payments or allowances, being an essential part of the consideration for the lease of the Lehigh & Susquehanna Railroad need not have been published or referred to in the tariffs.

With the third proposition, brought forward by the defendant only to preserve its rights in the litigation, we shall do nothing more than formally rule against it, as the same matter has been considered and decided by this court in Central Railroad Company of New Jersey v. United States, 229 Fed. 501, 143 C. C. A. 569. The decision in that case sustained the conviction of the railroad company for granting the rebates which the defendant here received and for receiving which it now stands convicted.

A distinction between the case against the railroad company, the carrier, and this case against the Navigation Company, the shipper, concerning the same rebates, is, that in the former the indictment was framed under both branches of the Elkins Act; first, for charging less than the established tariff rate; and second, for giving an advantage or discrimination to a shipper; while in the latter the offense charged by the indictment is only that of receiving transportation at less than the established tariff rate. It is urged by the defendant in this case the shipper, that the first proposition of law—that no basic rate was established by the tariffs—was neither considered nor decided in the case against the carrier; and that the second proposition, involving the good faith of the shipper in accepting rebates, was of course neither raised nor considered there. The defendant, disclaiming an intention to dispute any of the rulings expressly made in the case against the railroad company, further distinguishes the cases by a difference in the character of the good faith urged as a defense in both, by showing that in this case it does not contend that good faith in reliance on its contract of lease, as contended by the railroad company in its defense, was sufficient to justify its doing what it knew was not provided for by the tariff; but that what it did was under the honest belief, on grounds sufficient to induce that belief, that the receipt by it of the allowances was in compliance with proper provisions of the tariff; the vital difference between the cases being, in a word, the difference between good faith in reliance on a private contract and good faith in the interpretation of a published tariff.

[1] Having thus distinguished the cases, the defendant addressed itself to its first proposition of law. It maintained that before it can be convicted of knowingly receiving transportation at less than the duly established tariff rate, it must affirmatively appear that a tariff rate was duly established. It contended that, far from establishing a standard or basic rate, departure from which is inhibited by law, the tariff, on the contrary, gave specific notice that what purported to be the established rate was not in fact the rate which it, the defendant, was to pay; and that, as it could not depart from a rate that did not exist, it did not, knowingly or otherwise, offend against the statute.

This proposition is based on the defendant's admission that the tariff published and specified the rate of $1.55 a ton on coal from Nesquehoning to Elizabethport, New Jersey, and on its contention that the footnote to this tariff showed that "out of" this rate there would

be made an allowance or deduction in favor of the Navigation Company under the tenth covenant of the recited lease for an undisclosed amount, and that, accordingly, the rate to the Navigation Company was not the published rate of $1.55, but was a lesser rate, not disclosed by the footnote, and, therefore, not published in the tariff.

While there is enough in this contention to arrest our attention, its infirmity is disclosed on brief examination. Though the question of an established rate was not expressly raised in the case against the railroad company (229 Fed. 501, 143 C. C. A. 569), the decision in that case implicitly involved the determination that the $1.55 rate published by the tariffs was the duly established rate for departing from which the railroad company was convicted. Unless the rate from which the railroad company was found to have departed had been duly established, it obviously committed no offense. Moreover, the rate of $1.55 per ton was recognized as the established rate, first, by the railroad company in charging it; and second, by the defendant in paying it, subject to the allowances contemplated by and subsequently made under the terms of the footnote. Aside from the conduct of the carrier and shipper with reference to the rate, an examination of the record discloses, we think with little question, the existence of an established rate. There was a tariff published by the carrier—many tariffs, in fact, but, for convenience, we speak of one. That tariff showed among others a rate of $1.55 from Nesquehoning to Elizabethport. That rate was applicable primarily to every shipper, including the Navigation Company, from the point of shipment to the point of delivery. If the rate had showed nothing more, a drawback or return of a part of it to the Navigation Company would, incontestably, have been a rebate denounced by the law. But added to the published rate of $1.55 between the points named was a footnote which showed that in compliance with the tenth covenant of the lease between shipper and carrier, the public record of which was given, a "lateral allowance" was made "out of herein named rates" to the Navigation Company on coal originating at the point designated. The footnote while disclosing that some deduction would be allowed the shipper out of the published rate, did not show its character by the use of the phrase "lateral allowance" or its amount by reference to the recorded lease, hence it did not show, the defendant maintains, the rate which it was required to pay. It is because of this that the defendant contends, that, as to it at least, there was no rate published, and that, in consequence, it could not commit the offense of receiving a rebate from a rate that did not exist. We think the fault in this contention is the failure of the defendant accurately to distinguish between the published rate applicable to all shippers, including itself, and the net rate paid by it after deducting therefrom the footnote allowance. If in every rebate case we were to accept the "net" as a shipper's "rate," we would always beg the question of a rebate from an established rate. But the net is arrived at only by assuming that $1.55 was the gross or basic rate and by deducting from it the agreed allowance of the footnote. In actual practice extending for a long time over innumerable transactions the net was reached by the carrier charging the ship-

per for transportation at the published rate of $1.55, then crediting it with the agreed allowances and demanding payment for the difference, that is for the "net." While this was the parties' bookkeeping method of adjusting the rates, it was also a book record of the fact that the parties regarded $1.55 as the standard, basic or established rate, from which allowances granted by the carrier and accepted by the shipper were deducted in carrying out in figures the tenth covenant of the lease. Indeed, in stating that allowances would be made the defendant "out of herein named rates" the footnote recognized the published rates as the basis on which to calculate its concessions. Allowances from a rate do not disestablish the rate; it remains just what it was. Neither does an overt or covert deduction from a published rate change the rate or convert it into a new rate.

That both parties regarded $1.55 as an established rate is proven not only by their long continued practice of charging and paying it and granting and receiving deductions out of it, but also by their treatment of the published rate as the standard or basic factor in estimating rentals under the lease of the Lehigh & Susquehanna Railroad. In this lease between the Navigation Company and the Central Railroad Company, whereby the Navigation Company preserved to itself the advantage of its location with reference to tide, the parties did not originally contemplate the granting of a specific rate for transportation of the Navigation Company's coal. They contemplated that "on coal delivered * * * on sidings at the northern end of the Nesquehoning tunnel, *the rates* of transportation *shall not exceed* the rates charged at the same time from Penn Haven." This arrangement was later translated into rates, which by a given percentage to rates from other points preserved its advantage of location, and was still later put into figures and embodied in the flat allowance of 19.18 cents a ton less than the published rate from Nesquehoning to Elizabethport, whatever that rate from time to time might be. In order for the defendant to reap the advantage of location through this allowance there had to be a published rate out of which to take it. Until the carrier made and established such a rate by its tariffs there was no rate on which to calculate the contract deduction or by which to preserve the advantage of closeness to tidewater which the shipper had, and, by its lease, insisted upon retaining.

We are of opinion that the rate of $1.55 per ton, named in the published tariffs, was a duly established rate, and that the learned trial judge committed no error in so charging as a matter of law.

The remaining proposition of law had to do with the good faith of the Navigation Company in accepting allowances out of a lawfully established rate. Our minds inclined to the belief,—against what we regarded to be the trend of the decisions,—that, under the circumstances of this case, evidence of the defendant's good faith or honest belief in these transactions should have been admitted by the trial judge and submitted to the jury. In this situation, we asked the Supreme Court for instruction (section 239 of the Judicial Code [Comp. St. § 1216]), on a certificate containing the following question:

"In the criminal prosecution of a shipper for knowingly accepting transportation at less than the duly established rate by receiving an allowance that was referred to in the tariff but was not specified in figures therein, has the defendant a right to offer evidence that the allowance was received under the honest belief that it was lawfully established by the tariff, and under the honest belief that in receiving it he was not disregarding what he believed to be the provisions of the tariff but was complying therewith?"

The Supreme Court has answered this question in the affirmative (Lehigh Coal & Navigation Co. v. United States, 250 U. S. 556, 40 Sup. Ct. 24, 63 L. Ed. 1138), distinguishing Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, and saying that the circumstances under which the Navigation Company sought to justify its acceptance of the allowances "can bring into action and exculpatory effect the provision of the statute which requires the acceptance of a rebate to be 'knowingly' done to incur the guilt of a misdemeanor." As evidence of this character was excluded at the trial, after first being admitted, it now appears that the trial judge fell into error; and that, unless there is substance in the remaining contentions of the parties, the case should be remanded for retrial.

[2] At the rehearing of this case, following the Supreme Court's instruction on the matter of the defendant's honest belief, counsel for both parties contended that the case should not, for exactly opposite reasons, be returned to the District Court for another trial, but could and should be finally disposed of by this court; the contention of the Government being, that the defendant's evidence of honest belief, if it had not been excluded, would not have sustained that defense, and would, therefore, have required the trial judge to direct a verdict against the defendant; the contention of the Navigation Company being, that its evidence of honest belief, if it had not been excluded, would, in view of the lack of evidence controverting it, not only have sustained the defense, but would have required the trial judge to direct a verdict for the defendant. We are not impressed by either contention. The Supreme Court has said, in substance, that upon the facts shown in our certificate the defense of honest belief is open to the defendant. These facts were drawn from the testimony under constructions most favorable to the defendant, in order to follow the practice, in certifying questions to the Supreme Court, of giving the facts, not the testimony, on which the questions are predicated. Whether a jury would find the same facts from the same testimony is quite another matter; especially as we regard the testimony to be such that reasonable men might draw different conclusions from it. We therefore direct that the judgment below be reversed and a new trial be had in accordance with the opinion of the Supreme Court and with this opinion.

MANKIN v. BARTLEY.*

SAME v. SAUNDERS.

(Circuit Court of Appeals, Fourth Circuit. May 10, 1920.)

Nos. 1779, 1780.

1. **Courts ⇐345—Waiver of objection to jurisdiction by appearance not affected by state statute.**
   A general appearance by defendant in a federal court is a waiver of objection to the jurisdiction of the court on the ground that he is a citizen and resident of another district, and such waiver is not affected by a state statute permitting the filing of pleas in abatement and bar at the same time.
2. **Trial ⇐2—Consolidation of causes within discretion of court.**
   Consolidation for trial of two actions at law, to recover for injuries to plaintiffs caused by defendant's automobile at the same time, *held* within the discretion of the court.
3. **Negligence ⇐134(4)—Reckless driving of automobile.**
   Evidence *held* to sustain a verdict holding defendant liable for injuries to plaintiffs caused by his automobile, which he was driving at a dangerous speed in the evening around a circular race track in fair grounds, while numerous people were crossing the track to and from amusement places within the circle.

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

Actions by James Bartley and by G. C. Saunders against Speed Mankin. Judgments for plaintiffs, and defendant brings error. Affirmed.

S. H. Sutherland and George C. Sutherland, both of Clintwood, Va., for plaintiff in error.

Roscoe Vanover, of Pikeville, Ky. (R. H. Cooper, of Pikeville, Ky., on the brief), for defendants in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff in error will be referred to as defendant, and the defendants in error as plaintiffs; such being the relative positions the parties occupied in the court below. In these actions process was in each case issued on March 26, 1919, returnable to the third Monday (21st day) of April, and was executed on April 10th. Counsel, in a brief for defendant filed in the court below, said:

"Now in this case the defendant appeared at the second April rules (third Monday), and a rule was given him to plead, and at the next rules filed his pleas."

The letter of defendant's counsel to the clerk of the District Court, dated April 15, 1919, was in the following language:

"In the cases of James Bartley v. Speed Mankin and G. C. Saunders v. Speed Mankin, actions of trespass on the case, please enter our appearances for the defendant in each of these cases at first rules, and give rule for defendant to plead."

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 7, 65 L. Ed. —.

In referring to this phase of the question the learned judge of the court below said:

"On May 6th (first May rules) the defendant did file simultaneously in each case two pleas. One is a plea asserting defendant's personal exemption from suit in this district, alleging himself to be a citizen of West Virginia. The other is a plea in abatement, alleging the pendency of another action between the same parties for the same cause of action in the United States District Court for the Southern District of West Virginia."

The facts upon which these actions are based may be epitomized as follows:

In October, 1918, the Dickenson county fair was held at Clintwood, Va., on grounds specially set apart and inclosed for that purpose. Within this inclosure was a race track 25 to 30 feet wide, nearly circular, and about 1,950 feet in circumference. There was a gate at the northeast corner of the "fair grounds," where people made their entrance as well as their exit. From this entrance the visitors passed on nearly westward, to a plank fence extending around the northern portion of the race track at its outer edge, and at the northeastern portion there was an opening or gate, where the people would enter upon the race track. On the inside of this race track was a street carnival. It appears that from 700 to 1,000 people attended this street carnival each night, and of necessity, in order to reach the carnival, it was necessary for them to cross the race track to get inside of the circle where it was being held. Those attending the carnival were frequently upon this race track, going to and returning therefrom, and using it practically all the time while it was being conducted.

After this condition had existed for three or four days, defendant, who, as alleged, had attended the carnival, and had full knowledge that the circular race track was thus being used by people attending and returning from the same, while it was being conducted, and at the time when he knew of his own knowledge that people were regularly crossing the race track, began to run his automobile upon the track at the rate of 25 miles or more per hour. It is further insisted that the defendant carelessly and negligently ran against and over the plaintiffs, thereby inflicting great physical injury upon them, especially upon the plaintiff Bartley, and on account of injuries thus sustained plaintiffs seek to recover damages against defendant.

Counsel for defendant insists that these plaintiffs had full knowledge of the existing condition at the time they entered the "fair grounds," and that the dangers were open and obvious, and that therefore they contributed to their own injuries. Judgment was entered in favor of the plaintiffs in the court below, to which defendant excepted, and the cases are here on writ of error.

[1] As stated, defendant raised the question of jurisdiction in the court below, insisting among other things that his plea to the jurisdiction should be sustained, relying principally upon section 3264 of the Code of Virginia, which is in the following language:

"The defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary, and he may file pleas in bar at the same time with pleas in abatement, or within a reasonable time thereafter, but the issues on the pleas in abatement shall be first tried."

The District Court, in referring to the effect of this section, said:

"Counsel for defendant argue that because, by section 3264, Code of 1904, inconsistent pleas may be simultaneously filed without being mutually destructive, and pleas in bar may be filed at the same time with pleas in abatement, the waiver of defendant's exemption cannot be held to have here taken place. But it seems to me that the question before us is not one of practice, or of pleading, or of modes of proceeding, but is a question of federal jurisdiction, governed entirely by the federal decisions. In so far as this statute relates to mere matters of procedure, it is followed in the federal courts in this state. For instance, if there had been no question here as to the citizenship of the defendant, he could in these cases, by force of this statute, have filed his pleas in abatement because of the pendency of another action, and at the same time he could have filed pleas in bar [of not guilty] without waiving his pleas in abatement. But in respect to the question of a waiver of the defendant's alleged personal exemption from suit in this district this state statute has no effect, for the question is one of the jurisdiction of the federal court and is not controlled by the state law. In Goldey v. Morning News, 156 U. S. 518, 523, 15 Sup. Ct. 559, 561 (39 L. Ed. 517), it is said: 'The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and cannot be enlarged or abridged by any statute of a state.' See, also, So. Pac. Co. v. Denton, 146 U. S. 202, 209, 13 Sup. Ct. 44, 36 L. Ed. 942; Western Loan Co. v. Butte, etc., Min. Co., supra, 210 U. S. 368, 369, 28 Sup. Ct. 720, 52 L. Ed. 1101; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 443, 30 Sup. Ct. 125, 54 L. Ed. 272. In Lehigh Valley Co. v. Yensavage, 218 Fed. 547, 550, 134 C. C. A. 275, 278, in respect to this question the court said: 'In this respect federal courts do not follow the state practice.'"

Also, in referring to Interior Construction Company v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401, the lower court said that—

"* * * is a decision exactly in point, and so far as I know it stands unshaken as the last enunciation of the Supreme Court on this exact point. I say that it is a decision in point, because the case was decided on the theory that the sureties (citizens of Indiana) would have had an exemption from a joint suit in the Indiana federal court, based on the fact that their codefendants (the principals in the bond), were citizens of Pennsylvania, if this exemption had not been waived by the general appearance made for the sureties and one of the principals prior to the filing of the plea of exemption. This case is therefore here a binding authority. It follows that, by reason of the unrestricted appearance of the defendant at the 2d April rules, the plea setting up exemption from suit in this district filed at 1st May rules was unavailing. The exemption, if it existed, had been irrevocably waived by the antecedent appearance. On this ground alone I am constrained to hold that the present motions must be overruled."

We approve this construction of the law.

The eighth assignment of error is to the effect that the court erred in overruling the demurrer to the declaration. We have carefully examined the declaration in connection with the bill of particulars, and are of opinion that the facts set forth therein were sufficient to inform the defendant as to the nature and character of the alleged acts of negligence contained in the declaration. Therefore this assignment is without merit. What we have said as to this assignment applies with equal force to assignment No. 9.

[2] It is insisted by assignment No. 10 that the court erred in consolidating these cases. It appears that both plaintiffs were run over by the defendant at the same time, and the same witnesses testified as

to what occurred. Had they been tried separately, it would have required simply a repetition of the same evidence, and we fail to see wherein defendant was prejudiced by hearing the evidence as to both at the same time; and, besides, this was largely a matter of discretion with the court below, and there is nothing to indicate that the court in the exercise of such discretion did or said anything to the prejudice of the rights of defendant.

[3] Assignments 11 and 12 relate to the refusal of the court below to direct a verdict. As we have stated, at the time these plaintiffs were injured there was a street carnival being held at a point in the "fair grounds" where it became necessary for those attending the same to cross the track, around which (the evidence shows) the defendant was running his car at a rate which, under the circumstances, was exceedingly dangerous if not to say reckless. Plaintiff Bartley, among other things, stated that there were about 500 or 600 people in attendance the night he was injured; that it was understood that before any race could be run some of the marshals were to advise the people so as to enable them to clear the track; that on this occasion no such notice was given; that he and his coplaintiff "* * * had started to the soft drink stand up there"; that the people were "circled" all around the rack track; that there may have been 40 or 50 people on or crossing the track at that time; "that the automobile was something near 8 or 10 feet of witness before he ever saw it, and that he then started to jump; that it was going fast. * * * I would say it was going something like 40 to 45 miles an hour; * * * that the defendant could have seen him on the track * * * I would say 100 yards or 150 yards. * * * That there was nothing to obstruct the driver's view, no timber, house, or anything. * * *"

The plaintiff Saunders, after testifying as to the number of people, etc., said that at the time of his injury they were crossing the track from the inside to the outside, going to get a bottle of something to drink. "* * * We were hit, standing near the fence there." When asked as to where he was hit he stated: "* * * in the back, a little bit to one side (right side), and the next I recollect after that I was in an automobile and being taken to a party's house." That he did not see the car, only had "kind of a side view of it. * * *" It appeared like he could see them running from something, and when he looked it seemed like he could almost reach the car, and he wheeled with his back "kindly" to it; hardly any time elapsed from the time he saw it until it struck him, "you could not snap your finger" twice from the time he saw it until it hit him. The plaintiffs were corroborated by others who testified in their behalf that this accident was due to the fact that defendant, in utter disregard of the safety of the public, was engaged on that occasion in racing his car around the track which, at the time from the very nature of things, was being used by pedestrians who were constantly passing to and fro across it.

Thus we have a car rushing at a high rate of speed into a group of people, without any attempt on the part of the driver to check the speed until within 10 feet of them. Under these circumstances the accident was almost inevitable. With a clear space intervening between the

driver and the group of people on a track that was well lighted, the defendant undoubtedly knew of their presence, and his failure to blow the horn or check the speed of the car tends to show that the proximate cause of the accident resulted from the careless and negligent conduct of the defendant. It is a miracle under these circumstances that the plaintiffs escaped with their lives. It is true the defendant claims that he was only going 25 miles an hour; but there was testimony, as we have stated, showing that the rate of speed was about 45 miles an hour. Even the rate at which defendant testified he was going was excessive. We think that under all the circumstances there was ample evidence to go to the jury as to the negligence of the defendant in both of these cases. Under the rule the court will never direct a verdict, when the evidence is such that reasonable men may reasonably differ as to the inference to be drawn therefrom. In the case of Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, Justice Gray, in referring to this phase of the question said:

"The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this court. It has repeatedly been decided that a request for a ruling that upon the evidence introduced the plaintiff is not entitled to recover cannot be made by the defendant, as a matter of right, unless at the close of the whole evidence, and that if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error. Grand Trunk Railway Co. v. Cummings, 106 U. S. 700; Accident Insurance Co. v. Crandal, 120 U. S. 527; Northern Pacific Railroad v. Mares, 123 U. S. 710; Robertson v. Perkins, 129 U. S. 233." Also the case of McDermott v. Severe, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162, is to the same effect.

This rule is also announced in the case of American Locomotive Co. v. Thornton, 259 Fed. 409, 170 C. C. A. 381, decided by this court. The following Virginia cases are very much in point: Carrington v. Ficklin's Ex'rs, 32 Grat. (Va.) 670; Chesapeake & Ohio Ry. Co. v. Williams, 108 Va. 689, 62 S. E. 796; Bass v. Norfolk R. Co., 100 Va. 1, 40 S. E. 100. There are numerous other cases to the same effect. In view of the evidence, we think the ruling of the lower court on this point was eminently proper.

It is insisted by the thirteenth assignment of error that the court erred in permitting counsel for plaintiffs to argue that it was negligence on the part of the defendant not to keep a lookout for persons on this circular track, when he was speeding around, according to his own evidence, at the rate of 25 miles per hour. We do not deem it necessary to discuss this assignment, further than to say it is without merit.

By the fourteenth assignment it is contended that the court erred in permitting the introduction of an X-ray picture of James Bartley's broken leg. It appears that this picture was made while plaintiff Bartley was being treated for his injuries at a hospital. Plaintiff testified that he was exposed to the X-ray machine in two different ways, and that the next day the doctor presented him with these pictures. The pictures showed the leg as being broken. The photographs were accurate pictures of the identical place where the leg was broken. The plaintiff Bartley in his testimony identified the pictures, we think, sufficiently to admit them in evidence. In any event, the introduction of

these pictures could not have in any way been prejudicial to the rights of defendant. An exhibition of same showed that they correctly portrayed the condition of the leg, and therefore corroborate the testimony of plaintiff.

An examination of the record shows that assignments 15 and 16 are without merit.

Assignments 17, 18, and 19 relate to the instructions given by the court below. In view of the facts and circumstances, these instructions fairly present the law under the evidence.

We have also considered the court's action in regard to assignments 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29, and are of opinion that the court's ruling in regard to the instructions was eminently proper. There are numerous authorities cited by counsel for defendant but they do not apply to the cases at bar. The record shows that the instant cases were tried with great care and that every opportunity was afforded defendant to make his defense; the charge being fair and impartial. The defendant, in utter disregard of the rights of others, drove his machine in a reckless and dangerous manner under the circumstances, which was the proximate cause of the injuries sustained by these plaintiffs. Under the circumstances, we think the verdict of the jury was amply warranted; that the amount of damages awarded was very reasonable.

From what we have said, it follows that the judgments of the court below should be affirmed.

CIAFIRDINI v. UNITED STATES.*

(Circuit Court of Appeals, Fourth Circuit. April 19, 1920.)

No. 1707.

1. **Intoxicating liquors ⇐210—Indictment for transportation into prohibition state sufficient.**
   An indictment under Reed Amendment, § 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), for transporting liquor into a prohibition state is not fatally defective because it incorrectly states or fails to state the point from which the shipment started.

2. **Indictment and information ⇐121(2)—Denial of bill of particulars not error.**
   Denial of a motion for bill of particulars on the second trial of defendant, where the evidence for the government was fully presented on the first trial, *held* not error.

3. **Intoxicating liquors ⇐233(2)—Evidence as to possession of liquor admissible in prosecution for interstate shipment.**
   Where there was evidence that two packages containing whisky came by mail from Cincinnati to a point in West Virginia to fictitious addresses, but each in care of a post office box, one rented by a brother of defendant, a tailor, and the other by an employé of his, that on the same and the preceding day both the brother and employé sent telegrams to defendant in Cincinnati, inferentially relating to the shipments, and that the packages were addressed by direction of defendant, testimony of a government agent that he found a large quantity of whisky in the brother's shop *held* relevant and competent.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 8, 65 L. Ed. —.

4. Criminal law ⟸369(6)—Evidence as to receipt of other liquor admissible in prosecution for interstate shipment.

In a prosecution for transporting liquor into a prohibition state, where it was shown that two packages of whisky were received by mail, testimony that similar packages had previously been received addressed to the same post office boxes *held* admissible.

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

Criminal prosecution by the United States against Pasquale Ciafirdini. Judgment of conviction, and defendant brings error. Affirmed.

Horan & Pettigrew, of Charleston, W. Va., for plaintiff in error.
Lon H. Kelly, U. S. Atty., of Sutton, W. Va.

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

PRITCHARD, Circuit Judge. This was a criminal action tried in the District Court of the United States for the Southern District of West Virginia, which involves a charge against Pasquale Ciafirdini (defendant below and so referred to hereinafter in this opinion), for violating the act of Congress of March 3, 1917, commonly known as the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), by transporting in interstate commerce through the mails intoxicating liquors from the state of Ohio into the prohibition state of West Virginia.

On the morning of February 20, 1919, two separate but similar packages came by mail from Cincinnati, Ohio, to the post office at Welch, in McDowell county, W. Va., both addressed in the same handwriting, and each containing two ordinary rubber water bottles filled with whisky, and in the aggregate containing about 10 quarts of whisky. Those in the post office discovered that one of the packages contained whisky, by reason of the fact that one of the water bottles had been punctured, or had sprung a leak, rendering the contents readily ascertainable. One package was addressed to Frank Marksell, Box 271, Welch, W. Va., and this was a post office box rented by the postmaster to John Ciafirdini, and was used as a receptacle for mail addressed to Ciafirdini, or the Welch Tailoring Company, which was owned and conducted by Ciafirdini. The other package was addressed to Fredo Fiscer, Box 314, Welch, W. Va., and this was a post office box rented by the postmaster to one G. Terrano, who was a tailor employed at the shop of the Welch Tailoring Company, and an employé of John Ciafirdini. Notices of the arrival of these packages were placed by the postmaster in the respective post office boxes, and G. Terrano, upon receipt of his notice, called for his package, but when he was confronted with the leaking package of whisky, he disclaimed ownership of the same, and asserted that some mistake had been made, although the notification card placed in the box bore the name of the addressee. Within an hour or so afterwards, this same G. Terrano sent a telegram from Welch to the defendant, Pasquale

Ciafirdini, who is the brother of John Ciafirdini. This telegram was in the Italian language and read:

"Don't ship nothing. Wait for letter."

These packages of whisky left Cincinnati on the evening of February 19th, and were carried in a through mail bag to Welch. On the 19th of February, John Ciafirdini, then at Welch, sent a telegram to his brother, the defendant, then in Cincinnati, which telegram was in the Italian language, and when translated, read:

"You leave to-night. Bring ten. All good. John."

The names of the addressees, Frank Marksell and Fredo Fiscer, were fictitious, as no witness ever heard of any person bearing either of those names. A visit to the tailoring shop of John Ciafirdini at Welch by a special agent of the Department of Justice disclosed a secret drawer in the work table in the shop which contained 27 quart bottles filled with whisky, and a metal container fitted snugly inside of what appeared to be a merchant tailor's sample case, in which metal container was found a small quantity of whisky. Several pint bottles of whisky were found in some other part of the shop.

In some way it was learned that the writing on these packages was that of one Joe Diorio, and Diorio was therefore taken into custody, and immediately upon being apprehended stated that he had addressed these two packages at the instance of the defendant, Pasquale Ciafirdini; and the said defendant was therefore indicted and tried at Bluefield, and the jury failing to agree upon a verdict, the case was transferred to Charleston, and upon the second trial, the defendant was convicted and sentenced to be confined in jail for six months and pay a fine of $100. Defendant excepted, and the case comes here on writ of error.

[1] First, we will consider the question as to whether the indictment is demurrable. This question was decided by this court in the case of Malcolm v. United States, 256 Fed. 363, 167 C. C. A. 533. The first point in the syllabus of that case is in the following language:

"An indictment under the Reed Amendment, Act March 3, 1917, for transporting liquor into a prohibition state, is not fatally defective because it incorrectly states the point from which the transportation started."

Judge Knapp, who wrote the opinion, among other things, said:

"The gravamen of the offense charged is the transportation of liquor into a prohibition state, and the place from which it is brought is wholly immaterial. In our judgment it would have been sufficient merely to charge, in the language of the statute, the transportation of the whiskey in question into the state of West Virginia, without naming the particular place, or even the state, from which it was transported."

This, we think, disposes of this point.

[2] Considering the question as to whether the defendant was entitled to a bill of particulars as asked for at the second trial, we think that the court very properly refused to require the government to file a bill of particulars as to the point from which the whisky was shipped. This request was not made until about the time of the second trial,

more than two months having elapsed since the first trial. It appears that in the first trial the prosecution had presented fully the facts involved in this case. Therefore it would have been useless to have furnished a bill of particulars, which, from the very nature of things, could only have been a repetition of the facts which had already been testified to in the presence of the defendant.

[3] It is also insisted by counsel for defendant that the court below erred in admitting the testimony of the witness Hayes, agent for the Department of Justice. We think the testimony of this witness was material, and therefore the court was amply warranted in permitting the same to go to the jury. This evidence shows that shortly after the packages of whisky arrived at Welch, and after the witness had been given those parts of the two wrappers containing the addresses he visited the tailor shop of John Ciafirdini and found in a drawer of the work table 27 quart bottles filled with whisky; that he also found a metal container fitted snugly in what appeared to be a sample case; that inside this container a small quantity of whisky was found; also that he found several pints of whisky in another part of the shop.

It was shown that John Ciafirdini, owner of the shop, and Pasquale Ciafirdini, the defendant, were brothers; that John was the lessee of post office box No. 271, to which one of the packages was addressed, and that this particular box was used as a receptacle to hold mail addressed to John and to the Welch Tailoring Company; and that G. Terrano was an employé of John's, and as such worked in the Welch Tailoring Company's shop, and was the lessee of post office box No. 314, to which the other package was addressed, as will appear by the following testimony of the witness Henritze, postmaster at Welch, W. Va.:

"Q. Do you know a man by the name of Frank Marksell? A. I do not.
"Q. Do you know a man by the name of Fredo Fiscer? A. I do not.
"Q. Have you a box in your post office numbered 271? A. Yes, sir.
"Q. Who has that box, and who had rented it in February of this year? A. It was rented to John Ciafirdini and various names; the Welch Tailoring Company and John Ciafirdini, the latter of whom conducts the tailoring company, the Welch Tailoring Company.
"Q. Did you know John Ciafirdini? A. Yes, sir.
"Q. What business has he in Welch? A. I think he runs a tailoring place; has a tailor shop there.
"Q. And this box 271 was for the mail of John Ciafirdini and the Welch Tailoring Company, as I understand you? A. Yes, sir.
"Q. Did you have a box in your post office numbered 314? A. Yes, sir.
"Q. To whom was that box rented, and by whom was it used during the month of February last? A. The foreign name is G. Terrano, or Tiaronno, I think is the name that we have on the box.
"Q. Do you know Terrano? A. Yes, sir; by sight.
"Q. What was he doing in Welch about that time? A. I think he was working for the Welch Tailoring Company, for I saw him in the place of business there a number of times."

It also appears that the day the packages left Cincinnati a telegram was sent from Welch to the defendant in Italian, which, when translated, reads as follows:

"You leave to-night. Bring ten. All good. John."

It is very significant that, immediately after G. Terrano had seen the leaky package in the post office, he was observed at the telegraph office; as we have said, a telegram was sent from there to the defendant in Cincinnati, signed "G. T.," which, when translated, reads:

"Don't ship nothing. Wait for letter."

This, the government insists, is a very important circumstance, from which the jury could infer that Terrano, upon the discovery that the package was leaking so as to disclose the character of its contents, became alarmed and telegraphed the shipper to send no more —to "ship nothing," but to "wait for letter," and thus cover up his tracks.

The government also insists that this piece of evidence is pertinent, in that it tends to connect the defendant with the transaction for which he is now indicted, and the contention is further reinforced by the evidence of Diorio, who, among other things, when being asked as to whether he lived in Cincinnati, and as to when he last lived there, said, "Three months ago." He further testified as follows:

"Q. Do you know Pasquale Ciafirdini, the defendant? A. Yes, sir; I do.

"Q. Did you ever direct any packages for him and at his request? A. Yes, sir; I did.

"Q. I hand you herewith a paper wrapping, which bears on it the name of Mr. Frank Marksell, Box 271, Welch, W. Va., and a return card, apparently from John Dela, 822 Main street, Cincinnati, Ohio, and state whether or not you did that writing? A. That is my handwriting.

"Q. And you wrote it? (The paper referred to by the witness was then offered in evidence by the government, marked "Government Exhibit No. 8.") A. Yes, sir.

"Q. Now, I wish you would look at another paper handed to you, with an address on it as follows: Mr. Fredo Fiscer, Box 314, Welch, W. Va.—and also a return card on it from Joe Spino, 1232 Vine street, Cincinnati, Ohio, and state whether or not you did that writing? A. Yes, sir. (The paper referred to was offered in evidence by the government, marked "Government Exhibit No. 9.") * * *

"Q. Were those papers around any packages or wrappers of any packages when you addressed them? A. Well, I guess they were on a package when I addressed it for him.

"Q. About what sized packages were they, Jo? A. Well, I cannot represent exactly what the size they was; but they wasn't very big packages.

"Q. What would you say as to whether they would be as big as those two hot water bottles laid together, as I am laying them there? A. I cannot say exactly, but they was a regular package, but I cannot tell the size. * * *

"Q. Well, about how long was it? Show us with your hands. A. Well, I would say about that big (indicating about two feet).

"Q. Do you know anybody by the name of Fredo Fiscer, or did you know anybody by that name at that time? A. No, sir.

"Q. How did you come to write his name on this paper? A. Because he told me to.

"Q. Who told you? A. Pasquale Ciafirdini.

"Q. And he told you the box number to put on it? A. He did.

"Q. Now, did you know anybody by the name of Frank Marksell? A. No, sir.

"Q. Who told you to write Frank Marksell and the box number there? A. He told me.

"Q. Who do you mean by he? A. Pasquale Ciafirdini.

"Q. Do you know anybody by the name of John Dela, at 822 Main street, Cincinnati, Ohio, or anywhere else? A. No, sir.

"Q. How did you come to put Dela's name there? A. He told me to; Pasquale Ciafirdini.

"Q. Do you know anybody by the name of Joe Spino, or whatever this is, at 1232 Vine street, Cincinnati, Ohio, or anywhere else? A. No, sir.

"Q. Well, how did you come to write that in the center of the package? A. Because Pasquale Ciafirdini told me."

The question for the determination of the jury was as to whether the defendant caused the whisky to be shipped into Welch, or, on the other hand, was Joe Diorio, who admitted having addressed the packages, responsible for the shipment. The government insists that having shown that these packages were being sent to two fictitious persons and addressed to two post office boxes, being used by both Ciafirdinis and the tailoring company and an employé of the company, is a strong circumstance tending to show that the defendant and those operating with him were seeking by stealth to avoid being discovered.

In view of this evidence, the inquiry as to why the whisky should have been sent to the tailoring establishment is very pertinent, and of such character that the jury was, we think, amply warranted in finding as a fact that some of those in charge of the establishment were engaged in illicit handling or dealing in such liquors. We also think, from this evidence, it could be inferred that the brother of the defendant was probably the person who aided him in securing the stock in trade, rather than some stranger. After the relationship had been established between the two brothers, as well as the sending of the telegrams from John and his employé, this showing a course of dealing between these several parties, it certainly became material to show the plan and purpose of the course of dealing in securing the quantities of liquor in question.

In the case of Moore v. United States, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996, the court said:

"As intimated in the case of Alexander v. United States, 138 U. S. 353, where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors."

[4] Likewise we think that the testimony of the witness Mrs. Herndon, showing that other packages prior to February 20th came to the office addressed in care of those same boxes, was admissible.

The charge of the learned judge who tried this case is very clear and comprehensive, and we think fairly presented the case to the jury. In view of what we have said, we are impelled to the conclusion that the defendant received a fair and impartial trial, and that the judgment of the lower court should be affirmed.

HORSE CREEK COAL LAND CO. v. ALDERSON et al.

(Circuit Court of Appeals, Fourth Circuit. April 16, 1920.)

No. 1717.

Judgment ⇐743(2)—Conclusive as to issues which should have been raised by defendant.

A judgment of the Supreme Court of Appeals of West Virginia, which finally determined title to a tract of land *held* conclusive as between the parties and to preclude the defendant therein from afterward asserting title to a part of the land based upon a prior decree of a federal court, which it did not plead in the state suit, but which was available to it as a defense as to the part of the land to which it related.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Suit in equity by the Horse Creek Coal Land Company against George P. Alderson and others. Decree for defendants, and complainant appeals. Affirmed.

This is a suit instituted in the District Court of the United States for the Southern District of West Virginia, by the appellant, the Horse Creek Coal Land Company, as a privy in interest and estate of A. P. Levassor, executor and trustee, for the purpose of carrying into execution a former decree of the Circuit Court of the United States for the Southern District of West Virginia, rendered in 1901, in favor of said A. P. Levassor, executor and trustee, against William Thompson, commissioner of school lands for Boone county, W. Va., J. C. Alderson, and others, predecessors in title of the appellee, George P. Alderson, by which it is insisted by appellant that Levassor's right and title to a certain parcel of land, part of which is here involved, was settled and established, and to which title and interest appellant thereafter succeeded.

The salient points appearing in the record may be epitomized as follows: It appears that in October, 1885, William Thompson, commissioner of school lands of Boone county, W. Va., instituted proceedings in the circuit court of Boone county against certain lands as waste and unappropriated, in order to effect a sale thereof for the benefit of the school fund. During the pendency of that suit and in the month of April, 1889, A. P. Levassor, executor of the estate of Eugene Levassor, deceased, filed his petition in said suit, alleging that certain lands already sold by the commissioner in that proceeding were the property of said petitioner, being a portion of a tract which had been redeemed by him by proceedings instituted in an adjoining county, wherein the major portion of said tract was situate, and asking that said sales be annulled in so far as the same affect the portion of said land so claimed by him.

The court entered a decree denying the prayer of the petition, from which decree said Levassor did not apply for an appeal, as he had the right to do, but on the 17th day of September, 1890, filed his bill in the Circuit Court of the United States for the District of West Virginia, against the commissioner of school lands and certain persons alleged to have purchased portions of the lands so claimed by him, seeking to vacate the decrees, sales, and proceedings so far as they affected the lands claimed by him, and to enjoin all further proceedings by the commissioner of school lands, and to enjoin such purchasers from taking possession of, or from exercising acts of ownership over, the lands in question, etc. Nothing appears to have been done in the case until December 12, 1893, when Levassor filed an amended and supplemental bill, showing that on January 24, 1892, the commissioner of school lands had conveyed to J. C. Alderson and R. C. McClaugherty certain of the lands so sold by the commissioner of school lands as aforesaid and claimed by Le-

vassor, and making J. C. Alderson a party to the suit. The Levassor suit lay dormant from December 12, 1893, until July 20, 1901. In the meantime, on September 5, 1899, the said J. C. Alderson was adjudicated a bankrupt, and on October 12, 1899, John A. Preston was appointed trustee for such bankrupt. On February 28, 1899, J. M. Hopkins, clerk of the county court of Boone county, conveyed to F. C. Leftwich and S. E. Bradley the undivided two-thirds interest of J. C. Alderson in two tracts of 650 and 616¼ acres, respectively, purchased at a tax sale made by E. D. Stollings, sheriff of Boone county, in the name of said Alderson, for taxes delinquent in his name for the years 1895 and 1896. By deed dated April 19, 1901, said Leftwich and Bradley conveyed the Alderson land, being an undivided two-thirds interest in the two tracts, to J. R. Wingfield, trustee, and by deed dated April 25, 1901, R. C. McClaugherty conveyed his undivided one-third interest in the land to said Wingfield, trustee, and for the year 1901 said two tracts are charged on the land books of Boone county for taxation in the name of Wingfield, trustee.

On July 20, 1901, 11 years after the institution of the suit, and 8 years after the last preceding step taken therein, a decree was entered in the Levassor suit, setting forth that "all matters in controversy in this cause between the plaintiff and the defendant, R. C. McClaugherty, and William A. Breedlove, having been settled and adjusted, on motion of the plaintiff this cause is dismissed as to said McClaugherty and William Breedlove." This decree proceeds to enjoin the commissioner of school lands and his successors in office, and J. C. Alderson and others, from taking any further steps in the school land proceeding so far as it concerns the tract of 692 acres set out in the bill and exhibits, and then declares that the deed of January 24, 1892, from William Thompson, commissioner of school lands, to R. C. McClaugherty and J. C. Alderson, in so far as it conveys or attempts to convey that part or portion of the lands claimed by Levassor to J. C. Alderson or his vendors, are to that extent set aside and annulled, "and, there being nothing further to be done in this cause, it is ordered that the same be retired from the docket." On November 21, 1901, Wingfield, trustee, in order to protect his title derived through Alderson and McClaugherty, purchased from W. L. Ashby, who had acquired the Levassor title, all his right, title, and interest to the Levassor land, in which was included the interlock in question, comprising approximately 236 acres. By that deed Ashby, for the consideration of $300, quitclaims his interest in eight tracts, aggregating 4,121.5 acres, including the 844.5 acres conveyed to Wingfield by Leftwich and Bradley, and the 426 acres conveyed to Wingfield by McClaugherty.

At February rules, 1909, George H. Shrewsbury, trustee in bankruptcy for J. C. Alderson, filed his bills of complaint against Horse Creek Coal Land Company and others, and at March rules filed his amended bill against the same defendant, alleging that the tax deeds from Hopkins, clerk of the county court, to Leftwich and Bradley, and the sale in pursuance of which said deeds were made, were void for various reasons, and praying that he be permitted to redeem the two tracts of land therein described. The two bills are practically identical, and were consolidated and proceeded with as one suit.

The first bill alleges that on January 3, 1898, and for a long time before that date, said J. C. Alderson and R. C. McClaugherty were the owners in fee of a tract of 616¼ acres of land, situate on Horse creek, or the branches thereof, in Boone county; the said Alderson being the owner of an undivided two-thirds, and the said McClaugherty the owner of the remaining undivided one-third. The second bill contains the same averment with respect to the tract of 650 acres.

Horse Creek Coal Land Company filed its answer to the bill relating to the 650 acres, in which, among other things, it states: "Further answering this defendant says it is true that on the 3d day of January, 1898, and for a long time prior thereto, one J. C. Alderson and one R. C. McClaugherty were the owners in fee of a tract of 650 acres of land, situated on the waters of Horse creek, in Boone county, W. Va.; and this defendant says that said McClaugherty and Alderson, as such owners, were jointly charged with the taxes on said tract of land in said county for the years 1895 and 1896."

The answer then proceeds to aver and vouch for the validity of the sale and deed made for the failure to pay the taxes for those years, and to defend its title acquired under said deed. It avers that "by deed dated April 19, 1901, said Bradley and Leftwich, and their respective wives, conveyed the said tract of 410¾ acres of land to J. R. Wingfield, trustee, who afterwards, as trustee and in his own right, together with * * * conveyed the said tract of land to this defendant, the Horse Creek Coal Land Company, and that it is now the owner of said tract of land, subject only to the rights of the defendant, Joseph C. Trees, under a certain oil and gas lease, bearing date August 11, 1908. And this defendant says that for a period of more than five years next before the institution of the suit, the said Horse Creek Coal Land Company and its predecessors in title have been in actual, continuous and exclusive possession of said tract of 410¾ acres, claiming the same under the deed aforesaid as part of a larger boundary of land made up of contiguous tracts, and have been, during said period of more than five years, assessed with state, county, and district taxes on said tract of 410¾ acres, and have paid the taxes thereon for each and all said years for all purposes, and that whatever title the said Alderson and McClaugherty, or either of them, had in said 410¾ acres, the same passed to and became vested in the said Bradley and Leftwich by virtue of the tax sale and deed in pursuance thereof, and is now, by virtue of the subsequent conveyance hereinbefore mentioned, vested in the Horse Creek Coal Land Company, and this defendant denies that said sale and purchase and the tax deed to said Bradley and Leftwich were or are void for or on account of any matter or thing alleged in said bills."

On this state of the pleadings, and upon the evidence adduced, the Supreme Court of Appeals of West Virginia rendered its decision, in Shrewsbury v. Horse Creek Coal Land Co., 78 W. Va. 182, 88 S. E. 1052, holding that the tax deed and deeds made in pursuance thereof are invalid; that the forfeiture pleaded by the defendant (Horse Creek Coal Land Company) had not accrued (syllabus 5), holding that "the lands were not off the land books for five successive years, and were not forfeited for nonentry." Accordingly the mandate of the Supreme Court, dated April 18, 1916, holds that Shrewsbury, trustee, was entitled to redeem the two parcels of land.

After this final adjudication by the Supreme Court of Appeals of West Virginia, George P. Alderson, who had purchased the real estate in question from Shrewsbury, trustee in bankruptcy, filed his bill at February rules in the circuit court of Boone county, against Horse Creek Coal Land Company, a corporation, and others, for partition of the two tracts of land of the undivided two-thirds interest in which he had been adjudicated the owner and for an accounting for waste. In that instance it was alleged, as in the original case, "that on the 3d day of January, 1898, and for a long time before that date, the said J. C. Alderson and one R. C. McClaugherty were the owners in fee of two tracts of land, one containing 616¼ acres and the other containing 650 acres, situate on Horse creek and the branches thereof, in Boone county, W. Va., the said J. C. Alderson being the owner of two-thirds of each of said two tracts, and the said McClaugherty being the owner of the remaining one-third." It was also alleged that since the decree of the Supreme Court in the Shrewsbury Case, the existence of the Ashby deed to Wingfield, trustee, of the 21st day of November, 1901, purporting to grant the Levassor title, had been brought to plaintiff's (George P. Alderson) attention. The bill avers that Horse Creek Coal Land Company is estopped from now setting up such title by reason of failure to plead the same in the original suit, but asks that, if such estoppel be not sustained, such acquisition of the Levassor title by his cotenant be held to inure to his benefit, and that he be permitted to pay his proportionate amount of the cost thereof.

The Supreme Court of West Virginia decided that the Horse Creek Coal Land Company was estopped from setting up the Levassor title against the cotenancy. 81 W. Va. 411.[1] On the 8th day of April, 1918, Horse Creek Coal Land Company filed its bill against George P. Alderson and others in the District Court of the United States for the Southern District of West Virginia, now before this court. On the 23d day of July, 1918, George P. Alderson appeared and filed his motion to dismiss the bill, on the ground that the

[1] 94 S. E. 716.

matters therein alleged had already been adjudicated as between the parties, and that appellant cannot by the medium of a new suit have a rehearing of the matters decided, and a nullification of the decision of the Supreme Court of Appeals of West Virginia. The District Court entered an order sustaining the motion to dismiss the bill, and the cause is now before this court upon an appeal from that decree.

L. H. Kelly, of Gassaway, W. Va. (J. Blackburn Watts, of Charleston, W. Va., on the brief), for appellant.

W. E. R. Byrne, of Charleston, W. Va., and Frank P. Murphy, of Madison, W. Va, (Murphy & Wade, of Madison, W. Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). The facts of this case are numerous and more or less complicated. A consideration of the same has involved much study and investigation on the part of the court. However, in the last analysis, the case, in our opinion, turns on one point, to wit, as to whether the appellant is precluded by the judgment of the Supreme Court of West Virginia, in the case of Shrewsbury, Trustee, v. Horse Creek Coal Land Co., 78 W. Va. 182, 88 S. E. 1052, wherein it was held that:

"J. C. Alderson and R. C. McClaugherty, on the 3d day of January, 1898, and for many years previous thereto, were the owners in fee simple of two certain tracts of land, situated on Horse creek, in Boone county, W. Va., one containing 650 acres, and the other 616¼ acres; the said Alderson owning an undivided two-thirds interest, and the said McClaugherty owning an undivided one-third interest, therein."

In that case appellant failed to avail itself of the opportunity to plead in bar the decree of the Circuit Court of the United States for the Southern District of West Virginia, rendered on the 20th day of July, 1901, in the case of A. P. Levassor, executor and trustee, against William Thompson, commissioner of school lands for Boone county, W. Va., J. C. Alderson, and others, being the decree upon which appellant now bases its present suit, and upon which it relies to recover. Therefore the question now presented is as to whether the appellant is not now estopped from setting the same up as a means of defeating the appellees.

After the decision of the Supreme Court of Appeals of West Virginia, Alderson, the purchaser of the real estate in question from Shrewsbury, trustee in bankruptcy, filed his bill in the circuit court of Boone county against the appellant and others, for partition of the two tracts of the undivided two-thirds interest in which he had been adjudicated the owner, and for an accounting for waste. In that suit appellant, among other things, set up as a defense the decree of the Circuit Court of the United States for the Southern District of West Virginia, in the case of A. P. Levassor, executor and trustee, against William Thompson, commissioner of school lands for Boone county, W. Va., J. C. Alderson, and others, supra, and, referring to the same in its answer, said:

"Defendant files herewith a certified copy of the decree aforesaid in the cause of A. L. Levassor, executor, etc., and others, in the Circuit Court of the

United States for the Southern District of West Virginia, marked 'Defendant's Exhibit No. 2' and asks that the same be taken and read as a part of this answer. For the reasons aforesaid defendant therefore avers that the acquisition of title by it to the land conveyed to J. R. Wingfield, trustee, by W. L. Ashby as aforesaid, was not the purchase of a conflicting claim that would operate for the benefit of plaintiff as cotenant with this defendant, in the event that this court should hold that such cotenancy exists, but that under said conveyance defendant acquired good and indefeasible title to the lands therein conveyed, in which plaintiff and his alleged predecessors in title have not now and have never had any rights or claim, and therefore that it was not incumbent upon defendant to plead said title in its former answer in said original suits, since the same was never attacked until the filing of plaintiff's amended and supplemental bill."

That case was taken to the Supreme Court of Appeals of West Virginia, and the court on the 27th day of November, 1917, announced its decision (81 W. Va. 411, 94 S. E. 716), in which the defense interposed by the appellant is squarely met and decided. The first point in the syllabus is as follows:

"An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in the former litigation, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits."

Among other things the court in its opinion says:

"But the defendant contends that the Levassor title was not involved upon the former hearing, and that it was not necessary for it to set up that title then in order to get the benefit of it as a defense. It is quite true the plaintiff in that bill did not refer to the Levassor title. He did not rely upon it; in fact, there is no averment in the bill in regard to it, but that fact did not prevent it from becoming a good defense to the bill in toto or pro tanto, as it might cover the whole or a part of the land in controversy. The fact that the plaintiff in his pleading does not set up the defenses which may be made to his case does not preclude the defendant from presenting them, nor does it excuse a failure upon his part to present any defense which he may have that would defeat the claim asserted by the plaintiff. The contention of the defendant was that the plaintiff had no title nor interest in either of these tracts of land. It relied upon the tax sale and the transfer of plaintiff's title under the provisions of the Constitution to defeat any claim plaintiff might have to the land. It now by its answer says that it has two other defenses, one of which entirely defeats the plaintiff's claim to any of this land, to wit, that it has had the adverse possession thereof under color of title for sufficient time to bar plaintiff's right of recovery; and, second, that it has acquired an outstanding title which covers a part of these tracts of land, which title plaintiff is enjoined from claiming under. Why did it not make these defenses in the first suit? They were just as available to it then as they are now; they would have been just as effective then as now. Its defense of adverse possession was just as full and complete then as it is now, and while defendant's claim of defense under the Levassor title might not extend to defeat the whole of plaintiff's claim, it would have been just as effective as a defense to the original bill to defeat the claim of plaintiff to that part of the land covered by that title as it could be now. The fact that a defense does not go to defeat the plaintiff's entire right of recovery does not preserve it for future reliance in case it is not relied upon when the opportunity is given to make it. Ordinarily but one opportunity is given a defendant to make defense, and if he fails to present all of the matters which are available to him to defeat the plaintiffs' right in whole or in part, he will be forever barred from

thereafter presenting them. This seems to be the well-established doctrine of the authorities cited above. We are therefore clearly of the opinion that the court did not err in denying the defendant the right to set up these additional defenses to the bill."

Thus it will be seen that the Supreme Court of West Virginia has finally settled the law as respects this litigation adversely to the contention of the appellant. The general rule is that, when a court takes jurisdiction of the subject-matter of a particular suit, the parties in interest should raise any and all questions that naturally come within the scope of the issues involved in such controversy. In other words, by this rule it is sought to reach a speedy determination of all questions that are raised or could be raised, so as to secure a final determination of all matters coming within the scope of the issues involved in such controversy. If this were not the rule, we would have chaos and uncertainty, and as a result litigants would be left in doubt as to whether the judgment obtained was conclusive and binding. As was well said in the case of Southern Pacific R. R. Co. v. U. S., 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined by them."

The rule announced by the West Virginia court is borne out by the Supreme Court of the United States in the case of Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463. There the plaintiff, Applegate, instituted a suit against Dowell in a state court to enjoin him from asserting title or claim by virtue of his deed under a decree of the federal court to a certain tract of land. Prior to the institution of the suit Dowell had brought suit in the federal court against Jesse Applegate, Daniel W. Applegate, and others to vacate as fraudulent a certain deed to the said Daniel W. Applegate from his father, Jesse Applegate, for a certain tract of land. The deed was vacated, and all the interest of Jesse Applegate in the tract of land of 121.55 acres was decreed to sale, sold, and purchased by and conveyed to Dowell. Some time subsequent to the said purchase Daniel W. Applegate brought a suit against Dowell, alleging that, prior to the commencement of Dowell's suit in the federal court, one W. H. H. Applegate had conveyed to Daniel W. Applegate a tract of 40 acres of land, being a part of said tract of 121.55 acres, and asserting that his title to the 40 acres was paramount to the claim of Dowell, and that the same was not affected by the suit and decree in the federal court

under which Dowell purchased, as the validity of the deed from W. H. H. Applegate to Daniel W. Applegate was in no wise put in issue or determined by the decree in question. Dowell averred in his answer that the deed under which plaintiff now claims was put in issue in the suit in the federal court and determined by its decree. Mr. Justice Harlan, after stating the facts, said:

"It is disclosed by the present suit that, when Daniel W. Applegate answered Dowell's bill, he held the deed of October 8, 1874. If Daniel W. Applegate became, when taking that deed, a bona fide purchaser of the 40 acres of land now in dispute, and if the title so acquired was superior to Dowell's right to have that land sold for his demands against Jesse Applegate, it behooved him to assert that title in defense of the suit brought against him. The very nature of that suit required him to assert whatever interest he then had in the lands, or any part of them, that was superior to any claim of Dowell upon them, whether by judgment liens or in any other form. So far from pursuing that course, he forebore—purposely, as may now be inferred—to claim anything in virtue of the deed of October 8, 1874, and long after the decree under which Dowell purchased, he comes forward with a new, independent suit, based alone upon that deed, as giving him a superior title. His object is—certainly, the effect of his suit, if it be sustained, will be—to retry the issues made in Dowell's suit, so far as they involved the latter's claim to have the 40-acre tract subjected to his demands. The decree in the federal court was an adjudication, as between all the parties to the suit in that court, that Dowell was entitled, in satisfaction of his claims against Jesse Applegate, to subject to sale all the lands his bill sought to reach, which the decree directed to be sold; and that decree, never having been modified by the court that rendered it, nor by this court upon appeal, necessarily concludes every matter that Daniel W. Applegate was entitled, under the pleadings, to bring forward in order to prevent the sale of the lands claimed by him, by whatever title. Having remained silent as to the deed of October 8, 1874, and having allowed the suit in the federal court to proceed to final decree upon the question as to whether the lands described in the bill could be subjected to Dowell's demands—which description included the 40 acres here in dispute—and having been defeated upon that issue, and the decree having been fully executed, he cannot have the same issue retried in an independent suit, based solely upon a title that he was at liberty to set up, but chose not to assert, before the decree was rendered."

It is well settled that a judgment is conclusive upon the questions actually contested and determined, and also upon all matters which might have been litigated and contested in the suit. Phelan v. Gardner, 43 Cal. 306; Rogers v. Higgins, 57 Ill. 244; C. & O. Canal Co. v. Gittings, 36 Md. 276. There are many other questions presented by the assignments of error, which, in our opinion, are immaterial in the view we take of this matter. Therefore we have not deemed it necessary to enter into a discussion of the same.

Considering the whole record, and the decision of the Supreme Court of Appeals of West Virginia, which we find in perfect harmony with the decisions of the Supreme Court of the United States, it necessarily follows that the decree of the court below should be affirmed.

F. S. ROYSTER GUANO CO. v. OUTTEN et al.
THE NANNIE MAY.

(Circuit Court of Appeals, Fourth Circuit. April 6, 1920.)

No. 1761.

Wharves ⇐20(3)—Loading crane, left extending over slip, unlawful obstruction.

A loading crane, erected without permission of the Secretary of War, traveling on a track along the edge of a wharf, and which, although movable, was left at a time when not in use extending 38 feet over the water of the slip, *held* an unlawful obstruction to navigation, and the owner *held* liable for injury to a boat which, without negligence on its part, struck the crane in passing out.

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

Suit by L. A. Outten, master of the schooner Nannie May, against the F. S. Royster Guano Company with intervening petition by the Pocomoke Guano Company. Decrees for libelant and intervener, and respondent appeals. Affirmed.

For opinion below, see 258 Fed. 955.

Cadwallader J. Collins, of Norfolk, Va., for appellant.

G. M. Dillard, of Norfolk, Va., for appellees.

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

PRITCHARD, Circuit Judge. This is an appeal by the F. S. Royster Guano Company, a corporation, from a decree of the District Court at Norfolk, Va., sustaining a libel in personam in admiralty and giving damages against it for the full amount claimed by L. A. Outten, master of the schooner Nannie May, appellee, for $1,315, with interest from February 7, 1919, and also giving damages against said F. S. Royster Guano Company for the full amount claimed by the Pocomoke Guano Company, a corporation, for $699.75, with interest from February 7, 1919. The Pocomoke Company filed its petition, praying to be admitted as a party in the pending libel, and was allowed to assert its demand for damages against the F. S. Royster Guano Company for the loss of commercial fertilizers that were on board the Nannie May when she sank. So far as the Pocomoke Guano Company is concerned its petition rests upon the same alleged negligence as that for which L. A. Outten brought his libel in personam, and all assignments of error raised against the libel apply with equal force to the petition.

The libel was brought to recover damages for the negligent maintenance of a loading crane, variously referred to in the evidence as a derrick, a traveling crane, and shears, erected without making application to the Secretary of War for his approval and authorization, which, it is claimed, constituted an unlawful obstruction to navigation, and with which the Nannie May collided. An ocean-going barge, variously estimated at from 200 to 250 feet in length, was lying along

the wharf in question. Along the edge of the wharf there ran a track, upon which the crane in question was moved. This crane, on the day in question or the day before, had been used to unload the barge, but had not been in use for some time previous to the time of the landing of the Nannie May at the wharf, and it had been left suspended over the center of the barge. The mast of the Nannie May was 45 feet high and struck the crane about 6 inches from the top, and it thus appears that the crane was suspended about 45 feet above the water. The beam of the barge was about 30 feet, and the crane projected about 8 feet beyond the barge over the water. In his testimony in chief Outten states that the crane projected 10 or 12 feet beyond the barge. The extreme length of the crane was about 38 feet. The loading crane has occupied its present location since 1912.

In his redirect examination E. M. Griffin is reported as saying that the "shears were about 125 feet long—at least that, between 125 and 150 feet." It is insisted by Proctor for appellant that the reporter misunderstood Griffin as to this point, inasmuch as on his direct examination witness stated that the beam of the barge was about 30 feet and that the derrick projected about 8 feet from the barge.

The Nannie May on the day in question made her first landing in a slip, astern of the barge, to load a cargo of commercial fertilizers; but, when told that he could not load at that point, Capt. Outten left the stern of the barge and came around it to the other end. Capt. Outten said that the crane was suspended over the barge when he landed astern of her, that he passed around the crane without trouble in order to reach the bow of the barge, and that he saw "the shears over the barge" when he left the stern to come around to the bow of the barge. It also appears from the evidence that Griffin, an employé of the F. S. Royster Guano Company, warned Capt. Outten "to be careful of the shears" when the Nannie May moved from the stern to the bow of the barge. A Capt. Willey, the owner of a small boat very similar to the Nannie May, also landed in the slip astern of the barge some three or four hours before the Nannie May arrived. Capt. Willey states that his boat and the Nannie May were tied together lying alongside, that they went around together from the stern to the bow of the barge, and that "it happened that I noticed the shears. I was next to the dock, and happened to see them just in time to go back on both engines and get out of the way of the derrick." Why Capt. Willey's boat and the Nannie May were lashed together does not appear from the evidence.

After moving from the slip around the barge, the Nannie May lay alongside the wharf for several hours loading, and Capt. Willey's boat lay alongside the Nannie May. The two boats left the wharf at practically the same time, going out in the same way that they came, except that they did not again pass around the barge. Capt. Willey's boat was somewhat ahead of the Nannie May, but the evidence as to how far is conflicting. Oscar Wilson, a witness for the F. S. Royter Guano Company, states that one boat was about 12 inches behind the other, and that the "other boat struck the Nannie May; if it hadn't, I guess they would have passed;" and that "what caused Capt. Wil-

ley's boat to strike the Nannie May was by running too close together, and both leaving at the same time, the stern of one striking the other, turning off from the dock." And Ben Blunt, also a witness for the F. S. Royster Guano Company, states that "they both went out together, and the one that was ahead struck the Nannie May about amidship, and caused her to sheer into the barge and strike the shears." On cross-examination Ben Blunt further stated that "they started bow to bow, and when they got about 38 feet away from the wharf, coming down stream, I saw Capt. Willey's vessel turn out and hit the Nannie May—turned against her and pushed her round. I reckon she was about 4 or 5 feet ahead at that time; it looked to me about that." On being recalled, both Capt. Outten and Capt. Willey denied these statements.

The first question in the consideration of the matters involved in this controversy is as to what constitutes an obstruction to a navigable stream. U. S. Comp. Statutes 1916, § 9910, is as follows:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited. * * *"

It is the well-established policy of the government to keep navigable streams clear of unauthorized obstructions, so as to render them safe for the passage of vessels. It is just as essential to keep our waterways clear of obstructions which might interfere with the free passage of vessels as it is to keep streets and highways so as to permit the free passage of vehicles. Therefore Congress has, as we have stated, adhered strictly to the policy of not permitting any unauthorized obstructions to navigable waters. Any other policy would soon render it unsafe and inconvenient to travel on the public highways and navigable waters. The extent to which navigable waters and public highways are to be kept free from obstruction has been before the courts many times.

In the case of Richmond v. Smith, 101 Va. 166, 167, 43 S. E. 346, the court says:

"As to precisely what the extent of the obstruction must be, in order to create a nuisance, is not definitely settled by the cases. But it would seem that, strictly speaking, any encroachment upon any part of a highway, whether upon the traveled part thereof or on the sides, comes clearly within the idea of a nuisance. * * *"

The requirement of the various statutes in this respect is based upon the theory that the public highways and navigable streams belong to the public, and it is to protect the public in the enjoyment of such right that it is made unlawful to obstruct either a navigable stream or a public highway. Any obstruction not authorized by legislative authority is therefore deemed a nuisance.

In the case of Woodman v. Kilbourn Mfg. Co., 30 Fed. Cas. 503, it is said:

"It is not for an individual, but for the state, to decide whether the whole of a public highway is necessary for the public accommodation or not; hence any partial obstruction of any navigable stream or highway, or any portion of it, without legislative authority, is a nuisance. The public have a right to

the use of the entire highway: and no citizen can appropriate a portion, upon the principle that enough remains for public use."

In the case of Atlee v. Packet Co., 88 U. S. (21 Wall.) 394, 22 L. Ed. 619, the Supreme Court said:

"He rests his defense solely on the ground that, at any place where a riparian owner can make such a structure useful to his personal pursuits or business, he can, without license or special authority, and by virtue of this ownership, and of his own convenience, project a pier or roadway into the deep water of a navigable stream, provided he does it with care, and leaves a large and sufficient passway of the channel unobstructed. No case known to us has sustained this proposition, and we think its bare statement sufficient to show its unsoundness."

In other words, any obstruction of a navigable stream must be subordinate to the right of navigation. When we consider the facts in this case in the light of the case above cited, we find that the derrick which the defendant permitted, while not in use, to project at least 38 feet over the navigable water, was not only dangerous, but an obstruction not authorized by law. The obstruction in question being in the air, a considerable distance from the water, rendered it all the more difficult for one navigating a vessel to determine accurately as to the proximity of such an obstruction to the top of a vessel. If this crane, after being used, had been immediately turned to one side, so as not to project over the navigable waters, and at all times kept in that position while not being used, it could not have been said to be an unauthorized obstruction. Even if this obstruction had been authorized by the proper authorities, it would have been just as much an obstruction to navigation as would have been a drawbridge left in an improper position, when not being manipulated so as to permit vessels to have an easy passage.

It is shown that the derrick of appellant while not in use, as we have said, projected at least 38 feet over the navigable water. However appellant seeks to escape, or at least diminish liability for damages, by attempting to establish contributory negligence on the part of the appellees, and in support of this cite the language of the Supreme Court in Gring v. Ives, 222 U. S. 370, 32 Sup. Ct. 167, 56 L. Ed. 235. An examination of that case shows that the language cited was not the language of the Supreme Court, but of the court below. That was a case of fault acknowledged by the master of the tugboat, and nothing appears as to why he, "instead of following the usual course, ran diagonally towards the shore, and, striking the marine railway of plaintiffs, damaged it." The facts of that case are not analogous to the instant case, and have no application to the same. We think that the facts in the case of Panama Railroad v. Napier Shipping Co., 166 U. S. 287, 17 Sup. Ct. 572, 41 L. Ed. 1004, are materially different from the facts of this case. There the agent of the shipping company knew of the sunken vessel, and with this knowledge landed his ship in a dangerous place. In the instant case the appellee landed in a safe position, but the agent of appellant directed him to change his position, and directed him where to land, with full knowledge that he had to depart from that landing.

Capt. Willey, of another vessel, testified as follows:

"Mr. Outten and myself were lying alongside; in fact, I went there in the morning part of the day, and lay waiting for him to go to Pocomoke and come back and load. He came, and stopped at the lower end of the barge, the same as I loaded, expecting to load there, and some man came out and gave him orders to go to the bow of the barge to get his load, and of course he went to the bow to get his load, and I went with him. The man came from out of the building; I did not pay attention; first a white man, and then a colored man, will come and tell you where to go. I understood he was connected with the Royster Guano Company. He was one of the men there."

In the Panama Railroad Case the obstruction was a sunken wreck, which was not under the control of the defendant; whereas in this case appellant could by a simple turn of the wheel have moved the derrick so as to obviate the possibility of danger. The crane being so constructed as to be movable, this clearly places it in the category of drawbridges over navigable waters, and the rules applying to the operation of drawbridges apply with equal force to a crane, which was "traveling" or movable. In the case of Central R. R. Co. v. Penna. R. R. Co., 59 Fed. 193, 8 C. C. A. 86, the court said:

"It was the duty of the appellant, in exercising its rights to maintain a drawbridge over navigable waters to respect the rights of the public, and in this behalf to exercise reasonable care, not only not to impede the safe navigation of passing vessels, but also to obviate any unnecessary delay to such vessels."

Also in the case of Clement v. Metropolitan West Side El. Ry. Co., 123 Fed. 273, 59 C. C. A. 291, the court said:

"A bridge spanning a navigable river is an obstruction to navigation, tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary; the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible."

In those cases the owners and operators of authorized drawbridges over navigable waters were held liable for the negligent obstruction of navigation which resulted in injury to the libelants' vessels. As we have already stated, it is difficult to estimate as to the proximity of an obstruction overhead, as in this instance. Capt. Willey was a disinterested witness, and in testifying as to this point said:

"It looked like 3 or 4 inches from the top of the mast was hit; the end of the top. It came pretty near getting under it. If he had had 6 inches, he could have made it. Any one standing on the deck of the vessel could not tell whether it would hit it or not, with a mast that high. It was not like an obstruction in the water."

Oscar Wilson and Ben Blunt testified on behalf of the appellant that, as the Nannie May and Capt. Willey's vessel were leaving the wharf abreast of each other, the vessel of Captain Willey struck the Nannie May and caused her to run into the derrick. This testimony is contradicted by Capt. Outten and Capt. Willey, who testified as follows:

Captain Outten: "Q. Captain, two of the colored boys, Wilson and Blunt, have testified that this accident was caused, or at least contributed to by Capt. Willey's boat sheering off, and her stern coming in contact with your vessel, and shoving it round in the direction of this derrick. Tell the court whether there is anything in that? A. I never touched Capt. Willey's boat. His boat did not touch me going out. When the accident happened, I judge they were 25 yards apart."

Captain Willey: "I did not touch his boat; I was ahead; how could I touch him; we were both going out. When I got abreast of the derrick, he was 35 yards behind me."

Capt. Willey's explanation of the accident, to-wit, that the appellee's vessel was forced into the unlawful obstruction owing to the combined force of the tide, and the failure of appellee's engine to function properly, is probably the true one. On this point he says:

"I was going faster than he was, and I was leaving him all the time. The tide must have been carrying him very near as much as his own power. I noticed his engine didn't start; it started on one cylinder, hitting first one and then the other slowly."

The court below found in favor of the appellee on this point. In view of these facts, we think that appellant failed to show that this accident was due to the contributory negligence of appellee. The court below, after careful consideration of the evidence, has found that this accident was due to the negligence of appellant, and that appellee did not contribute thereto.

Under all the circumstances, we think the decree of the lower court should be affirmed.

SECOND NAT. BANK OF PARKERSBURG, W. VA., et al. v. UNITED STATES FIDELITY & GUARANTY CO.*

(Circuit Court of Appeals, Fourth Circuit. April 30, 1920.)

No. 1781.

1. **Banks and banking ⇐260(4)—Incidental powers of national banks authorize contract of indemnity.**
   National banks, which were unsecured creditors of a bankrupt corporation, having practically no assets except an uncompleted government contract, *held*, under Rev. St. § 5136 (Comp. St. § 9661[7]), giving such banks "all such incidental powers as shall be necessary to carry on the business of banking," to have power to join in execution of a bond to indemnify a surety company against loss by reason of its suretyship for bankrupt on its contract, to enable the trustees in bankruptcy to proceed with and complete the contract work.

2. **Indemnity ⇐4—Agreement to forego rights valid consideration for indemnity bond.**
   Where a surety company, as surety for a bankrupt government contractor, had the right to take over the contract, with plant and materials, and to receive all sums then due under the contract, an indemnity bond given by creditors to induce it to forego such rights *held* based on a valuable consideration.

3. **Indemnity ⇐9(2)—Costs and expenses within scope of contract.**
   A bond, indemnifying a surety from all loss and liability "heretofore accrued or hereafter accruing against it by reason of its suretyship" on the contract, *held* broad enough to cover cost and expense incurred in

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

*Appeal dismissed 254 U. S. —, 41 Sup. Ct. 10, 65 L. Ed. —.

litigating fraudulent claims asserted, against which the indemnitors, although notified, refused to contest.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Suit by the United States Fidelity & Guaranty Company against the Second National Bank of Parkersburg, W. Va., and another. Decree for complainant, and defendants appeal. Affirmed.

V. B. Archer, of Parkersburg, W. Va. (W. H. Wolfe, of Parkersburg, W. Va., on the brief), for appellants.

B. M. Ambler, of Parkersburg, W. Va. (Van Winkle & Ambler, of Parkersburg, W. Va., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is another of the numerous cases growing out of the bankruptcy 16 years ago of the Evansville Contract Company. That concern had, prior to its adjudication, contracted with the United States to build certain locks and dams in the Ohio, the Big Sandy, and the Congaree rivers. The United States Fidelity & Guaranty Company, herein called the surety, was on its bond in the aggregate amount of $200,000. To induce the surety to execute these bonds the bankrupt agreed that, if it became unable to complete or carry on the contract, it would, and did, assign the plant it owned or had upon the work to the surety, and, in the event of any breach or default of the contract with the United States, the surety should be subrogated to all its rights and properties, as principal, in such contract, and that all deferred payments and all the moneys due and payable to it at the time of the breach, or which might thereafter become due, should be credited upon any claims against the surety upon the bond.

At the time of the adjudication, the government was retaining $11,000 earned by the bankrupt, and the latter had $20,000 or more of material on hand on the work. It owed about $40,000 for claims for labor and materials, for which the surety was secondarily liable. It apparently had little or no other assets, and its unsecured debts footed up $200,000, of which an aggregate of $115,000 was due to the appellants and five other national banks; the appellants themselves being creditors in the amounts of $25,000 and $20,000, respectively.

It was clear enough that, if the general creditors could not get something out of the contracts, they stood to lose practically all their claims. As is usual in such cases, the officers and employés of the bankrupt concern were absolutely sure that a large profit would be realized if the work was only carried on to completion, and, as so often happens, the creditors, who were otherwise hopeless of getting anything, were persuaded that they could save something if the work was finished. To enable the trustees to complete the contracts the creditors were willing to advance money up to the amount of $75,000, but before anything could be done in this direction it was necessary to come to terms with the surety, which had the right to take over the contracts and complete them itself. The surety believed that if it went on with the contracts it would get out whole. It did not know what would happen

if it put the performance of them in the hands of the trustees in bankruptcy. So, in substance, it took the position that the creditors could take their choice: They could let it carry out the contract, or it would turn the whole matter over to the trustees; but in the latter event it must be absolutely protected against all liability it had incurred or might thereafter incur. The seven national banks, each through the action of its board of directors, elected the second alternative, and as a result, on the 4th of April, 1904, gave a bond in the aggregate amount of $75,000, each of the obligors, however, becoming bound for only the same proportion of any sum that might become payable under the bond as its claim against the bankrupt was of the aggregate claims of it and its six associates. This bond, after reciting a number of the facts, stated that the obligors believed it to the interest of the creditors that the contracts be finished by the bankruptcy trustees, and that money be borrowed by the trustees under the orders of the bankruptcy court, and that the surety was unwilling that this course be taken unless it was indemnified against any liability that had accrued, or might accrue, to it by reason of its suretyship. The condition of the obligation was that the obligors should in all respects indemnify and save harmless the surety from all loss, charge, damage, and liability theretofore accrued, or thereafter accruing, against it by reason of its suretyship, or liability, on the bonds.

Thereupon, under orders of the bankruptcy court, the trustees went on with the work. As in at least nine out of ten such cases, the high expectations with which they entered upon the task were disappointed. Many of the claims due at the time of the bankruptcy, and for which the surety was liable, were subsequently bought at a great discount by persons formerly connected with the bankrupt. The surety resisted the claims of the purchasers to be paid in full, and as a result of long and expensive litigation their demands were materially cut down. It is not now disputed that the amount actually paid by the surety for such claims was $18,600. In the suits in which the surety company defended itself against the claims as first presented, and the other litigation resulting from the suretyship, much expense was incurred for counsel fees and other incidental expenses, such as for copies, documents, printing, premiums on appeal bonds, etc. Some of these items were disallowed by the court below, but those for which it held the obligors on the bond liable amounted to $20,451. The appellants deny all liability on the bond given to the surety, asserting that as national banks they had no power to enter into such an obligation, and that, even if they had, it was not binding on them, because it was, to the knowledge of all the parties, assumed for the purpose of facilitating the carrying out of the order of the bankruptcy court directing the trustees to complete the contract, and to borrow, if need be, as much as $75,000 for such purpose.

[1] It is insisted by appellants that—

"The execution of the indemnity bond and the entry of the parties into the agreement or scheme for borrowing money, issuing certificates of indebtedness, and all obligations of the banks as enumerated in the indemnity bond, were against public policy; and, as the banks had no power or authority to execute the guaranty bond, it is illegal, because ultra vires."

As we have stated, these two banks holding debts against the contract company, to wit, Second National Bank of Parkersburg, $25,000, and the Farmers' & Mechanics' National Bank, $20,000, on February 13, 1904, joined in a petition to have the contract company adjudicated a bankrupt, and procured that adjudication on February 27, 1904. It was upon their petition a receiver was appointed under section 3e of the Bankruptcy Law (Comp. St. § 9587), which required them to give an indemnifying bond. It was made to appear by the report of the trustees that a large profit, as we have stated, could be made by finishing the government dam contracts, and that the interest of creditors demanded that the business of the bankrupt be continued, and that these profits in question be realized. This course was authorized by Bankruptcy Act, § 2, cl. 5 (section 9586), and under section 55c (section 9639) it is provided that—

"The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate."

It was then generally understood that the plan proposed was the only hope of the general creditors. At that time it was but natural that the banks, who were pecuniarily interested in the outcome, should accept the proposition which, as we have said, gave promise of fruitful results. Thus it was that the necessary steps were taken culminating in the indemnity agreement upon which this decree is based. While the indemnity bond in question was not executed under the provisions of the Bankruptcy Act, nevertheless, in view of their status as creditors, these banks had the sanction of the Bankruptcy Law for executing an indemnity bond to protect their interest in the bankruptcy estate.

The question as to the wisdom of the directors in entering into an agreement of this kind is not involved; the real question being as to whether the banks at that stage of the proceedings had the power to enter into an agreement of this kind for the purpose of self-protection in the collection of their debts. In other words, were they not warranted in taking such steps as were necessary to conserve the assets of the banks, and could their acts in this respect be said to be ultra vires?

Section 5136, Rev. St., in the National Banking Act (Comp. St. § 9661), among other things, provides:

"Third. To make contracts. * * *

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

The limitations contained in the foregoing section were intended to insure the safe management of the affairs of a national bank, so as to protect the owners thereof in the safe conduct of its affairs, and as a guaranty that the management of such bank should at all times be free from speculation, the assumption of undue risks, or the doing of anything else calculated to injure the public by impairing the credit of the

bank. It also confers upon the directors "all such incidental powers as shall be necessary to carry on the business of banking." In referring to this phase of the question, the Supreme Court of the United States, in the case of First Nat. Bank v. Nat. Exchange Bank, 92 U. S. 122, 23 L. Ed. 679, affirming 39 Md. 600, said:

"* * * Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter. * * * This necessarily implies the right of a bank to incur liabilities in the * * * course of its business, as well as to become a creditor of others. * * * Obligations may be assumed that result unfortunately. * * * Compromises to avoid or reduce losses are oftentimes the necessary results. * * * These compromises come within the general scope of the powers committed to the * * * directors and officers, * * * and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter. * * * Banks may do, in this behalf, whatever natural persons could do under like circumstances."

This rule is also announced in Bank v. Vermont, 231 U. S. 120, 140, 34 Sup. Ct. 31, 58 L. Ed. 147.

It is highly important that the directors of a bank should be vested with the power for the protection of assets and the saving of debts. In 7 Corpus Juris, p. 831, it is stated:

"The power to adopt reasonable and necessary methods for the collection and the security of debts is necessarily incident to the powers expressly granted to national banks. * * *"

In Morris v. Third Nat. Bank of Springfield, Mass., 142 Fed. 25, 73 C. C. A. 211, the Circuit Court of Appeals for the Eighth Circuit, said:

"It may be conceded that a national bank may not lawfully engage in the business of a trust company or of acting as the representative of others in matters in which it otherwise has no corporate concern, but it does not follow that where its own interests, which have been acquired in the usual course of its business, are involved and have become the subject of controversy or litigation, it is not authorized to combine them with like interests of other persons and to contract to represent the whole. Wylie v. Northampton Bank, 119 U. S. 361, 7 Sup. Ct. 268, 30 L. Ed. 455. A national bank may lawfully do many things in securing and collecting its loans, in the enforcement of its rights and the conservation of its property previously acquired, which it is not authorized to engage in as a primary business. Thus a national bank has no power to subscribe for or deal in the stock of other corporations (First Nat. Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007; California Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198); but in the usual course of its business it may accept such stock as collateral to a loan, and thereafter, through the enforcement of the loan, become the owner of the stock (National Bank v. Case, 99 U. S. 628, 25 L. Ed. 448); or it may accept such stock in compromise and satisfaction of its claims (First National Bank v. National Exchange Bank, 92 U. S. 122, 23 L. Ed. 679). It has been held by this court that, under the power to purchase and hold such real estate 'as shall be necessary for its immediate accommodation in the transaction of its business' (Rev. St. § 5137 [U. S. Comp. St. 1901, p. 3460]), a national bank having a lease of a plot of ground for 99 years may erect thereon a building of a size largely in excess of its own immediate requirements for the purpose of renting apartments to others (Brown v. Schleier, 118 Fed. 981, 55 C. C. A. 475). It was said: 'Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively

for banking purposes. If the land which it purchases or leases for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive. There is nothing, we think, in the national bank act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined.'

In Cockrill v. Abeles, 86 Fed. 505, 30 C. C. A. 223, it was held that, where a national bank acquired an undivided interest in real property in satisfaction of a debt, it might thereafter lawfully purchase other undivided interests in the property and discharge existing liens and incumbrances, if such course was necessary to enable it to manage or dispose of the property to better advantage. In Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402, a national bank owned an abandoned mining property. 'The shaft and drifts were filled with water, the machinery silent, and the tools gone.' It was held that under its incidental and implied powers the bank had authority to expend money in putting property in presentable condition to attract purchasers. Such cases are sufficient to illustrate the latitude that is permitted national banks, not in the character of the acts they may primarily engage in as a business, but in the management and protection of property and property rights acquired in the usual course of banking transactions, and it includes such minor incidental powers as may be reasonably adapted to the ends in view. As was said by the Supreme Court in Wylie v. Northampton Bank, supra: 'It would certainly be competent for a national bank to take measures for the recovery of its own property lost in the way described. If the loss, as in the present case, included the property of others, and it was deemed best, having reference to the bank's own interest, that these measures should be taken by the bank alone for itself and all concerned, it might lawfully undertake to act for others thus jointly concerned with itself, as well as for itself alone; and want of proper diligence, skill, and care in the performance of such an undertaking would be ground for liability to respond in damages for such failure.'"

It is urged by appellants that the indemnity bond is void upon the ground that this court, in the case of Bray v. Johnson, 166 Fed. 57, 91 C. C. A. 643, ruled that Johnson, the referee, should not have made the order of April 4, 1904, contending that this indemnity bond was related to that order. This position is untenable, inasmuch as such order has never been attacked and could not be assailed by the appellants, who themselves were parties to and voted for it. The referee was vindicated by the court, which, among other things, held that he was "not guilty of the slightest impropriety."

Under the order of April 11, 1904, it appears that the trustees borrowed money to be used as a fund connected therewith in making renewals and expenditures, handling and accounting for over $415,000; the proceeds of plant and property was $65,000, making all told a grand total of $480,000, but winding up with only $30,000 net. In the court below, presided over by the late Judge Jackson, Johnson, as referee, was allowed fees of 1 per cent. on all the moneys paid out, upon which $1,500 was paid him. After the retirement of Judge Jackson, his successor held that the court was precluded by the former order, and that the referee should be allowed 1 per cent. on $430,657, less $1,500 already received, and gave judgment for $2,806.50, and from this decree the trustee appealed to this court. The court held that under the statute not exceeding 1 per cent. could be allowed on sums paid in dividends, and that inasmuch as only $30,000 could be so paid, his commission

under the law should be $300. However, the court reached the conclusion that, inasmuch as no appeal was taken from the order of Judge Jackson, which had been acted upon by the parties in good faith, it therefore should not be set aside, and that the $1,500 paid should stand, and that the allowance of $2,806.50 could not be sustained. It should be remembered that the order of Judge Jackson was not held to be void, although it was erroneous, and therefore the only question in the judgment was in regard to commissions; the judgment being founded upon the words of the statute.

It is insisted by appellee that appellants rely upon an obiter in argument, to the effect that a referee should not be allowed to increase his emoluments by continuing a business, and borrowing money, and taking a commission on all the money handled. In the case of Bray v. Johnson, supra, the court said:

"The courts are authorized to continue the business of bankrupts, and this referee exercised this authority, which, in passing, it may be said as to a transaction of this magnitude, without the express sanction of the court, was of exceedingly doubtful propriety, and the issuance of trustees' certificates for $75,000, or indeed for any amount, assuming it should be done in a bankruptcy case at all, ought manifestly not to be thought of by a referee. The temptation, if a referee could thus increase his compensation, to err, would be too great."

It should be remembered, however, that the court permitted the allowance of $1,500 in favor of the referee, five times as much as the court deemed lawful, to stand, and now appellants seek to avoid their contract under the decision in that case. It appears, however, that the Fidelity Company never handled any money realized from the sale of the certificates. It is clear that, if the trustees had borrowed on their own credit without certificates, the law would have reimbursed them. That transaction is completely wiped out, and cannot avail appellants in this controversy. What the court said as respects this phase of the question is purely obiter and not binding. There is not the slightest suggestion contained in the record that the Fidelity Company was guilty of any fraud. The bond now in question was made in good faith and accepted by all the parties who were obviously promoting their own interests.

[2] It is urged that there was no consideration upon which to base this transaction. When we take into consideration the benefits received by the banks, or consider the risks and prejudice to the Fidelity Company, we think the consideration was ample. Further, the recitals of the contract import a consideration and the appellants are estopped from denying the same. As we have stated, the Fidelity Company had a lien and a right of possession, and control of material and plant, and all money in the hands of the United States, being vested with the right to take hold of unfinished jobs and complete them. The banks naturally reached the conclusion that there was a profit in continuing the business through the trustees, hence their anxiety to bring about such an arrangement, and they readily agreed, in order to promote "the interests of the undersigned creditors," to indemnify the surety, if they could only have an opportunity to participate in any benefits growing out of the finishing of the contracts. It was faith

in this indemnity that induced the Fidelity Company to waive its rights.

[3] However, it is urged by appellants that this bond does not cover material claims, charges for professional services, copies of records, printing, costs, etc. This objection is urged upon two grounds by which they claim they are exempt: (a) That they are not within the terms of the indemnity; (b) that the material claims in question had accrued against the Fidelity Company before the indemnity contract was executed. It is made perfectly plain by the indemnity contract that the Fidelity Company was unwilling to agree to the proposed contract or indemnity, unless it should be indemnified against any liability that had accrued, or might accrue by virtue of its suretyship on the bonds above mentioned. Therefore, among other things, it recited:

"Now, therefore, if the above bound obligors shall and will, in all respects, indemnify and save harmless the Fidelity Company from all loss, charge, damage, and liability heretofore accrued or hereafter accruing against it, by reason of its suretyship or liability on said bonds, and on each of them, then this obligation to be void."

The foregoing makes it very clear that it was the purpose of the banks to save the Fidelity Company harmless, and this contention on the part of the Fidelity Company is reinforced by the following explanation at the end of the order in which the trustees are directed and authorized "to fully and completely release and save harmless any and all sureties which may have guaranteed the completion of said contracts." The use of the word "all" fairly indicates that the language of the contract was not to be modified in any respect as to matters growing out of this transaction.

It appears from the decree that suits and proceedings were taken against the surety company for claims based on the four bonds. It further appears that proceedings were necessary to enforce the liens upon funds in bankruptcy, and that appellants were notified of the existence of such suits and proceedings, but refused to take any steps. In the emergency thus created the company employed counsel learned in the law, and the appellee and counsel acted in good faith. We think that under the guarantee of the banks, as well as in equity and good conscience, the banks should be required to save the appellee harmless as respects the costs of these services.

Mr. Ambler, who was a witness, testified at length in regard to the services and charges, the measure of labor, and the reasons and correctness. He also testified as to the propriety and good faith of the litigation, explained the vouchers, and gave references supporting his statements. Mr. Schoyer testified as to the history of matters in the District Court and the Court of Appeals in Pennsylvania. The testimony of these witnesses is not denied or contradicted in the slightest, and, as we have stated, the Fidelity Company notified the appellants of the proceedings, and it impleaded them in the West Virginia proceedings, and called on the appellants to defend, warning them at the time, if they made default in the performance of their duty under their contract, that it would hold them liable for all costs, charges, and expenses.

It appears, among other things, that Bray, trustee, and Eichel, had bought up claims at a discount, including some of the lien claims in question, and that for a number of years they sought to have the funds in bankruptcy applied to common creditors—held by them. It further appears that these parties instituted suit in Pennsylvania to compel the surety to pay par for claims partly fraudulent, and partly discounted. It also appears that they put the claims in the name of Mrs. Eichel, and sought to have the surety pay off the liabilities in Pittsburgh, while the claims themselves were assigned to third parties in order that others might in this manner receive the money on the dividends in bankruptcy, and leave the Fidelity Company to pay the claims and lose the security. Thus it will be seen that it required great diligence on the part of counsel to ferret out these fraudulent claims so as to protect the creditors. This litigation we think was highly beneficial and successful, and inured to the benefit of the indemnitors.

It is further insisted by counsel for appellee that—

"The trustees, of their election, used resources of the estate, and piled up expenses of over $20,000, none of which would have been expended, if the Fidelity Company had taken matters in its own hands, and had not accepted the bond and deed of the banks."

In conclusion we feel that by the rule of honesty and fair dealing, these banks should be required to save the appellee harmless as respects these matters.

For the reasons stated, we think that the decree of the lower court is proper, and should be affirmed.

LEDERER, Collector of Internal Revenue, v. PEARCE.

(Circuit Court of Appeals, Third Circuit. June 14, 1920. Rehearing Denied June 23, 1920.)

No. 2549.

Internal revenue ⇐8—Property bequeathed under power of appointment held not taxable as part of testator's estate.

Under Estate Tax Act Sept. 8, 1916, § 202 (Comp. St. § 6336½c[a]), imposing a tax upon the transfer of property in which a decedent dying after passage of the act has an interest, which is subject to payment of charges against his estate and to distribution as part of his estate, and under the law of Pennsylvania, by which property passing under the exercise of a power of appointment, passes under the will of the donor of the power, and not as property of the donee, property bequeathed by a testator dying after passage of the act, under a power of appointment contained in the will of another, who died prior to its passage, *held* not subject to tax, although the last testator made the property, together with his own estate, subject to payment of his debts, where, not being required for such purpose, the orphans' court distributed it directly to the appointees.

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

Action by John W. Pearce, Executor of Alfred Pearce, against Ephraim Lederer, Collector of Internal Revenue for the First Dis-

trict of Pennsylvania. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 262 Fed. 993.

Charles D. McAvoy, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa., for plaintiff in error.

Arthur U. Bannard, of Philadelphia, Pa., for defendant in error.

E. Bartram Richards and Thomas Raeburn White, both of Philadelphia, Pa., amici curiæ.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

WOOLLEY, Circuit Judge. This is a suit brought against a Collector of Internal Revenue to recover taxes assessed and collected on the theory that property passing under a general power of appointment, exercised by a testator, constituted a part of his estate, and was, as such, liable for an estate tax under the Act of September 8, 1916, c. 463, 39 Stat. 777, as amended by the Act of March 3, 1917, c. 159, 39 Stat. 1002, and the Act of October 3, 1917, c. 63, 40 Stat. 324.

Elizabeth Pearce, dying before the passage of the act, bequeathed certain of her property to trustees with direction that they divide it into equal parts and pay the income therefrom, under spendthrift trusts, to her several children for the terms of their respective lives; and, in the event of the decease of any one of her children, she (further disposing of her property by the same will) gave, devised and bequeathed the principal of that part of her estate to the income of which the child so dying had been entitled while living, "unto such person or persons for such uses and purposes * * * as may be set forth and declared in any last will and testament" that such child might make.

Alfred Pearce, a son of Elizabeth Pearce, dying after the passage of the act, seized of an estate of his own and possessed of the recited power of appointment, left a will whereby he provided for the payment of his debts and also for the payment of sundry legacies in excess of his own estate, and exercised the power of appointment by *including* "in the dispositions" of his will the share of the principal of the mother's estate to which the power related.

From John W. Pearce, executor of the will of Alfred Pearce, the Collector of Internal Revenue demanded payment of an estate tax assessed on property which included that which was the testator's own and that with reference to which he had as donee of the power made appointments. John W. Pearce, being also trustee under the will of Elizabeth Pearce, the donor of the power, resisted payment of part of the taxes on the contention that the property which passed under the power to the appointees of Alfred Pearce, the donee, was the property of Elizabeth Pearce, the donor; that it passed not under his will but under hers; and that, not being "subject to distribution as part of his estate," his estate was not liable for the tax. Failing to impress the Collector with this position, the executor of Alfred Pearce paid the tax under protest, and, after the usual formalities brought

this action to recover the same. Judgment was rendered for the executor and the Collector sued out this writ of error. 262 Fed. 993.

There is but one question in this case, and this question, when considered with reference to the facts out of which it arises, is fraught with little difficulty. It is: Whose property passed under the power, property of the donor or of the donee? Upon the answer to this question the law acts with no uncertainty.

By Section 201 of the applicable act (39 Stat. 777), a tax, equal to given percentages of the value of the net estate, is "imposed upon the transfer of the net estate of every decedent dying after the passage of this act."

In order to obtain a net estate of a decedent as a basis for taxation, Section 202 directs how his gross estate shall first be determined, by providing that it shall include the value of all property,

"(a) To the extent of the interest therein of the decedent at the time of his death which, after his death, is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate."

The gross estate of a decedent being thus ascertained, Section 203 provides, by allowing sundry deductions therefrom, how the net or taxable estate shall be determined. Lederer v. Northern Trust Co., 262 Fed. 52 (C. C. A. 3d).

As the tax is imposed upon *the transfer of property* in which a decedent *dying after the passage of the act* has an *interest* which is *subject to distribution as part of his estate,* it is clear that if the property which passed under the exercise of the power of appointment in this case was the property of Elizabeth Pearce, the donor of the power, and as such was subject to distribution as part of her estate, her estate is not liable for the tax, because she died before the passage of the act; and, although Alfred Pearce died after the passage of the act, neither, in such event, is his estate liable, because "at the time of his death" he had no "interest" in the property "which, after his death," was "subject to the payment of the charges against his estate and the expenses of its administration and [was] subject to distribution as part of his estate," unless he made it such, within the Pennsylvania law, when, upon exercising the power of appointment, he included the property of the power in his testamentary dispositions.

From the form of the Federal Estate Tax Act, it is evident the Congress intended that the act should operate not in opposition to but in harmony with the many different state acts with which, because of its very terms, it would come into contact. Lederer v. Northern Trust Co. (C. C. A.) 262 Fed. 52. Therefore in creating an estate tax, the Congress very wisely leveled the tax at that property of decedents which is subject to distribution as part of their estates according to the laws of different states (Section 202), after deducting therefrom such expenses, claims and charges against estates as are allowed by the laws of the states under which they are administered. (Section 203). Thus it appears that the Federal Estate Tax may reach property in one state when it would fail to reach like property in another, according as the laws of distribution and administration vary in dif-

ferent states. The law of the state being the test of the valid assessment of the tax against given property, our inquiry is therefore directed to the law of Pennsylvania to determine whose property passed on the exercise of the power of appointment in this case, and under whose estate was the property distributed.

The rule in England is that a donee of a power takes a beneficial interest in the property of the power, and, upon the exercise of the power, the property becomes a part of his estate, subject to his debts like his other property in preference to the claims of legatees or appointees. 2 Sugden on Powers (6th Ed.) c. 8, § 3, pars. 6 and 7; Powell on Powers (2d Ed.) 366; Lassels v. Lord Cornwallis, 2 Vern. 465; Thomson v. Town, 2 Vern. 319; Hinton v. Toye, 1 Atk. 465; Shirley v. Ferrars, 2 Atk. 172, 2 Ves. 289, 7 Ves. Jun. 503; Jinney v. Andrews, 6 Madd. 264. The English doctrine was rejected in Pennsylvania by the Supreme Court in Commonwealth v. Duffield, 12 Pa. 277, and, upon an opinion by Chief Justice Gibson, a new rule was established to the effect, that a donee of a power is vested with no interest in its subject matter and therefore conveys none by the exercise of the power; that on the exercise of a power by the donee property passes by the will of the donor as part of his estate, not as part of the estate of the donee; and that the appointees of the donee of the power derive title immediately from the donor.

The plaintiff does not challenge this rule. Indeed, he admits that by this rule, if applicable, the property in question passed under the will of Elizabeth Pearce, the donor of the power, and was not liable for the Federal Estate Tax. But he contends that because, in this particular case, the donee in exercising the power included the property of the power in his will and made it liable for the payment of his debts, he thereby "blended" the property of the power with property of his own and made it "part of his estate," and, accordingly, made it liable for the Federal Estate Tax.

The doctrine of "blending," upon which alone the plaintiff relies in this case, has not, so far as we have been informed, been directly passed upon by the Supreme Court of Pennsylvania, but it has been considered (though diversely regarded) by the Orphans' Courts of different counties in that Commonwealth. The learned trial judge has discussed this doctrine at length, 262 Fed. 993, giving to the Pennsylvania cases, so far as they have arisen, an analysis in which we discern no weakness. He held in effect that the Pennsylvania rule as announced by Chief Justice Gibson prevails even against the doctrine of blending where the donee of a power in its exercise makes provision for the payment of his debts out of the property of the power, on the principle that under such an exercise of a power by a testator the appointment is to creditors, not to the estate, and that creditors take not qua creditors but qua appointees; and that the property passes to creditor appointees, not from the donee through his estate, but from the donor through his estate; just as under the general rule it passes to appointees designated by name, though described here by class.

We have been much impressed by the reasoning of the learned trial judge upon the application of this rule of Pennsylvania law to the

facts of this case; yet, as it involves an interpretation of a rule of state law, we hesitate, as a Federal court (in the absence of pronouncement by the state Supreme Court), to express an opinion either approving or disapproving the opposite views of county courts,—the only state courts that have expressed themselves,—when there is in the case one fact, which, standing apart and alone, determines the case.

The Orphans' Court of Philadelphia follows a rule—with which, apparently, the doctrine of blending had its rise—that the mere direction by a testamentary donee of a power to pay his debts with the property of the power is sufficient to blend the estates and cause property under a general power of appointment to become part of and to pass through the estate of the donee (Stokes' Estate, 3 Pa. Co. Ct. R. 193; Horner's Estate, 4 Pa. Co. Ct. R. 189), though in the absence of such direction the property of the power would not so pass. Regarding this rule as applicable to this case, the Orphans' Court first awarded the property of the power here in question to John W. Pearce, executor of the will of Alfred Pearce, the donee, for administration under his estate. By later and final adjudication, the Orphans' Court, on being presented by the executor of Alfred Pearce with an account which did not include any portion of the property of the power and on being shown that Alfred Pearce's own estate was more than sufficient to pay his debts, amended the previous adjudication and awarded the property of the power not to the executor of the will of Alfred Pearce for distribution, but directly to his appointees.

As to facts, this was a holding that the property which passed under the exercise of the power was not property in which the donee testator had an "interest," and was, therefore, not property "subject to distribution as part of his estate"; but was the property of the donor of the power and as such was subject to distribution as part of her estate. As to the law, it was a holding (upon an interpretation of its own doctrine of blending) that the doctrine did not apply in a case where, like this one, the donee's own estate is sufficient to pay his debts. As this decision of the Orphans' Court—a court of competent jurisdiction whose judgment we regard as binding upon us—put out of the case the doctrine of blended estates, the general rule of law as pronounced by the Supreme Court of Pennsylvania through Chief Justice Gibson returns to control our decision. We think the Collector was entirely correct in admitting that under this rule, if applicable, the property in question was not liable to an estate tax. We find the rule applicable.

The judgment below is affirmed.

HINES, Agent, v. SANGSTAD S. S. CO. et al.

(Circuit Court of Appeals, First Circuit. July 2, 1920.)

No. 1465.

1. **Shipping ⟸3½, New, vol. 8A Key-No. Series—Admiralty has jurisdiction of suits against carrier under federal control.**
That Federal Control Act March 21, 1918, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j), authorizing suits against carriers while under federal control, specifies only "actions at law and suits in equity" *held* not to have the effect of excluding suits in admiralty, especially in view of the construction placed on the provision by General Orders of Director General No. 50 and Transportation Act Feb. 28, 1920, both of which recognize such suits as within the intendment of the statute.

2. **Railroads ⟸5½, New, vol. 6A Key-No. Series—Action against carrier under federal control not limited.**
Actions against carriers while under federal control, authorized by Federal Control Act March 21, 1918, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j), are not limited to such as arise out of a breach of some duty imposed on defendant as a common carrier.

3. **Shipping ⟸58(3)—Charterer entitled to allowance for time lost in repairing damage to ship.**
In a suit by a charterer for damage to the mast of the ship, necessitating repairs before her next voyage, libelant *held* entitled to allowance for time lost while they were being made, without deduction because it was time when she should have been dry-docked under the terms of the charter, where she was not, or because the time was utilized for making other minor repairs, which would not have neeessitated laying her up.

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

Suit in admiralty by the Sangstad Steamship Company and another against Walker D. Hines, Agent. Decree for libelants (266 Fed. 390), and respondent appeals. Affirmed.

Damon E. Hall, of Boston, Mass. (Henry F. Hurlburt, of Boston, Mass., on the brief), for appellant.

Robert G. Dodge, of Boston, Mass. (Raymond S. Wilkins, of Boston, Mass., on the brief), for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. The libelants are the Sangstad Steamship Company and the United Fruit Company. The former was the owner and the latter the charterer of the steamer Sangstad, and they seek to recover damages which they sustained by reason of an accident to the steamer, due to the alleged negligence of the libelee. The libel was filed September 3, 1918. It was originally brought against James H. Hustis, receiver of the Boston & Maine Railroad. After the issuance of General Orders Nos. 50 and 50-A of the railroad administration, Walker D. Hines, Director General, was substituted as libelee. On March 29, 1920, and before entry of final decree, federal control of the railroads having terminated, Walker D. Hines, Agent, under section 206 of the Transportation Act of February 28, 1920, was

made libelee. March 29, 1920, a final decree was entered in the cause, adjudging that the Sangstad Steamship Company recover as damages the sum of $2,669.95, with interest, amounting to $321.72; that the United Fruit Company recover damages in the sum of $15,473.32, with interest, amounting to $1,972.85; and that the libelants recover costs, taxed at $596.95. From this decree the libelee appealed.

Three questions are raised by the appeal: (1) That the District Court was without jurisdiction in admiralty to hear and determine the libel; (2) that the libelants failed to prove that the damage occasioned the ship was due to the fault of the libelee; and (3) that the court erred in allowing as damages 8½ days for loss of time consumed in repairs, instead of 3 days, as allowed by the assessor.

[1] By an act of Congress of August 29, 1916 (39 Stat. 619, 645, c. 418 [Comp. St. § 1974a]), the President was authorized to take over the management of the railroads, and on December 26, 1917, he issued a proclamation by which the railroads of the country, including the Boston & Maine System, were taken over on the 28th of December, 1917. In the proclamation the President designated a Director General of Railroads and provided that "suits * * * [might] 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," but that "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," except with the prior written assent of said director.

The accident in question occurred February 14, 1918, but before this proceeding was instituted Congress passed the act of March 21, 1918 (40 Stat. 451, c. 25 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p]), known as the Federal Control Act, section 10 (section 3115¾j) of which provided:

"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."

March 29, 1918, the President issued a further proclamation in which he authorized the Director General to exercise all the powers which the foregoing "act, or any other act in relation to the subject hereof, the President is authorized to do and perform." 40 Stat. pt. 2, pp. 1763, 1764. October 28, 1918, the Director General issued General Order No. 50, the material portions of which, as amended by General Order No. 50–A, are as follows:

"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 the 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, 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."

February 28, 1920, Congress enacted what is known as the "Transportation Act," whereby it terminated federal control on March 1, 1920. In section 206 of this act it is provided:

"(a) Actions at law, suits in equity and proceedings in admiralty based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the act of August 29, 1916) of such character as prior to federal control could have been brought against such carrier, may, after the termination of federal control, be brought against an agent designated by the President for such purpose. * * *

"(d) Actions, suits, proceedings * * * of the character above described pending at the termination of federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a)."

Although the libelants' cause of action arose during that period of federal control embraced within the first proclamation of the President, still, as the libel was not brought until after Congress had enacted the Federal Control Act of March 21, 1918, and in that act proceedings in admiralty were not specifically named among the actions that could be brought, the libelee contends that there was no authority sanctioning the bringing of this proceeding in admiralty. In furtherance of this contention the libelee says that General Orders No. 50 and No. 50–A did not relieve the situation; that by these orders the Director General did not intend to authorize the bringing of proceedings in admiralty; that all he intended to do was to authorize the substitution of the Director General for the carrier corporation as the party against whom proceedings should be brought; that, if he did intend to authorize the bringing of proceedings in admiralty, he had no authority to do so; and that, the suit being in effect a suit against the United States, it "could not be impleaded in a judicial tribunal, except so far as * * * [it has] consented to be sued."

If the libelee were right in his contention, it would result that Congress stayed the operation of that great body of law known as admiralty, and remitted the parties to proceedings at law and in equity, so far as controversies might arise with respect to carriers by land or by sea that were being operated under federal control. That such was the intention of Congress seems inconceivable, and, if such an interpretation is the one that might be given the language used in the act of March 21, 1918, considered by itself, we do not think, in view of the practical interpretation put upon the act by the department of the government charged with its administration and by Congress in the

act of February 28, 1920, in which it states that proceedings in admiralty "pending at the termination of federal control shall not abate by reason of such termination, but may be prosecuted to final judgment," that it is the interpretation which Congress could have intended or did intend in the enactment of the law.

[2] A further contention on the part of the libelee is that, under section 10, carriers under federal control are liable and may be sued for breaches of duty arising only from their obligations as common carriers; that, if the accident was due to a breach of some duty not imposed on the carrier as a common carrier, no action could be brought against the carrier under the act of March 21, 1918, either at law, equity, or in admiralty; and that, inasmuch as the evidence does not disclose that, at the time of the accident, the railroad property was being used for common carrier purposes, the District Court was, for this reason, also without jurisdiction. In support of this contention he cites the case of Friesen v. Chicago, R. I. & P. Ry. Co. (D. C.) 254 Fed. 875, 878. We have examined that case and do not regard it as authority for any such proposition. It stands clearly for the proposition that an action at law may be maintained against a carrier under federal control upon a cause of action not arising against it as a common carrier, and that the bringing of such action is not subject to the order of the President limiting the district in which it could be commenced, because of anything contained in section 10 of the act of March 21, 1918.

Upon the question of liability the libelee's contention is that there was no evidence warranting a finding that he was at fault for the injury to the Sangstad's mainmast. The only evidence in the case was that introduced by the libelants. That evidence showed that neither the owner nor the charterer was in any way at fault; that the steamer was tied up at Mystic Dock, and her cargo of coal was being discharged by the use of apparatus on the dock belonging to the Boston & Maine Railroad, which was under the control of the Director General of Railroads, and was operated by his agents and servants; that the apparatus consisted in part of a horizontal boom, which projected over the vessel, and from which a digger bucket was lowered into the hold; that the boom projected between the masts of the vessel, certain of whose stays were let go in order to allow it to take a proper position; that the discharging apparatus, including the boom, was movable horizontally, the boom being so arranged that it could be hoisted clear of the mast; that, having completed the discharge of hatches 1, 2, and 3, the boom, not having been sufficiently raised, was moved against the mainmast with such force as to bend it, doing the damage complained of; that immediately after the damage had been done the boom was lifted clear of the mast, and moved past it, and the discharge continued; and that, at the time of the accident, the vessel was tied up at the dock and did not move against the boom. From this evidence we think the conclusion was warranted that the accident was due to the fault of the servants and agents of the libelee who were operating the boom.

[3] The District Judge allowed demurrage for 8½ days that were consumed in the repairs upon the mast and overruled the assessor, who allowed but 3 days. The reasons assigned for the assessor's action in allowing only 3 days are stated by the court below as follows:

"By the charter party the steamer was to be dry-docked every 6 months. She was last dry-docked before the accident on July 28 [1917]. As the accident happened on February 14th [1918] dry-docking was then overdue. It usually consumed 2½ days of the steamer's time. The assessor seems to have ruled, in effect, that the owners should have dry-docked the steamer and in connection therewith have made repairs on the mast, which would have saved 2½ days' lost time; his view being, as I understand it, that the dry-docking had to be done anyway, and the vessel had to be laid off for that purpose in the immediate future, and that therefore the injury to the mast did not pro tanto necessitate lost time. Deducting this 2½ days from the 8½ left 6 days, of which the assessor allowed only one-half, for the following reason: While repairs to the mast were going on, the charterers made certain repairs of cargo damage, i. e., injuries to stanchions, rails, hatch coamings, etc., caused by loading and discharging cargo. These repairs were not pressing, and could have been made without laying up the ship; but, as she had to be laid up to repair the mast, the charterers took advantage of the opportunity to make them at the same time. They cost more than the repairs to the mast. The respondent contends that such repairs had to be completed before the expiration of the charter party in August following, and that therefore they should be regarded as presently necessary work. The assessor * * * apportioned the 6 days' period between the two sets of repairs, and held the respondent liable only for one-half of it."

The first question, therefore, is whether the court below was right in overruling the assessor as to the 2½ days which he had allowed in reduction of the 8½ days consumed in repairing the damage to the mast.

It appears that the repairs to the mast were made at Boston without putting her into dry dock; that 8½ days were consumed in making the repairs, and that they were made as rapidly as possible; that it was good judgment to have the mast repaired immediately, and a reasonable thing to do; that the mast is the arm of the ship, by which she handles her cargo; that, after the mast was repaired, it was used in discharging cargo at Cuba, where she went before going into dry dock at Baltimore; that dry-docking the steamer usually consumed 2½ days; and that, at the time the repairs to the mast were made, the time for dry-docking, within the express terms of the charter, was overdue. The terms of the charter as to dry-docking do not seem to have been strictly adhered to, as previous to the accident the Sangstad had been put into dry dock on August 24, 1914, April 12, 1915, March 18, 1916, September 25, 1916, and July 28, 1917, which shows that the average period between dry-docking had exceeded 6 months. But we do not regard this as material to a proper determination of the question under consideration.

In considering this question it is to be borne in mind that the charterer, by claiming demurrage for the 2½ days, is not seeking to make a profit out of the accident, but to be reimbursed for the loss of the use of the ship due to the libelee's negligence, and that the libelee, by insisting that the 2½ days be deducted, is endeavoring to impose upon the charterer the loss of the use of the ship during that time. The repairs to the mast were not necessary to make the ship seaworthy, but were required to render her useful in handling her cargo, and, in view of the contemplated voyage to Cuba, there was an especial reason why these repairs should be made at once. Under these circumstances it cannot be said that the charterer, even though it was under obligation

to the owner to dry-dock the ship in the near future, was bound to do so immediately (and at the time of the repairs to the mast) for the benefit of the libelee.

We know of no decisions involving like facts in which it has been held that the loss should be apportioned. See Simpson's Patent Dry Dock Co. v. Atlantic & E. S. S. Co., 108 Fed. 425, 47 C. C. A. 443. The cases relied upon by the libelee do not sustain any such position. Marine Insurance Co. v. China Transpacific S. S. Co., 11 App. Cas. 573; The Ruabon, [1900] App. Cas. 6; The Ancanthus, [1902] Prob. Div. 17. The most they stand for is that, if the charterer had put the ship into dry dock and had her bottom cleaned and painted at the time the repairs to the mast were made, the 2½ days might be deducted; otherwise, the charterer would be making a profit.

At the time of the repairs to the mast the charterer had certain cargo repairs made. These repairs did not extend the time or in any way interfere with the work of making the repairs to the mast. The assessor, having deducted the 2½ days for the reasons before mentioned, divided the remaining 6 days, and allowed the charterer only 3 days. He did this, notwithstanding he had found that the cargo repairs were not necessary to make the ship seaworthy; that they could be made at any time before the expiration of the charter; and that they could be made without loss of time to the ship and while she was profitably employed in loading or discharging cargo. Clearly, under such circumstances, the charterer was not making a profit by being allowed the full time as demurrage, and we think the District Court was right in overruling the assessor as to both propositions.

The decree of the District Court is affirmed, with costs to the appellees.

BONFILS et al. v. LEDOUX et al. (two cases).

LEDOUX et al. v. BONFILS et al.

(Circuit Court of Appeals, Eighth Circuit. May 22, 1920.)

Nos. 5439, 5440, 5444.

1. **Landlord and tenant ⇐108(1)—Equity has jurisdiction to relieve tenant from forfeiture for nonpayment of rent.**
   Equity has jurisdiction of a suit to relieve a tenant from forfeiture of his estate because of failure to pay the rent reserved at the time required by the terms of his lease.
2. **Landlord and tenant ⇐108(1)—Demand unnecessary to forfeit for nonpayment of rent, where lease so provides.**
   Where a lease expressly so provides, no demand is necessary to sustain a forfeiture by lessor for nonpayment of rent.
3. **Landlord and tenant ⇐108(1)—Lessee willfully in default not entitled to relief from forfeiture.**
   The lessee of a theater, who without fault of the lessor did not take possession at the beginning of the term, nor demand possession for more than seven months, during which time lessor had declared a forfeiture under the terms of the lease for nonpayment of rent, and had leased to another, who had made extensive improvements, *held* not entitled to be relieved in equity from the forfeiture.

4. **Landlord and tenant ⊂=108(1)—Tender by tenant of rent due condition precedent to relief from forfeiture.**
To entitle a lessee to relief in equity from a forfeiture of the lease for nonpayment of rent, the rent due must be paid or tendered.

5. **Landlord and tenant ⊂=213(5)—Rent paid in advance under terms of lease not recoverable.**
The lessee of a theater, who, as required by the terms of the lease, paid ten weeks' rental in advance, but did not take possession, nor demand possession, until long after the ten weeks had expired, and the lease had been forfeited for nonpayment of rent, *held* not entitled to recover the rent so paid in advance.

6. **Landlord and tenant ⊂=128(1)—Lessor occupying with consent of lessee liable for use and occupation.**
Where, after commencement of the term of the lease of a theater, pursuant to a common understanding, lessor remained in possession and operated the theater during the time for which lessee had paid rent in advance, lessee *held* entitled to recover the reasonable value of such use and occupation during such time.

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

Suit in equity by Wilfrid Ledoux and others against Frederick G. Bonfils and another. Heard on cross-appeals from the decree. Affirmed on complainants' appeal; reversed and remanded for further proceedings on appeal by defendants.

Appeals and cross-appeal challenge the decree of the trial court. The bill sought to have the defendants held to be trustees of the lease of a theater building. This theater building, known as the Empress Theater, in Denver, was held under a lease by the defendant Greaves, as lessee. Although he was the title holder, the defendant Bonfils and one Tammen, who is not a party to the suit, were co-owners each having a third interest in the lease. Greaves was managing the building and conducting a theater therein in the fall of 1915. On October 9, Greaves executed a written lease of the building to the plaintiffs, who were experienced managers of theaters. The term was to begin on November 1, and to continue about five years, and the rental fixed was $500 per week, payable in advance on the first day of each week. No rent was to be paid for the period from November 1 to November 15. The plaintiffs paid $5,000 of the rental in cash at the time of the execution of the lease, to cover the first 10 weeks of their term, beginning November 15, 1915, and ending January 24, 1916. Among the covenants of the lease were the following:

"It is further expressly understood and agreed by and between the parties hereto that if the rent herein reserved, or any part thereof, stipulated herein to be paid by the said lessees, shall be behind or remain unpaid for 5 (five) days from and after the day and date whereon the same ought to have been paid, or if the said lessees shall fail or make default in the performance of any one or more of the covenants or promises herein set forth to be by said lessee kept and performed, the same and each and every instance thereof shall work a forfeiture of this lease, and upon the occurrence of any one default it shall and may be lawful for the said lessor, its assigns, agent, or attorney, at its or their election, to declare said term ended and into the said premises or any part thereof, either with or without process of law, to re-enter and the said lessee, or any person or persons occupying in or upon the same, to expel, remove, and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy as in its first and former estate without first making any demand for said rent, either upon the premises or elsewhere, or giving any notice that said lease is forfeited, anything in the statutes of Colorado to the contrary notwithstanding.

"It is hereby agreed and understood between the parties hereto that the authority above given to re-enter and take possession of said premises in case

of a forfeiture of the lease as above provided is a license in law to the lessor and its agent to so enter and take possession of said premises, and no action of forcible entry, unlawful detainer, trespass, or like action shall be brought by the lessee, in case said lessee is forcibly dispossessed from said premises by reason of the forfeiture of this lease as aforesaid."

The plaintiffs never took possession, and did not pay any rent after the first payment of $5,000. Greaves continued in possession, and on February 17, 1916, assigned the lease held by him as lessee to a corporation known as the Empress Theater Company, which had been organized on January 26, 1916, and in which Bonfils, Greaves, and Tammen were the principal stockholders. That corporation thereafter conducted a theater in the building. The plaintiffs and Bonfils had some extended negotiations looking to the acquirement of another theater in Kansas City, Mo., also known as the Empress Theater. The plaintiffs claimed in their bill, and there was proof tending to show, that shortly before the term of the Denver lease began Bonfils stated to the plaintiff that he was about to get possession of the Kansas City theater and that there was an urgent necessity for the plaintiffs to go there, as some one was needed to take and hold possession of that theater because of some legal complications, and that he depended upon the plaintiffs to do that work; that, in reply to plaintiffs' expostulations that it was necessary for them to take possession of the Denver theater, Bonfils stated that they need not worry about that theater, because he would have Greaves continue to operate it until the plaintiffs came back from Kansas City and were ready to take possession. The plaintiffs claimed that, relying on their statements, they agreed to go to Kansas City, and there entered into a lease of that theater also from a lessor who held the title in trust for Bonfils and Tammen. They took possession of the Kansas City theater and operated it for several months. It proved a losing venture, and the plaintiffs organized a corporation, in which they were the chief stockholders, and to which they assigned the lease. This company continued operations for some months, and then became a bankrupt. The plaintiffs conducted a theater at Omaha, and were interested in similar enterprises elsewhere. Greaves notified the plaintiffs, about the time when his lease required him to deliver possession, that he did not wish to operate the Denver theater longer and asked them to take possession. Thereupon the plaintiffs again consulted Bonfils, and plaintiffs assert that Bonfils, in the hearing of Greaves, again stated that Greaves would continue to operate the Denver theater, and that the plaintiffs could return to Denver after they were through at Kansas City; that they need not worry about Denver, as he would look after their interests there. The plaintiffs also claim that Bonfils again made statements to the same effect about November 13, when they assured him that their affairs in Kansas City were such that they could then go to Denver. The plaintiffs claimed that in March, 1916, they again inquired of Bonfils about their taking possession of the Denver theater, but that he informed them that he would not permit them to have possession, because they had forfeited their lease. About the middle of June, 1916, the plaintiffs demanded possession of the Denver theater from Bonfils and Greaves, but were notified that their leasehold rights had been forfeited. Based on this assumed state of facts, plaintiffs' bill prayed that the defendants be decreed to be trustees for plaintiffs in the operation of the Denver theater and required to account, and that possession of the theater should be surrendered to them.

The claim of the defendants was that no such statements as those relied upon by the plaintiffs had been made to them by either Bonfils or Greaves, and their evidence supported this denial. They also claimed that early in December, 1915, the plaintiffs had abandoned and surrendered the lease of the Denver property, and that they had accepted the surrender, and after the assignment of Greaves' lease to the new corporation, it was shown that that company had expended $14,000 in making alterations and improvements in the theater building, removing the storerooms, building a lobby, inside foyer, and a new box office, and in refurnishing and redecorating, before the plaintiffs made demand in June for possession. The plaintiffs' testimony denied that any surrender or abandonment had been made. Other defenses were asserted in the answers, and the defendants prayed that the rights of the

defendants Bonfils and Greaves to the $5,000 paid by plaintiffs be determined, and for general equitable relief. The decree dismissed the bill as to the Empress Theater Company, and gave judgment in favor of the plaintiffs against Bonnls and Greaves for the $5,000, which plaintiffs had paid them, with interest and costs. The court expressed the opinion that the plaintiffs had not proved the statements they had alleged Bonfils to have made, and that no trust was established. The recovery of the $5,000 and interest was allowed, because defendants had rendered nothing of value to the plaintiffs in return therefor, and because possession was not taken by the plaintiffs. The defendants have filed two appeals on a single record, but the later one must be regarded as in substitution for the earlier.

John T. Bottom, of Denver, Colo. (John M. Waldron, of Denver, Colo., on the brief), for Bonfils and others.

Anan Raymond, of Omaha, Neb. (T. J. O'Donnell, of Denver, Colo., Brogan, Ellick & Raymond, of Omaha, Neb., and John W. Graham, of Denver, Colo., on the brief), for Ledoux and others.

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

MUNGER, District Judge (after stating the facts as above). The plaintiffs, in support of a cross-appeal, urge that the evidence shows that there was a constructive trust established, whereby the defendants held the property in trust for the plaintiffs, while the defendants urge that the plaintiffs' evidence shows nothing more than an express trust concerning lands and relating thereto, and that such a trust is invalid under the Colorado statute of frauds (section 2660, Rev. Stats. of Colo. 1908), which forbids the creation or declaration of such a trust otherwise than by deed or conveyance in writing, subscribed by the party or by his agent authorized by writing. It is not necessary to determine this issue, because the court below decided on conflicting evidence that no such agreement as the plaintiffs rely upon had been made. That conclusion is supported by direct evidence and by many circumstances in the case, and should not be set aside.

[1] The defendants assert that the court should have dismissed the plaintiffs' bill, because, when it turned out that the equitable relief sought by the bill, the declaration of a trust, could not be granted, the court was without jurisdiction to proceed further, leaving the parties to their actions at law for further relief sought. The correctness of this conclusion may be conceded, if the bill had sought only the establishment of a trust relationship; but the bill also proceeded upon a familiar ground of equitable jurisdiction for relief from a forfeiture asserted by the defendants. A court of equity has power to relieve a tenant from forfeiture of his estate, because of a failure to pay the rent reserved at the time required by the terms of his lease, when it is just to do so. Sheets v. Selden, 7 Wall. 416, 19 L. Ed. 166; Kann v. King, 204 U. S. 43, 27 Sup. Ct. 213, 51 L. Ed. 360; The "Elevator Case" (C. C.) 17 Fed. 200; 1 Pom. Eq. Jur. §§ 433, 434, 450, 453.

[2] When the conclusion of the lower court is accepted that there was no agreement on the part of the defendants to hold the Denver theater as trustees for the plaintiffs until they should be ready to assume possession of it, we have the fact remaining that the plaintiffs did not take possession of the leased property, but allowed the

lessor to remain in possession for 7½ months before demanding possession. The lessor did not refuse or withhold possession. Finding no one claiming possession on the part of the lessees, he continued to use and occupy the premises, conducting a theater as he had done before the execution of the lease. After the 10 weeks' period had expired for which plaintiffs had paid the rent in advance, and when more than 3 weeks had elapsed thereafter without payment of the rent reserved by the terms of the lease, the lessor assigned his interest to a corporation as a new tenant, and thereafter insisted that the plaintiffs had forfeited their estate. Under the terms of the lease, as they have been quoted, no demand was necessary as a foundation for a legal forfeiture. Lewis v. Hughes, 12 Colo. 208, 20 Pac. 621; Fifty Associates v. Howland, 5 Cush. (Mass.) 214; 24 Cyc. 1355; 16 R. C. L. 1128.

[3, 4] We perceive no equitable grounds for relief from the forfeiture which the defendants have declared. The default in the payment of the rent must be taken to be willful. The rent due amounted to the sum of $9,500 before possession was demanded of the lessor. A valuable business property was left without attempt at occupation by the tenants, when a large portion of its leasehold value consisted in the uninterrupted continuance of its use as a theater; the new lessee was allowed to expend $14,000 in making substantial alterations and improvements of the building, under circumstances that imparted knowledge to the plaintiffs, and without objection on their part, and, when possession was demanded, no tender or offer to pay the rent due was made. In the case of Sheets v. Selden, supra, the court said, in refusing equitable relief from a forfeiture declared against a tenant:

"Courts of equity are governed by the same rules in the exercise of this jurisdiction as courts of law. All arrears of rent, interest, and costs must be paid or tendered."

And in the case of Kann v. King, supra, the same court said:

"In considering this subject two propositions are obvious: First, where the forfeiture from which relief is sought has been occasioned by the gross negligence of the person claiming to be relieved, the default so occasioned is not one brought about by accident or mistake; and, second, that even where accident or mistake has been shown, especially in the absence of culpability or fraud on the part of the other party, a court of equity will not grant relief from the forfeiture, unless it can be done with justice to that party."

For these reasons the cross-appeal must fall.

[5] The defendants insist that there is no basis for allowing a recovery from the defendants of the $5,000 paid by the plaintiffs in advance as rental from November 15 to January 24, because it was paid according to their express covenant in the lease. It is the general rule that the failure of the lessee to take possession is no defense to a claim for rent, because that liability is fixed, not by the fact of possession, but by the covenant to pay rent. Oregonian Ry. Co. v. Oregon Ry. & Nav. Co. (C. C.) 27 Fed. 277; Moore v. Dove, Fed. Cas. No. 9757; Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 164 Ill. 88, 45 N. E. 488; Tiffany on Landlord & Tenant, 1154; Taylor on Landlord & Tenant, § 15.

The mere fact that the lessor remains in possession after the term of the lease has begun does not involve any exclusion from the premises, in the absence of any request for possession by the lessee. If the tenant desires to occupy the premises, he should manifest that intention in a decisive way. Millie Co. v. Thalmann, 34 App. Div. 281, 54 N. Y. Supp. 276; Vanderpool v. Smith, 4 Abb. Dec. (N. Y.) 461; Fitzhugh v. Baird, 134 Cal. 570, 66 Pac. 723; Little v. Hudgins, 117 Ark. 272, 174 S. W. 520. The continued occupation by the lessor awaiting the tenant's entry often is a protection to the interests of both against possible injury of the building by fire, by trespass, by lapse of insurance, or by deterioration. So long as such possession by the lessor is permissive, or not adverse to the lessee, it cannot amount to an eviction or termination of the lease, or excuse the tenant from payment of rent according to his contract, nor can it be a basis for recovery from the lessor of rent that has already been advanced. The portion of the decree awarding a judgment against the defendants for the recovery of the rent paid must therefore be reversed.

[6] As the parties are in a court of equity, and as the defendants Bonfils and Greaves ask affirmative relief in having determined the rights of those defendants to the $5,000 paid by the lessees, we think that the denial of relief from the forfeiture of the lease should be coupled with a determination of the rights of the parties before the court arising from the payment of this sum, and the occupation of the leased premises by the lessor during the term in which the lease was in full effect, in order that the whole controversy between the parties may be settled.

It is evident that the trial court found that there was no abandonment or surrender of the leased premises in December, as claimed by the defendants, because the decree for the restoration of the $5,000 presupposes that the lessees were entitled to a possession under their lease for the full term of the ten weeks ending January 24. We may accept this conclusion, also, as the testimony was in direct conflict. What was, then, the legal effect of the continued possession by the lessor with the acquiescence of the lessees? The law implies a promise by the occupier, who has entered and occupied the premises by permission of the owner, and without any express contract to pay the owner a reasonable rent for his occupation. Carpenter v. United States, 17 Wall. 489, 21 L. Ed. 680; Lazarus v. Phelps, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. Ed. 363; United States v. Whipple Hardware Co. (C. C. A.) 191 Fed. 945; Cobb v. Kidd (C. C.) 8 Fed. 695. The vendor may become liable to his vendee, or the lessor to his lessee, for use and occupation of the land conveyed, when he continues in possession after the time the grantee was entitled to possession. Preston v. Hawley, 139 N. Y. 296, 34 N. E. 906; Larrabee v. Lumbert, 34 Me. 79. Greaves and Bonfils each obtained a one-third portion of the beneficial use of the theater building during a period of 10 weeks, for which period the plaintiffs had paid the rent demanded by their lease, and this occupation was with the knowledge and consent of the plaintiffs. It was the opinion of the trial court that the failure of the lessees to take possession was with the knowledge and acquiescence of the

lessor, and the evidence sustained this conclusion. The plaintiffs are therefore entitled to recover from each of these two defendants one-third of the value of such use and occupation. The answer of the defendant Bonfils asserted a set-off as assignee of legal demands against the plaintiffs, but there was no evidence given to show that he was such assignee.

The decree will be affirmed as to the Empress Theater Company, and will be reversed as to the defendants Bonfils and Greaves, with directions to the trial court to allow proofs of the value of the use and occupation by Bonfils and Greaves, as has been indicated, and to enter a judgment for that sum against them, and to deny other relief prayed for by the parties other than the Empress Theater Company. The appellants will recover their costs in cases numbered 5439 and 5440, and no costs to be taxed in this court in favor of either of the parties in case numbered 5444.

GUZZI v. DELAWARE & H. CO.

(Circuit Court of Appeals, Third Circuit. July 6, 1920.)

No. 2503.

Judgment ⇐828(3)—Adjudication in state of court question directly in issue conclusive between parties suing in federal court.

A decree in equity of a state court directly adjudging that plaintiff had no title to the surface of a lot as against defendant, which owned the coal thereunder, *held* conclusive on that question and a bar to a subsequent action between the same parties, in which the right to recover was dependent on proof of title in plaintiff.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Action at law by Teresa Guzzi against the Delaware & Hudson Company. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 256 Fed. 719.

Thomas P. Duffy, of Scranton, Pa., for plaintiff in error.

James H. Torrey, of Scranton, Pa. (Walter C. Noyes, of New York City, of counsel), for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and RELLSTAB, District Judge.

BUFFINGTON, Circuit Judge. The question here involved is whether a prior case between the same parties involved the same issue as the present one. If such was the fact, it follows that an issue, once tried and judicially determined between the same parties, is finally settled, and cannot be relitigated by either party.

From the pleadings in the present case, it appears that in 1913 Teresa Guzzi, the plaintiff in the present case, filed a bill in equity against the Delaware & Hudson Company, the present defendant, in the court of common pleas of Lackawanna county, Pa. In that bill the plaintiff averred she was the owner in fee simple of a certain lot

in said county and the defendant was the owner of the coal underlying said lot. The prayer of the bill was that defendant be enjoined—

"from mining the coal under the surface of said tract of land as aforesaid in any other way than in a workmanlike manner, and without leaving sufficient pillars and supports to fully protect the surface of said land."

The case was so proceeded in that it was finally adjudged by the Superior Court of Pennsylvania, in an opinion reported in Guzzi v. Delaware, etc., Co., 61 Pa. Super. Ct. 50. The pleadings, the proofs and the issues involved in the case are set forth in the full discussion thereof in that court's opinion, and we avoid a present restatement thereof by reference to such volume. For present purposes, it suffices to say that court held the issue between the parties was the title to the lot in question, in that regard saying:

"We have before us in substance an action of trespass. Unless the plaintiff has established that she was the owner of the locus in quo, her case has entirely failed. * * * The case immediately and necessarily resolved itself into the trial of a disputed title to land."

Taking up such issues of title, the court then examined the plaintiff's evidence, and held that—

"The plaintiff failed to establish that she had any title to or ownership in the land that would support any interference by her in the mining operations of the defendant in the coal which had been owned by it or its predecessor for half a century."

The court accordingly directed the court of common pleas of Lackawanna county, whose judgment was being reviewed, to dismiss the plaintiff's bill. It will thus appear that, as between Teresa Guzzi and the Delaware & Hudson Company, the question of the title to the land involved was adjudged and settled, and, as between them, such question of title was res adjudicata, and could never again be raised or litigated in any other court or action. Such being the case, it is clear that this action of trespass for injury to said surface real estate could not succeed, unless the plaintiff established title to the surface land in question. The question of the plaintiff's title to the surface is basic, and absolutely essential as a condition precedent to her recovery for injury done to such surface land by the defendant. But, whatever may be the plaintiff's title to this lot as against others, as to the defendant it was adjudged adversely to the plaintiff in the case in the state court. That case was a finding on the issue of title, the parties were concluded, and if the present case had gone to trial the court below would have been bound, as a matter of law, to have instructed the jury that the plaintiff had as against the defendant no title to the land alleged to have been injured.

These facts appearing on the record, the court below, in an opinion printed in the margin,[1] disposed of such question of law in advance of

[1]"The plaintiff by former suit in equity, brought in the Lackawanna county court, sought to enjoin the defendant from removing the underlying coal support and recovery for injury to the surface right of a certain lot to which she claims title. The case was heard and a decree was entered in favor of the plaintiff. On appeal the judgment was reversed without a venire. 61 Pa. Super. Ct. 48. The present action has since been brought to recover damages

the hearing. We have not overlooked the contention of the plaintiff that in the case in the state court her claim was for injury done by reason of failure of the defendant to furnish vertical support to her land, and that the failure of the defendant to furnish lateral support was not involved and not adjudged in that case. This contention is fully met by the judge below in holding, as he did, that such negligence could have been proven in that case, if the plaintiff had chosen to do so; but above and beyond that is the basic fact, and no recovery—no matter what the negligence, lack of vertical or lack of lateral support—could have been

for injuries to the lot and the improvements thereon erected. The lot damaged, forming, the subject-matter of this suit, is the same as the one embraced in the equity suit, and the injuries thereto are likewise the same. In the plaintiff's statement of claim, wherein she recites the proceedings in equity, attempt is made to distinguish this action from the former suit in equity, by alleging that the matter of plaintiff's right to lateral support and of defendant's negligent mining were not raised, considered, or decided in Guzzi v. Delaware & Hudson Co., supra. It is insisted that defendant's failure to provide plaintiff's lot with vertical support was the only cause of complaint brought before the court. It is upon the alleged basis of the defendant's negligent mining, and the failure to afford plaintiff's property lateral support, that she bases her right of recovery in this suit.

"On examination of the proceedings introduced, it appears that the plaintiff is mistaken in her conclusion that the matter of vertical support was all that was brought into court. The plaintiff, in the prayer of her bill in such suit, asks for an accounting for damage and injury suffered by reason of the illegal mining by defendant under plaintiff's lot. The term 'illegal mining' is, it seems, broad enough to embrace, without mistake, all form or manner of wrongdoing in removing or taking the coal from the premises by the defendant company. However, were it not so, the plaintiff would not be permitted to maintain this action. The subject-matter, the injury and consequent damages to his lot occasioned by the defendant's negligence or wrongdoing in conducting its mining operation, having been brought into court for settlement by the plaintiff on the former occasion, bars her from having the same again adjudicated, though occasioned through want of lateral support and illegal mining, and not by failure merely to furnish vertical support.

"Whatever question is properly involved in a former suit, and might have been there raised and determined, is conclusively settled by the decree. Taylor v. Cornelius, 60 Pa. 187; Jenkins v. Scranton, 205 Pa. 598, 55 Atl. 788. A judgment is conclusive upon the merits of every question raised, or which could have been raised in the proceedings. Stearns v. Hewes, 256 Pa. 577, 100 Atl. 1054; Hewes v. Miller, 254 Pa. 57, 98 Atl. 776. 'As was said by defendant's counsel, the plaintiff cannot escape the effect of a judgment as res adjudicata by a refined exploration of the pleadings, evidence, and decree in a former case, under the claim that that case involved only a question of damages for failure to furnish vertical support, while the present case includes also the failure to furnish lateral support.' The subject-matter of the former suit was the damage resulting to plaintiff's property from defendant's mining operation, whether by reason of negligence or otherwise directly under or adjoining plaintiff's lot; and whether plaintiff in his former suit urged any or all of the particular grounds upon which she now bases recovery matters little, if she had the opportunity to do so. However, on examination of the record in the former suit, it does not appear that plaintiff did not succeed in recovering the damages occasioned to her lot by failure of sufficient allegations of a cause, or causes, contributing to its injury. The chancellor found for the plaintiff, and gave her an award sufficient to effect reparation. The appellate court reversed, upon the ground that she had not established or shown ownership of the locus in quo.

"The effect of the judgment is conclusive. Defendant's motion is therefore allowed, and judgment is directed to be entered for the defendant."

had in that case, or in this, unless the basic issue of title to the surface was proven in the plaintiff, and this basic title, adverse to the plaintiff, was not one the plaintiff could maintain or have adjudged in the present case, for the simple reason it had been once and for all adjudged against her in the state court.

The judgment below is therefore affirmed.

PORTO RICO RY. LIGHT & POWER CO. v. DIAZ MOR.

(Circuit Court of Appeals, First Circuit. July 2, 1920.)

No. 1432.

Courts ⇐438—Jurisdiction of District Court for Porto Rico.

To confer jurisdiction on the District Court of the United States for Porto Rico, under Jones Act March 2, 1917, § 41 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3803qq), where defendant is a citizen of Porto Rico, plaintiff must allege and prove, not only that he is a foreign citizen or subject, or a citizen of the United States, but that he is not domiciled in Porto Rico.

In Error to the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Action by Adalberto Diaz Mor against the Porto Rico Railway Light and Power Company. Judgment for plaintiff, and defendant brings error. Judgment vacated, and case remanded, with direction to dismiss for want of jurisdiction.

Carroll G. Walter, of New York City (J. Henri Brown, of San Juan, P. R., and Edward J. Patterson, of New York City, on the brief), for plaintiff in error.

Francis H. Dexter, of San Juan, P. R., for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This action was brought December 28, 1918, in the District Court of the United States for Porto Rico. In the complaint it is alleged that the plaintiff is a subject of the king of Spain residing in Porto Rico and that the defendant is a corporation organized under the laws of Porto Rico, with its principal office in the city of San Juan. The evidence showed that the plaintiff was a subject of the king of Spain domiciled in Porto Rico and that the defendant was a citizen of Porto Rico.

In section 41 of the Jones Act of March 2, 1917 (39 Stat. at Large, 951, 965 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3803qq]), it was provided:

"Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000. * * *"

The jurisdiction of the United States District Court for Porto Rico under this act being in dispute, the question was certified to the Supreme Court for decision, which, on June 1, 1920, handed down an opinion in which it held that the requisite diversity of citizenship to give the District Court for Porto Rico jurisdiction was wanting.

Where the defendant is a citizen of Porto Rico, to confer jurisdiction on the federal District Court, a plaintiff must allege and prove, not only that he is a foreign citizen or a citizen of the United States, but that he is not domiciled in Porto Rico.

The judgment of the United States District Court for Porto Rico is vacated, and the case is remanded to that court, with directions to dismiss the same for want of jurisdiction; the plaintiff in error to recover its costs in this court.

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

(Circuit Court of Appeals, Fourth Circuit. May 7, 1920.)

No. 1697.

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

On rehearing. Former opinion (171 C. C. A. 58, 260 Fed. 22), which reverses 252 Fed. 613, adhered to.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

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

Wyndham R. Meredith, of Richmond, Va., and T. T. Hicks, of Henderson, N. C. (Hicks & Stem, of Oxford, N. C., on the brief), for appellees.

PER CURIAM. The above-entitled cause was decided at the July term, 1919, in favor of the appellant; a petition for a rehearing was presented by the appellees, and granted by this court on November 14, 1919; and the case was argued on the rehearing at the January term, 1920.

After a careful consideration of the contention of counsel for the appellees, as well as the authorities cited, we think that the decision of this court in the first instance was correct.

Therefore we adhere to our former opinion, reversing the lower court.

LOW et al. v. McMASTER.

(Circuit Court of Appeals, Third Circuit. July 1, 1920. Rehearing Denied August 18, 1920.)

No. 2540.

1. **Patents ⇐328—1,168,820, for portable tire vulcanizer, valid and infringed.** The Miles patent, No. 1,168,820, for a portable tire vulcanizing apparatus the essential feature of which is the substitution of a solid for the liquid fuel of the prior art, with the result of making vulcanization, not only much cheaper, but more efficient, and so simple that the operation may be performed by persons wholly unskilled, *held* to disclose patentable invention and also infringed.
2. **Patents ⇐328—1,163,629, for portable tire vulcanizer, valid and infringed.** The Low patent, No. 1,163,629, for a portable vulcanizing package peculiarly adapted for use with the apparatus of the Miles patent No. 1,168,820, *held* valid and infringed.

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

Suit by Arthur B. Low and others, partners as the C. A. Shaler Company, and others, against Harry McMaster, doing business as the Presto Patch Company. Decree for defendant, and complainants appeal. Reversed.

See, also, 255 Fed. 235.

Amasa C. Paul, of Minneapolis, Minn., and H. S. Johnson, of St. Paul, Minn. (L. C. Wheeler, of Milwaukee, Wis., and C. H. Howson, of Philadelphia, Pa., of counsel), for appellants.

Hector T. Fenton, of Philadelphia, Pa., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and ORR, District Judge.

WOOLLEY, Circuit Judge. By sundry assignments and contracts of license, the C. A. Shaler Company, a copartnership, acquired the exclusive right to make, use and sell the invention of Letters Patent No. 1,168,820 for vulcanizing apparatus for repairing rubber tires, issued January 18, 1916, to W. H. Miles, and a similar right as to the invention of Letters Patent No. 1,163,629 for a portable vulcanizing package, issued December 7, 1915, to A. B. Low. Charging infringement of both patents by Harry McMaster, doing business as Presto Patch Company, the licensee—joining the owners of the patents—brought this action. The District Court held both patents invalid for want of patentable invention and dismissed the bill. The plaintiffs took this appeal.

The Miles patent—the first applied for and the last granted—relates to a compact and portable apparatus for mending punctures in bicycle, motorcycle and automobile tires by vulcanization, and comprises in combination a clamping device with two jaws, a metal plate attached to each jaw with means for compressing the plates against an interposed tire and its patch, and a block of slow-burning heat

producing material brought into direct contact with the plate bearing upon the part of the tire to be vulcanized.

The Low patent—the last applied for and the first granted—is peculiarly if not particularly adapted for use in the apparatus of the Miles patent, and provides, in lieu of the fuel carrying and heat transmitting plate depending from the upper jaw of the Miles device, a removable and portable metal pan designed to hold an uncured rubber patch on its underside and a solid slow-burning self-oxygenating heat producing substance within its bowl.

The difference between the two inventions is that Miles' is a vulcanizing apparatus in combination with fuel of a given type, while Low supplies that fuel in a new and useful way. Both inventions appear in the plaintiff's commercial product.

[1] The prior art is not extensive. Although tire punctures—the bane of automobilists—have been coextensive with the use of rubber tires on motor vehicles, creating a great and increasing demand for means easily and quickly to mend them, the art had produced very little of practical use in the hands of inexpert operators. It contained apparatus in abundance for use in the garage, but little for use on the road. All these apparatus comprised arrangements to compress the tire and patch undergoing vulcanization. They contained also a pan or pot, the bottom of which was used as the heat transmitting or vulcanizing plate. Much of this mechanism we find in one way or another in the metal parts of Miles' apparatus; therefore, in them we find nothing inventive. But the Miles apparatus is a combination of a metal clamping structure with a heat producing substance having certain characteristics. So also were the portable apparatus of the prior art; but the characteristics of the heat producing materials used in the earlier apparatus were such as to make the presence of a pan or other receptacle necessary, because they consisted entirely of liquid fuel, such as oil, gasoline, or methylated spirits. The heat-producing material of the patent is a solid and therefore does not require a pan to hold it. It rests upon the vulcanizing plate and is held there by a pin. If there is invention in the combination of the Miles patent, it is found not in any novel arrangement of elements, but in the substitution of a new fuel as an element of a combination otherwise old. That was the beginning and the end of Miles' achievement. As we regard this to be his sole contribution to the art, we think the one question of the validity of his patent is, in a word, whether the substitution of this fuel for others involves invention.

On this subject it is the law, that merely to substitute superior for inferior materials, in making one or more or all of the parts of a machine or manufacture, is not invention, although the substitution may be of materials that are both new and useful in high degree. It is also the law, as exceptions to this general rule, that if the substitution involved a new mode of construction; or if it developed new properties and uses of the article made; or where it produces a new mode of operation, or results in a new function; or when it is the first practical success in the art in which the substitution is made; or

where the practice shows its superiority to consist not only in greater cheapness and greater utility, but also in more efficient action, it may amount to invention. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 496, 23 L. Ed. 952; Celluloid Mfg. Co. v. Crane Chemical Co. (C. C.) 36 Fed. 110; Potts v. Craeger, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275; Walker on Patents, §§ 28, 29, 36.

These are the principles to be applied here. What do the cases say about them?

We recognize, of course, that the law consists of principles, not of cases. Yet cases are veritable applications of the law, from which we may extract its principles and to which we may turn for explanation and illustration. Rex v. Bambridge, 3 Douglas, 332. Of the many cases dealing with the principles of the law of substitution, we are attracted—because of their seeming resemblance in fact and their actual contrast in principle—to the campanion cases of Union Hardware Co. v. Selchow (C. C.) 112 Fed. 1006, and George Frost Co. v. Cohn (C. C.) 112 Fed. 1009, affirmed (C. C. A. 2d) 119 Fed. 505, 56 C. C. A. 185, as showing, nowhere better perhaps, just when and why the general rule and its exceptions should be applied.

In Union Hardware Co. v. Selchow the claimed invention of the patent consisted in the substitution of sheet metal for cast metal as material for roller skate trucks. In one sense a new result was attained. This new result was reflected in the advantages of the new metal over the old. It made the truck lighter, cheaper and stronger. But that was all. No new function or other result was found in the change of material. The skate continued to operate in all its parts precisely as it did when the truck was made of cast metal. Conceding that these advantages amounted to a step forward in the art, the court, following Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683, and Hicks v. Kelsey, 18 Wall. 670, 21 L. Ed. 852, found that they were due not to inventive skill but to such good judgment in selecting metal as might be expected from one skilled in the art.

In George Frost Co. v. Cohn, the same court was at the same time confronted with another case involving the question of the validity of a patent in which the patentee's sole contribution to the art was the substitution of one material for another, namely, of a button made of rubber for a button made of metal previously used on a hose supporter or garter of the type (so far as we can tell) now commonly worn by men and generall known as the "Boston garter." As in Union Hardware Co. v. Selchow, that was all the patentee did. Having there held against invention on authority of Hicks v. Kelsey, 18 Wall. 670, 21 L. Ed. 852, the learned trial judge, still following that case, quoted Mr. Justice Bradley's statement of the rule:

"The use of one material instead of another in constructing a new machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, unless some new and useful result, an increase of efficiency, or a decided saving in the operation, is clearly attained."

Applying the exceptions to the rule to the case then before him, the learned trial judge found that rubber when substituted for metal

as a button material clearly combined the three alternative essentials there stated, in that it gave to the garter a new and useful result, an increase of efficiency and a saving in operation; distinguishing the case from Union Hardware Co. v. Selchow, then just decided, where, though other qualities were present, these were absent. The rubber button performed the same function as the metal button of the art. It buttoned hosiery. But it did something more. It buttoned hosiery without tearing it and without permitting it to slip and run. To do this one thing inventors and mechanics had striven for years and had failed. The patentee did it by the mere substitution of a material that was present in innumerable arts, yet of its use in this art no one had thought. When done, it was of such utility, that, on demand by the public, it wholly displaced the metal button and came into universal use. The court found that in this substitution invention was involved.

The Supreme Court in Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 496, 23 L. Ed. 952, also following Hicks v. Kelsey, 18 Wall. 670, 21 L. Ed. 852, held, that where there is some such new and useful result, where a machine has acquired new functions and useful qualities, it may be patentable as an invention, though the only change made in the machine has been supplanting one of its materials by another; citing the familiar case of Crane v. Price, 1 Webs. Pat. Cas. 393, sustaining a patent, where the whole invention consisted in the substitution of anthracite for bituminous coal in combination with the hot-air blast for smelting iron ore. The doctrine there asserted was, that if the result of the substitution was a new and better or cheaper article, the introduction of the substituted material into an old process was patentable as invention. Applying these general principles to a case which involved no more than the substitution of an elastic for a non-elastic crotch piece in an union suit of underwear, this court found invention, Globe Knitting Works v. Segal, 248 Fed. 495, 160 C. C. A. 505; not because the substituted material was merely better, but because it produced new and useful results evidenced by the increased comfort afforded and the popular demand created.

Let us apply these principles to the apparatus of the Miles patent and see if it involves invention. This will necessitate a short excursion into the prior art. We shall restrict our inquiry to the art of tire vulcanizers and particularly to the art of portable tire vulcanizers. We are not concerned with combustible fuel or its use in a foot-warmer, as in the patent to Stoker, No. 54,477, nor with a charcoal stove vulcanizer, as in the patent to Walter, No. 1,104,722; nor with an electric vulcanizer, as in the patent to Welch, No. 923,224; nor with a hot metallic block vulcanizer, as in British Patent No. 25,502 of 1906 to Hadfield. The Stoker invention was for a heat producing material,—similar, it may be, to the one used by Miles,—and for certain of its uses. The patentees here claim no invention as to material but admit using a material well known in many arts. The other patents just cited have to do, not with portable tire vulcanizers, to be used chiefly in emergencies at the roadside, but with vulcanizers employing heat producing media obtainable only from such stationary sources as may be found in garages. We are concerned with *portable* tire vulcanizers;

and so far as we have been shown, the only heat producing materials used in such vulcanizers before Miles were liquid fuel. These references are: Adamson patent, No. 1,057,911; McGraw, No. 1,039,308; Nelson, No. 1,200,009; Magri, No. 1,157,793; and Marshal, No. 1,058,-306.

In distinguishing this prior art from the invention of the patent, the art may be described collectively, for in the apparatus of each patent there was—because the fuel was liquid—a fire pan or fire pot; and again, because of the characteristic of such liquid fuel to burn only on the surface, there was in each fire pan or pot means for carrying the heat from the burning surface down through the liquid to the bottom plate of the pan or pot for transmission to the tire to be vulcanized. This means variously consisted of upright posts, fins, flanges, wings, radiator pins, and other arrangements for carrying the heat from the flame of the fuel to the bottom of the pan where it was wanted. By substituting solid fuel for liquid, Miles did away with the pan or pot and its heat transferring means, and put his solid fuel in direct contact with the plate to be heated and through which the heat is to be transmitted to the tire. He resorted to a fuel commonly used in Vesuvian matches. Though unknown in this art, it was well known in many, having the characteristics of being self-oxygenating, of smouldering instead of burning with a flame, of burning at once throughout its entire mass, and of burning in any atmosphere without being affected by wind or weather. It can not be blown out. Nothing short of a drenching rain can put it out. Being a fuel, its function, like that of gasoline, was to produce heat; and it produced it in the same way, that is, by ignition; just as the function of the rubber button was to button, and it buttoned in the same way that the metal button did; but like the rubber button, the solid fuel which Miles substituted for the liquid fuel of the art performed not only its normal function but it did something else. It did more than produce heat; it produced it in a way and at a place that brought new results and made new things possible. The Miles' substituted fuel brought heat for the first time in direct contact with the vulcanizing plate of a portable vulcanizing apparatus—a new mode of heat application—and thereby dispensed with the mechanical means of posts, flanges and fins to carry heat from gasoline flame to the place at which it is used. Being solid and composed of known chemicals in variable proportions, Miles' substituted fuel was capable of being made to produce heat of precisely predetermined intensity and duration, thus insuring correct vulcanization in the hands of the inexpert. It substituted exact heat creating means and heat producing results for the skill and judgment indispensable in vulcanization by fluid fuel. It not only made vulcanization simpler and decidedly cheaper, but made it more efficient, and thereby enlarged the field from skilled men in shops and semiskilled men in garages to all users of automobiles however unskilled; and extended the area of this field from shops and garages to all out-doors. It put into the hands of the wholly inexpert a simple little apparatus which has only to be seen to be understood. It is so simple that a child of thirteen can install a patch on a punctured tube as perfectly as an adult. Upon

actual experiment by one conspicuously unskilled in such matters, it has been demonstrated that it takes less than a minute to place a tube between the plates of the Miles apparatus, install the Low package, turn the clamp and ignite the fuel. Thereafter there is nothing to do except to wait five minutes for the fuel to burn out and the pan to cool, when the trick is done. Vulcanization by other portable devices consumed nearly half an hour, and then could be done on the roadside only when means was at hand to extract gasoline from the tank and only when wind and weather permitted. That this use of the substituted fuel was novel is evidenced by the change from the old to the new, admittedly made by Miles. That it is useful is evidenced by its acceptance by the art and the place it has achieved. Railroad Supply Co. v. Hart Steel Co., 222 Fed. (C. C. A. 7th) 271, 274, 138 C. C. A. 23; Diamond Rubber Co. v. Consol. Tire Co., 220 U. S. 428, 434, 435, 31 Sup. Ct. 444, 55 L. Ed. 527. The measure of its acceptance and of its actual advance is demonstrated by the fact that the plaintiff company has sold more than 600,000 of its commercial apparatus based on the Miles invention, together with more than 20,000,000 of the Low patch-and-heat packages, thereby displacing nearly all other kindred apparatus on the market.

We regard these facts as pregnant evidence of the novelty, value and usefulness of these devices. If they are close to the line dividing the field of invention from the field of mechanical skill, as first marked in Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683 and surveyed again and again in the cases we have cited, their novelty and usefulness incline our judgment to a finding of invention, remembering that when the question is close, as it usually is when the thing done is simple, the thing achieved, its recognition by the art, and the demand for it by those who use it, are matters properly to be put in the scale and weighed in favor of invention. Schmertz Wire Glass Co. v. Western Glass Co. (C. C.) 178 Fed. 977, 988; Krementz v. Cottle Co., 148 U. S. 556, 560, 13 Sup. Ct. 719, 37 L. Ed. 558.

We are aware, of course, that mere summation of points of merit does not constitute invention any more than mere aggregation of elements; yet the presence of these qualities in a markedly increased measure can not be overlooked in estimating utility of a device and in determining whether it acts in a new way, does new things and produces new and useful results within the principles upon which patents are granted. Globe Knitting Works v. Segal, 248 Fed. (C. C. A. 3d) 495, 498, 160 C. C. A. 505; Neill v. Kinney, 239 Fed. (C. C. A. 3d) 309, 314, 152 C. C. A. 297; Railroad Supply Co. v. Hart Steel Co., 222 Fed. (C. C. A. 7th) 271, 274, 138 C. C. A. 23; Diamond Rubber Co. v. Consol. Tire Co., 220 U. S. 428, 434, 435, 31 Sup. Ct. 444, 55 L. Ed. 527; Thropp & Sons Co. v. De Laski & Thropp Circular Woven Tire Co., 226 Fed. (C. C. A. 3d) 941, 947, 141 C. C. A. 545.

The learned trial judge found that Miles "undoubtedly produced, and was the first to produce, as a concrete tangible thing, a device by the use of which patches could be put on automobile tires handily, quickly and with good job results," and that "he has made a highly useful thing, and there is great practical merit in his claim to be left in

the undisturbed possession of the sole right to deal in what, in a very emphatic practical sense, he has created." But the judge found, in line with Union Hardware Co. v. Selchow, that the patentee had done nothing more, and had, in consequence, not made an invention. It may be that this case presents an instance where, invention defying definition, the difference between a patentable improvement and one that is produced by the skill of the calling rests upon a difference of attitude between the minds of those whose task it is to decide it. Seward Trunk & Bag Co. v. Osterweil, 252 Fed. (C. C. A. 3d) 138, 164 C. C. A. 248. However that may be, we are constrained to differ with the learned trial judge in holding against patentability; for we feel, that while Miles' invention was not a great one, it was, nevertheless, a real one.

[2] The device of the Low patent, if an invention, is even less of one than Miles'. Yet, limited to the use for which it is intended, being peculiarly, if not entirely, adapted for use in the Miles apparatus, adding to it convenience in carriage and speed in operation, we think it contains in small measure the quality of invention and is entitled to a patent within its scope.

We are of opinion that the claims of the patents in suit (1 and 4 of Miles and 1, 5, 8 and 16 of Low) are valid.

The issues of infringement may be disposed of in a few words. The defendant has taken bodily the plaintiff's commercial device, in which are found the inventions of the two patents, and denies infringement on the ground of their invalidity; or, should the Miles patent be found valid, then on an interpretation of its claims sufficiently narrow to confer upon him the privilege of walking away with the invention. We find infringement.

We therefore direct that the decree below be reversed, that the bill be reinstated, and the action proceed in harmony with this opinion.

DENTAL CO. OF AMERICA v. S. S. WHITE DENTAL MFG. CO.

(Circuit Court of Appeals, Third Circuit. July 10, 1920.)

No. 2558.

1. **Patents ⟸259—Making one element of a tooth constituted contributory infringement.**
   A defendant, which under contract with a dental manufacturer made one element of a tooth, which, when joined to another part by such manufacturer, as intended, formed a complete tooth that infringed complainant's patent, *held* a contributory infringer.

2. **Patents ⟸288—Contributory infringer subject to suit in district where acts are committed.**
   A contributory infringer is subject to suit in the district where it committed its part of the infringement and has a regular established place of business.

3. **Patents ⟸328—762,289, for tooth, valid and infringed.**
   The Davis patent, No. 762,289, claim 1, for a crown tooth is for a new combination of old elements which produces a better result than anything in the prior art, was not anticipated and discloses invention; also *held* infringed.

⟸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 Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit by the S. S. White Dental Manufacturing Company against the Dental Company of America. Decree for complainant, and defendant appeals. Affirmed.

See, also, 263 Fed. 719.

Charles H. Howson, of Philadelphia, Pa. (Charles D. Woodberry and Odin Roberts, both of Boston, Mass., of counsel), for appellant.

Henry N. Paul, Jr., and Joseph C. Fraley, both of Philadelphia, Pa., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and WITMER, District Judge.

WOOLLEY, Circuit Judge. The S. S. White Dental Manufacturing Company, assignee of Letters Patent No. 762,289, granted June 14, 1904, to Frank H. Davis, brought this suit for infringement. The District Court found the first claim of the patent—the only one in issue—valid and infringed. The defendant appealed.

At the threshold of the case there arose a controversy as to what is the subject matter of the patent. Ostensibly the patent is for a "Crown Tooth." The defendant says that in the nomenclature of the art these words describe a definite and well known article of manufacture, adapted and intended to restore a natural crown, and include a tooth composed of a porcelain facing and a metallic backing and also means—such as a post or collar—for attachment to a natural root. The pertinency of this definition appears from the defendant's claim that all it manufactured was porcelain facings of teeth—at most only one element of the invention—and that these facings (even though designed after the keyway of the invention) were not used in crowns thus defined; therefore it did not infringe. Although by its title the patent purports to be for "Crown Tooth," and although the patentee, describing the subject matter of the patent, said in the specification that his invention relates to certain improvements in "crowns for teeth," it should be noted that he also said his invention relates "more particularly to the manner of securing the face-plate of said crown to the backing." The face-plate being the front part of a tooth and the backing being the back part, the two make a tooth, whether later the tooth is put in a crown or used otherwise. To these parts, whether separate or joined in a tooth, the patentee makes no claim of invention. His invention resides in the place of bringing them together and the manner of fastening them together. We think the terms of the patent are broad enough to cover teeth whose parts interlock after the manner of the patent. We therefore lay aside the question of the scope of the invention as limited by the title under which the patent was granted.

But the defendant says even so it did not infringe because it made but one of two parts of the tooth, and because the part it made was as susceptible of innocent use as it was of guilty use. Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 723, 26 C. C. A.

107; Winne v. Bedell (C. C.) 40 Fed. 463; Edison Light Co. v. Peninsular (C. C.) 95 Fed. 669, 674. Even if this were true, the facts of the case show but one actual and intended use of the facing made by the defendant and that was its use with a backing made by another manufacturer, afterward put together and sold by the latter, thereby justifying to this extent the plaintiff's charge of contributory infringement against the defendant.

[1, 2] The evidence establishes, we think beyond valid dispute, that the defendant made what a mechanic would term the female facing of a tooth, under contract with a dental manufacturer that made the male backing, and that the two parts when later put together made a complete tooth within the terms of the patent as we construe it. If the tooth with such facing and backing and correlative locking means was the tooth of the patent, the defendant contributed to infringement by making one element with intent that it should be united with the other elements, though later united and completed by another person. Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U. S. 325, 29 Sup. Ct. 495, 53 L. Ed. 805. For such act it must answer in a suit instituted in the jurisdiction where it committed its part of the infringement and had a regular and established place of business. Judicial Code, § 48 (Comp. St. § 1030). Thus disposing preliminarily of the defendant's liability as a contributory infringer, if infringement there was, and of the question of jurisdiction of the District Court to entertain an action charging it with such infringement, the case resolves itself into the customary issues of validity and infringement.

[3] The tooth of the patent consists as we have said of a porcelain facing and a metallic backing with an interlocking fastening device intended to overcome the ever present tendency of porcelain facings to split under the strain of mastication. Many inventors had for many years striven to do the thing which Davis claims he has done, and had striven to do it with the same three elements of facing, backing, and interlocking key differently positioned and disposed. In the teeth of some inventors we find the metal key buried and burned into the porcelain facing, the corresponding keyway being in the metal backing. Notable among these were patent No. 566,695 to Mason; patent No. 441,265 to Van Woert; and the Roach Wedgelock Tooth. In the teeth of some of these patents, the key and keyway were parallel to the facing and backing surfaces as in Mason and in the French patent No. 794 to Evslin and Ott. In others the key was positioned at an angle or was shaped with angular sides so that the key in the facing and the keyway in the backing, instead of being parallel to the surfaces of these parts, were on an incline, as in Roach's Wedgelock Tooth and in the Van Woert tooth.

Differing from teeth of this type with the key embedded in the facing, the prior art also contained teeth with key between facing and backing with keyways in both (Evslin and Ott French patent of addition No. 794 and 1115) and key in the backing and keyway in the facing and also keys and keyways differently positioned, one with the key and keyway parallel to the surfaces of the two parts (Thom's British Patent of 1857 and Steele's Interchangeable Tooth) and anoth-

er with the key and keyway parallel thereto but so shaped by angles as to perform (the defendant claims) the exact drawing-in function of the key and keyway put upon an incline to the surfaces of the parts in the Davis invention. Such was the invention of Evslin and Ott, French Patent No. 319,555, to which we shall presently refer.

In all these arrangements teeth split. But they split more readily in some than in others according to the manner and degree in which the pressure, thrust, or strain from mastication was taken up; that is, according as it was confined to and centered in the facing or carried to and spread over the backing.

The thing Davis claims to have done was not to invent a new element in a tooth but to take old elements from the art and put them in new relation. He put the key in the metal backing. There was nothing new about this. He then gave the key thus positioned an old incline of a prior art facing key. Here also there was nothing new. But when he took these two old things from their separate places in the art and put them together, he brought a new thing into the art, unless Evslin and Ott were before him with the invention of their French patent.

What new thing did Davis do, and what new and useful results did he get merely by combining two elements admittedly old? By placing the key on the metal backing instead of on the porcelain facing, he got rid of the risk of face-plate splitting incident to burning in the key. This alone was not new. But in fastening the key in the backing and cutting a corresponding keyway in the facing *on an incline*,—that is, in giving an old backing key the old direction of a facing key—he took from the brittle facing the strain of mastication at the place where the key came into compression with it, and (using the incline of the key to draw the entire surface of the porcelain facing flatly against the entire surface of the metal backing), he relieved the former of the strain of mastication and carried it to and distributed it over the entire surface of the latter. In other words, merely by inclining such a key as was found in Steele, he brought the facing and backing together in such relation that the metal backing instead of the porcelain facing withstood substantially the whole strain and thereby reduced to a minimum the natural tendency of porcelain to split under strain. As we have said, this was new, except, perhaps for the Evslin and Ott invention.

It seems a little thing for Davis to take what was right before him, transpose key from facing to backing and keyway from backing to facing and change the position of both from parallel to incline. Yet, little as it was, it has resulted in this litigation, in which it appears quite conclusively that its achievement—for which both parties are contending vigorously—was an advance in the art which measurably solved the long standing problem of means to prevent splitting of the porcelain part of a tooth.

The District Court found this to be invention. If it is not invention it is only because it was anticipated by the prior invention of Evslin and Ott. These inventors placed a metal key on the backing with a corresponding keyway in the facing of a tooth just as in Davis; but

differing from Davis, neither was inclined. While both key and keyway were parallel to the surfaces of the parts to which they respectively related, the key was triangular in shape in the sense of being broader at the top than at the bottom, and was undercut from its outer surface inward toward its base. The action of such an undercut triangular key when moved in a keyway of corresponding shape (though parallel to the surface of the parts), is to draw the facing toward the backing and on contact to carry the thrust or strain of mastication to the backing in a way suggestive of that of the Davis inclined key and keyway. Admittedly this was close to Davis; and if it had stopped there it might have anticipated his invention. But it happened that the keys as shaped in the two inventions did something more than draw the facing to the backing. The inclined key of Davis drew the facing to the backing and held it there substantially without pressure. Being almost wholly relieved of pressure, the tendency of the facing to split was substantially overcome. This was a good thing. The key in Evslin and Ott also drew the facing to the backing, but in a way that did not so completely relieve it of pressure. Indeed, on the contrary, their wedge key, as it traveled in its keyway, exerted a lateral pressure and spread the facing. This was a bad thing. This action, if left alone, instead of decreasing the tendency of porcelain to split, actually increased it. If not arrested, then, obviously, there was no limit to the splitting action of the Evslin and Ott wedge key with undercut edges. The greater the strain, inevitably the more certain the split. But as we read this patent, it made provision for a floor in the facing intended to act as a stop to the key in its wedging action and to limit the inevitable splitting result. Although such floor or stop to key mechanism with an inherent splitting action operated to reduce the liability of the facing to split, it is clear that such triangular undercut key did not cause practically the entire thrust of mastication to be spread over the entire surface or area of the backing as in the Davis invention, but allowed a part of the thrust or strain to be directed against the porcelain facing itself, weakened as it was by the undercut slot made to receive the wedge-shaped key. This division of strain between facing and backing the Davis key avoids. By its manner of drawing-in, the Davis facing is so positioned against the backing that the backing takes up and cares for substantially the entire thrust. Therefore, we think, that, even if the incline of the Davis key effects the same drawing-in of the Evslin and Ott parallel wedge-shaped key, it does it in a different way, and advances a step farther in solving the problem to which the contesting inventors had addressed themselves, in reducing splitting by more complete strain distribution. Evidenced by practical results it is shown that in the Davis tooth porcelain splitting is reduced to a point that is negligible. There is no evidence of the results of the Evslin and Ott invention, as it had not, so far as the record shows, gone into general use. We find in the Davis tooth patentable invention.

The reasoning by which we have arrived at this conclusion also bears on the issue of infringement, because the alleged infringing tooth (which in physical structure resembles Evslin and Ott not at all), has, like Steele, a key in the backing, but unlike Steele and yet

like Davis, it has the key inclined instead of parallel to the surface of the backing. As an additional feature, the key of the alleged infringing tooth is cone-shaped, the larger end being uppermost; the keyway in the facing being of course correspondingly shaped. The defendant, while admitting that its key, like Davis, is in the backing and inclined, claims it is unlike Davis but is like Evslin and Ott in being cone-shaped. Its conical key, the defendant maintains, is the equivalent of the Evslin and Ott flat triangular undercut key, because, it argues, the curved undersides of its cone-shaped key perform the same drawing-in function in their travel in a corresponding keyway that the undercut sides of the Evslin and Ott triangular key perform in their travel in its corresponding keyway. Regarded from the standpoint of abstract mechanics, this may be true; but considered with reference to the actual mechanism of the defendant's interlocking means and the manner of its operation, we doubt it for several reasons: If the undersides of the defendant's cone-shaped key are the mechanical equivalent of the sharp undercut angles of the Evslin and Ott key as means to draw the facing to the backing, the defendant, we think, does not use them for that purpose. Instead of relying upon the conicity of its key to draw in the facing as Evslin and Ott relied upon the angles of their key to do that thing, the defendant departed from the parallel key of Evslin and Ott and borrowed from Davis the incline of his key—for some purpose, manifestly. As the only purpose or function of the incline of a key with which we are familiar is to draw the facing to the backing and to hold it there, the defendant, in using the incline, draws in the facing by the incline and by the incline alone, as we comprehend the exhibits and read the record. If, however, the incline and undersides of the conical key are so made that they actually cooperate in the drawing-in action, the incline is manifestly the master factor; the undersides of the cone are a superfluous factor; for the incline will produce the result inevitably, while the curved undersides of the conical key will do no more than supplement what the incline would do alone. If the defendant's cone-shaped key were not inclined but were parallel to the surface of the backing, its undersides doubtless would function to draw in the facing on the principle of the undercut angles of the Evslin and Ott parallel key. But the defendant prefers an incline, and in using an incline capable of but one function the inescapable inference is that it uses it for that function. That in its commercial tooth the defendant relies for drawing-in action not upon the conicity of its key but upon the incline of the key borrowed from Davis is shown by evidence that its conical key standing in its inclined position is loose. Being loose, the key as drawing-in means cannot function conically. It can function only by the incline. Therefore, we gather that the key of the defendant's tooth, though conical in shape, is intended to do and actually does nothing different from what is done by the key in the Davis tooth, except as to a feature not in issue.

For these reasons, tediously recited, we are of opinion that in holding the first claim of the patent valid and infringed the District Court committed no error and that its decree must be

Affirmed.

BELLOWS et al. v. NEW YORK CENT. R. CO. (two cases).

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

Nos. 180, 181.

Patents ⇐328—762,796 and 762,858, for car sill, void for lack of invention.

The Bellows patents, No. 762,796 and No. 762,858, for a car sill, consisting of a steel channel reinforced by an angle bar, *held* void for lack of invention.

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

Two suits by Arthur B. Bellows and others against the New York Central Railroad Company. Decrees for defendant, and complainants Bellows and Slack appeal. Affirmed.

George H. Parmelee and Clarence P. Byrnes, both of Pittsburgh, Pa., for appellants.

Robert J. Fisher, of Washington, D. C., for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The patents were issued on June 14, 1904, to the appellant Bellows, for car sills. Thereafter the Cambria Steel Company became the exclusive licensee under this patent. A provision of this license agreement provided that it was the understanding of the parties that if the patents were declared invalid, or found to infringe patents to others, the Cambria Steel Company would have the right to surrender the agreement and would not thereafter be obligated to pay royalties under it. After the decision of the District Court, the Cambria Steel Company refused to further be bound and discontinued payment of royalties pursuant to the terms of this agreement. There has been a severance of parties granted, and this appeal is prosecuted without the Cambria Steel Company or its aid.

The patents relate to railroad freight cars, and particularly freight cars having flat bottoms, such as flat cars and gondola cars, as distinguished from hopper cars, where there is no flat floor. The patent relates to the sills supporting underframes of the cars on which the body is mounted. They are the supporting longitudinal sills, and especially the center sill, which forms the backbone of the car, running lengthwise of the car frame from end to end. These are connected with the center and side sills by body bolsters. The claims involved in patent No. 762,796 are 1, 7, 10, 11, 12, 13, 14, 15, 16, and 17; and claims 1 to 9, inclusive, of patent No. 762,858. The suggestion of counsel is that the following language covers each:

"A car sill, consisting of a channel reinforced by an angle bar or other flanged shape secured to it at any point below its top and between the body bolsters, and in some instances extending below the bottom of the channel.

"A car sill, composed of one or more channel girders, each of which has a reinforcing angle bar secured to it at a point between the bolsters, and not projecting either above or below the flanges of the channels making up the sills."

The need for steel sills came at a period of the transition from wood to steel cars. The problem, if there was one involved, was to avoid the fish-belly shaped sills, and arrange for a proper distribution of the strains and stresses. It involved having due regard for the buffing strains and the economical manufacture of the sills. The inventor in his specifications states that—

"Heretofore, in order to obtain the necessary strength at the central portion of car sills, the webs of these sills have been commonly formed of gradually increasing depth from the ends toward the center. The making of these sills, whether formed of pressed steel shapes or of a sheet with angles riveted along its edges, has been an expensive operation, and necessitated the use of special and expensive machinery. My invention obviates this difficulty, and it consists in securing along the central part of the sill a separate longitudinal strengthening member; this member adding the necessary strength at the desired points."

The transition period between the wooden and steel cars, and the making of necessary repairs in used cars, brought out many types of sills and reinforced channels used as sills. This record is topheavy with instances of the inventor's idea of reinforcing structural steel beams used as supporting sills for freight cars and other load-carrying appliances. Indeed, it has been the subject of grant of several patents which have been offered as part of the prior art. The reinforcing angle and other bars have long been secured along the lower edge of roll channel beams in various structures, including cars and their parts, as well as the framework of buildings and bridges. Straight channel sills of pressed steel were rolled, as were straight sills of channel form built up from plate and angle bars. Steel fish-belly sills of channel form, each of which was provided with a reinforcing angle secured along its lower edge, was used in 1900 and 1901 on railroads and manufactured by the Pressed Steel Car Company. In some instances this angle was flush with the bottom of the sill, and in others extended beyond the bottom of the sill.

This prior use illustrates the reinforcing of sills. To be sure, they were of the fish-belly shape, as distinguished from the Bellows straight sill, or roll shape reinforced; but drop bottom gondola cars were built for the Louisville & Nashville Railroad and used by it as early as 1895. In its cars there was bolted to the sills of the cars, which were of wooden timbers, along its lower inner edge, a smaller reinforcing timber, which was flush with the bottom of the sill and extended from bolster to bolster; the ends of the reinforced beams being notched or gained, so as to rest upon the upper surface of the bolster. But straight steel beams, used for carrying loads and for meeting stresses and strains of heavy loads, were old in the arts. In the shipbuilding art, as appears in the patent to Withy & Siveright, No. 14,885, granted in 1886, and to Stuart, granted June 3, 1890, girders in the form of channels were both built up and integral, which were provided with angle reinforcements at the point of stress. In the building art, straight channels were reinforced at the point of stress by reinforcing plates.

We think that it did not constitute invention to make and reinforce straight channels and use them as sills. It was an obvious expedient to take care of stresses and strains. The idea of making a car sill from

rolled material, which was for years made and could be purchased in the open market, was not the subject of patentable invention. The reinforcing of the car sill was long before anticipated. The publication which was offered in evidence of the Master Car Builders' Association antedated the time of conception of this invention. What the inventor did was to apply to the steel sill a reinforcement analogous to that which had been applied to wooden cars. We think that the claim of advantages of greater strength in appellants' construction over that of the fish-belly shaped sills was fully met by the proof that fish-belly sills have not been supplanted by straight sills and are in very extensive use, and, even in this day, may be found as a prevailing type.

What advance was made by the appellant Bellows was simply an outgrowth of mechanical construction required for the transition period from wooden to pressed steel cars, in the matter of rearrangement and readjustment of the many parts necessary for the building of the car. We find nothing of an inventive character in what he accomplished. It was never the object of the patent laws to grant a monopoly upon an idea which would naturally occur to a mechanic in the ordinary progress of manufacture. Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438. It was held not patentable to place a strip of steel upon a horizontal leather part of a shank strip for the purpose of stiffening it. Crouch v. Roemer, 103 U. S. 797, 26 L. Ed. 426. And it was no invention to place a stiffening rib upon the under surface of a grate bar. Parson Mfg. Co. v. Coe, 185 Fed. 522, 107 C. C. A. 628. Nor was it patentable to reinforce a plowshare by a patch of soft metal welded into the inner face. Moline Plow Co. v. Omaha Co., 235 Fed. 519, 149 C. C. A. 65. "Invention in reinforcement is to be found only in discovering a new principle or employing new means embodying the old principle." Turner v. Lauter Piano Co., 248 Fed. 930, 161 C. C. A. 48.

We agree with the District Judge that any reinforcing of the steel sills would occur to the lay mind, not to speak of the skilled mechanic. In view of the prior art and publications as disclosed by this record, we are satisfied that no invention is disclosed in appellants' idea of metal sills.

The decrees are affirmed.

BELLOWS et al. v. NEW YORK CENT. R. CO.

SAME v. PRESSED STEEL CAR CO.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

Nos. 182, 183.

1. Patents ⇐328—693,218, for car construction, anticipated.

The Bellows patent, No. 693,218, for a car having a longitudinal sill with a sectional end spliced to the body of the sill at a point between the body bolster and its end, to facilitate removal and repair of the end portion in case of injury from collision or buffing *held* void for anticipation by uses in the prior art.

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

2. Patents ⟸27(2)—Using repair methods in new construction not invention.

The idea of using in new cars a construction theretofore used in repair jobs *held* not invention.

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

Suits by Arthur B. Bellows and others against the New York Central Railroad Company and against the Pressed Steel Car Company. Decrees for defendants, and complainants Bellows and Slack appeal. Affirmed.

George H. Parmelee and Clarence P. Byrnes, both of Pittsburgh, Pa., for appellants.

Alfred W. Kiddle and Wylie C. Margeson, both of New York City, for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. These actions were heard as one and will be treated in one opinion.

[1] When the actions were tried in the District Court, the Cambria Steel Company, an exclusive licensee of the appellants, joined in the action. The claims were held invalid in the District Court and the Cambria Steel Company refused to prosecute an appeal. Its license agreement, dated February 21, 1900, contained the following clause:

"This agreement is based upon the understanding that the patents of the parties of the first part are valid, and if any of them shall be invalid, or shall infringe patents to others, the party of the second part shall have the right to surrender this agreement, and shall not thereafter be obliged to pay royalties under it."

Prior to making this agreement, the Cambria Steel Company was not engaged in the business of making structural steel cars, but became engaged in such manufacture thereafter. Under the license agreement, they agreed to pay the appellants $5 per car, and did so up to the date of the decree below. Many cars were built, and a considerable sum was paid as royalties. When the Cambria Steel Company refused to further pay royalties, or to prosecute this appeal, a motion for a severance of parties was granted, and thereafter the individual plaintiffs prosecuted the appeal. A motion was thereafter made to dismiss this appeal. It was denied. At the time of such denial, it was determined to hear the merits of the appeal, when we might reconsider the motion to dismiss. The license to the Cambria Steel Company appears to be a right to make and sell the cars, using the construction which the appellants contend, is covered by their patent. It was not an assignment. Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923. The Cambria Steel Company could not sue in its own name alone, and Bellows and Slack were made parties. We are satisfied that the appellants have an interest in maintaining the validity of the patents. The patent has expired, and no injunction can be granted. The infringement alleged at bar is in reference to the

car made by the manufacturer and used by the railroad company in 1910. Notice of infringement was not given until 1915. However, we shall pass upon the merits of the case, rather than dismissing the appeal, as urged by the appellees.

The patent in suit relates to a sill, which has been referred to as a "spliced sill," used in the manufacture of the underframe which supports the car body of freight cars. Frames of this and like character were made of wooden beams and planking prior to 1898. Then the steel car made its appearance. Steel plates and sheets were pressed by high hydraulic presses into different shapes, and replaced wooden parts in the wooden cars. Among the parts wherein steel replaced wood were the lateral sills, which not only supported the load, but were obliged to meet the buffing blows and collisions, which are of everyday occurrence in the life of a freight car.

On the 11th of February, 1902, the patent here considered was granted to Bellows. Later the appellant Slack obtained an interest in the patent by assignment. Claims 2 and 3 of the 13 claims of the patent are in suit, and are as follows:

"2. A car having a longitudinal sill with a sectional end spliced to the body of the sill at a point between the body bolster and its end, substantially as described.

"3. A car having at the side a plate girder with an end portion detachably fixed to the body of the plate girder at a point between the body bolster and the end, substantially as described."

In his specifications the inventor says:

"The center sill and plate girders are preferably made sectional—that is to say, divided at each end at a point between the body bolster and the end of the car—and spliced, as at *B*; the splicing, which is sufficiently illustrated in Fig. 3, being effected by suitable flanged sections and rivets. The object is that, in case the car should be injured at the end by collision, the damaged end sections of the sill and plate girders may be detached and replaced with relatively small cost, as compared with cutting out and replacing the entire sill, as in prior car constructions, or replacing the entire plate girders. Within the scope of my broader claims I may, however, make the sill, or the plate girders, or both, continuous throughout their length. For economy of construction I preferably form plate girders of less depth from the body bolster outwardly than between the body bolster, as shown at *12* in Fig. 1."

The act of infringement relied upon by the appellants, was the sale of a car on July 26, 1910, by the Pressed Steel Car Company, and the use of said car by the New York Central Railroad Company. Reading the patent, taken in conjunction with the testimony of the inventor, it is clear to us that the invention relates to making longitudinal sills of cars in sections and splicing end portions or sectional ends of the central portion of the sills at a point between the body bolster and the end of the car; the object or purpose being to easily repair the end sections of the sill, if damage should occur by reason of collision or buffing, the thought being that the repair would be less costly, and, instead of the entire sill crumbling or bending, which might result in the loss of the entire structure, the greater part of the car could be spared damage by the injury being confined to the sectional end, due to the splicing of the sills at a point between the body bolster and the end of the car. The splicing of the sills, referred to, at a point be-

tween the body bolster and the end, does not confine the construction to original construction, but may involve the repair of a section of the car which may have been damaged by collision. The longitudinal sill, referred to in claim 2, is not limited to any particular character of sill. It may be composed of metal beams and of suitable section, as the specification reads. It comprehends any kind of a sill, whether it be wood or metal, or a composite of wood and metal. The plate girder referred to in claim 3 (which is referred to in the specifications as metal in the side sills) is used in the side sills, as it is referred to in the specifications as "metal plates having one or more flanged metal pieces at the top and bottom edge." Thus the inventor utilized web plates with a reinforcing angle on the top to form the top chord, and a reinforcing angle on the bottom forming the bottom chord.

We are satisfied that these plate girder sides, when used in gondola or flat cars, are cargo-carrying members, intended to carry part of the load, and in turn transmit the same to the body bolster. The plate girder, extending between the body bolster and into the space between the body bolster and the end of the car, is the body or web of the plate girder, and it is to this that the end portion or sectional end is to be spliced by flanged sections and rivets. The manner of uniting the central and end portions is by a butt splice. The webs of the central and end portions abut each other and are spliced together by means of spliced plates. In the construction of these cars by the Cambria Steel Company, using this sectional sill, the lower angle or chord is continuous from end to end of the car. It is by thus splicing that the inventor is able to "remove and replace without necessarily removing the car from the track or even unloading the car." Whether this is done, as claimed by the inventor, must necessarily depend upon the force of the collision and damage done. It is contended by the appellant that it requires the features of the two claims to make up the total of Bellows' invention of the detachable underframe end, but we fail to find any combination of the features of the two claims together referred to in the patent. It is not referred to as a "detachable underframe end," nor does the patent require the splice to be adjacent to the body bolster. This is not found in the claims in suit. We agree with the District Court that the claims refer to details of construction.

[2] On examining the prior art and prior uses in this structural sill art, we are not convinced that the appellant Bellows was the first to make a successful structural sill car. Hardie and Reese built a car with structural steel shapes long prior to Bellows' period. The Lehigh Valley tender underframe, which has been offered in evidence, shows the method of splicing these underframes by the splicing of center sills. The proofs establish that for many years prior to the inventor's date of conception the Lehigh Valley Railroad Company had followed the practice of splicing center sills of damaged locomotive tender underframes. Center sills and side sills were of rolled channels, the lightest of them being about 6 inches in depth, and some were 12 inches in height. Any experience which this railroad company had, and in which the injury was sustained by collision, it was found that it resulted principally in bending or breaking the center sills between

the body bolster and the end sills, and its spliced center sills, comprised of rolled channel, and extended through the bolster at each end of the car, and had sectional ends spliced thereto at a point between the bolster and the end sills. The drawings which were offered in evidence clearly show the cars having true body bolsters. Nor can it be said that this is not an apt case of inception, because the construction as used by the Lehigh Valley Railroad Company was in connection with a tender. It is true that the inventor here entitles his patent a steel car; but, when examined as to claims and specifications, it is found that the invention has to do with the sills used in car construction. The appellants are therefore confronted with the rule so long established and time-honored: That which infringes, if later, would anticipate, if earlier. Peters v. Active Mfg. Co., 129 U. S. 530, 9 Sup. Ct. 389, 32 L. Ed. 738; Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059.

Applying an old contrivance in a new way, if such it be, to this analogous subject of constructing the underframe of a car, without any novelty in the mode of applying the old construction to the new purpose, is not a valid subject-matter of patentable invention. The idea that using the construction theretofore used in repair jobs for new cars is not invention. National Harrow Co. v. Quick, 74 Fed. 236, 20 C. C. A. 410.

It also appears from the testimony that there were 2,000 Baltimore & Ohio cars made embodying center sills having sectional ends spliced thereto at a point between the body bolster and the end of the cars—precisely the construction contended for in claim 2 of the patent in suit, and part of which were delivered on December 20, 1899. Some of these cars went into service before the date of this application. We think the construction of these cars anticipates appellants' invention. An examination of the drawings of the so-called Erie cars, contract for which construction was made August 2, 1899, and as appears from a tracing dated December 11, 1899, shows the central longitudinal sill with a sectional end spliced to the body of the sill at a point between the bolster and its end. The first car was delivered February 25, 1900, and the last car shipped May 19, 1900. In view of this construction, we cannot escape the conclusion that the idea of splicing was originated by Mr. Hanson. He supervised the construction at the Pressed Steel Car Company's plant. In the latter part of 1896 and the early part of 1897 one Hardie, of Pittsburgh, designed a steel hopper car for the Pittsburg, Bessemer & Lake Erie Railroad. The drawings, which were completed January 22, 1897, and under which a large number of cars were built by the Schoen Pressed Steel Company, provided for a plate girder side with an end portion detachably fixed to the body of the plate girder by spliced plates running forward and back of the bolster. It is immaterial that the lower angle of this car is continuous from end to end, for the reason that in the appellants' structure, as indicated in the patent in suit, the lower chord or angle *9* of the plate girder side projects beyond the bolster for the purpose of being utilized as one of the splicing members. This is what was done in the Hardie car. The sectional end of the Hardie

car is just as detachably fixed to the plate girder side as a sectional end or end portion of the appellants' car. The Hardie car discloses the use of the plate girder side as a load-carrying member with a sectional end spliced thereto, and this construction will permit the sectional end or end portion of the plate girder side to be replaced in a damaged car just as readily as in appellants' car, by removing the rivets at the head of the bolster, uniting the section end with the gusset plate, and either straightening or cutting off the lower angle. This sectional end may be repaired.

We think that, construing claim 3 either broadly or reading it literally, and limiting it to a construction in which the web of the plate girder side extends beyond the bolster into the space between the bolster and the end of the car, to which extended web a sectional end is spliced, or the splicing of the sectional end in front of or at or back of the bolster, the result is the same—the Hardie car is a complete anticipation. In addition thereto, it is clear that the Reese car, the drawings of which were made in the spring of 1897, which was placed in service on June 28, 1897, with the Pittsburg, Bessemer & Lake Erie Railroad, and which has been constantly in use since, anticipates the patent in suit. In these cars the load was carried by the plate girder side; the center sills being utilized for the attachment of draft riggings and for the transmission of pulling and buffing strains. The sectional end of the plate girder side in this car can be replaced just as readily as in appellants' car. It would only be necessary to remove the rivets passing through the upper angle, the web, and the lower angle of the sectional end. The fact that this freight car has been in constant use since that date is sufficient answer to the claim of commercial failure. Indeed, the subject of splicing ends of the car was considered in the proceedings of the Master Car Builders' Association in 1897. This method of construction of underframe was advocated by Mr. Barr, and we think he clearly sets forth the extension of the longitudinal sills into the space between the bolster and the end sill, and that to these extending ends of the lateral sills there could be secured section ends to bridge the space between the lateral sills and the end sills, so that, in ordinary case of damage, repairs could be made without disturbing the general frame. It may be that Bellows has improved on Barr's idea, but the mere fact that the new method of construction is a better one than the old, requiring perhaps less repair and having greater strength than the old one, does not alter the rule that it is not invention to produce a mere change in an instrument or machine of one material into another. Hicks v. Kelsey, 18 Wall. 670, 21 L. Ed. 852.

We conclude that the splicing of the sills between the bolster and the end of the car was not new, and that the appellants' patent has been anticipated by uses in the prior art.

The decrees are affirmed.

BELLOWS et al. v. NEW YORK CENT. R. CO.

SAME v. PRESSED STEEL CAR CO.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

Nos. 184, 185.

Patents ⇐328—694,715, for car construction, anticipated.

The Bellows patent, No. 694,715, for a metal car, claim 19, which relates to a detail of construction of the body bolster, *held* anticipated by the prior art and prior use.

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

Suits by Arthur B. Bellows and others against the New York Central Railroad Company and against the Pressed Steel Car Company. Decrees for defendants, and complainants Bellows and Slack appeal. Affirmed.

George H. Parmelee, and Clarence P. Byrnes, both of Pittsburgh, Pa., for appellants.

Alfred W. Kiddle and Wylie C. Margeson, both of New York City, for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. These actions were tried as one, and were heard on appeal by stipulation as one. We will therefore treat them in one opinion.

A motion was made to dismiss in these cases, as in the cases between the same parties involving patent No. 693,218. For the reasons there assigned, we shall consider the merits of the cases and dispose of the issues accordingly.

Letters patent No. 694,715 were granted March 4, 1902, for a metal car, to the appellant Bellows. The patent expired March 4, 1919. Claim 19 is here involved, and reads as follows:

"19. A car having a body bolster located over the truck bolster and formed with a continuous web plate or plates, having a hole cut therein, mainly below the neutral axis, and a longitudinal sill passed therethrough; said sill being formed of metal pieces with a diaphragm interposed at or near the plane of the bolster to resist compression, substantially as described."

The patent is entitled "a metal car." The claim in suit, however, covers a detail of construction of the body bolster which is part of the underframe of the car. The body bolster receives and transmits the entire weight of the car and its load to the truck bolsters. The bolsters are subject to torsional and lateral strains, and this, particularly, when the car rounds a curve in the track. The strains are resisted by and absorbed in the structure of the bolster, and in turn transmitted to the truck bolster, and finally to the wheels of the truck.

The invention of the appellant Bellows was designed to afford the desirable stiffness and rigidity to the bolster, so that it would be fully strong for carrying and transmitting the entire load. The body bolster,

as used in appellant's construction, is a plate girder, being composed of a strong vertical web plate with reinforcing angles along its top and bottom, and also along its entire ends. In order to accommodate the through center sills, it is necessary to have the center of the bolster cut out. This is done by cutting through the web portion of the body bolster. The appellants' claim is that it was a new or novel idea, subject to patent monopoly, to fill up this hole after the center sill passes through. After the center sill, composed of channels with their flanges projecting inwardly toward each other, was put in place, special fillers were placed over the remaining open space of the hole; the outer face of the web of the channel was brought against the side edges of the hole and reinforced by vertical angles, making a flat metal to metal join. The sills of the cars are supported at the bolsters, and between the bolsters they constitute a beam supported near the ends and loaded in the intermediate part. To resist the compression strains, special fillers or diaphragms, which were formed to conform to the inner parts of the channel, were inserted, completely filling the space between them.

The appellants used two of these diaphragms, located between the center sill members within the lines of the bolster, thus effectually resisting the closing in; the idea being to make the bolster substantially of its original strength before cutting a hole. It is contended that this was the only solution of the problem confronting the art at the time of this invention. Claim 19 rests upon the combination of a diaphragm with the other elements of special fillers, which were old, in the same combination. The patent issued to Bagshawe, No. 554,641, granted February 18, 1896, shows a center sill passing through bolsters, with a spacing piece interposed between the center sill at or near the plane of the bolster. In the specification Bagshawe refers to these pieces as spacing pieces, and points out their function as serving to strengthen the structure in a large measure. In the Maris patent, No. 630,385, granted August 8, 1899, there is shown a bolster showing a web plate having a hole or slot therein, through which the sill passes, mainly below the neutral axis, with a diaphragm interposed between the sills at or near the plane of the bolster to resist compression. The use of the diaphragm in a bolster interposed between the center sills at or near the plane of the bolster, for the purpose of resisting compression, is shown in the Schoen patent No. 584,709, granted June 15, 1897.

In the Pittsburg, Bessemer & Lake Erie car referred to, a lattice bolster is used, running across the width of the car to resist compression; two diaphragms are interposed between the sills at or near the plane of the bolster while, in addition thereto, a bottom cover plate was also used to resist compression. A latticed girder is the full equivalent of a plate girder. They are interchangeable, and can be used as desired by the engineer. Likewise it appears that, in the Pittsburg, Bessemer & Lake Erie car No. 3, a diaphragm between the center sills is used with the idea of resisting strains. This car went into service June 26, 1897. But reliance is placed on the claim of the appellants that, in the use made by them, the sill members have a metal to metal contact with the edges of the hole in the plate girder, and the same,

with the diaphragm between, so that the metal of the sills and diaphragm completely fill the hole. But we find the metal to metal contact between the diaphragm and the center sills in the Hardie car, and in the structure shown in the Bagshawe and Schoen patents we find diaphragms conforming to the shape of the center sills.

In the Maris, both bolsters and diaphragms are conformed to the center sills. It is apparent that the inventor did not conceive the idea of passing center sills through the bolster mainly below the neutral axis. We do not think it constituted invention on the part of the appellants to take the diaphragm found in the Pittsburg, Bessemer & Lake Erie car and use it in connection with the plate girder, since diaphragms were old and in use. This is particularly so since the evidence warrants the conclusion that the lattice girder was the full mechanical equivalent of the plate girder and merely substituting the plate girder bolster for the lattice bolster does not amount to invention. Indeed, this state of the art was well developed and should have been known, if, indeed, it was not known, to the appellants at the time that patent was granted to Bellows.

We conclude that whatever the appellants constructed was anticipated by the prior art as well as by prior use.

The decrees are affirmed.

STEPHENSON v. SHORT.

(Circuit Court of Appeals, First Circuit. July 2, 1920.)

No. 1444.

Patents ⊂=328—722,766 and 1,011,874, for garbage receptacle, void for lack of invention.

The Stephenson patents, No. 722,766 and No. 1,011,874, for underground garbage receptacles, while for convenient articles, both cover combinations of old elements, which produce no new mode of operation and no new results, involving exercise of the creative faculty, and are void for lack of invention.

Appeal from the District Court of the United States for the District of Massachusetts; George W. Anderson, Judge.

Suit by Charles H. Stephenson against Milledge C. Short. Decree for defendant, and complainant appeals. Affirmed.

Henry T. Williams, of Boston, Mass., for appellant.

H. J. Jaquith, of Boston, Mass., for appellee.

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

JOHNSON, Circuit Judge. This is an appeal from a decree of the District Court for the District of Massachusetts dismissing the bill of complaint in a suit for infringement of claims 1, 2, and 3 of letters patent of the United States No. 722,766, dated March 17, 1903, and claim 4 of No. 1,011,874, dated December 12, 1911, granted to the plaintiff, appellant, for underground garbage receptacles.

The usual defenses of invalidity and noninfringement were set up, and the District Court, while holding that the validity of the patents "is very far from clear," found that they were not infringed by the defendant's devices.

In both patents a holder or container is placed as a fixture in a cavity in the earth, and in it is a removable garbage receptacle, which receives the garbage and can be removed to be emptied. The container, in the case of each patent, is provided with a primary cover seated upon a flange at its top, and this cover is provided with a garbage-receiving mouth, over which there is a secondary cover, resting upon a flange in the primary cover. The operation of the secondary cover is thus described in No. 722,766:

"To enable the operator to conveniently open the secondary cover *i* without stooping, I provide an operating member which is supported by the primary cover *h*, and is preferably formed as a treadle adapted to be moved by the foot of the operator, and suitable connections between the said operating member and secondary cover; the arrangement being such that when the operating member is moved by the operator's foot, or otherwise, the secondary cover will be elevated. A simple contrivance for this purpose is shown in which the operating member is a treadle pivoted to ears on the primary cover, which treadle has a hub portion upon it, with a shoulder in close proximity to its pivot on the primary cover, and an arm or lever portion extending a considerable distance from the fulcrum and having a face corrugated and adapted to be engaged by the operator's foot."

The whole combination may be simply described as a cylindrical holder set vertically into the earth and provided with two covers, a primary one, which may be opened to admit a garbage bucket, and in which there is a hole through which the garbage may be poured into the bucket when in place in the holder, and a secondary one, which covers this hole and is raised by a lever fulcrumed on the primary cover and operated by a foot treadle.

The second patent differs from the earlier patent in the means employed for raising the secondary cover. In it the treadle is rigidly secured to the secondary cover, and when this is closed the treadle projects upwardly and outwardly in an inclined direction beyond the hinge thereof. When this is pressed by the foot of the operator to lift and open the cover, the underside of the treadle being formed to engage the top of the receptacle limits the opening movement of the cover to less than 90 degrees, so that, when foot pressure upon the treadle is released, it will automatically fall back into place.

The convenience and advantage of such a garbage receptacle are plainly apparent, because both hands are left free to empty the garbage bucket into the receptacle, and it does not become necessary for the operator to stoop and grasp any part of the cover which, in cold weather, might cause injury to wet or moist fingers.

It was not invention to make use of a cavity in the ground in which to place garbage, nor is there anything about the can itself or its covers which entitle it to merit the term "invention"; but the plaintiff claims that the combination of the can with the covers and the lever operated by foot to raise a cover entitle him to a monopoly. Everything about this combination is old. At the time of Stephenson's first

application garbage containers had been used; double covers, primary and secondary, had been applied to them, and the desirability of foot operation had been pointed out. The use of a lever operated by a foot treadle is one of the oldest methods of imparting motion when it is desirable to have the hands disengaged. There are so many instances of such use that it seems hardly necessary to allude to any of them. The defendant has cited some:

No. 78,722, Detwiler, issued in 1868, is for a spittoon or cuspidor, provided with a primary cover and secondary cover, and a foot lever to lift the secondary cover.

No. 498,920, issued to Roth, is for a garbage receptacle, to be placed upon a platform and moved from one place to another. This is a receptacle provided with a top, upon which is an outwardly extended member, which is pivoted and connected to a treadle, so that, by pressing with the foot upon the treadle, the cover may be opened.

No. 257,087, issued to Spear in 1882, is a patent for a foot lever for opening oven doors of stoves.

Numerous patents are cited, which were issued for rigid levers on coffeepots, teapots, syrup jugs, etc.

It is admitted that all the elements of the combination for which both patents were issued are old; but it is claimed that a new and useful result is obtained by their co-operation. We do not perceive any new result produced in either patent by the co-operation of its elements. The application of a foot treadle to a lever, so that a cover can be thereby opened, is old in the art; and it required simply mechanical skill—and that of not a very high order—to adapt it to be used upon the cover of a garbage receptacle.

In Grinnell Washing Machine Co. v. E. E. Johnson Co., 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196, which was a suit for infringement of a patent "for a gearing device applied to a washing machine, whereby the operation of wringing, in either direction, may be conducted and controlled simultaneously with the operation of washing, or separately, with one motor," the court held the patent to be "a combination of old elements, evolving no new co-operative function and producing no new result, other than convenience and economy," and "not patentable."

The court there said (247 U. S. at page 433, 38 Sup. Ct. at page 550 [62 L. Ed. 1196]):

"The operations of the wringer and the washing machine, although simultaneous, are independent one of the other. The control of the operation of the wringer is by an old and well-known method. From the co-operation of the elements, here brought together, no new result, involving the exercise of the creative faculty, which is invention, is achieved. Phillips may have produced a more convenient and economical mechanism than others who preceded him, but superiority does not make an aggregation patentable"—citing Specialty Manufacturing Co. v. Fenton Metallic Manufacturing Co., 174 U. S. 492, 19 Sup. Ct. 641, 43 L. Ed. 1058. "The assemblage of the old elements, and their operation in the manner indicated, may save time, and the mechanism may meet with a readier sale than other similar devices; but these things may result from mechanical skill and commercial enterprise, and do not necessarily involve invention."

In Roth the garbage receptacle was not placed underground, but it had a foot treadle device for raising the cover; and we do not think

it was invention to place the receptacle underground and have a foot treadle extending upwardly and outwardly, so that by connection with a lever the cover could be raised by it.

The difference between a combination of old elements, which may be patentable, and an aggregation which is only the result of mechanical skill, is fully discussed in Grinnell Washing Machine Co. v. Johnson Co., supra, and the authorities upon which the distinction rests are there collated, so that no further reference to them is necessary.

We think the devices described in both patents in suit amount merely to mechanical improvements, as pointed out in that opinion, and that both patents are void for want of invention and not patentable.

The decree of the District Court is affirmed, with costs in this court to the appellee.

METALLIC RUBBER TIRE CO. v. HARTFORD RUBBER WORKS CO.

(District Court, D. Connecticut. June 12, 1920.)

No. 1261.

1. **Patents ⇐318(3)—Willful infringer cannot limit recovery to established royalty.**
   Where infringement by defendant after termination of its license was willful and deliberate, it is liable for all profits made, and cannot require complainant to accept the royalty fixed by the license contract.
2. **Patents ⇐318(5)—Patentee entitled to interest, where infringement was deliberate and recovery was long contested.**
   Where infringement by defendant was willful and deliberate, and it contested recovery in the courts for 12 years, complainant *held* entitled to interest from the date of the decision of the Circuit Court of Appeals holding the patent valid and infringed, except for the time the matter of accounting was held for decision by the master after close of the evidence before him.

In Equity. Suit by the Metallic Rubber Tire Company against the Hartford Rubber Works Company. On exceptions to master's report. Modified and confirmed.

See, also, 245 Fed. 860.

Henry F. Parmelee and George D. Watrous, both of New Haven, Conn., for plaintiff.

Ernest Hopkinson and Charles S. Jones, both of New York City, for defendant.

THOMAS, District Judge. This matter is again before the court on exceptions to the master's second report. The plaintiff and defendant each filed exceptions. The plaintiff further filed a motion to strike out certain portions of the report, and, as thus modified, that the report be accepted and confirmed, and that a decree be granted for the plaintiff to recover $183,383.53, with interest from July 1, 1910.

A brief history of this case seems necessary. It may be found in the following summary:

The suit was brought March 5, 1908, and on July 27, 1911, Judge Platt dismissed the bill. 189 Fed. 402. Upon appeal, the Circuit Court of Appeals, on November 11, 1912, reversed the Circuit Court,

and remanded the case, with instructions to enter a decree for the plaintiff for an injunction, an accounting, and costs. 200 Fed. 743, 119 C. C. A. 187.

This decision established the law of the case, and it has ever since been the law, and has been followed by this court. The case was then referred to the master, who began taking testimony on February 26, 1913, and proofs were closed November 9, 1914. His report finding that no profits had been realized by the defendant was filed September 20, 1915, and nominal damages were awarded. The case then came on for hearing on plaintiff's exceptions to the master's report, and decision rendered February 19, 1917, which was modified June 29, 1917, by which the exceptions were sustained and the case recommitted to the master to state an account in accordance with the opinion. 245 Fed. 860.

On this second reference, proofs were taken before the master and concluded October 4, 1917, and report filed January 31, 1920. There must be a speedy termination of this interminable litigation. The delay merits censure, and justly may a litigant complain of the delay, which is in no way the fault of or caused by this plaintiff.

[1] The Circuit Court of Appeals, in holding the patent valid and infringed, said:

"This result is quite equitable, for the objection of invalidity comes with rather ill grace from a defendant which has had a license under a patent, and which, upon the expiration of the license, has put out a product which, even if not infringing, closely simulates the patented structure. In our opinion, moreover, the defendant's structure does infringe."

So it is apparent that the defendant could have manufactured the infringing tires under the license agreement, and the plaintiff would have received the royalties therein provided, or the defendant could have refrained from infringing the patent, and the plaintiff, in the absence of such infringement, might have been able to make a profitable use of its own patent.

But the defendant preferred, immediately after the cancellation of the license agreement, to disregard the plaintiff's patent, and under protest to question its validity, and by its conduct effectually prevent plaintiff from exercising its own rights thereunder.

Manifestly the plaintiff has been entitled to all profits realized from the infringement by the defendant, and the defendant should be held to pay those profits over, and its own conduct estops it, in my judgment, from any consideration, but the strict application of the established rules; so that, in view of the facts abundantly disclosed, under the application of rule, reason, or justice, it cannot expect to have applied the lesser punishment of assessing 1½ per cent. royalty as the measure of what this plaintiff is fairly entitled to recover, rather than the exact amount of the profits disclosed by the master's report.

The defendant's exceptions are overruled, the report of the master is modified in accordance with the prayer of the plaintiff, and the report, as thus modified, is accepted and confirmed.

[2] Claim has been made for the allowance of interest from July 1, 1910, and in this particular case this claim raises a perplexing ques-

tion. While it is true that the usual rule, as disclosed in the decisions, is that interest is allowed only from the date of the master's report, nearly all such decisions either concede or imply that circumstances might arise in a particular case which would justify an award of interest from an earlier date.

A discussion of the cases cited by learned counsel is unnecessary, as I feel justified by the facts in this case, disclosing the determination evidenced by this defendant to avoid the consequences of its wrongful act, in following Judge Hand's ruling in Consolidated Rubber Co. v. Diamond Rubber Co. (D. C.) 226 Fed. 455. "The deliberateness of the infringement" in the instant case is apparent. Unless all deliberate infringers are to be released from liability, unless a powerful infringer may, by sheer force, tire out and exhaust the resources of the patentee, less able to carry on interminable litigation, and thus never be obliged to account, strict application of all rules must be made by the court, and the punishment by way of money payment must be all that the patentee can justly claim. Here we have "deliberate infringement," and defendant ought not to complain if it has to pay for it. I therefore shall allow interest after the date of the decision of the Circuit Court of Appeals, which was November 11, 1912, on the revised net profits, and found by the master to be $183,383.53.

But the defendant may justly complain that it ought not to be punished by the payment of interest computed during the time the matter was in the hands of the master on the reference after the evidence before him was closed, and in this connection the defendant is reasonably entitled to a rebate of two years of interest from the time to be computed in accordance with this ruling.

I am well aware that this ruling is based on no rule that can be found in the books, and perhaps, therefore, precedent does not sustain it, except by implication, or by invoking the discretion referred to in the general discussion found in the cases; but justification of this somewhat arbitrary way of reaching a conclusion is found, when a full review of the whole case is had and the facts surrounding it are carefully considered.

The defendant's exceptions are overruled. The plaintiff's exceptions and motions are sustained, and the master's report, as modified, is accepted and confirmed, and a decree may be entered for plaintiff, to recover from defendant its profits in the sum of $183,383.53, with interest at 6 per cent. from November 11, 1912, except for a period of two years, as herein noted, together with costs; and it is so ordered.

COLONIAL TRUST CO. et al. v. CHAPLIN-FULTON MFG. CO. et al.

(District Court, W. D. Pennsylvania. June 23, 1920.)

No. 351.

Patents ⇐285—Causes of action joined in infringement suit must be joint.
The separate owners of two patents, one having the interest of a licensee only in the patent of the other cannot join in a suit for infringement of both patents, under Equity rule 26 (201 Fed. v; 118 C. C. A. v), providing that, when there is more than one plaintiff, the causes of action joined must be joint.

In Equity. Suit by the Colonial Trust Company, trustee, the Westinghouse Electric & Manufacturing Company, and the Chowning Regulator Corporation against the Chaplin-Fulton Manufacturing Company and others. On motion to dismiss bill. Motion sustained.

Green & McCallister, of Pittsburgh, Pa., for plaintiffs.
Christy & Christy, of Pittsburgh, Pa., and McGill & Maguire, of Washington, D. C., for defendants.

THOMSON, District Judge. This is a motion to dismiss the bill, first, for misjoinder of parties plaintiff; and, second, for misjoinder of parties defendant. At the argument plaintiffs' counsel asked leave to amend the bill alleging conjoint or co-operative infringement by the defendants. The motion being allowed, the bill will be considered as so amended.

As to misjoinder of parties plaintiff: The bill is for infringement of two patents. The title to one, No. 935,283 is as follows: Assignment from John H. Stringham to the Westinghouse Machine Company, dated May 24, 1905, and duly recorded; assignment from the Westinghouse Machine Company to the Colonial Trust Company, as trustee, dated May 9, 1911. The title to patent No. 1,066,252, is by two assignments—one dated January 24, 1913, from Leroy C. Chowning, and one dated March 31, 1914, from said Chowning et al., to the Chowning Regulator Corporation.

The bill then alleges that by virtue of a written agreement between the Westinghouse Machine Company and the Chowning Regulator Corporation, dated October 6, 1916, the Chowning Company acquired an exclusive license to manufacture, use, and sell the invention of patent No. 935,283, throughout the United States, upon certain terms and conditions appearing in said agreement, and that by letters patent of the commonwealth of Pennsylvania, dated June 15, 1917, the Westinghouse Machine Company and the Westinghouse Electric & Manufacturing Company became merged, forming the Westinghouse Electric & Manufacturing Company, one of the plaintiffs, in which the equitable title to said patent No. 935,283 became vested.

It thus appears from the bill: First, that the Colonial Trust Company, trustee, and the Westinghouse Electric & Manufacturing Company, have no right, title, or interest whatever in the Chowning patent, owned and held by the Chowning Regulator Corporation. For any

infringement of that patent, the said Chowning Regulator Corporation alone has a right of action. Second, while it is averred that the Westinghouse Electric & Manufacturing Company has an equitable right in the Stringham patent, it nowhere appears in the bill how such equitable right, if it existed, arose or was acquired by said Westinghouse Company. On the other hand, it appears that title to said invention became vested in the Westinghouse Machine Company by virtue of a written assignment from Stringham to said company, which was duly recorded, and that "by virtue of a similar assignment from said Westinghouse Machine Company to the Colonial Trust Company, as trustee, dated May 9, 1911, and recorded in the same office [giving the place of record), legal title to the said patent became vested in the Colonial Trust Company, as trustee." Third, title having thus passed to the Colonial Trust Company, as trustee, on May 11, 1911, so far as appears by the bill, the Westinghouse Machine Company on October 6, 1916, had no power or authority to convey to the Chowning Regulator Corporation "an exclusive license to manufacture, use, and sell the invention of the patent No. 935,283 throughout the United States upon certain terms and conditions," and it is only by virtue of such contract that the parties plaintiff could, by any possibility, be said to be jointly interested in one of the patents in suit.

Under equity rule 26 (201 Fed. v, 118 C. C. A. v), "when there is more than one plaintiff, the causes of action joined must be joint." In whose favor, under the patent laws, does a cause of action arise on a patent? This is made clear by Chief Justice Taney, in Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504. The Chief Justice there elucidates these fundamental propositions:

1. That the patent law confers upon the inventor the exclusive right to the use of the improvement, and that prior to such issue no suit can be maintained.

2. The act of Congress makes every patent assignable in law by an instrument in writing, to be recorded within the time specified, the thing assigned being the monopoly which the grant confers, the right of property which it creates, and under an assignment suit must be brought by the assignee.

3. That the monopoly granted is one entire thing, "the exclusive right of making, using, and vending to others for use the improvement covered by the patent, and, as the monopoly is created by act of Congress, no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes."

4. The law recognizes three assignments only: (a) The whole interest in the patent; (b) an undivided part of the entire interest, whereby the patentee and assignee become joint owners of the whole interest secured by the patent; (c) the assignment of an exclusive right within a specified part of the United States.

Under the second of these, the patentee and assignee sue jointly. Under the third, the assignee sues in his own name; but, to entitle him to do so, the assignment must convey to him the entire and unqualified monopoly which the patentee held in the territory specified, excluding even the patentee himself, and that any assignment short of this is a mere license.

A contract for the purchase of any portion of the patent right may be good and enforceable as a license, as between the parties themselves;

but the legal right in the monopoly remains in the patentee, and he alone can maintain an action against the third party who commits an infringement against it. These same general propositions are enunciated by Justice Gray, in Waterman v. McKenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923. Referring to the three kinds of assignments above enumerated, Justice Gray says:

"A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers—in the second case, jointly with the assignor; and in the first and third cases, in the name of the assignee alone. Any assignment or transfer short of one of these is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement."

While the grant of an exclusive right to manufacture and sell the invention throughout the United States would in legal effect be an assignment of the patent, such an assignment could not be operative in this case, because of the prior outstanding title in the Colonial Trust Company, trustee. We must therefore assume that, by reason of the "terms and conditions" contained in the contract with the Chowning Regulator Corporation, the grant is a mere license, as the plaintiff calls it, and not an assignment, which attempted to convey the title. Such license carried with it no right of action in the Chowning Regulator Corporation for infringement. That right remained in the owner or owners of the title. As was said by Chief Justice Taney in the case above referred to:

"It was obviously not the intention of the Legislature to permit several monopolies to be made out of one, and divided among different persons within the same limits."

This for the reason that it would lead to fraudulent impositions upon purchasers and a harassing multiplicity of suits. As the facts appear in the bill, there being more than one plaintiff, I do not think that the causes of action joined are joint, within the true meaning of equity rule 26, nor do I think that this ruling conflicts with that of Judge Dickinson in the case of Low v. McMaster (D. C.) 255 Fed. 235, upon which plaintiffs chiefly rely.

The motion to dismiss the bill is sustained, and the bill dismissed, with costs.

THE SHINSEI MARU.

(District Court, E. D. Virginia. June 15, 1920.)

1. Collision ⟸71(2)—Passing vessel in fault for collision with stationary dredge.

A collision in Elizabeth river between one of two passing vessels and a scow alongside a dredge stationed to one side of the center of the 600-foot channel *held* due solely to the fault of such vessel in changing her signal, so as to require passing the other vessel starboard to starboard, which brought her next to the dredge and in failing to sooner stop and reverse.

2. Collision ⇐71(2)—Duty of moving vessel to avoid risk of collision with stationary vessel imperative.
The obligation on the part of free vessels to avoid risk of collision with those incumbered or at rest is imperative.

3. Collision ⇐74—Defense of suction not sustained.
Defense that collision with a stationary dredge was caused by suction of a meeting vessel *held* not sustained.

In Admiralty. Suit for collision by the Maryland Dredging & Contracting Company against the Steamship Shinsei Maru. Decree for libelant.

Knapp, Ulman & Tucker, of Baltimore, Md., and John W. Oast, Jr., of Norfolk, Va., for libelant.

Burlingham, Veeder, Masten & Fearey, of New York City, and Hughes, Vandeventer & Eggleston, of Norfolk, Va., for respondent.

WADDILL, District Judge. The collision, the subject of this litigation, occurred about 5 o'clock on the evening of January 15, 1919, in the Elizabeth river, some 450 feet to the southward of Boush Bluff buoy, under the following circumstances:

The libelant's dredge Kennedy was anchored about 50 feet to the eastward of the center of the 600-foot dredged channel, engaged in dredging, and had made fast to her a mud scow, used in connection with the service, known as scow No. 26. The respondent ship, the Shinsei Maru, a Japanese vessel, loaded, 329 feet 6 inches long, 48 feet beam, and 15 feet 9 inches deep, navigated by a United States pilot, was passing up the channel, and observed the dredge some 2 miles away, and also, when approximately a mile away, observed the United States steamship Canonicus, then about three-quarters of a mile away, above the dredge, coming down the channel. The Shinsei Maru sounded one blast of her whistle, with a view of effecting a port to port passage with the Canonicus, which the latter answered with one whistle, but before her helm responded to these signals the Shinsei Maru sounded two blasts of her whistle, indicating her desire to effect a passage starboard to starboard, to which the Canonicus gave her assent by sounding two blasts of her whistle, and the two vessels so proceeded to navigate with respect to each other that the Canonicus took the western side of the channel, and the Shinsei Maru navigated to the eastern. The ships thus passed each other some 250 feet to the northward of the dredge, and the Shinsei Maru, while making the starboard passage, came into collision with the starboard quarter of scow No. 26.

[1] There is no claim that either the dredge or scow were guilty of fault, and as a matter of fact the testimony seems undisputed that, in apprehension of possible danger of collision with the Shinsei Maru, the dredge actually succeeded in so throwing her bow to port, and away from the up-coming steamship, as to widen the space between the vessels some 50 feet. This, however, did not prevent the Shinsei Maru from striking the scow with considerable violence, causing much damage.

The Shinsei Maru seeks to avoid responsibility for the collision by placing the same upon the Canonicus, and especially says that it was brought about by suction from the Canonicus, and, without fault on her part, she was forced against, and came into collision with, the scow.

The court's conclusion is that the Shinsei Maru cannot escape liability for bringing about the collision, by thus attempting to place the blame therefor on the other ship; nor can she, under the circumstances of this case, call for the latter to share her burdens or losses arising from her own negligence, by suggesting fault, or possible fault, on the part of the Canonicus. The Shinsei Maru, as viewed by the court, is at fault in the following particulars:

1. Under the circumstances she should have kept her proper course, to the westward side of the channel; that is, kept to the right, and carried out the port hand maneuver which she first attempted to do, but changed when she gave the signal for the directly opposite passage, which threw her nearer to, instead of away from, the stationary dredge. Under the port hand passage, the Canonicus should have passed between her and the dredge; whereas she confessedly inaugurated a maneuver which resulted in placing her, instead of the Canonicus, nearer to the dredge and scow. This alone is sufficient to account for the collision, certainly so far as she is concerned, as there was ample room within the 600-foot channel, as well as outside of it, to avoid collision with either the Canonicus or the scow made fast to the dredge.

[2] 2. The Shinsei Maru is also at fault for failure to discharge her duty to avoid the risk of as well as the collision itself. She did not stop or reverse her engines until within 250 or 300 feet of the dredge, which was a gross fault. She should not only have stopped and reversed earlier, but realized that, in attempting so to do in that short distance to the stationary vessel, such a maneuver would tend to kill her headway, and cause her to lose control of her movements, and in that way bring about a collision. The obligation on the part of free vessels to avoid risk of collision with those incumbered, or at rest, is imperative, and one that the admiralty courts must enforce, having regard to the perils of navigation and the importance of the rule of the road in respect thereto. The New York, 175 U. S. 207, 20 Sup. Ct. 67, 44 L. Ed. 126; La Boytaux, Rules of the Road at Sea, p. 109; The Jamestown (D. C.) 114 Fed. 593, 595. In the last-named case, a collision between a steamship and an incumbered vessel, which occurred a short distance above the scene of this one, it is said:

"There was nothing in the existing conditions to prevent the steamship's keeping out of the way of the tug and tow, and having seen the same at the distance it admits it was observed, at that hour of the evening, about dark, knowing that the tow was moving with the wind and tide, it should have exercised a greater degree of care and caution than it did in approaching the tow. Any error should have been on the safe side. It was not enough to have so acted or changed its course as possibly, or even probably, to have avoided a collision. No such chances need or should have been taken. The Wilkes-Barre (D. C.) 50 Fed. 582; The Chatham, 3 C. C. A. 161, 52 Fed. 396, 399; The Owego (D. C.) 71 Fed. 537; Mars. Mar. Coll. 377."

[3] 3. The defense that the accident was brought about by suction from the Canonicus is likewise not sustained. Such a defense would not in any event avail the Shinsei Maru, since she had no right to so navigate as to allow her to be drawn by the suction of a passing vessel into collision with a vessel at anchor. This was hazardous, and at least taking a risk likely to result disastrously, as well to the ship taking it as to other vessels not in fault, liable to be affected thereby. Moreover, the Shinsei Maru not only failed to sustain her suction theory, but the libelant quite clearly showed that there was nothing to warrant the claim; it being a collision between passing vessels. Two accomplished expert witnesses were examined by the libelant, whose testimony strongly sustains this view, that as between passing vessels the question of suction is theoretical, rather than practical, and certainly, under the evidence in this case, the same did not exist. The City of Cleveland (D. C.) 56 Fed. 729, a decision of Mr. Justice Brown in the District Court, discusses the improbability of suction from passing vessels. In The Ohio, 91 Fed. 549, 553, 555, 33 C. C. A. 667, Mr. Justice Lurton, in the Circuit Court of Appeals, a case in which a third vessel had been sunk, fully considered the subject of suction, and inevitable accident resulting therefrom. In the present case, the defense of inevitable accident would not avail the Shinsei Maru (The Maryland [D. C.] 182 Fed. 829, and cases cited), since it would be necessary to show that she herself was free from fault in bringing about the collision.

It follows, from what has been said, that the collision occurred solely through the fault of the Shinsei Maru, and a decree so ascertaining will be entered on presentation.

THE FREDA.

(District Court, S. D. New York. April 30, 1918.)

1. Shipping ⇐197—Shipper held entitled to recover general average contribution.

Where a time charterer issued to a shipper a clean bill of lading, which entitled him to have his cargo loaded below decks, but it was without his knowledge loaded on deck, and was jettisoned when the ship stranded, a provision of the bill of lading that general average was to be under the York-Antwerp rules, which specifically exclude jettisoned deck cargo from general average, *held* inoperative as against the charterer, and also against the shipowner, whether or not its master signed the bill of lading as required by the charter party, which also permitted the loading of deck cargo.

2. Shipping ⇐195—Libelant in suit for loss of cargo may recover general average contribution.

In a suit against a vessel and her time charterer for nondelivery of cargo, where recovery cannot be had on that ground, because the shipment was lost through an excepted peril of the seas, libelant may recover the amount to which he is entitled in general average, from which he was excluded through the fault of the charterer; execution first to issue against the time charterer.

In Admiralty. Suit by the C. B. Fox Company, Incorporated, against the steamship Freda, with the Caribbean & Southern Steamship

Company, Incorporated, impleaded, to recover for lost cargo. Decree for libelant.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for libelant.

Duncan & Mount, of New York City (Russell T. Mount, of New York City, of counsel), for The Freda.

Kirlin, Woolsey & Hickok, of New York City (John M. Woolsey, of New York City, of counsel), for Caribbean & Southern S. S. Co.

HOUGH, Circuit Judge. [1] The Freda, being under time charter to the Caribbean Company, was by the charterer dispatched on a voyage from New Orleans to Progresso, Mexico. The charter party gave charterer the right to put deck cargo on board; i.e., the shipowner agreed that it might be done.

Libelant shipped goods for Progresso, delivering same to charterer, and from the charterer received bills of lading, signed by its agents. Deck loading was not agreed for, nor did the bills of lading specify it. Without shipper's knowledge, and without objection from ship master, libelant's cargo was laden on deck.

Alacran Reef is a well-known danger to navigation in the path from New Orleans to Progresso. On it Mexico has long maintained a light, which, however, was extinguished without warning to navigators a few days before the Freda sailed. I find that the Freda ran on the reef because the light was out; that was the proximate cause.

By the stranding the Freda was so damaged that she never reached Progresso. All cargo on deck and much under deck was jettisoned in an endeavor to lighten ship, in order to back or warp off. This was unsuccessful, and a wrecking tug was necessary to release the steamer. Some cargo was delivered at Progresso by lighters. This libel prays for the value of jettisoned deck cargo, merely alleging shipment and nondelivery.

It appeared in evidence that after disaster the Freda's chronometers were varying from true time more than had been revealed by tests made very shortly before voyage began. If they were "out" as greatly when observation was made, not many hours before stranding, the Freda was about 18 miles off her course because of such undiscovered error. But the Caribbean is a region of difficult and varying currents, and I think it not proven or provable whether it was because of chronometrical error or currents that the steamer was approximately 18 miles nearer the extinguished light than was supposed. The evidence is not sufficiently clear to induce me to substitute chronometrical error, for the extinguished light as the proximate cause of disaster.

Be this as it may, however, I think due diligence to render the ship seaworthy is affirmatively shown, and for that reason, also, I hold the proximate cause to have been the act of Mexico in putting out the light and giving no notice. The loss of libelant's goods was not in fact due to their being deck-laden, for either jettison or damage by sea water affected all cargo, except some in the very top of the after hold. But by the bill of lading general average was to be under the York-Antwerp rules, which specifically exclude jettisoned deck cargo from contributory benefits. There was a general average taken after the

Freda was salved, and libelant's goods excluded; the ship being the paying contributor, jettison having been for her benefit.

The average proceeding has been closed, and no provision made for libelants, and freight was payable and paid in full in advance of shipment, so that the charterer had no contributing interest.

[2] On the foregoing facts it is held that the stranding of the Freda was due to peril of the sea; therefore the libel, which relies baldly on failure to deliver goods shipped in good order, cannot strictly prevail. Under Dupont v. Vance, 19 How. 162, 15 L. Ed. 584, however, libelant may, even in this action, recover whatever the ship should contribute in general average to libelant's proven loss.

Libelant, having been excluded under the York-Antwerp rules from the average actually taken, must rely for relief on the circumstances preceding such justified exclusion. Here the original breach of contract was by charterer. Libelant received a "clean bill of lading" and therefore had a right to assume that the lading was under deck. The Delaware, 14 Wall. 579, 20 L. Ed. 779. In legal effect, it was under deck, so far as charterer was concerned. But shipowner was bound by the bills of lading issued by charterer, so far as not inconsistent with charter party; nor did the ship master object to or even examine the bills of lading as issued, though they were exhibited to him. This is not the subject of unfavorable comment, for he was bound to sign whatever charterer offered, not infringing rights reserved by charter. He would have been obliged to sign these bills of lading, even if he had been told that it was the intent to give deck cargo the position and rights of hold cargo.

Therefore I think that, against ship as well as charterer libelant's cargo is to be considered as if under deck. What libelant is entitled to is the amount he should have gotten in general average, and the final inquiry is: Who kept him out of the average actually held? Or (to put it in another way) who treated the cargo so as to create an actual condition preventing participation, and a legal condition permitting it? Clearly the charterer; the shipowner in effect only obeyed charterer's directions.

Therefore let libelant take a decree for the amount of the average contribution that should have been obtained, against ship and impleaded respondent; execution first to issue against charterer.

HYAFILL v. BUFFALO MARINE CONST. CO.

(District Court, W. D. New York. June 12, 1919.)

Courts ⇐516—Equity has power to restrain person from prosecuting admiralty suit in foreign court.

A court of equity, having jurisdiction of the parties, *held* to have power to grant a temporary injunction to restrain the defendant from further prosecuting a suit in admiralty in a foreign court to enforce a maritime lien until rights claimed by complainant, which cannot be asserted in the admiralty suit, may be determined.

In Equity. Suit by David Hyafill against the Buffalo Marine Construction Company. On motion for preliminary injunction. Granted.

David H. Bilder, of Newark, N. J., and Fleischmann & Pooley, of Buffalo, N. Y., for plaintiff.

Brown, Ely & Richards, of Buffalo, N. Y. (Alfred L. Becker, of New York City, of counsel), for defendant.

HAZEL, District Judge. In this action in equity the averments of the bill disclose that the defendant, Buffalo Marine Construction Corporation, furnished labor and materials at Buffalo to the steamer Natironco in the amount of $505,000, declared to be grossly excessive; that $395,000 has been paid on account thereof, leaving a balance of $110,170; that the master and chief engineer of the steamer were bribed by the defendant in the sum of $19,750 to improperly influence them to procure such repairs to be done by the defendant company; and that an unlawful agreement existed by which exorbitant and unreasonable prices were to be charged for such repairs and materials furnished. It is also averred that giving a bribe or gratuity to an agent or servant of another under the laws of the state of New York subjects the giver to a penalty and renders the contract void and unenforceable; and it is then averred that the defendant, for such repairs and materials furnished to the steamer in question, had a maritime lien in this jurisdiction, with a right to enforce the same, but that, instead of doing so, permitted the steamer, in December, 1918, to depart from Buffalo on her journey to France, where her owner resides, and upon her arrival at Sorel, in the province of Quebec, Canada, where she was compelled to lay up for the winter, the defendant libeled her in the Exchequer Court of Canada for the balance remaining due for the repairs and materials furnished; also that the steamer was seized under the maritime process of the court.

Upon the filing of the bill and affidavits in support thereof—affidavits showing that defendant intended to effect an immediate sale of the steamer to the irreparable loss of the plaintiff, and that doubt existed as to whether the Exchequer Court of Canada, under the laws of Canada applicable to the enforcement of maritime liens, would entertain plaintiff's counterclaim of set-off arising from the fraudulent acts of the defendant and from its violation of the penal laws of the state—this court granted a preliminary injunction against the defendant, restraining it from further proceeding in such action, to enable further investigation and consideration of the questions presented. Both parties, plaintiff and defendant, now having been heard orally, and the briefs afterwards filed having been examined, I have concluded to continue the restraining order in question. This will not necessarily draw into controversy the validity of a maritime lien, of which a court of admiralty alone has jurisdiction. The injunctive power of the court operates upon the defendant alone, and clearly is not directed against the Exchequer Court of Canada.

The gravamen of the bill is for an accounting, and that the proceeding in admiralty was instituted from unfair motives, to carry out a fraud perpetrated upon the plaintiff, and to evade its liability therefor

under the statute. As contended by defendant, it is a well-settled rule of law that, where a lien or claim upon the thing is given by the maritime law, admiralty alone has jurisdiction to enforce it by a proceeding in rem; but this does not deprive a court of equity in a proper case of the power of maintaining the status quo. It makes no difference that the res is beyond the territorial jurisdiction of the tribunal, the parties being before the court, since the defendant may nevertheless be compelled to do all the things required by the lex loci rei sitæ. Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538. None of the adjudications cited by defendant goes so far as to hold that a court of equity has not power to enjoin a pending action in another jurisdiction simply because in such action it is intended to enforce a maritime lien.

In the case of Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981, upon which reliance is placed, it is held, inter alia, that a maritime lien is a jus in re, and only a maritime court has jurisdiction to enforce it; but, as heretofore pointed out, neither the correctness of this rule, nor the rule that the court first obtaining jurisdiction of the res is entitled to retain it without interference, is disputed or questioned. There will be no interference with the physical possession of the res by the Exchequer Court of Canada, by the maintenance of the status quo until the rights of the plaintiff herein are ascertained or determined. But in order to afford proper protection to the defendant, the motion for a continuance of the temporary injunction will be granted conditionally, to wit, that in the pending proceeding a bond and stipulation be filed by the plaintiff as a substitute for the steamer Natironco, as required by the admiralty rules and practice applicable in the Dominion of Canada for the release of said steamer.

The motion of the defendant to dismiss the bill is denied. The motion to remove the case to the law docket is also denied, with the privilege of renewing the same on notice.

UNITED STATES, to Use of SARGENT & CO., v. BROWN et al.

(District Court, M. D. Pennsylvania. July 9, 1920.)

No. 111.

United States ⇐67(3)—Bonds of contractors for public work; suit by subcontractors not stayed by subsequent suit by United States.

Under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), relating to bonds of contractors for public works, and providing that, if no suit should be brought by the United States on such bond within six months from the completion and final settlement of said contract, persons furnishing labor and materials, payment for which has not been made, may bring suit thereon in the name of the United States, a suit so brought in conformity to the statute will not be stayed because of the subsequent commencement of a suit by the United States in another jurisdiction.

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

At Law. Suit by the United States, to the use of Sargent & Co., against H. L. Brown, the American Fidelity Company, and Casualty Company of America. On rule to stay proceedings. Rule discharged.

Charles L. Bailey, Jr., and William Jenkins Wilcox, both of Harrisburg, Pa., for plaintiff.

Knapp, O'Malley, Hill & Harris, of Scranton, Pa., for defendant.

WITMER, District Judge. A rule was granted to show cause why proceedings should not be stayed, upon the petition of the American Fidelity Company, setting forth that this action was brought on August 15, 1919, by Sargent & Co. in the name of the United States against the defendants, upon a certain bond given by the American Fidelity Company in accordance with the act of Congress, for the faithful performance of a contract for the construction of the post office building at Harrisburg; that since the beginning of said action the United States in its own right has brought an action against the American Fidelity Company on the bond in the United States District Court for the District of Vermont, service of process being made on the 11th day of March, 1920; and that such action brought by the United States in the District Court for Vermont is based upon the same cause and grows out of the same transaction as that previously brought in the District Court of the Middle District of Pennsylvania.

An answer to this petition was filed by Sargent & Co., and other of the intervening creditors, in which the following facts have been set forth, without denial: That the date of the completion and final settlement of the contract of H. L. Brown Company was December 18, 1918; that no suit was brought by the United States within six months after the completion and final settlement of said contract, namely, within six months from December 18, 1918, expiring June 18, 1919; and that this action of the use plaintiff, and the several interveners, for the recovery of the price or value of labor or materials supplied by them, payment for which had not been made by the contractor, was commenced August 15, 1919, more than six months after the final completion and settlement of the contract of H. L. Brown Company, and after the United States had brought no action within six months from such time, and before the expiration of the year in which the right to bring such suits as limited by the act of Congress, and was so far proceeded with that the cause was at issue, and set for trial for the week commencing May 3, 1920.

Defendant requests the court to stay proceedings until final determination of the suit commenced in the district of Vermont, upon the ground that under the act of Congress the United States shall have priority in the enforcement and collection of its claim. The United States has not joined in the request, and as for the defendant surety company, who has obtained this rule, it is enough to say that the court will see to it that it shall pay no more than the face of the bond, whether to the United States, or the plaintiff claimants, or both, according to its liability. Though the claims of plaintiffs as against the defendant contractor are determined in this suit, the liability of the defendant surety company upon its bond being fixed, the application or apportionment of the penalty of the bond in proportional ratio

found due each claimant, including the United States, if necessary, may well be hereafter controlled by the court.

Plaintiffs' action was, it appears, instituted as authorized by the act of August 13, 1894, amended by the act of February 24, 1905, wherein it is provided that:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall * * * have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed. * * * and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution. * * *" Comp. St. § 6923.

Whether the United States may also maintain its action in Vermont, or whether two actions may be maintained at the same time in different places on the same bond, one by the United States and another by creditors of the contractor, need not be decided here.

The court being satisfied that there is nothing in plaintiffs' way barring them from a speedy trial, the rule to show cause is dismissed, and the case ordered on the trial list for trial at the next term of court at Harrisburg, Pa.

WEST & DODGE CO. v. BETHLEHEM SHIPBUILDING CORPORATION, Limited.

(District Court, D. Massachusetts. April 7, 1920.)

No. 1112.

Army and navy ⊂=27—Power to modify contracts does not apply to subcontracts.

The power to modify or cancel contracts for naval vessels given by Act March 4, 1917, does not apply to subcontracts between the original contractor and others, even though the original contract was on a cost plus basis, and the contractor cannot avoid payment for supplies furnished under a contract approved by the compensation board, on the ground that thereafter the compensation board withdrew its approval and fixed the price for the supplies at a sum less than the contractor had paid.

At Law. Action by the West & Dodge Company against the Bethlehem Shipbuilding Corporation, Limited. On demurrer to answer. Demurrer sustained.

Ralph M. Smith, of Boston, Mass., for plaintiff.
G. W. Currier, of Boston, Mass., for defendant.

MORTON, District Judge. The plaintiff has demurred to the defendant's answer, and the question is whether the answer discloses any defense. It is not necessary to restate all the somewhat complicated facts and statutes involved, as stated in the answer.

The order for oil burners, etc., given by the defendants to the plaintiff, which was accepted by the latter, constituted a contract between the parties. The price therein agreed upon was, by the terms of the contract between the defendant and the government, subject to the

approval of the compensation board of the Navy Department. It was submitted to the board, which required a slight reduction by the plaintiff, and approved the price as reduced. The contract thereupon became effective, binding both parties to it. It covered oil burners and appliances for 40 destroyers, and was fully performed by the plaintiff. The defendant paid the plaintiff large sums under it. Then the compensation board rescinded its approval of the price, and fixed a new price at less than one-half that originally approved. According to the new price, the defendant has overpaid the plaintiff. It therefore refuses to make further payments. The defendant is, in effect, acting for the United States; briefs have been submitted by the Navy Department and by the United States attorney.

The short and sufficient answers to the contentions of the defendant and of the government is that the act of March 4, 1917 (39 Stat. 1168), on which their position rests, regulates only transactions between the government and persons with whom it deals. It does not apply to subcontracts and more remote dealings. The language of the act had been used in previous statutes, and had been so construed by government officials for a number of years. 29 Op. Attys. Gen. 14, 44. The only distinction suggested for the defendant, differentiating the case at bar, is that here the principal contract is on a "cost plus" basis, while the other contracts were at fixed prices. But the act either stops at the first contractor or it does not; I do not see that the form of the contract can affect the scope of the act. The defendant was not acting or purporting to act as agent of the United States, but on its own behalf.

The construction given by the Attorney General, supra, seems to me the only sensible and practical one. To say that the price of every screw entering into these vessels can be followed back through dealers and jobbers to the original manufacturer, and revised if at any point in the chain what is regarded as undue profit was charged approaches absurdity; but that would be the result of the government's contention. Moreover, the contract itself clearly shows that the parties contemplated that the contractor might purchase, either at fixed prices (Contract, art. 22, par. 7), or on a "cost plus" basis (Id. par. 3). As to the former sort of purchases, the contract expressly makes the prices subject to the approval of the compensation board of the Navy Department; as to the latter, it expressly reserves the right to investigate and check the actual costs on subcontracts. The system appears adequate to safeguard the government's interests. The fact that in particular instances there may have been failures under it is no sufficient reason for sanctioning a repudiation by the government of the approval of its own board specifically provided for in its contract (see U. S. v. North American Commercial Co. (C. C.) 74 Fed. 145; Kugler v. U. S., 4 Ct. Cl. 407; Wilder v. U. S., 5 Ct. Cl. 468), or reversing the previously accepted ruling on identical language, which appears to be well grounded.

Various other points have been argued. As they involved only questions of law, and as what has been decided is sufficient to dispose of the case, it is unnecessary to pass upon them.

Demurrer sustained.

UNDERWOOD et al. v. DISMUKES.

(District Court, D. Rhode Island. July 2, 1920.)

No. 116.

Removal of causes ⊂=21—Suit to restrain interference with rights in land purchased by navy cannot be removed; "revenue law."

Judicial Code, § 33 (Comp. St. § 1015), providing for the removal of suits against officers appointed under or acting by authority of any "revenue law" of the United States, does not extend to naval appropriation laws. Consequently a suit against a naval officer to restrain him from interfering with plaintiff's rights to remove sand from land purchased by the United States pursuant to a naval appropriation act cannot be removed; "revenue laws" not including all laws appropriating money for the expenditure of the revenue of the United States, and the question of proprietary rights in lands purchased by the United States through an appropriation of moneys of the United States not involving a question of revenue law.

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

In Equity. Bill by Joseph M. Underwood and others against Douglas E. Dismukes. The suit, which was begun in the state court, was removed by defendant to the federal court on writ of certiorari. On motion to quash writ and to remand. Motion granted.

John A. Murphy, Jr., of Newport, R. I., for plaintiffs.
Harvey A. Baker, U. S. Atty., of Providence, R. I., for defendant.

BROWN, District Judge. This bill in equity, for an injunction to restrain the defendant from interfering with plaintiffs' alleged rights to enter upon lands situated in part in the city of Newport, and in part in the town of Middletown, in the state of Rhode Island, and to take away sand, gravel, and seaweed from the shores of Coddington Cove and Coddington Point, was removed from the state court upon writ of certiorari, upon petition of the defendant under section 33 of the Judicial Code, as amended by Act of August 23, 1916, c. 399, (Comp. Stats. § 1015), alleging that he is an officer of the United States navy, having the rank of captain, and now detailed by the Secretary of the Navy as commandant of the naval training station at Newport, R. I., and that by virtue of his office he is acting under and by virtue of chapter 114 of the Public Laws of the United States, 65th Congress, 2d Session, to wit, the act approved by the President July 1, 1918, known as the Naval Appropriation Act (40 Stat. 704).

The petition further alleges that said act is a—

"revenue law of the United States, and that by virtue of said law he is in possession and charge of that certain land at Newport, Rhode Island, known as Coddington Point Extension, which said land was purchased under and by virtue of the authority contained in said act of Congress," etc.

It is the contention of the United States that section 33 of the Judicial Code should be construed to include all laws appropriating money for the expenditure of the revenue of the United States. Ward v.

Congress Construction Co., 99 Fed. 598, 39 C. C. A. 669, is relied upon. The opinion in that case cites U. S. v. Bromley, 12 How. 88, 97, 13 L. Ed. 905, which held that the revenue of the Post Office Department is as much a part of the income of the government as moneys collected for duties and imposts.

While it may be possible to say that the work of erecting a post office has relation to the revenue of the government, and that the Secretary of the Treasury, by whom the work was ordered, was an officer administering the revenue laws and acting under color of his office, (Ward v. Construction Co., 99 Fed. 605, 606, 39 C. C. A. 669), it does not seem to follow that an appropriation act for the purchase of lands for military purposes can be deemed to be a "revenue law," in the sense in which that term is used in section 33 of the Judicial Code.

In support of the motion to quash the writ of certiorari, and to remand, the plaintiffs rely upon Twin Falls Canal Co. v. Foote (C. C.) 192 Fed. 583. This case contains a full and able discussion of the authorities, and, in my opinion, supports the plaintiffs' contention that the present case does not fall within the provisions of section 33 of the Judicial Code. See, also, City of Stanfield v. Umatilla River Water Users' Ass'n (C. C.) 192 Fed. 596.

To accept the contention of the United States that the term "revenue laws" includes all laws appropriating money for the expenditure of the revenue of the United States, and that the question of proprietary rights in lands purchased by the United States through an appropriation of moneys of the United States involves a question of revenue law, would result in a great expansion of the scope of section 33, and a great enlargement of the jurisdiction of the federal courts.

As the right to a removal of this case is based solely upon section 33, and as the present case, in my opinion, is not within the terms or the intent of that section,

The plaintiffs' motion to quash the writ of certiorari, and to remand, is granted.

THE J. H. WILLIAMS.

(District Court, E. D. New York. June 21, 1920.)

1. **Towage ⇐11(7)—Tug held at fault in attempting to take two loaded boats.**
   Where a tow collided with a bridge abutment and was injured, *held*, that the tug was at fault in attempting to take two loaded boats; the tide being at flood.
2. **Towage ⇐11(2)—City not liable for collision of tow with bridge.**
   Where a tow collided with a bridge abutment, but there was nothing to indicate any obstruction under water, the city, which constructed the bridge, was not liable, even if there was a slight roughness of the stones under water.

In Admiralty. Libel by Joseph Kenny against the Tug J. H. Williams, claimed by the Cornell Steamboat Company, which impleaded the city of New York. Petition against the City of New York dismissed, and decree for libelant against claimant.

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

Foley & Martin, of New York City, for libelant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, for claimant.

John P. O'Brien, of New York City (Charles J. Carroll, of Brooklyn, N. Y., of counsel), for city of New York.

GARVIN, District Judge. On November 9, 1919, the steam tug J. H. Williams took in tow on her port side two vessels, loaded with coal. One of these, the Sarah T. Kenny, was made fast to the tug; the other was on the port side of the Kenny. Thus made up, the tow started from 119th street and East River, bound for 138th street and Harlem River. While approaching the Willis avenue bridge, with the tide strong flood, which was in the direction in which the tow was proceeding, the Kenny was swung around and brought into collision with the abutment of the bridge and injured. A libel was filed against the Williams, and the claimant has brought in by petition the city of New York, alleging that the accident was caused because of the unlawful existence of under-water projections along the face of the abutment, which were not protected by piling.

[1, 2] The circumstances under which the accident happened lead to the conclusion that the pilot of the tug was negligent in attempting to take the two loaded boats. He testified, it is true, that he navigated the boat carefully, had been through the bridge several times before. The owner of the Kenny, however, testified that he had never been taken through the bridge with two boats in the tow, and, with the tide running as it was, it seems to me quite clear that the tug captain could not be reasonably certain of retaining control over his tow, with both boats loaded with a heavy cargo, on the same side of the tug. The Kenny was injured about five feet below the water line. Her bottom was not damaged. No evidence was offered of any submerged ledge or projection. The testimony was quite to the contrary. The accident may have been caused by a water-logged spar, which was drifting below the surface of the water, or by some slight roughness on the face of the pier. There is no obligation to have a highly polished surface of stone under water. There is nothing to indicate that the construction of the pier was in any respect unusual, and there appears to be no reason for holding the city even partially liable. The authorities cited in behalf of the owner of the J. H. Williams, who urges that the city be held partly, at least, liable, are cases in which there was a distinct submerged obstruction or projecting ledge.

A decree will accordingly be entered, dismissing the petition against the city of New York, and in favor of the libelant against the claimant, with the usual reference to fix the damages.

THE JACK-O-LANTERN.

(District Court, D. Massachusetts. July 2, 1920.)

No. 1821.

Maritime liens ⇐10—Contract for reconstruction not creating lien.

A contract for converting a car float, having neither motive power nor steering gear, into an amusement steamer, with dance hall, rooms, and power equipment, *held* one for reconstruction, completely changing the identity of the vessel, which did not create a maritime lien.

In Admiralty. Suit by the New Bedford Dry Dock Company against the Steamer Jack-O-Lantern. On objection to jurisdiction. Objection sustained, and libel dismissed.

George R. Farnum, of Boston, Mass., for libelant.
George L. Dillaway, of Boston, Mass., for claimant.

MORTON, District Judge. This case was heard on so much of the answer as sets up lack of jurisdiction, for the reason, as alleged, that the contract sued upon was not of such character as to create a maritime lien. The facts, which are simple, were orally agreed on by counsel in open court at the hearing, and are as follows:

The Jack-O-Lantern was originally a car float of the usual type, something over 200 feet long, with neither motive power nor steering gear, and having two lines of track on her single deck. The claimant bought her and proceeded to convert her into a steamer to be used for amusement purposes. The tracks were removed, the deck relaid to make a dancing floor, a large house, or superstructure, was built, inclosing most of the deck, and containing a dance hall, rooms, balconies, etc. Steering apparatus and a steam plant of the propeller type, for propulsion, were also installed.

For the purpose of carrying out these changes the contract now before the court was made between the claimant and the libelant. It covers, generally speaking, all the woodwork involved in the changes above outlined. The libelant did not install the power plant, but it did prepare the vessel for it. The scow was towed to the libelant's yard for the work to be done. The engine and boilers were there installed. As they were not yet in working condition when the vessel left the libelant's yard, she was towed away. The contract and specifications are as stated in the pleadings.

The present question is whether, upon the foregoing undisputed facts, the contract was one for repairs and supplies, such as creates a maritime lien. It is too late now to question, in a court of first instance, at least, the rule that a contract to construct a vessel does not give rise to such a lien. In rebuilding operations the test is whether the identity of the vessel has continued, or has been extinguished. It would serve no useful purpose for me to discuss the cases referred to in argument by the libelant. The matter turns, as I view it, upon a question of fact; and upon the facts stated I think it clear that the

identity of the car float which was delivered to the libelant was completely lost by the conversion into an amusement steamer under the contract in suit. It is true that the hull is substantially unchanged; but mere identity of hull is not sufficient to preserve the identity of the vessel. McMaster v. One Dredge (D. C.) 95 Fed. 832; The Dredge A. (D. C.) 217 Fed. 617, 629, 630. The Jack-O-Lantern, with her dance hall, rooms, and power plant, self-propelled and able to maneuver, is an essentially different vessel from the car float, which furnished the hull.

Decree dismissing libel for lack of jurisdiction.

ROSENTHAL v. HELLER et al.

(District Court, M. D. Pennsylvania. July 9, 1920.)

No. 286.

Equity ⟸53(2)—Objection to jurisdiction because of adequate remedy at law may be waived.

A suit in equity will not be dismissed, under Rev. St. § 723 (Comp. St. § 1244), on the ground that complainant has an adequate remedy at law, where defendant has waived his right to make such objection, which is a personal privilege, by entering his defense on the merits.

In Equity. Suit by David Rosenthal, trustee in bankruptcy of Joseph Lederman, against Sol Heller and others. On motion to dismiss bill. Denied.

D. Rosenthal, G. Fred Lazarus, W. M. Reynolds, Jr., and S. M. O'Hara, all of Wilkes-Barre, Pa., for plaintiff.

A. Hourigan, Abram Salsburg, D. Oppenheimer, and M. J. Mulhall, all of Wilkes-Barre, Pa., for defendants.

WITMER, District Judge. Plaintiff by his bill in equity is endeavoring to recover from defendants the value of merchandise sold by a constable on execution issued upon judgments confessed by bankrupt within four months of his adjudication in bankruptcy; such sale and disposition of bankrupt's property, it is alleged, having been fraudulent and with intent to cheat the creditors of the bankrupt. To accomplish what plaintiff is here attempting could no doubt be accomplished by an action at law, and where such remedy is afforded a suit in equity will not be sustained, unless waived by the parties. The provisions of section 723 of the Revised Statutes of the United States (Comp. St. § 1244), that suits in equity shall not be sustained in the courts of the United States where there is an adequate remedy at law, was enacted to secure a privilege to a defendant which he may waive (Warmath v. O'Daniel, 159 Fed. 87, 20 Am. Bankr. Rep. 101), either by actual consent (Hicks v. Knost, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183), or by acquiescence. See Hollins v. Brierfield Coal & Coke Co., 150 U. S. 371, 380, 381, 14 Sup. Ct. 127, 37 L. Ed. 1113; and Brown v. Lake Superior Iron Co., 134 U. S. 530, 536, 10 Sup. Ct. 604, 606 (33 L. Ed. 1021) where it was said by Justice Brewer:

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"* * * If the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it; and in a note [in 1 Dan. Ch. Prac. (4th Am. Ed.) p. 550] many cases are cited to establish that. 'if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff had a plain and adequate remedy at law. This objection should be taken at the earliest opportunity.'"

The defendants having entered their defense upon the merits at large, they have waived their right to a trial at law, and their motion to dismiss will be denied.

GINNOCHIO v. HYDRAULIC PRESS BRICK CO.

(District Court, S. D. Ohio, E. D. April 14, 1920.)

No. 1804.

1. **Master and servant ⇐348—Time of taking effect of Ohio Workmen's Compensation Act.**
Under Ohio Workmen's Compensation Act March 14, 1913, which went into effect January 1, 1914, and section 22 of which provides that employers subject to the act "shall in the month of January, 1914, and semi-annually thereafter," pay the premium determined by the State Industrial Commission, or may at their election, with the consent of the commission and on giving security, undertake to pay compensation direct to their injured employés or their dependents in case of death, an employer which prior to January 1, 1914, notified the commission of its intention to comply with the statute and its election to pay direct, and thereafter did all that was required of it without delay or default, paying the premium and furnishing its bond on January 30th, *held* under protection of the act as of January 1st.

2. **Statutes ⇐219—Construction by administrative tribunal of great weight.**
The contemporaneous and practical construction of a statute by a state administrative tribunal, whose duty it is to carry the statute into effect, while not absolutely controlling upon the courts, is entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.

3. **Statutes ⇐199—"Fail to comply."**
The words "fail to comply" in general have the same operation in law as the words "refuse to comply."

4. **Master and servant ⇐348—Employer, complying with statute, not debarred from benefit by delay caused by public officials.**
An employer, who has complied with a workmen's compensation statute on his part without delay or default, is not debarred of its protection because of delay by a public official or administrative board in performance of a ministerial duty.

At Law. Action by Charles Ginnochio, administrator, against the Hyraulic Press Brick Company. On demurrer to second and third defenses of answer to second amended petition. Demurrers overruled.

Paxton, Warrington & Seasongood, of Cincinnati, Ohio, for plaintiff.

Bulkley, Hauxhurst, Saeger & Jamison, of Cleveland, Ohio, and Edward R. Meyer, of Zanesville, Ohio, for defendant.

SATER, District Judge. [1] The charge made in the second amended petition is briefly as follows: The decedent, Curcio, while engaged in the course of his employment by defendant, on account of its negligence met with an injury on January 2, 1914, in consequence of which he died on the day following. The defendant regularly employed at that time more than five workmen and operatives in and about its business and establishment, and had not paid into the insurance fund, as provided by the Workmen's Compensation Act of Ohio, passed March 14, 1913 (103 Ohio Laws, p. 72), any sum for the benefit of employés who might be injured or the dependents of those who might be killed in the course of their employment, and had not otherwise complied with any of the provisions of such act. The prayer is for recovery on account of the defendant's alleged specific acts of negligence.

The second defense contains the following averments: The defendant in December, 1913, and thereafter, employed more than five workmen and operatives regularly in its business. On December 29, 1913, it notified the Industrial Commission, successor to the state liability board of awards, of its intention to comply with the above-mentioned act and of its election to pay compensation directly to its injured employés or the dependents of such as might be killed in the course of their employment. Its application for authority so to pay was approved by the commission on January 7, 1914. On January 12 the commission issued its statement of premium to defendant and fixed the amount of the bond required of it under the act. On January 30 such bond was filed and the premium paid. The bond was approved by the commission on February 3. Defendant asserts compliance as of January 1 with the act and the orders of the commission, and claims that at the time of Curcio's injury and death it was entitled to all the protection, rights, and privileges afforded to employers who have complied with its provisions, and that Curcio's dependents are limited to the compensation therein provided, and cannot hold the defendant to respond in damages. The third defense is contributory negligence.

To each of such defenses a demurrer is interposed. The provisions of the statute which deny compensation in cases of injury or death "purposely self-inflicted" are not involved. If the defenses named are good, it is because defendant's application, which was on file with the commission on January 1, when the act went into effect, and its subsequent compliance within that month with all legal requirements, entitled it to protection at the date of Curcio's accident and death.

Under the well-pleaded facts, admitted by the demurrer to the second defense the defendant, if it complied with the provisions of section 22, is not liable in damages at common law or by statute. Section 23. If it did not thus comply, it is subject to the following pertinent provisions of section 26:

"Employers mentioned in subdivision 2 of section 13 hereof, who shall fail to comply with the provisions of section twenty-two hereof, shall not be entitled to the benefits of this act during the period of such noncompliance, but shall be liable to their employés for damages suffered by reason of personal

injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employés, and also to the personal representatives of such employés where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common law defenses: The defense of the fellow servant rule, the defense of the assumption of risk or the defense of contributory negligence."

The defendant, having had in its service down to Curcio's death five or more workmen regularly in its establishment under contract of hire, was an employer within the terms of subdivision 2 of section 13. Curcio was an employé within the definition of that term found in subdivision 2 of section 14. The second subdivision of section 21 provides that the dependents of an employé who is killed "on and after January 1, 1914," in the course of his employment, "shall be entitled to receive, either directly from his employer as provided in section 22 hereof, or from the state insurance fund, such compensation for loss sustained on account of such injury or death, and such medical, nurse and hospital services and medicines, and such amount of funeral expenses in case of death, as is provided by sections 32 to 40 inclusive." Section 22, in so far as pertinent, is as follows:

"Except as hereinafter provided, every employer mentioned in subdivision two of section thirteen hereof shall, in the month of January, 1914, and semi-annually thereafter, pay into the state insurance fund the amount of premium determined and fixed by the state liability board of awards for the employment or occupation of such employer the amount of which premium to be so paid by each such employer to be determined by the classifications, rules and rates made and published by the board: * * * Provided, * * * that such employers who will abide by the rules of the state liability board of awards and as may be of sufficient financial ability or credit to render certain the payment of compensation to injured employés or to the dependents of killed employés, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in this act, * * * may, upon a finding of such facts by the state liability board of awards elect to pay individually * * * such compensation, and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to such injured or the dependents of such killed employés; and the state liability board of awards may require such security or bond from said employers as it may deem proper, adequate and sufficient to compel, or secure to such injured employés, or to the dependents of such employés as may be killed, the payment of the compensation and expenses herein provided for, which shall in no event be less than that paid or furnished out of the state insurance fund, in similar cases, to injured employés or to the dependents of killed employés, whose employers contribute to said fund. * * *"

On May 18, 1915, Wallace D. Yaple, as chairman of the Industrial Commission, after stating the facts disclosed by its record as to defendant's application for classification of industry and premium, which facts are the same as those pleaded in the second defense, wrote the defendant as follows:

"During the month of January, 1914, which was the month in which the Workmen's Compensation Act of 1913 became compulsory, this department was unable to transact the immense volume of business which came to it, which accounts for the delay from December 30, 1913, to January 12, 1914, in advising the company of the amount of its bond and premium, and also for the delay from January 30, 1914, to February 3, 1914, in approving the bond. Section 22 of the Compensation Act seems to contemplate that the employer

should have the entire month in which to comply with the provisions of the act by either paying his premium into the state insurance fund or by electing to pay compensation, etc., direct, and we have held in a number of state insurance cases that where an employer paid his premium into the fund at any time during the month of January that he was protected from the 1st day of January. We think the same thing should be true in self-insurance cases as well, and it appears that the Hydraulic Press Brick Company complied with the terms of the act and did all that it was required to do within the month of January; its bond and premium being received on January 30, 1914. That being true, it is our opinion that it complied with the law and that it was under compensation from January 1, 1914."

No other utterance affecting a case of like character has been cited. The Industrial Commission, however, on July 1, 1914, in Biddinger v. Champion Iron Co., 13 O. L. R. 65, rendered another opinion, which, notwithstanding the difference in facts reflects that body's views and practice in dealing with an employer who proceeds to qualify under the act. The company's application for classification was filed on December 17, 1913. On account of correspondence between it and the commission in reference to the proper classification of the industry in which it was engaged, its classification and rating and the amount of its first annual premium were not determined until March 6, 1914, on which date it was furnished with a "pay-in order," directed to the treasurer of state, authorizing him to receive the amount of the premium. The company, the commission held, had the opportunity to comply with the law not later than March 10, but it did not do so until after the death of its employé on April 10. The commission said:

"Had the injury resulting in Biddinger's death occurred prior to the 6th of March, 1914, we would have no hesitancy in arriving at the conclusion that the company had made diligent effort to comply with the law, and so had done all that could reasonably be required of it, and under such circumstances would order the compensation paid out of the state insurance fund. But we do not think that the facts in this case justify such a course. The provisions of the act are clear. Section 22 provides in substance that it shall be the duty of all employers employing five or more employés to either pay their premium into the state insurance fund in the month of January, 1914, and semiannually thereafter, or, by proper proceedings before the Industrial Commission, to make arrangement to pay compensation direct to their injured and the dependents of their killed employés. The language is plain and there is no room for construction, and it is obvious that to order payment of compensation in this claim out of the state insurance fund would not only be a plain violation of the law, but would establish a precedent which would be prolific of abuses."

[2] The contemporaneous and practical construction of the statute by the Industrial Commission, an administrative tribunal, whose duty it is to carry it into effect, is entitled to great respect. Though not absolutely controlling, it is entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. U. S. v. Moore, 95 U. S. 760, 763, 24 L. Ed. 588; Barrett v. Grays Harbor Commercial Co. (D. C.) 209 Fed. 95; Industrial Comm. v. Brown, 92 Ohio St. 309, 311, 110 N. E. 744, L. R. A. 1916B, 1277. I am convinced that its views, as expressed by its chairman, Mr. Yaple, are correct. One of the methods of compensating injured or the dependents of killed employés is effected by the employer paying into the

state insurance fund the amount of premium fixed by the Industrial Commission, as determined by its classifications, rules and rates; another is by the employer's paying the compensation himself, providing he is able to furnish satisfactory proof to the commission of his financial ability so to do, in which case the commission may require of him such security or bond as will in its judgment insure payment to persons entitled to the same. Employers thus availing themselves of the statute are arranged into two classes—(1) contributors from choice to the state insurance fund; and (2), noncontributors thereto, who by their own election and by permission of the commission pay directly to the prescribed beneficiaries. The statute establishes the rule of equality as to their status, and also as to the amount of compensation to be received by employés, whether it be paid from the state insurance fund or directly by their employers. In addition to section 22, see also the second subdivisions of sections 21 and 22, the first subdivision of section 25, sections 23, 26, and 29, and State v. Fidelity Co., 96 Ohio St. 250, 117 N. E. 232.

It is true that under the second subdivision of section 25 a noncontributing employer may, by reason of some rule or regulation of his own, be compelled to pay a greater compensation than a contributing employer; but the establishment and maintenance of such rule or regulation is entirely voluntary on his part. The statute expressly provides that, beginning with January 1, 1914, the dependents of an employé killed in the course of his employment—his death not being purposely self-inflicted—shall be compensated from the state insurance fund (if his employer has become a contributor to such fund), or by his employer (if such employer has qualified to pay directly to them). Its provisions are equally clear that the employer, whether a contributor to the state insurance fund or of the class to which the defendant belongs, if he brings himself within the terms of the act within that month becomes entitled, as of the 1st day of such month, to all the protection the act affords. Curcio's dependents, in consequence of his death, became entitled to compensation from the defendant, and this was so, even if the petitioning employer and the Industrial Commission had not performed all the acts required of them respectively by statute. Their right and defendant's liability were coexistent.

The Legislature declared that the injured and the dependents of killed employés should be compensated, and designated the means by which and the persons by whom payment shall be made. The law-making body, it must be presumed, was cognizant of the physical inability of the Industrial Commission to consider and dispose of the multitude of applications of employers immediately after midnight of December 31, 1913, or for some time thereafter. It did not intend that either employés or employers should even temporarily be deprived of the benefits of the act. Having conferred the right to compensation for injury or death occurring on and after January 1, it therefore by section 22 gave employers the whole of the month of January in which to qualify under its provisions. The defendant in this case, having within that time met every requirement imposed on it, obtained all the protection

and benefits which the act accords. The protection thus secured related back to and became effective with the beginning of January 1. It was permissible for the Legislature thus to provide (Bernard v. Michigan United Traction Co., 198 Mich. 497, 165 N. W. 846); the purpose of the retroactive feature being to prevent penalizing of an employer by the denial to him of his common-law defenses after his lawfully declared intention and diligent effort to come under the act.

The statute is highly remedial in character (Honnold, Workmen's Compensation, § 6, p. 25), and is not therefore violative of the state Constitution (Peters v. McWilliams, 36 Ohio St. 155, 161, 162). Retrospective laws that violate no principle of natural justice, but are in furtherance of equity and good morals, are not forbidden in Ohio. Trustees of Cuyahoga Falls Real Estate Ass'n v. McCaughy, 2 Ohio St. 152, 153. That an employer who, in the month of January, diligently endeavored to bring himself within the statute, shall have its benefits as of January 1, is not expressly declared in the Ohio act, as in that of Michigan; but it is necessarily implied, and what is implied in a statute is as much a part of it as what is expressed. Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 175, 17 L. Ed. 520; Id., 68 U. S. (1 Wall.) 221, 17 L. Ed. 519; U. S. v. Babbit, 66 U. S. (1 Black) 55, 61, 17 L. Ed. 94. The defendant by virtue of such relation back became liable, commencing with January 1, to compensate its injured or the dependents of its killed employés, who in the meantime had met with accident or death in the course of their employment. Had the defendant become a contributor to the state insurance fund, the protection afforded to the parties hereto would have been the same. Other provisions which give both classes of employers the whole of the month of January, in each and every year the statute remains in force, to bring themselves by diligence within its protection for the whole of that month, and which confer on its designated beneficiaries the right to compensation, are found in sections 17 and 19, and subdivision 1 of section 21.

[3] Consideration of section 26 points to the conclusion above reached. The employers who are debarred from the benefits of the statute during noncompliance therewith are those "who shall fail to comply with the provisions of section 22." "Fail" means "to be wanting in action." Cent. Dict. The words "fail to comply," in general, have the same operation in law as the words "refuse to comply." Taylor v. Mason, 22 U. S. (9 Wheat.) 325, 344, 6 L. Ed. 101. Had the defendant been wanting in diligence, and prolonged performance on its part beyond the month of January, the rule applied in the Biddinger Case, it would seem, would have obtained. But the defendant did not refuse, and was not wanting in action, to comply with the requirements of the statute. Notice of acceptance of its provisions even preceded the date on which it became operative, the sufficiency of which notice cannot be questioned. Coakley v. Mason Mfg. Co., 37 R. I. 46, 90 Atl. 1073.

[4] To the charge of noncompliance before January 3, the answer is that, if there were such in fact, it was not such noncompliance as depended on the will of the defendant, but was rather due to the com-

mission's discharge of its manifold duties preventing the defendant's earlier qualification to secure the protection of the act. On such a state of facts the defendant's position would be quite as favorable as that of the person to be benefited by a statute, who has performed within the time allotted therefor all that was required to be done by him, but who falls short of complete performance within such period on account of the failure of some public official or board to perform a ministerial or administrative duty. He will not under such circumstances be penalized for the delay in official action (Coakley v. Mason Mfg. Co., supra; Industrial Com. v. Patterson, 65 Ohio Law Bull. 94), or denied the protection and benefits which the statute confers (Pace v. Volk, 85 Ohio St. 413, 416, 417, 98 N. E. 111; Heininger v. Davis, 96 Ohio St. 205, 213, 117 N. E. 229; Burchard v. State, 83 Ohio St. 1, 93 N. E. 199). His rights have been preserved, even when the misapprehension or inability of a judge has delayed action. J. D. Randall Co. v. Foglesong Mach. Co., 200 Fed. 741, 119 C. C. A. 185 (C. C. A. 6); Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 Fed. 350, 138 C. C. A. 612 (C. C. A. 6).

The demurrers to the second and third defenses are overruled, and an order may be taken accordingly.

THE CUSHING.
THE PROTEUS.

(District Court, S. D. New York. June 26, 1920.)

Collision ⊜40—Mutual faults of unlighted vessels meeting at night.

A collision at night, between Capes Lookout and Hatteras, between two steamships sailing without lights pursuant to war regulations and on courses nearly opposite, but on which they would have passed starboard to starboard, *held* due to faults of both; the north-bound vessel for changing her course to starboard under misapprehension of the other's course, without flashing her lights or signaling until a minute later, and the south-bound, which could see the other at a greater distance and knew her course, for not showing her lights and signaling and going further to port to allow more room.

In Admiralty. Petitions on behalf of the steamships Cushing and Proteus for limitation of liability arising out of a collision between them at sea. Both vessels held in fault.

These are two petitions for the limitation of liability arising out of a collision which took place on August 19, 1918, about 30 miles southwest of the Diamond Shoal Lightship, half way between Cape Hatteras and Cape Lookout, and about 20 miles off the coast. Both ships were American owned, and had been requisitioned by the United States for war purposes. The Proteus was steaming N. 50° E. true from Cape Lookout at about 13½ knots an hour. The Cushing was steaming in the opposite direction, S. 47° W. true at about 12½ knots. The moon was in the southwest, and therefore on the bows of the Cushing and on the quarter of the Proteus. The night was clear, though there were occasional clouds. Both vessels were sailing without lights in accordance with the orders of the navy.

The Cushing made out the Proteus over 10 minutes before the collision, rather narrow on her starboard bow, and after a few minutes, finding that her

bearing broadened, concluded that the ships would pass starboard to starboard. The Proteus did not make out the Cushing until between 2 and 3 minutes before the collision occurred, and then supposed her to be dead ahead, or very fine on her port bow. At once the Proteus put her helm hard aport and continued porting under full steam until the collision. Between a minute and a minute and a half after putting her helm over, and about the same interval before the collision, the Proteus blew a single blast, but continued under full headway, and failed to show her lights, which could have been switched on. Shortly after the Proteus hard-aported and, as the court concluded, after her blast, the Cushing ported, hard-aported, turned on her lights, and reversed her engines, at the same time giving three blasts. She was backing when the collision occurred, and her heading had changed about two points to starboard.

The collision was either at right angles or six points leading forward on the Proteus; the bows of the Cushing striking the Proteus a little abaft of amidships. The Cushing stood by, and took off the crew and passengers of the Proteus, which floated for an hour, and then sank, becoming a total loss.

Suits were brought against the Cushing by the Proteus and the cargo, and these limitation proceedings were thereafter commenced.

Charles C. Burlingham and Chauncey L. Clark, both of New York City, for the Proteus.

J. Parker Kirlin and William H. McGrann, both of New York City, for the Cushing.

T. Gatesby Jones, of New York City, for certain cargo of the Proteus.

LEARNED HAND, District Judge (after stating the facts as above). In this case the conceded facts seem to me to help dispose of much of the controversy, regardless of the testimony of the witnesses, based upon necessarily fugitive recollection. It is agreed that the Proteus, a vessel 390 feet long, with a speed of 13½ knots, was upon a course N. 50° E. true. It is further agreed that she made no maneuver except to hard-aport her helm and continue at full speed. If she had turned through an angle of eight points, as is practically certain, we can tell with much approach to certainty the position of her bow off her course at the time of the collision; i. e., what had been her "traverse." We can also tell how far she had advanced, measured along her projected course, from the point of porting; i. e., her "advance." The basis of this calculation I take from Admiral Knight's "Modern Seamanship," plate 93, p. 303. This shows that the "advance" of a ship 350 feet long is 453 yards, and for a ship 420 feet is 663 yards. The "advance" of the Proteus, on the basis of the smaller ship reckoning that the proportion is constant, would be about 1,514 feet; on the basis of the larger, about 1,845 feet. It is of course impossible to be exact, but it is reasonably safe to take it at 1,700 feet, and to say that the bow of the Proteus, when she ported, was 1,300 feet behind the place of collision, measured on her own projected course.

I shall show later that the stern of the Cushing had not yet left her course, taking her story of backing and porting at its full value. If she was headed two points to starboard, and her stern was on her course, her bow had made a "traverse" of a little over 150 feet, and as she struck the Proteus about amidships, the bow of the Proteus was

substantially crossing the projected course of the Cushing at the moment of collision. Since it is possible to find the "traverse" of the Proteus by the same means as her "advance," we can tell with very reasonable accuracy how far the courses were apart. By the same calculation as in the case of the "advance" I find the Proteus "traverse" to have been between 1,100 and 1,200 feet.

The distance actually covered by the Proteus is more difficult to estimate, and is not important, except as it fixes the time from her hard-over helm to the collision. Capt. Colomb (transparent diagram 4) gives to a vessel under similar conditions a change of about 5½ points in 85 seconds, a minute and a half. The distance covered by a boat 420 feet long computed on Admiral Knight's plate 93, is about 2,250 feet, and for a boat 350 feet long, 1,410 feet. If I take the distance covered by the Proteus at 2,000, it will not be far wrong. At the end of this time her speed is 60 per cent. of her initial speed. An average of 75 per cent. is not far wrong, or 10 knots an hour, say two minutes. This corresponds pretty well with Colomb's figure for a change of 5½ points, and is, all things considered, not very far off the estimates of all the witnesses, of between 2½ and 3 minutes.

I can now, I think, estimate fairly closely the position of the Cushing when the Proteus ported, taking the Cushing's version of porting and backing and a change of 2 points. Colomb's diagrams (transparent No. 4) for such a situation gives a change of a little less than two points at the end of 35 seconds. A change of 2 points would not take over forty seconds, and the "advance" is just about two lengths; i. e., 850 feet. The earlier part of the two minutes the Cushing was going at full speed, 12½ knots; a distance of say 1,600 or 1,700 feet. Her bow was therefore about 2,500 feet from the place of collision when the Proteus ported. At that time the vessels were about 4,000 feet away from each other; the Proteus bearing a little more than 1½ points on the Cushing's starboard bow. The estimate of 1 to 1½ miles of the Proteus' witnesses is not so far wrong as might be expected at night, and that of three-quarters of a mile made by the Cushing's witnesses would be close, if they had seen the original change of helm, though I do not believe they did, for reasons given later.

Knight, pp. 316–318, gives a somewhat different description of the behavior of a ship backing under a hard-aport helm; but it is to be observed (page 318) that the discrepancy between these authors disappears in cases where the helm is first put hard over and the vessel therefore begins to swing before she feels the effect of the screw. He says:

> "If the ship has actually begun to swing in obedience to a hard-over helm before the screw is reversed, she will in most cases continue to swing the same way in spite of the screw, although much less rapidly than if the screw were not reversed."

In the case at bar the helm was put over first to port and then hard-aport for some seconds before the engine was reversed. A very substantial part of a minute must also be allowed in the engine room (20 or 30 seconds, Brown). Besides, Bergman had to enter the wheelhouse to turn on the lights and go back to the bridge to reverse. It

is safe to say that the Cushing was quite all of 30 seconds under a port helm before the engines were reversed. This, if anything, makes the time of her swing of two points to starboard shorter than I have found.

The supposed bearing of the Cushing from the Proteus seems to me so clearly wrong that I can only account for it through the excitement of the moment. It is physically impossible that the Cushing should ever have been on the Proteus' port bow. The supposed bearing of the Proteus from the Cushing is stated by the witnesses generally to have been 1½ points at 5 miles, but that is equally impossible. At 5 miles the Proteus would have borne about 5 degrees on the Cushing's starboard bow, if the courses had been exactly parallel or 8° in fact. This bearing broadened till it was a little over 1½ points when the Proteus ported. However, it is not likely that during the earlier part of the Proteus' swing her changed helm without side lights could be noticed from the Cushing. For nearly half her "advance" her mass continued on her old course, and meanwhile the Cushing was advancing. At about the time when she began to make in upon the Cushing she bore substantially more than 2 points on her starboard bow. It was not far from that time when the Proteus blew her whistle, and this I think is the first moment when Bergman became aware of her maneuver. His estimate of bearing is not so far wrong, then, though the distance had become about half a mile, not three-quarters. I remember that he says he could tell the change in the range of the masts, and saw her swing before this, but I think this most unlikely. The angle subtended by the masts at that distance and seen so nearly ahead was small. It is clear from the log that he did not act till he heard the whistle, and that was about the time when he could first have seen any change, unless by the range of the masts. If he had in fact seen the Proteus start to cross his bows, I can scarcely believe that he would have waited at all to act as eventually he did act. Besides, his vessel would have been in a different position, had he been backing and hard-aporting for so long. Taking all the evidence, it appears to me the more reasonable conclusion to suppose that he did not, as he supposes, see so finely as to observe the masts come in range, but that he saw the Proteus swing in and heard her whistle, and that then he did what he says.

I am, of course, aware that deductions of the foregoing sort are proverbially hazardous. In this case, however, they are founded on unusually certain data, and, what is perhaps more, they correspond surprisingly well with the observations of the witnesses where these are not in conflict. As to the period of the Cushing's backing, her testimony rests entirely upon estimates made at a moment of great excitement, except that of the engine room, the entries in whose log I am unfortunately forced to conclude, from inspection, have been tampered with.

Such being the facts, as I find them, the fault of the Proteus is open and unquestioned. To take but one, the failure to sound her whistle until midway on her swing cannot be shown not to have contributed to the collision. For the greater part, perhaps the whole, of the interval between her hard-aport helm and her whistle she was still on her

course. I have concluded that Bergman failed to act for probably a minute after she in fact put her helm over, and had he not so waited the collision would not have happened. If he had got a single blast at once, as he should, it is of course impossible to say that he would not have acted.

Furthermore, it seems to me a clear fault not to have switched on her lights at once when she began to maneuver. Whatever latitude is to be allowed to commanders because of submarines, the period of caution ends when the ships begin to avoid collision. The Larchgrove, 1 Lloyd's Hist. Rep. 498. Had the Proteus done so, Bergman would have seen the red light open before he did in fact notice any change in course. These two faults I find, and it is not necessary to consider the more doubtful question of the sharpness of her lookout. That the case was not one of head-on meeting, but of starboard to starboard, appears plain. I think it indistinguishable from the case of The Worsley Hall, mentioned below.

As to the Cushing, the question is, indeed, more embarrassing. In spite of Bergman's admission that he saw the masts swing into range, I have, for the reasons I have given, concluded that he did not observe the Proteus' change of course until her mass began to move towards him, at about which time he heard her whistle. It is quite impossible in my judgment to convict him of any delay in the remaining period, or the ship either, assuming two men should have been on the bridge, as they should. He had not much more than a minute to do everything, and he succeeded in getting his helm over and his ship backing for a period of over half that time. Of course, the calculations are not to be taken exactly; but this very fact forbids holding him at fault. I am aware that it is a somewhat strong finding, in the face of his admissions, to say that he did not see the change earlier; but I can only add that it is clear that, as he was certainly keeping a sharp lookout and was ready to act, it seems to me incredible that he should have waited after he became aware of the Proteus' perilous undertaking. If the Cushing was at fault, it was for letting matters come to such a pass that the emergency could arise at all.

The Cushing had had the Proteus under observation for at least 10 minutes, and had pretty clearly made out her course. Bergman assumed, though he clearly had no right to do so, that the Proteus had equally made him out. He had every advantage in seeing, and it was clearly negligent not to consider his own low visibility at night to one peering away from the moon. He knew, also, at least he was charged to know, that he only had a berth of about 3 lengths, and that, while all would be well if the Proteus kept her course, he was dealing, not with mechanical forces, but human beings, whose automatic conduct, when surprised, is not absolutely predictable. In short, he had no right to suppose anything about the conduct of the Proteus if surprised in a narrow berth, unable to make out without lights what was the course and speed of another ship close aboard.

What he had reason to expect actually happened. The Proteus made him out, misunderstood his position, and did exactly the wrong thing. It was then too late. Now he had had it entirely in his hands

to avoid just that emergency. I quite agree with his conclusion that it was not a case of article 18 at all, because the two vessels would "pass clear of each other," if both kept their courses. The English cases earlier than The Worsley Hall, H. of L. Dec. 19, 1919, so far as they may be to the contrary, are no longer to be considered as English law. To have ported and crossed the Proteus' bows would have been improper and hazardous, and it was not in the least necessary. Yet it does not follow that he should have kept on without giving warning. All cases are necessarily of special circumstance in which the ships run without lights; the rules, of course, presuppose that the courses of all ships shall be declared to each other, so that they shall be able to navigate accordingly. Though Bergman knew that he could pass clear, he should have used a caution measured by the consideration that the Proteus might not have the same knowledge.

He was bound, I think, either to flash or set his lights, or to give her a wider berth. If he had given as his reason for not showing his lights earlier that he was afraid of submarines, I should not, perhaps, hold his decision wrong; that being the judgment of the master pro hac vice as to when an emergency had arisen. But he does not give that as an excuse; on the contrary, he says that he supposed that the Proteus already saw him and was navigating accordingly. That, as I have said, he had no right to assume. It does not appear that he would not have thought the situation an emergency, if he had supposed that the Proteus did not see him. Hence it seems to me that he cannot be excused on a ground which he does not suggest, and because of a choice which apparently he did not make. At best it would have been proper to call Miller, the master, and let him make the choice whether the time had come to give some signal with the lights.

But I think it is not even necessary to assume this. Indeed, if he had given as his reason that in his judgment the time had not yet come under the navy orders to flash or set his lights, I should still think his navigation improper, because the very fact that he could not give the usual information of his presence, and so set in operation as it were the steaming rules, that very fact imposed upon him the duty to insure against the possibility of danger arising from the special circumstances in which he was forced to steam. All that he need have done, when the Proteus' course was once made out, was to ease off to the south, and give her an ample berth, a maneuver which would, in addition, have involved in its execution the clear warning of a double blast. It cannot be reasonable for a master under such circumstances to hold his course through thick and thin, because from his superior position he and he alone can see that all will go well if neither ship changes her helm.

No rule forbade this; he was not bound to hold his course, and he had open sea on his port hand. It required but a little easing of his helm during the period of at least 5 minutes after he had made her out and before she saw him. The most common prudence would have suggested that he make his scanty assurance doubly sure. Why he should have so persistently held a course which brought him to such close quarters is inexplicable, except upon the assumption that he slavishly

followed the letter of the master's orders, or was unwilling to rouse him. I find the Cushing at fault because, with the fullest possible notice, she failed either to warn the Proteus of her advance or to put between them a safe distance.

It is quite true that both in her own petition and in her answer to the Cushing's petition the Proteus alleges as a fault the supposed starboarding of the Cushing; but that is quite another matter. It refers to a starboarding after the Proteus ported, which never took place. The fifth and seventh charges of fault include failure to warn the Proteus, and the eighth is a general charge of failure to take precautions when the risk of collision should have become apparent. I think that that risk did become apparent as soon as the Cushing saw or should have seen that the vessels would pass so close that a confusion or misunderstanding of their courses on the part of the Proteus might result in collision.

In The Worsley Hall, H. of L. Dec. 19, 1919, a very closely similar situation was held not to be a head-on case, but one of passing starboard to starboard. The ship corresponding to the Cushing was entirely relieved upon closely analogous navigation to that of the Cushing here. Yet there is one difference which appears to me to be of final importance between that case and this. There the ships made each other out about 1½ miles off, and the Worsley Hall, as soon as she got the loom of the Ioannis Vatis, at once uncovered her lights, which the Ioannis Vatis did not do. 1 Lloyd's List. Rep. 414. At least this was alleged in the case made by the Worsley Hall, and was not denied by the Ioannis Vatis. As the joint speeds of these two ships was 18½ knots, this was over 4 minutes before they would have met. That time would have been ample in the case at bar to avoid collision, even if the Cushing had waited, as the Worsley Hall did not, for a very substantial period after she discovered the Proteus. The case cannot be taken for more than that such a situation is a starboard to starboard meeting, with which I humbly agree, and that the navigation of the Cushing in extremis was free from fault in the case at bar. The other cases of ships without lights decided in England do not appear to me to be relevant. This, so far as I am advised, is the first case which has arisen in this country.

I find it impossible to reach any but a speculative conclusion, based upon the Cushing's camouflage, and in any event it appears to me to be irrelevant.

TEXAS CO. v. BROWN, Commissioner of Agriculture of Georgia, et al.

(District Court, N. D. Georgia. June 28, 1920.)

No. 143.

1. **Commerce ⇐51, 72—Oil inspection law, with fees largely exceeding cost, void as to interstate commerce.**
   Park's Ann. Pol. Code Ga. § 1800 et seq., providing for inspection of petroleum oils, and fixing the fees therefor, which aggregate many times the cost of the inspection service, *held* a revenue statute, and unconstitutional, as imposing a tax on interstate commerce as applied to oils brought into the state for sale in the original containers and so sold, but valid as to oil imported for indefinite storage or for sale after breaking the original package.

2. **Inspection ⇐6—Foreign corporation liable for cost of inspection.**
   Payment by a foreign corporation of a general tax for doing business in the state does not exempt it from liability for the cost of inspection of an article in which it deals.

3. **Inspection ⇐2—Taxation ⇐40(2)—Oil inspection law valid under Georgia Constitution.**
   A statute exacting graduated fees for inspection of oils *held* not a tax on property, nor in violation of Const. Ga. art. 7, § 2, providing that "all taxation shall be uniform on the same class of subjects, and ad valorem on all property subject to be taxed."

   Walker, Circuit Judge, dissenting in part.

In Equity. Suit by the Texas Company against J. J. Brown, Commissioner of Agriculture of the State of Georgia, and others. Decree for complainant.

James L. Nesbitt, of New York City, and Rosser, Slaton, Phillips & Hopkins, of Atlanta, Ga., for plaintiff.

Clifford Walker, Atty. Gen., and Brewster, Howell & Heyman and Mark Bolding, all of Atlanta, Ga., for defendants.

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

SIBLEY, District Judge (with whom concurs BEVERLY D. EVANS, District Judge). By a law of Georgia, passed in 1890 (Park's Pol. Code, § 1800 and following), kerosene and petroleum and products thereof were required to be inspected under specified standards, for which fees were fixed of one-half cent per gallon for lots exceeding 400 gallons, and a larger fee for smaller lots, the fees to be paid monthly into the state treasury, less certain amounts, not to exceed $100 per month, which the inspectors might retain as their compensation. In 1912 this act was extended expressly to gasoline, benzine, and naphtha. Park's Code, § 1809(a). In 1913 (Park's Code, § 1809[e]) the provisions of the last-named act were made applicable, not only to gasoline, benzine, and naphtha sold or offered for sale in Georgia, but also to those sold elsewhere and brought into the state of Georgia for consumption or use by the importer. No question upon this last-named act arises in this case, as the products involved are not

imported for consumption by the importer. By a criminal enactment (Park's Penal Code, § 642) it is provided:

"If any person shall sell, or keep for sale or in storage, any crude or refined petroleum, naphtha," gasoline, benzine or kerosene "without having the same inspected and approved by an authorized inspector, he shall be guilty of a misdemeanor."

The petitioner, a corporation of another state, is an importer of kerosene and gasoline, made or bought by it in other states and brought by it in interstate commerce for sale in Georgia, in tank cars of about 8,000 gallons each, which sometimes are sold in bulk and sometimes broken for retail, or their contents stored. It is shown, and not denied, that for years past the receipts by the state from inspection fees have been many times the salaries of inspectors and other costs of inspection, and thereupon it is claimed that the law operates as an unconstitutional burden upon interstate commerce, and that it is also in conflict with the tax provisions of the state Constitution, and an injunction is prayed against its enforcement as against petitioner's business.

[1] 1. The inspection is obviously an exercise, primarily, of the state's police power. Petroleum products may constitutionally be inspected while still in interstate commerce, even at the state line, and an accompanying fee, which does not obviously and largely exceed the cost of inspection, is a part of the inspection and equally allowable under the police power. Pure Oil Co. v. Minnesota, 248 U. S. 158, 39 Sup. Ct. 35, 63 L. Ed. 180. A so-called inspection fee, however, which obviously and largely exceeds the cost of inspection, is not so justified and cannot be imposed by a state upon interstate commerce. Standard Oil Co. v. Graves, 249 U. S. 389, 39 Sup. Ct. 320, 63 L. Ed. 662; Foote v. Maryland, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698. Such a fee, though imposed professedly as an inspection fee, and under the police power, is really a tax, and must be justified as an exercise of the taxing power, if at all. Accordingly the licensing of occupations, which is properly an exercise of the police power, may be accompanied by the exaction of fees for revenue. Notwithstanding the police guise, these are taxes, and stand or fall as such. License Tax Cases, 5 Wall. 462, 18 L. Ed. 497; Royall v. Virginia, 116 U. S. 572, 6 Sup. Ct. 510, 29 L. Ed. 735. Such exactions may be referable to both the police and the taxing powers at the same time, and are valid if sustained by either or both powers.

"It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfils the two functions—one a regulating and the other a revenue function. So long as the state law authorized both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the federal Constitution." Gundling v. Chicago, 177 U. S. 189, 20 Sup. Ct. 633, 44 L. Ed. 725.

Disregarding names, therefore, and going to the substance, the exaction sub judice, though called a fee, and imposed in connection with

an inspection, is found, not only to greatly exceed the cost of inspection, but to have been intended to raise revenue. The charge for inspecting a tank car of petitioner's oil is $40, but under the law the inspector can keep but $10 for his services and, when his retentions reach $100 per month, the whole of it is paid into the state treasury. Actual trial of the law has showed, for many years, an income to the state many times the cost of executing the inspection law. The fees were not reduced by the Legislature, but the law was amended and extended, and the revenue increased, and has been specifically appropriated from year to year to the support of certain public institutions. Both in purpose and in effect, the law is a revenue law.

Regarded as such, this case is ruled as to the federal question by that of Askren v. Continental Oil Co., 253 U. S. ——, decided by the Supreme Court April 19, 1920, 40 Sup. Ct. 355, 64 L. Ed. ——. In that case inspection is not prominent, but a license tax was imposed on dealers, and in addition an excise tax of 2 cents per gallon on oil sold or used. But the inspection fee of the Washington statute dealt with in the Graves Case, supra, which is quite similar to the Georgia law, was referred to as a tax because in excess of the cost of inspection; the court saying:

"As to gasoline brought into the state in the tank cars, or in the original packages, and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in Standard Oil Company v. Graves, 249 U. S. 389, 39 Sup. Ct. 320, 63 L. Ed. 662, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed, what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the federal Constitution the importer of such products from another state into his own state for sale in the original packages had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case, and the cases therein cited, as establishing the proposition that the license tax upon the sale of gasoline brought into the state in tank cars, or original packages, and thus sold, is beyond the taxing power of the state."

We accordingly hold the Georgia statute unenforceable as against the importations by petitioner intended to be sold in the original packages and so sold.

In the Askren Case, as to the portion of the plaintiff's business that consisted in selling gasoline at retail, though brought into the state of New Mexico from another state, it was said:

"So long as there is no discrimination against the products of another state, and none is shown from the mere fact that the gasoline is produced in another state, the gasoline thus stored and dealt in is not beyond the taxing power of the state. Wagner v. City of Covington, decided Dec. 8, 1919. Sales of the class last mentioned would be a subject of taxation within the legitimate power of the state."

We accordingly hold that the importations of petitioner which are indefinitely stored within the state, or are resold there after breaking the original packages, are subject, not only to inspection, but to the tax imposed, so soon as the interstate transportation of them is ended.

The fact that such oils must inevitably meet the tax before they can be used otherwise than for sale in the original packages is not material. This is true of all general taxation. If there is no discrimination because of their being imported, they pass under the taxing power of the state, as under its protection, so soon as they pass out of interstate commerce by a sale or breaking of the original packages by the importer, or by indefinite storage. General Oil Co. v. Crain, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754; American Steel Wire Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538; Banker v. Pennsylvania, 222 U. S. 210, 32 Sup. Ct. 38, 56 L. Ed. 168; Bacon v. Illinois, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615, 23 L. Ed. 825.

[2] The pleaded payment of the general corporation tax for doing business in the state is not a relief from taxes such as these. Home Insurance Co. v. Augusta, 93 U. S. 116, 23 L. Ed. 825. The act imposing the corporation tax, moreover, expressly provides that the corporation tax is "in addition to all other taxes now required of them by law," and "the payment of this tax shall not be construed so as to relieve the corporation or agent of any other license or occupation tax whatever." Acts 1918, p. 54.

Nor is there any difficulty about the severability of this tax as between taxable and nontaxable oil. Even where a lump sum was laid on a business which included both interstate commerce, which was not taxable, and intrastate business, which was, the tax was held enforceable as to the latter. Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663. When, as here, there is no lump tax, and the subjects of taxation are readily separated as being either interstate commerce or otherwise, no question of severability can possibly arise. Ratterman v. Western Union Tel. Co., 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; Singer Co. v. Alabama, 233 U. S. 304, 34 Sup. Ct. 493, 58 L. Ed. 974.

[3] 2. Passing to the question of the state Constitution (Railroad Co. v. Garrett, 231 U. S. 301, 303, 34 Sup. Ct. 48, 58 L. Ed. 229), article 7, section 2, provides:

"All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The tax here in question is not ad valorem, and, if a property tax, is in conflict therewith. While the occasion of the tax is property, and its burden falls upon property, and for many purposes the property might be said to be taxed, we think the tax on property referred to in the Constitution is a tax imposed on the ownership of property. In Johnson v. Mayor, 62 Ga. 646, taxes thus levied "for each and every one-horse wagon, one-horse dray, or one-horse express wagon, hauling in the city, $25; for each two-horse do., $50," and similar impositions, were held not on property, but on business, and not in conflict with the Constitution. A similar ruling was made in Davis v. Mayor, 64 Ga. 128, 37 Am. Rep. 60. In the leading case of Atlanta Association v. Stewart, 109 Ga. 80, on page 87, 35 S. E. 73, 76, while dealing with a state tax of "one dollar for each telephone station or box," it is said:

"Can this be claimed to be a tax on property? There is not the slightest hint that the value of the box or station has any connection with the tax. For a station or box worth $25 the company would pay $1; for another costing or worth $1,000 it would pay exactly the same. No effort is made to ascertain value, or to deal with property as to its value. The company might have a building and real estate worth $1,000,000, and furniture and other property worth $10,000, or it might have no property, and operate with rented property; but this clause has no reference at all to property, and would be the same in either case. It simply refers to the number of stations or boxes rented or used. A tax on a person, graduated according to the number of a certain kind of articles, apparatus, or machines employed by him or it, without regard to value, is unquestionably not a property tax, but an occupation tax."

A similar ruling was made as to a tax on gross receipts. The tax on inheritances was held not to be a property tax, but a privilege tax, and valid, though not ad valorem, in Farkas v. Smith, 147 Ga. 503, 94 S. E. 1016.

There are difficulties about terming this oil tax an occupation tax, for it is not payable by each person who successively stores or sells the oil. It more resembles excises commonly laid by the United States upon articles and transactions evidenced by stamps or brands affixed to the articles. Perhaps it is best described by the term "privilege tax," used by the Supreme Court of the similar inspection fees in the Graves Case. The Legislature, by reason of the danger of oils whose qualities are uncertain, might have prohibited the storage or sale of them, and certainly could unless they be inspected. The privilege of storage and sale after inspection is what the tax is for. But it is unnecessary to name it, if it be not a property tax.

The other provision, "taxation shall be uniform on the same class of subjects," is not offended. The peculiarities of oils and the handling thereof are such as to make them reasonably a subject of classification. Since the law requires the inspector to travel as much as 30 miles to inspect, expenses and mileage being paid by the state (Park's Code, 1806), it is evident that inspection of the smaller lots of oil might be at a loss. There is thus reason for the subclassification as to quantity, with a higher fee for smaller lots. Sawtell v. Atlanta, 138 Ga. 687, 75 S. E. 982; Farkas v. Smith, 147 Ga. 503, 94 S. E. 1016. The Georgia Constitution forbids no form or mode of taxation generally permissible, but only requires specified uniformities. The form of taxation by excessive fees for so-called inspection of many articles has been for many years resorted to for revenue. Many public officers have been put on salaries, and their fees which exceed their salaries required to be turned into the treasury. This long-continued and unquestioned practice, in the absence of any decision by the state courts, would make us reluctant to declare the act in question contrary to the state Constitution.

It will accordingly be adjudged that the collection of inspection fees, so called, be enjoined and restrained in respect to oils imported by the petitioner for sale in the original package and so sold, and that an injunction will be refused as to oils imported for indefinite storage or for sale after breaking the original package.

WALKER, Circuit Judge (dissenting in part). I concur in the conclusion that, as to oil imported by the plaintiff for sale in the containers in which it is brought into the state, and so sold, the collection of the inspection fees should be enjoined; but I do not concur in the conclusion that, as to oil imported for use or sale, the prescribed fees may be exacted upon the removal of such oil from the containers in which it was imported.

I am unable to find any basis in the provisions of the statute in question for the conclusion that it is anything but an inspection measure. The fees prescribed cannot well be considered as exacted for anything but inspection, where nothing is required but inspection and payment for it, the payment not conferring on the payer any right or privilege not equally possessed by others who, without paying such fees, may use, keep, or store for sale, or otherwise deal in, the inspected oil. The statute is materially different from the one which was passed on in the case of Askren et al. v. Continental Oil Co. (April 19, 1920) 253 U. S. ——, 40 Sup. Ct. 355, 64 L. Ed. ——. The statute there in question was held to impose a tax upon the privilege of dealing in gasoline in the state of New Mexico. It did not require any inspection of gasoline. It imposed a tax on the privilege of dealing in that commodity. It was held that, so far as such dealing was in imported gasoline while still in the containers in which it was imported, it was not subject to the tax.

The statute now in question exacts the payment of fees for inspecting oil, and does not tax oil as property in Georgia, or the privilege of dealing in it there. By it the police power of requiring oil to be inspected before it is used or sold is so exercised as to be the means of raising a large revenue for the state. To sustain the statute to the extent indicated in the foregoing opinion requires the affirmance of the proposition that, as to imported goods, which, with intent to use or sell them, have been removed from the original containers in which they were brought into a state, a charge for inspection grossly in excess of the expenses involved may be exacted as the price of such goods becoming the subject of lawful use or disposition in the state. In Standard Oil Co. v. Graves, 249 U. S. 389, 39 Sup. Ct. 320, 63 L. Ed. 662, it was decided that such an inspection charge on imported goods is an unauthorized burden on interstate commerce, "certainly while the same are in the original receptacles or containers in which they are brought into the state."

So far as the writer is informed, it has not been authoritatively decided that the payment of an excessive inspection fee may be made the price of protecting imported goods, even after they have been stopped in a state and been removed from the containers in which they were brought in, from being treated as contraband or outlawed. If such an obstacle may be put in the way of imported commodities acquiring the beneficial qualities of property, the prohibition of interference with interstate or foreign commerce may easily be defeated. If such an exaction is not subject to the limitation imposed on inspection charges, then all imported commodities, whether properly subject to inspection or not, may be subjected to such exactions as a state may choose to impose as conditions precedent to their acquiring the capacity of be-

ing lawfully dealt in. As to such a commodity the charge amounts to a toll on the movement of it into domestic commerce. It is believed that as to oil coming from beyond the borders of the state the limit of the allowable toll on its transition into intrastate commerce is the reasonable expense of ascertaining if it is fit for use or sale.

It is not questioned that, as to imported goods which have been removed from the original containers in which they were imported, a state has the power of taxing either the goods as property, or the carrying on of any business or the exercise of any privilege in which the goods figure. This does not amount to saying that a state has the additional power of charging what it pleases as the price of such goods becoming the subject of lawful commerce or dealings within its borders. If a state can require the payment of such fees as those in question, it also may exact similar payments before shoes, hats, calico, nails, horse collars, or any kind of commodity can be used or sold. It is not believed that such an exaction properly can be regarded as a property, occupation, or privilege tax. No property, occupation, or privilege is taxed. If, on the ground that it is possible for a commodity to have its origin in a state, it may be subjected to such charges for inspection, there is an easy way of creating an obstacle to any imported commodity entering into the commerce of a state. No commodity which is a proper subject of inspection can be moved with the required freedom from one state into another, if it is subject to such an exaction as the one in question. If such an exaction can be made, without being kept within the limit fixed for inspection charges, any commodity coming into a state from beyond its borders may be met by a similar barrier. A denial of the state's right to make such exaction does not amount to a denial of its taxing power, or of its police power of making reasonable regulations for the protection of its people.

TRAYLOR ENGINEERING & MFG. CO. v. LEDERER, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. June 29, 1920.)

No. 6364.

Internal revenue ⇐9—Munition manufacturer's tax; net profits.

Where a corporation munition manufacturer entered into an agreement with two individuals by which, in consideration of their contributing to the expense of an agent sent to England to try to obtain a contract for furnishing munitions to the British government, and aiding by their influence and otherwise, not involving expense, in procuring and carrying out the contract, they were to share in proportion to the amount advanced in the profits made, and under which, the contract having been secured and performed, it paid them from the profits an amount approximately 1,000 times the amount of their contributions, the corporation *held* not entitled to deduct such payments from its gross profits in order to ascertain its net profits, subject to excise tax under Act Sept. 8, 1916, § 301 (Comp. St. § 6336¼b).

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

At Law. Action by the Traylor Engineering & Manufacturing Company against Ephraim Lederer, Collector of Internal Revenue. Trial to court, and judgment for plaintiff for part of demand.

F. B. Bracken, of Philadelphia, Pa., for plaintiff.

Robert J. Sterrett, Asst. U. S. Atty., and Chas. D. McAvoy, U. S. Atty., both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. In this case there was a waiver of the right of trial by jury, in accordance with the acts of Congress, and there is no controversy over the evidentiary facts. The defendant, as collector of internal revenue, exacted from the plaintiff the payment of a tax, and there is the equivalent of a stipulation with respect to the main question that, if this payment was unlawfully exacted, the plaintiff is entitled to judgment, but otherwise is not.

The legal merits of this main question are best presented by the grouping of three stories, which make up the whole story of the case, together with a sequel, which is thought to present the legal merits of the same story from a somewhat different viewpoint, or another phase of the legal character of the case.

The first story is that one man (whom we will call A.) advanced a sum of money, the exact amount of which we do not know, but which was about, and was assumed to have been, the sum of $666.67. It was advanced to the plaintiff as a contribution toward the expenses of a trip which a representative of the plaintiff was to make to Europe to seek to secure a munition contract with the British government. The conditions under which the advancement was made were a little indefinite in details, but they were in substance that A. was to share in the profits which the contract (if one was secured) ultimately yielded, in the proportion which his advancement bore to the total expenses of the trip. A contract was obtained, and ultimately proved so fairly profitable that A. received as his share the not unhandsome sum of $650,000.

The second story is that a second man (whom we will call B.) made a like contribution of another sum (which was afterwards treated as the sum of $500) under a like expectation of sharing in profits. This expectation was realized in the receipt by him of a like proportionate profit of $487,500.

The third story relates to the part the plaintiff had in the venture. It made and performed the contract, supplying everything required with such success that the venture yielded a total profit of $1,750,000, which it retained for itself after paying thereout the above shares. The original obligation assumed by the contributors does not seem to have extended beyond the risking of the respective contributions made. The contract brought back, however, was a large and important one, and gave promise of being profitable. It involved, among other things, the payment to the plaintiff of the sum of $1,000,000 as in effect, an advance payment for the shells to be manufactured, to enable the plaintiff to equip its plant for the production of the shells.

A bond was required of the plaintiff, with surety, to assure the British government against loss in making this advance payment. A.

and B., having gone into the venture, were, of course, interested in its success, and did what they could to promote it. This took the form (and the assistance rendered was without doubt real and substantial) of letters of introduction to persons in London, whose assurances of the ability of the plaintiff to perform and its responsible character were accepted by the British Secretary of State for War.

The securing of a surety on the bond required that the surety company should be indemnified, and A. and B. (each a man of large means) became the indemnifiers. It was of very practical advantage to have proving grounds in this country, at which the shells could be tested, and A., whose relations with the Bethlehem Steel Company were friendly, interceded and obtained for the plaintiff the use of the Bethlehem Company's ballistic equipment.

When the agreement, as originally made, came to be put in writing, the draftsman was a little put to it to expand the consideration flowing from A. and B., and to this end recited what they had already done, and added a very sweeping, but indefinite, undertaking that they were to do what they could to further the success of the venture. In fact, however, they were not called upon to do anything beyond what has been stated. The use of the proving grounds was a privilege which the plaintiff valued, and its president has put of record the expression of his opinion that it could not have been secured without the assistance of A. It may be, however, that convenient proving grounds could have been secured for something less than the over $1,100,000 paid A. and B.

Congress, by the Act of September 8, 1916, imposed (inter alia) an excise tax upon manufacturers of munitions, measured in amount by 12.5 per cent. of the profits made on munition contracts. The motive and purpose of the law was to reach so-called war profits. The main question raised and discussed is whether the $1,137,500 received by A. and B. enters into the measurement of the tax liability which plaintiff does not otherwise dispute. None, of course, would have the hardihood to deny either that the $1,137,500 was profit, or a profit, made by a manufacturer of munitions, and the plaintiff cannot deny this, because the obligation, which it recognized, to pay A. or B. anything, was dependent upon this fact.

The first and main point made by counsel for plaintiff, in his characteristically clear-cut argument, is not based upon a denial that the money paid A. and B. was part of the profits made on the contract, but upon the denial that this part of the profit was made by the plaintiff. It is confidently asserted, on the contrary, that the payment made to A. and B. was an expense to the plaintiff, the obligation to pay which had been (whether in the exercise of good judgment or not) in good faith incurred, and plaintiff could no more escape the payment, or be made answerable for it as a profit, than in the case of wages and bonus paid to its employés.

Just here it is to be observed that the question is not whether the payment to A. and B. was to them as creditors or distributees of a dividend from earnings, but the narrower question of whether the sums paid them are within the deductions which may be made from gross receipts, in order to determine the profits as defined by Con-

gress. Plaintiff's contention is that the deductions allowed by Congress in any fair view include all compulsory payments, whether strictly within the phrases of "running expenses," "management," or any one of the several expressions used to define the allowed deductions or not.

The same thought, differently expressed, is that it was the intent of Congress that the taxpayer should contribute only out of what he made and retained for himself, and not out of what he was obliged to pay out to others, before what were to him profits appeared. As a general abstract proposition this must be accepted. It still remains, however, the province of Congress to determine the mode by which excise taxes are to be measured, and if by profits, to define that term. There is a very practical necessity for doing this, because otherwise distribution of profits could easily be made to assume the guise of the payment of a debt.

Without any thought of escaping the payment of taxes, but to bring about what is believed to be a more just distribution of profits, it is not unusual to pay dividends, in the form of salaries, to executive officers of corporations. The illustration of wage bonus used in presenting the argument of counsel for plaintiff is one for which he is not responsible. Whether in strict principle even this, if measured by and dependent upon profits, is within the deductions allowed by the act of Congress, the distinction between an ordinary wage bonus and the case of what is really a division of profits is that the one bears a normal relation to the value of the service rendered; the purpose of the payment of the bonus being to stimulate the wage-earner to add to the productiveness of his labor, but the other has no such normal relation.

Without prolonging the discussion by going into all the refinements of the argument, we rest the ruling now made upon the broad proposition (concretely stated with respect to the facts of this case) that it is not the meaning of the act of Congress that a corporation may pay out of its profits to those interested with it in a common venture $1,000 for every dollar such persons have put into the venture, nor that it may pay them $1,000,000 as a premium for going on a surety bond for that sum, and thereby reduce the measure of the excise tax which the corporation would otherwise have been called upon to pay. The reason is that obviously such payments are not made as compensation for moneys advanced or services rendered, but are made by way of distribution of profits among the joint ventures, and what is more to the point the act of Congress does not permit deductions to be made for such payments before finding what are the profits made within the meaning of the taxing law.

This brings us to the sequel to the stories already told, which is, as told by the plaintiff, that the profits made, and because of which this tax was levied, were made, not by the plaintiff, but by A. and B., and that there is no more justification for demanding payment of their taxes from the plaintiff than there would be to demand of them payment of the tax assessed against the plaintiff. This view, and the further position that the act of Congress is not retroactive with respect

to the person taxed, is taken because the exaction of the tax is sought to be justified on the theory that the profits made were made by the "partnership" or "association" made up of the plaintiff, A., and B., and that the act of Congress authorizes the enforcement of the collection of the tax from the plaintiff; the partnership, or association, having ceased to exist.

The argument denying the act to be retroactive as affecting the taxpayer is summed up in the statement that, although the taxable year is made to begin on January 1 before the enactment of the law, the taxpayer subjected to the payment of the tax is one engaged in the manufacture of munitions at the time of the passage of the act. The view we have taken makes it unnecessary to go into this phase of the case. This contract belonged to the plaintiff, and was performed by it. The plaintiff was a munition manufacturer, taxable as such. The profits made were its profits, and received by it. The ruling is based upon the answer to the question of what were the profits which measure the tax. Is it the amount of profits as reduced by the payments to A. and B., or before such payments? The answer is, before the payments.

This conclusion calls for a judgment in favor of defendant. There was, however, payment of a further tax exacted, into which there is no need to go, because the defendant concedes that plaintiff is entitled to judgment for this.

Plaintiff may enter judgment for this sum, with costs, and the judgment so entered is incorporated herewith, to bear date, however, from the date of entry. If the parties cannot agree upon the amount, we retain jurisdiction of the case for the purpose of making the finding.

CONSOLIDATED TEXTILE CORPORATION v. DICKEY et al.

(District Court, N. D. Georgia. June 29, 1920.)

No. 144.

1. Courts ⇐272—Federal court without jurisdiction of personal suit between nonresidents; "suit to enforce lien or remove incumbrance."

A suit by a stockholder of a corporation to cancel an agreement between other stockholders creating a voting pool of their stock is not one to enforce a lien or remove an incumbrance, within the meaning of Judicial Code, § 57 (Comp. St. § 1039), and under section 51 (section 1033), where complainant is a nonresident of the district, it cannot be maintained against a defendant, who is also a nonresident, over his objection.

2. Corporations ⇐190—Party to pooling agreement indispensable party to suit to cancel or enjoin enforcement.

To a suit by a stockholder to cancel a pooling agreement between holders of a majority of the stock, not unlawful in itself, but the alleged purpose of which is the making of a contract employing one of their number as sales agent of the corporation, and to enjoin the making of such contract, such proposed agent *held* an indispensable party defendant, and the suit *held* not maintainable, where he could not be brought within the jurisdiction of the court.

In Equity. Suit by the Consolidated Textile Corporation against James L. Dickey and others. On motions to dismiss. Motions sustained.

King & Spalding, McDaniel & Black, and Anderson, Rountree & Crenshaw, all of Atlanta, Ga. (E. R. Black, Clifford L. Anderson, and Sanders McDaniel, all of Atlanta, of counsel), for complainant.

Reuben R. Arnold and Brandon & Hynds, all of Atlanta, Ga., for defendants.

SIBLEY, District Judge. The petition is brought by the Consolidated Textile Corporation, a corporation of Delaware, against Floyd W. Jefferson, a citizen of New Jersey, and James L. Dickey and six others, citizens of Georgia and residents within this district.

Briefly stated, it sets forth that the plaintiff was engaged in acquiring the ownership or control of a majority of the stock in the Exposition Cotton Mills, a Georgia corporation, when Floyd W. Jefferson pursuaded some of the stockholders who were dealing with the plaintiff to discontinue their dealing and to join him and the other defendants in pooling a majority of the stock of the Exposition Cotton Mills under a voting trust agreement in which Jefferson and the other defendants were to be the voting trustees, irrevocably authorized to vote the pooled stock as a majority of them might decide, the pool to continue until December 31, 1922, with the right of a majority of the pooled stock to extend it until December 31, 1927; the stock to be transferred to First Trust & Savings Corporation as trustee of the title thereto.

It is alleged that the purpose and agreement in making the pool was that Floyd W. Jefferson, or some corporation represented by him, should be appointed sales agent for the Exposition Cotton Mills for the period covered by the pool; the terms of his intended contract as agent not being set forth, nor any allegation made that they were unlawful or imprudent. It is stated that, to induce other stockholders to join the pool, the declaration of a stock dividend was promised, though under the charter of the corporation its stock can be increased only by a vote of two-thirds of the stockholders. It is averred that a bare majority of the stock is in the pool, that the shares have been transferred to the trustee, and that the voting trustees will, unless restrained, elect themselves as directors, recommend and have issued the stock dividend, and make the sales contract which is in contemplation.

The relief prayed is that the pooling agreement be declared null and void, and that it be delivered up and canceled; that the voting trustees be enjoined from exercising any power as such, or dealing with the pooled stock under the terms of said agreement; that they be enjoined from making any contract with the defendant Jefferson as sales agent upon any terms; and that the defendants, who are directors of the mill, be enjoined from using their power as such to declare a stock dividend or change the status of the mill as to its capital or surplus.

The defendant Jefferson moves the dismissal of the bill as to him, because this court is without jurisdiction over him as a citizen of New Jersey; and the other defendants move the dismissal on the ground, among others, that the Exposition Cotton Mills and the First

Trust & Savings Corporation are indispensable parties and are not made defendants, and that Floyd W. Jefferson is an indispensable party and cannot be held as a defendant.

[1] 1. Jefferson is not an inhabitant of the Northern district of Georgia, and under Judicial Code, § 51 (Comp. St. § 1033), cannot ordinarily be sued here. Although the jurisdiction is founded wholly on the fact that the suit is between citizens of different states, and might therefore have been maintained in the district of the residence of the plaintiff, the case is not helped thereby, for the plaintiff is a corporation of the state of Delaware. Nor does the joinder as defendants of persons who are residents of this district alter the case as to Jefferson. Upon any cause of action in personam he cannot be sued here without his consent. Camp v. Gress, 250 U. S. 308, 39 Sup. Ct. 478, 63 L. Ed. 997. The suggestion that under section 57 (Comp. St. § 1039) jurisdiction may be exercised over him by treating this suit as one "to remove any incumbrance or lien or cloud upon the title to real or personal property within the district," is untenable. The judgment in such a case is, by the language of the section, to—

"affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

It would be difficult to fix upon any property as the subject of the suit within the district. The title to none is in dispute. None is sought to be recovered. There is no incumbrance or lien or cloud upon the title to any property of the plaintiff in any ordinary acceptance of the term. While it is a suit to cancel a written instrument, that instrument does not purport to convey or affect the title of plaintiff to the shares it owns. The true cause of complaint is the conduct of the defendants in reference to their own property, which is claimed unlawfully and injuriously to affect the property of plaintiff company, a violation of the maxim "Sic utere tuo ut alienum non lædas." The unlawful use of a proxy to vote stock to the injury of another stockholder was treated as a tort in Witham v. Cohen, 100 Ga. 670, 28 S. E. 505, and such seems to be its true legal character. So concluding, the question is decided by Ladew v. Tennessee Copper Co., 218 U. S. 357, 31 Sup. Ct. 81, 54 L. Ed. 1069, where it is held that a bill to abate and enjoin a nuisance against inhabitants of the district and one who was an inhabitant of another state could not be maintained as to the latter under the provisions now found in section 57. This court, therefore, has no jurisdiction over Jefferson, and the suit must be dismissed as to him.

[2] 2. Thereupon the other defendants move a dismissal for want of parties indispensable to the relief sought, to wit, Jefferson, the Exposition Cotton Mills, and the First Trust & Savings Corporation. The two last named are within the court's jurisdiction, and as to them not dismissal, but a requirement to make them parties, would be in order; but if Jefferson be an indispensable party, since he refuses to submit to the jurisdiction, the court cannot proceed. It is apparent that the relief of cancellation invoked could not be applied, without either destroying the rights of Jefferson under the alleged agreements, he being unheard, or else leaving the other defendants exposed to litigation

with and possible liability to him. If the contract is either illegal or fraudulent, since he is a party to it and claims benefits under it, it ought not to be so declared without hearing him and binding him by the adjudication. It cannot be said that he is sufficiently represented in the other parties to it. The petition attributes to him special rights if the agreement be valid, and prays for special relief as to a further contract to be made with him. No one represents his special interests. It was so ruled in a similar situation in Ryan v. Seaboard Railroad (C. C.) 89 Fed. 397 (5). In Shields v. Barrow, 17 How. at page 139, 15 L. Ed. 158, indispensable parties are thus defined:

"Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. A bill to rescind a contract affords an example of this kind; for, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them, while it is set aside, and the contracting parties restored to their former condition, as to the others."

No difference is perceived between the case of a party to a contract seeking rescission and that of a person not a party seeking cancellation. See, also, Barney v. Baltimore City, 6 Wall. 280, 18 L. Ed. 825.

3. The same reasoning applies to the remedy by injunction. It is doubtless true that a direct and positive tort may, other necessary requisites of equitable jurisdiction being present, be arrested by injunction against persons about to commit it within the jurisdiction, though others interested in its commission be without the jurisdiction. One may be enjoined from destroying the shade trees of another though under contract so to do with a person beyond the reach of the court. But here none of the acts sought to be enjoined are in themselves a wrong to the plaintiff. The stock cannot be increased, as the bill discloses, without the concurrence of two-thirds of the stock, and upon the face of the bill an injunction is not needed to prevent that. The majority stockholders have the right to elect such directors as they desire, and to have them contract with whom they like to serve the corporation as sales agent, and they may exercise this right as well by proxy as in person. The foundation of the complaint is that they have contracted with Jefferson and each other so to do, and that the contract is such as to render illegal that which was otherwise legal. Its meaning and validity are the heart of the controversy. An injunction against some of the parties to it, effectually prohibiting the execution of it, would be equivalent to its cancellation. Neither remedy should be applied without jurisdiction over all the parties to it.

In Bank v. Carrollton Railroad, 11 Wall. 624, 20 L. Ed. 82, the plaintiff's right depended on a settlement of partnership affairs, one partner who had transferred his interest to the plaintiff could not be joined without ousting jurisdiction, and the bill was dismissed. In Ribon v. Railroad Companies, 16 Wall. 446, 21 L. Ed. 367, minority stockholders sought to set aside for fraud a sale of corporate assets which had been brought about by the majority. The corporation and the purchaser were made parties, but the majority stockholders and the

trustees of the mortgages which got the proceeds of the sale were not. The bill was dismissed; the court saying:

"The rule in equity as to parties defendant is that all whose interests will be affected by the decree sought to be obtained must be before the court; and if any such person cannot be reached by process—do not voluntarily appear, or from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties—the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable."

And see Coiron v. Millaudon, 19 How. 113, 15 L. Ed. 575.

In Northern Indiana Railroad Co. v. Michigan Central R. Co., 15 How. 233, 14 L. Ed. 674, the very remedy sought here, to wit, injunction, was sought against the building of a railroad in alleged contravention of exclusive rights of the plaintiff. The party defendant had contracted with New Albany Company, nonresident in the district and state, to do the work. It was said:

"In a case like the present, where a court cannot but see that the interests of the New Albany Company must be vitally affected, if the relief prayed for by complainants be given, the court must refuse to exercise jurisdiction in the case, or become an instrument of injustice."

On this and another ground the bill was dismissed. Similarly the Supreme Court, in a bill to annul the effort of majority stockholders to consolidate two competing railroads by pooling their stocks, the holding company having some analogy to a voting trustee, dismissed the proceeding for lack of parties, although they were beyond the jurisdiction of the court or would defeat the jurisdiction. Minnesota v. Northern Securities Co., 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499. Where corporate manipulation by the majority stockholders was attacked by the minority, an interested corporation was thought an indispensable party, though not subject to process, and the lower court dismissed the bill, which action was not disturbed by the Supreme Court in Bogart v. Southern Pacific Railroad, 228 U. S. 137, 33 Sup. Ct. 497, 57 L. Ed. 768; the question being held one of general law. By reason, therefore, of the circumscription of the power of this court, it is unable to grant the relief prayed for, and the bill must be dismissed without prejudice.

It would be vain as well as improper to pass upon any other question raised and argued, in view of the conclusion reached on this.

BERG v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. June 28, 1920.)

No. 4824.

1. Master and servant ⇐120—Shipowner liable for seaman's injury from defective appliance.

Failure of the owner of a barge to maintain in proper condition an eyebolt in the deck, which was a necessary appliance in using the donkey engine for hauling on another barge, *held* to render it liable for indemnity to a seaman, operating the donkey engine, whose injury was caused by the breaking of a hook, which, owing to the bent position of the eyebolt, could not be properly attached.

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

2. Admiralty ⇐2—Federal court has jurisdiction at law to enforce maritime right.

A federal court has jurisdiction of an action at law to enforce a right arising under the maritime law, where there is the requisite diversity of citizenship and amount involved, but such right is measured by the maritime law.

At Law. Action by Carl A. Berg against the Philadelphia & Reading Railway Company. On motion by defendant for new trial. Denied.

Karl G. Kirsch, of Philadelphia, Pa., and S. B. Axtell, of New York City, for plaintiff.

William Clarke Mason, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiff, a seaman on the barge Wiconisco, owned and operated by the Philadelphia & Reading Railway Company, received injuries on the barge while at sea, for which he brought suit to recover damages in a common-law action. The plaintiff was operating a donkey engine on the barge while in New York Harbor, where it, with a number of others, had been towed for anchorage because of threatening weather on a voyage fom Philadelphia to Portland. When the accident occurred, the Wiconisco was operating her steam winch in pulling up another barge. The hook had been caught into an eyebolt fastened into the deck to hold the snatch block in place, when the strain upon the line caused the hook to break, causing the snatch block to fly out and the line to strike the plaintiff's leg, causing the injury complained of.

There was evidence on the part of the plaintiff to show that the eyebolt was bent and twisted in such manner that, instead of the eye being upright, it inclined towards the deck to such an extent that the hook could not be inserted from below, and in inserting it from above the point of contact of the hook with the eyebolt was such that, instead of a direct pull upon the hook, it not being properly seated, its bearing upon the eyebolt was some inches nearer the point of the hook than if properly seated, and the leverage caused it to break. There was no latent or patent defect in the hook itself.

There was evidence on the part of the defendant that the accident was caused through the plaintiff's negligence in taking too many turns of the line around the drum before starting the winch.

[1] The cause of the plaintiff's injury was alleged in the statement of claim to be the failure of the defendant to provide a block and tackle and the attachments and fittings thereof for use on the donkey engine, of a sufficient size, adequate strength, and quality for the uses and purposes to which it was necessarily put, and in that no suitable tackle was provided by the defendant, its agents, servants, and employés, for the carrying on of the work required of the plaintiff on board the barge.

I think the eyebolt, without which the block and tackle used on the donkey engine could not have been employed in hauling in the other barge, is included within the "attachments and fittings," and that the evidence that the eyebolt was so bent as not to permit the seating of the hook to its normal position was sufficiently set out in the allegation

of lack of sufficient size and quality. The question whether the eyebolt was bent, and the bending caused the accident, was left to the jury, as was also the question of the plaintiff's negligence.

The charge of negligence and claim for indemnity is based upon the rule laid down in The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760:

"That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to such ship."

The defendant contends that, if there was a defect in the eyebolt, that fact was not evidence of unseaworthiness, relying on the cases of Hanrahan v. Pacific Transport Co. (C. C. A.) 262 Fed. 951, and The Santa Barbara (C. C. A.) 263 Fed. 369.

In the Hanrahan Case the injury arose from the temporary absence of a handrail while the vessel was lying alongside the wharf discharging cargo, and the plaintiff, who was also suing at law for a maritime injury, was held not entitled to indemnity, because, if there was negligence which caused the injury, it was the negligence of the master or other officers in not placing or causing to be placed in position the handrail. There was no charge in the case that no handrail had been supplied, or that it was out of order, but merely that it had not been put up.

In the Santa Barbara Case, the negligence charged was a failure to maintain in position while at sea a chain for use in cleaning the smokestack. In Judge Hough's opinion, he says:

"The chains were supplied; whether unseaworthiness would have resulted, had that not been done, is a matter not before us. Whether they should be 'maintained,' or retained in the pulleys, and left stretched along the guys, contributing weight without strength, while the steamer tossed at sea, is a matter wholly within the discretion of the captain. If that discretion was unwisely exercised, it was at most no more than his personal negligence in handling or mishandling good and proper appliances duly furnished by the owners. As nothing was defective in fit or material, and everything suggested as proper, even by libelant's proctor, was provided for the ship, we hold that no unseaworthiness was shown."

The cases cited may be readily distinguished from that at bar, where the eyebolt was an essential attachment to the block and tackle for the purposes to which it was to be put when the donkey engine was operating. The failure to supply a proper eyebolt and to keep it in order brings the case under the rule of The Osceola, and renders the vessel and owner liable to indemnity for injuries, and not for mere maintenance and cure.

[2] The defendant raises the question whether the federal courts have jurisdiction in a common-law action to apply maritime remedies, and relies upon the decisions in Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, and Knickerbocker Ice Co. v. Stewart (No. 543, October Term, 1919) 253 U. S. ——, 40 Sup Ct. 438, 64 L. Ed. ——. A careful reading of these cases has failed to convince me that Mr. Justice McReynolds' opinions are susceptible of the construction asserted.

In the Chelentis Case, it is broadly held that Judiciary Act 1789, § 9, giving exclusive original admiralty and maritime jurisdiction to the District Courts, saving "to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it," recognizes the fundamental distinction between rights and remedies, and allows a right sanctioned by maritime law to be enforced through an appropriate common-law remedy, but does not give a plaintiff his election to have the defendant's liability measured by common-law standards, instead of those prescribed by the maritime law.

And in the Knickerbocker Ice Co. Case, 253 U. S. —, 40 Sup. Ct. 438, 64 L. Ed. —, it is held that the statute of October 6, 1917, adding to the jurisdiction clause of section 9 of the act of 1789 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1233) the words "and to claimants the rights and remedies under the Workmen's Compensation Law of any state," does not enlarge the rights of a plaintiff suing at common law, because Congress has no power to delegate its authority to legislate concerning maritime rights and liabilities in a manner to interfere with the harmonious and uniform administration of maritime jurisdiction throughout the United States.

In both cases Workmen's Compensation Laws of New York (Consol. Laws, c. 67), were claimed to be applicable to the relief sought. Jurisdiction to entertain on the common-law side of the court an action to enforce maritime rights was distinctly recognized in the Hanrahan Case by the Circuit Court of Appeals for the Second Circuit, and I construe the Chelentis Case as also recognizing jurisdiction in the federal courts.

The jurisdiction conferred under section 24 of the Judicial Code (Comp. St. § 991) over all suits of a civil nature, at common law, where the matter in controversy exceeds the sum or value of $3,000, between citizens of different states, gives the District Courts, within the limitations expressed, jurisdiction, where the state courts would have jurisdiction, so that causes arising out of maritime rights may be brought in the federal courts in all cases where they may be brought in the state courts, subject to diversity of citizenship and jurisdictional amount, but the rights of the plaintiff may be enforced only according to maritime law.

The damages were not, in my opinion, excessive, even if the jury found that the plaintiff was guilty of contributory negligence and divided the damages. The plaintiff was seriously crippled by breaking up of the bones of one leg, which is twisted and materially shorter than the other, with a possibility of lessening the shortening by a serious and complicated operation.

The motion for a new trial is denied.

GASTON v. WESTERN UNION TELEGRAPH CO.

(District Court, N. D. Georgia. June 18, 1920.)

No. 297.

Death ⊂=35—Statutory action maintainable in courts of another state.
An action for wrongful death under the statute of Florida (Comp. Laws 1914, § 3146), brought for the benefit of the estate of deceased, who left no wife, child, or other dependent, *held* not contrary to the public policy of Georgia, and maintainable in its courts, although the statutes of the state do not give a right of action in such case.

At Law. Action by W. D. Gaston, administrator, against the Western Union Telegraph Company. On demurrer to petition. Overruled.

W. A. James and Westmoreland & Smith, all of Atlanta, Ga., for plaintiff.

Brewster, Howell & Heyman, of Atlanta, Ga., for defendant.

SIBLEY, District Judge. This suit, removed from the state court, is brought by the administrator of a deceased lineman of the telegraph company, who was killed while on duty in Florida. The petition discloses that he left no wife, child, or other dependent, and the suit is brought for the benefit of his estate, under a statute of the state of Florida (Comp. Laws 1914, § 3146) so permitting.

A general demurrer contends, first, that the enforcement of this right of action is contrary to the public policy of the state of Georgia; and, second, that no cause of action is set forth.

1. The statutes of the state of Georgia respecting homicides give a right of action to widow, husband, children, parents, and, in the case of employés of railroads, to any other dependent relatives. Where there are no such dependent persons, no right of action is given a representative in behalf of the estate of the deceased. The question is: Does this difference in the statutes render it impolitic for the courts of the state of Georgia to enforce this right of action.

This deceased was exercising his employment under the Florida statute. The rights of his estate, as well as the liabilities of the defendant, were presumably contemplated in the employment. There is certainly nothing immoral or contrary to natural right in the wrong doer making good the consequences of his wrong to whomever it may have affected, whether dependent on the deceased or not. So far as public policy in Georgia is concerned, it is true that this state inherited the common law, which gave no right of action whatever in cases of homicide. One of the common-law reasons, "actio personalis moritur cum persona," though not strictly applicable where a cause of action is created by a statute, instead of preserving the one that the deceased had, has been greatly modified in Georgia; for here, in the main, actions filed for torts do survive to the representative of the plaintiff and against that of the defendant (Park's Code, § 4421), and in the case of homicides survive to the successive beneficiaries named in the statute (Park's Code, § 4424).

Another reason given is the public policy of having prosecution precede civil reparation. This policy obtained in Georgia, but the effect of it was held not to destroy or merge, but simply to suspend, a right of action arising out of treason or felony (Adams v. Barrett, 5 Ga. 411; Neal v. Farmer, 9 Ga. 555); and it extended only to homicides that were felonious at common law (Dacy v. Gay, 16 Ga. 203), and did not affect a master's cause of action for loss of service by the homicide of his servant, where no felony was committed (Shields v. Younge, 15 Ga. 349, 60 Am. Dec. 698). In this case the doctrine was extensively examined, and it was decided that the failure to permit an action for homicide at common law was rather due to the fact that in cases of felony, which all homicides then were, all of the offender's goods were forfeited and a civil suit would have been idle, than to anything else.

The policy of prosecution before compensation was carried into the Code of Georgia, and in the Code of 1882 (section 2970) it appears with the proviso added in 1879:

"That this section shall not apply to torts committed by railroad corporations, or other incorporated companies or their agents, or employés, nor shall the same apply to natural persons."

The whole section, thus rendered meaningless, has been dropped from later Codes, and it is now the policy of Georgia to require no prosecution. In point of fact, beginning with South Carolina Railroad Co. v. Nix, 68 Ga. 572, and Central Railroad v. Swint, 73 Ga. 651, and continuing to the present time, the homicide statutes of other states have been enforced in this almost without question. In South Carolina Railroad Co. v. Thurman, 106 Ga. 804, 32 S. E. 863, the difference in the homicide statutes of South Carolina relating to negligence was considered, and the rule of public policy announced for the state of Georgia was adopted from the opinion of the Supreme Court of the United States in Northern Pacific Railroad Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958, thus:

"To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens."

The question was again considered in Southern Railroad Co. v. Decker, 5 Ga. App. 21, 62 S. E. 678, and a liberal rule recognized of the same character, where the difference between the Alabama statute and the Georgia statute lay in the measure of damages. In that case (5 Ga. App. on page 26, 62 S. E. 678) a decision of the Supreme Court of Alabama is referred to, to the effect that it was not necessary under the Alabama statute to aver that the intestate left a widow, children, or next of kin. Nevertheless the Alabama statute was considered not against the public policy of Georgia, and the suit was upheld. It is fair, however, to state that the particular suit before the court did involve a surviving widow.

In Burrell v. Fleming, 109 Fed. 489, 47 C. C. A. 598, the same rule of policy was announced by the Circuit Court of Appeals of the Fifth

Circuit, citing Railroad v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. The same court, in Mexican National Railroad Co. v. Slater, 115 Fed. 593, 53 C. C. A. 239, upheld a suit in Texas in enforcement of a Mexican homicide statute quite different from those of Texas. It appears (115 Fed. 602, 53 C. C. A. 248) that one of the contentions made was:

"That under the Mexican laws the parties who may prosecute the suit are different from the parties who may prosecute a like suit in the state of Texas."

But it does not appear from the report what the differences were. The suit was upheld.

In Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, a cause of action against directors for the debts of the corporation under the laws of one state was held enforceable in another state where no such liability existed. A discussion of the public policy involved will be found in that case. Much in point is the opinion in the case of Stewart v. B. & O. Railroad Co., 168 U. S. 445, 448, 18 Sup. Ct. 105, 106 (42 L. Ed. 537), where of a homicide it was said:

"A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim, 'actio personalis moritur cum persona,' damages therefor could have been recovered in an action at common law. * * * An action to recover damages for a tort is not local, but transitory, and can as a general rule be maintained wherever the wrongdoer can be found. * * * It may well be that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued; but, where the statute simply takes away a common-law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common-law obstacle has been removed. At least it has been held by this court in repeated cases that an action for such a tort can be maintained 'where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced.'"

I do not feel that the enforcement of the liability as defined by the Florida statute, between employer and employé, is contrary to any well-defined public policy of the state of Georgia, or would be injurious in any way to her citizens.

2. The allegations of the petition are somewhat unsatisfactory. It fairly appears that the deceased had equal means and opportunity with the master of knowing everything about the situation, except the single fact that the wires of the light company had come in contact with the wires of the telegraph company. Whether that contact was beyond his view does not clearly appear, but his general averment that he did not know of the danger and had no means of ascertaining it fairly implies that it was not within his sight. Thus understanding the petition, it is sufficient as against a general demurrer.

The demurrer will accordingly be overruled.

THE MINERVA.

RICKENBACH v. HAINESPORT MINING & TRANSPORTATION CO. et al.

(District Court, E. D. Pennsylvania. June 23, 1920.)

No. 10.

1. **Admiralty ⇐50—Third parties may be impleaded in other than collision cases.**

The principle on which admiralty rule 59 (29 Sup. Ct. xlvi), is based, permitting respondent in collision cases to implead a third party on allegations that the collision was due to the fault or negligence of such party, is applicable to and recognized in practice in cases other than for collision.

2. **Towage ⇐11(5)—Tug liable for stranding of tow.**

A tug *held* in fault and liable for loss of its tow by stranding.

In Admiralty. Suit by James Rickenbach against the Hainesport Mining & Transportation Company, with the tug Minerva, impleaded. On trial hearing on proofs. Decree against the Minerva.

Willard M. Harris, of Philadelphia, Pa., for libelant.
Charles S. Thompson, of Philadelphia, Pa., for respondent.
Howard M. Long, of Philadelphia, Pa., for the Minerva.

DICKINSON, District Judge. This cause presents unusual and interesting features upon which there is no need to dwell because they have been eliminated by the stipulations of the parties. They are in consequence best disposed of by being sidestepped beyond being mentioned, so that the real questions to be determined may be presented.

The cause began with a libel filed against the Hainesport Company to enforce what was averred to be the charter party covenant of the company to return in good condition the barge Gladys, which had been demised by the libelant to that company, and which had stranded and become a total loss. The original respondent then, under admiralty rule 59 (29 Sup. Ct. xlvi), impleaded the tug Minerva on the averment that the loss of the barge had been wholly due to the negligence of the tug which had the barge in tow, and because of this the tug was answerable not only for the value of the barge, but also for the damage thereby sustained by the Hainesport Company.

The answer of the tug denied the averment of negligence on its part, and set up that the stranding of the barge was due solely to the negligence of its crew, or that this at least was a largely contributing cause of the damage incurred. There is a denial, also, that the damage done was as great as had been claimed. A complete transformation had thus been brought in the cause of action as presented by the pleadings. The libel, as before stated, made claim against the Hainesport Company, and planted the right to damages upon the covenants of the charter party. There was no averment of negligence made against the original respondent, nor against the tug, with which the libelant had no contractual relations, and the latter not being then a party to the proceedings.

The subsequent proceedings transformed the action into one as if the libelant as owner and the Hainesport Company as pro hac vice

owner had joined in a libel against the tug, averring the damage from the loss of the barge to have been due to the negligence of the tug, and the latter retorting the charge by setting up the negligence of the crew of the barge, or as if the libel had been so filed against the tug, and the latter had brought in the Hainesport Company as wholly or in part answerable for the damage because of its negligence. The course of the trial was consistent with such a change of proceedings. The original libelant admitted there was no charter party covenant on which to found its action, and no negligence on the part of the Hainesport Company; the negligence of the tug not being the negligence of the company, for the reason that the latter was an independent contractor, and the company had met its full obligation of duty by the exercise of good judgment in its selection of the tug.

We were accordingly asked to determine the issues as thus presented at the trial. These were: (1) The negligence of the tug; (2) the negligence or conegligence of the Hainesport Company; and (3) the amount of the damage, if the negligence of the tug was found. We are quite ready to do this, and one clear way to do it is to treat the stipulations of the parties as an amendment of the libel, so that the case as pleaded may be the case as tried. The proctors of the respective parties were fully justified in so stipulating. The issues, as above outlined, must be met in some form. The libelant was unable to maintain its action as at first set forth.

The obligation of one who, by virtue of a charter party or other form of demise, becomes pro hac vice the owner of a vessel, is ordinarily and primarily the obligation of a bailee for hire. The obligation does not rise to that of an insurer, unless the assumption of the liability of an insurer appears by a clear covenant of the charter party. An obligation, which was not in strictness contractual, but which was an obligation of duty arising out of a contractual relation, might, it is true, be enforced, even at law by an action either on the contract or in tort; but the measure of the obligation is not enlarged by a suit on the contract.

This means that the libelant could recover only on proof of negligence, and the case of the libelant against the Hainesport Company was barren of any such proof. The principles of admiralty law applicable are so fully and so well formulated in the statement of them to be found in the case of Mulvany v. King, 256 Fed. 612, 167 C. C. A. 642, that acceptance of them by the libelant was compelled and frankly made.

[1] There was the like justification for the tug meeting the question of its responsibility as frankly as was done. At least as early as the Act of July 22, 1813 (Comp. St. § 1547), color of sanction was given to the practice of impleading a party (not made a respondent) whose negligence was averred to have been the sole cause of the damage or to have contributed thereto. The practice was at all events followed by the courts, and was distinctly recognized and the principles on which it rested proclaimed in the case of The Hudson (D. C.) 15 Fed. 162. This was almost immediately followed by the promulgation of rule 59. This rule, it is true, in terms has no application, because

it is limited to collision cases. The principle had been accepted, however, by the trial courts before the adoption of rule 59, and was not rested upon the authority of any specific rule. Since then it has been applied in almost numberless cases other than collision cases, and third parties have been thus impleaded, not necessarily at the instance of the libelant by way of amendment, but at the instance of the original respondent.

In a case in which this was done the Supreme Court refused a writ of prohibition, although, the refusal being on other grounds, the propriety of the practice was not decided. In re New York & Porto Rico Steamship Co., 155 U. S. 523, 15 Sup. Ct. 183, 39 L. Ed. 246. Further pursuit of the subject may be dropped, as the question is not raised, but, on the contrary, we are asked to determine the cause on the trial issues.

[2] The cause of action against the tug Minerva was based upon the familiar principle that a party whose negligence causes injury to the property of another must respond in damages. The case against the tug and the defense set up razees itself into one of findings of facts. The facts are accordingly found as follows:

Finding of Facts.

(1) The tug Minerva was guilty of negligence which caused the stranding of the barge Gladys, and her consequent loss, and all the damage which flowed therefrom.

(2) The Hainesport Company was guilty of no negligence which contributed to the damage done.

(3) The loss of the barge caused damage to the libelant to the amount of $2,500.

(4) The stranding of the barge is claimed by the Hainesport Company to have caused damage to it in the sum of $349.40, being the sum of the expenses to which it was thereby subjected, and the damages are so found.

Conclusions of Law.

The libelant is entitled to a decree awarding judgment in the sum of $2,500, and the Hainesport Company to judgment for $349.40, with interest and costs, and such decree may be submitted.

MORRIS-TURNER LIVE STOCK CO. v. DIRECTOR GENERAL OF RAILROADS.

(District Court, D. Montana. June 9, 1920.)

No. 740.

1. **Costs ⊜42(4)—Defendant entitled to costs on judgment less favorable than offer.**
   Under Rev. Codes Mont. § 7137, which, not being inconsistent with federal law, governs in the federal courts in that state, where a plaintiff recovers less than the sum for which defendant offered to allow judgment, defendant is entitled to recover costs.

2. **Costs ⊜185—Mileage of witnesses taxable beyond limits of subpœna.**
   Mileage for witnesses *held* taxable beyond the limits of a subpœna.

3. Courts ⊂=357—"Law," as used in statute relating to costs, defined.

The word "law," as used in Rev. St. § 983 (Comp. St. § 1624), providing that certain costs shall be taxed against the losing party where by law costs are recoverable in favor of the prevailing party, means the law administered in federal courts; that is, federal law, and also state law, in so far as the latter is not inconsistent with the former.

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

At Law. Action by the Morris-Turner Live Stock Company against the Director General of Railroads. On taxation of costs.

Norris, Hurd & Rhoades, of Great Falls, Mont., for plaintiff.

W. L. Clift, of Great Falls, Mont., J. V. DeLaney, of Chicago, Ill., and I. Parker Veazey, Jr., of Great Falls, Mont., for defendant.

BOURQUIN, District Judge. [1] Subsequent to removal hither, defendant offered to allow judgment in specified sum, which plaintiff did not accept. The latter recovering less, defendant claims costs by virtue of section 7137, R. C. Montana, which provides therefor in such contingency. Plaintiff resists, and claims costs. No costs at common law; the statute of Gloucester first allowed them, and now would be common law in most states, save that it is generally superseded by statute.

The federal law of costs is fragmentary and indirect. Section 983, R. S. (Comp. St. § 1624), which is merely declaratory of the law aside from it, provides certain costs shall be taxed against the losing party "where by law costs are recoverable in favor of the prevailing party."

[3] The law therein referred to is the law administered in federal courts; that is, federal law, and also state law, in so far as the latter is not inconsistent with the former. The state law in the present contingency, awarding costs to defendant and denying them to plaintiff, is not inconsistent with federal law, and here controls. See Wilcox v. Richmond & D. R. Co., 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804; Florence, etc., Co. v. Farrar, 119 Fed. 150, 55 C. C. A. 656; U. S. v. Railway Co. (D. C.) 235 Fed. 954. The justice of the law is obvious.

[2] Although it is said that, in the conflict of authority, it is the rule of this circuit to allow mileage only to the limits of subpœna (U. S. v. Railway Co. [C. C.] 172 Fed. 912; U. S. v. Railway Co. [D. C.] 230 Fed. 271), the Circuit Court of Appeals has decided otherwise (Jesse, etc., Co. v. U. S., 118 Fed. 824, 55 C. C. A. 433). This was in 1902, and in 1904 the judges of that court and of this circuit adopted rule 70, which is in accord with the cases first cited. Later this court changed rule 70 to accord with the Jesse Case.

That the rule of said case is a hardship to litigants, the state law being otherwise, is clear, and is a reason additional to that mentioned in the Crnich Case (D. C.) 260 Fed. 1015, why federal jurisdiction is avoided, and removal hither resented. By removal, litigants should neither gain nor lose.

It is believed, however, that the Jesse Case controls until overruled, as it probably will be, and costs are taxed accordingly.

UNITED STATES v. McHATTON et al.

(District Court, D. Montana. May 6, 1920.)

No. 301.

Internal revenue ⇐7—Stockholders receiving assets of dissolved corporation liable for income tax of corporation.

Stockholders of a corporation, who received in distribution the entire proceeds of its property on its dissolution in 1916, after payment of its federal excise tax, but before the passage of Income Tax Act Sept. 8, 1916, § 10 (Comp. St. 1916 or 1918, § 6336j), increasing the amount of the tax on the net income of all corporations for that year, *held* liable for the increased tax.

At Law. Action by the United States against John J. McHatton and others. On demurrer of defendants. Overruled.

W. W. Patterson, Asst. U. S. Atty., of Helena, Mont.

Charles R. Leonard and F. C. Fluent, both of Butte, Mont., for defendants.

BOURQUIN, District Judge. The complaint alleges that a Montana corporation sold all its property, distributed the proceeds to stockholders, including defendants, thereby became dissolved, reported its net income for 1916, and paid the federal excise tax of 1 per cent. thereon, all prior to the act of Congress of September 8, 1916 (Comp. Stats. § 6336j et seq.), imposing a tax of 2 per cent. upon the net income for that year of all corporations. It alleges the additional 1 per cent. has been demanded and is unpaid, and seeks judgment for that amount. A general demurrer only is interposed. Overruled.

It was the corporation's duty to pay all taxes lawfully imposed upon it. Taxes can be thus imposed by retrospective law. Brushaber v. Railway Co., 240 U. S. 20, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414. The corporate duty of payment cannot be escaped by dissolution. U. S. v. Loading Co. (D. C.) 192 Fed. 223. And see 28 Op. Attys. Gen. 241; Brady Case, 240 Fed. 665, 153 C. C. A. 463, certiorari denied 244 U. S. 654, 37 Sup. Ct. 652, 61 L. Ed. 1373.

Although taxes are not debts, and in respect to them the government is not a creditor, both being of higher nature, no reason is perceived why they are not within the principle that those who gratuitously take all a debtor's property, to the extent thereof, may be held to respond for his present debts and obligations, inchoate or vested, or for the damages thereby inflicted—the sometime "trust fund" doctrine, so far as corporations are concerned.

When defendants took the corporation's property, there was right in plaintiff to thereafter impose further taxes. To pay any such taxes was then an obligation of the corporation. The right was in its nature inchoate; the obligation was contingent. Defendants took subject thereto. The contingency happened; the right vested. The act of September 8, 1916, to this extent takes effect by relation as of the first of the year, and prior to distribution and dissolution.

Accordingly defendants are liable.

PHILLIPS et al. v. NOEL CONST. CO. et al.*

(Court of Appeals of District of Columbia. Submitted February 5, 1920. Decided May 3, 1920.)

No. 3297.

1. **Courts ⇐7—Court of domicile of government creditor can determine claims to fund.**
A debt owed by the United States has no locality at the seat of the government, and a state court in the state of the creditor's domicile has jurisdiction to determine conflicting claims to the fund between creditors of the government's creditor.

2. **Equity ⇐263—Motion to strike special plea admits facts.**
Facts alleged in special plea to the bill must be considered as true, where plaintiffs elected to stand upon their motion to strike the plea after it had been overruled.

3. **Courts ⇐508(2)—Prevention of dissipation of funds for receiver's costs not reason to interfere with state court.**
The fact that a fund owed by the government to a contractor, if paid to receivers of the contractor appointed by the state court, may be used to pay expenses of receivership, does not require the court of the District, at suit of receiver of creditor claiming priority, who did not reside in the District, in enjoining payment to the state receiver, which would also result in partial dissipation of the fund for court costs.

4. **Receivers ⇐210—State receiver can resist attempt to deprive him of funds due from United States.**
A receiver appointed by a Maryland court, who is a statutory receiver under Code Pub. Gen. Laws, Md. 1888, art. 23, § 264 et seq., can resist in the court of the District a suit to prevent payment to him of a government claim at the suit of a receiver appointed in another state, who claimed a prior right to the fund.

5. **Courts ⇐493(3)—Can refuse jurisdiction to determine priority determinable in state receivership proceedings.**
Under the doctrine of comity, the courts of the District can refuse to take jurisdiction to determine priority between claims to a fund owed a government contractor, which can be determined in the state receivership proceedings against the contractor, since it must be presumed that all legal rights will be preserved in that proceeding.

Appeal from the Supreme Court of the District of Columbia.

Suit by Jesse S. Phillips and others, as receivers, against the Noel Construction Company and others. From a decree dismissing the bill of complaint, plaintiffs appeal. Affirmed.

C. W. Maupin, of Washington, D. C., for appellants.

E. C. Brandenburg, F. W. Brandenburg, and W. E. Richardson, all of Washington, D. C. (Jackson H. Ralston, of Washington, D. C., on the brief), for appellees.

SIDDONS, Acting Associate Justice. This is an appeal from a decree in equity discharging a rule to show cause, overruling a motion to strike out a plea to the jurisdiction of the trial court, and dismissing the bill of complaint.

The appellants, plaintiffs below, seek by their bill to obtain an injunction against the defendants Noel Construction Company, and Edgar A. Poe, James B. Clark, and John M. Littig, receivers of said

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 7, 65 L. Ed. —.

company, enjoining and restraining them from receiving the sum of $26,912.76 from the United States, or any check or draft that may be issued in payment thereof; that the defendant Josephus Daniels, Secretary of the Navy, and his subordinates in office, be enjoined and restrained from making payment of said sum to said defendants, their agents, attorneys, or assigns, by way of check, draft, or otherwise, until the further order of the court; for the appointment of a receiver to demand and receive from the United States the said sum of $26,912.76, or any check or draft that may be issued in payment of the same, and that defendant Secretary of the Navy be directed to pay said sum to such receiver, in exoneration of plaintiffs from their liability under the bond of the Noel Construction Company; and for general relief.

Answers were filed by the defendants United States Fidelity & Guaranty Company, the Secretary of the Navy, and Edgar A. Poe, James B. Clark, and John M. Littig, receivers of the Noel Construction Company; the answer of Poe, Clark, and Littig containing a special plea to the bill, hereafter more fully set forth. A motion by the plaintiffs to strike out this plea was overruled; this action forming the basis of their second assignment of errors.

The material facts revealed by the pleadings are as follows:

The defendant Noel Construction Company on May 31, 1907, entered into a contract with the United States for the construction of a considerable building operation at North Chicago, Ill., and to secure its due performance and the payment of laborers and materialmen executed at the same time three bonds in the customary form, one being in the penalty of $123,000, with the defendant the Title Guaranty & Surety Company as surety, another in the penalty of $44,000, with the defendant the United States Fidelity & Guaranty Company as surety, and the remaining one in the penalty of $58,000, with the People's Surety Company as surety. In voluntary dissolution proceedings in the Supreme Court of New York, the plaintiffs were appointed the receivers of the last-named surety company, which was a New York corporation, with authority to sue for and recover its assets wherever found. It is not clear when this action was taken, though there is in the record a slight indication that it may have been some time in the year 1912.

The Noel Construction Company completed its contract on or about April 11, 1911. A dispute arose between it and the United States as to the balance of the amount due by the latter to it under the contract, a dispute which seems to have lasted up to the time of the institution of this suit; but it is admitted by the Secretary of the Navy, in his answer to the bill of complaint and rule, that there is $26,912.76 due to the contractor, "subject, however, to a retent of $1,000, to indemnify the United States against defects which may appear in the work within a limited period."

At the time of the completion of the contract there remained unpaid by the Noel Construction Company bills for labor and materials supplied to it for the operation, and pursuant to a decree passed in suits brought therefor on the contractor's bonds, and consolidated,

the defendant sureties, the Title Guaranty & Surety Company and the United States Fidelity & Guaranty Company, paid or advanced the sum of $35,486.71. Thereafter the said sureties applied to and obtained from the Supreme Court of New York, in which was pending the dissolution proceedings of the People's Surety Company, an order requiring the appellants, as the receivers of said company, to pay to the Title Guaranty & Surety Company and the United States Fidelity & Guaranty Company certain specified amounts as contribution for the ratable share of the People's Surety Company on account of its suretyship. These amounts had not been paid when the original bill of complaint was filed, but were paid the following month, as appears by the amendments to the bill, filed August 20, 1918. The total of these amounts is a little more than one-fifth of the sum paid or advanced by the other two surety companies.

The plaintiffs claim that they have a lien upon or—

"equitable interest in the balance of the contract price of said work in the hands of the United States, to the extent of the proportion in which said surety is bound to contribute for losses incurred under the several bonds of its principal aforesaid, which lien or interest is superior to the claims of all persons, including the said contractor and its receivers."

The defendant receivers of the Noel Construction Company were appointed such March 13, 1913, by the circuit court of Baltimore, Md., in proceedings for the involuntary dissolution of said company, which is a Maryland corporation, and they allege in their answer to the bill of complaint, as amended, that by the decree appointing them receivers of the Noel Construction Company they—

"were invested with full right and title to the balance payable on the contract described in said bill of complaint; that said decree was passed by said court on the 13th day of March, 1913, and since the date thereof these defendants have diligently proceeded to adjust and collect the amount due on said contract and to settle the differences which have arisen by reason of the deductions made by the government from the contract price described in the foregoing paragraphs of this answer; that by said decree these defendants have no authority to disburse or dispose of the said draft or other proceeds of the payment to be made on account of said contract, but are required to collect and receive the same and to hold the same subject to the further order and direction of the said circuit court and their purpose and intention on receiving said draft and the proceeds thereon was not to disburse or to pay out the same in the manner described in said paragraph of said bill of complaint, and they have no authority so to do, but it was and is their intention when said draft is collected to report the collection thereof to said circuit court and to hold the same subject to the further action of said court, and said fund would not be distributed without a full opportunity for the plaintiffs and said defendant surety companies to assert and have determined their claim for priority in the distribution of said fund, if such priority exists."

The eleventh paragraph of the receivers' answer consists of a special plea in the following words:

"Further answering said action, these defendants, for a special plea to the said bill of complaint and amended bill, and to each paragraph thereon state that by the decree of the circuit court investing these receivers with title to said fund and requiring them to account for the same to said court for distribution of said fund as stated in the foregoing paragraphs of this

answer, which allegation is hereby made a part of this special plea, the said circuit court acquired full jurisdiction and authority to administer said fund, which jurisdiction is binding upon all parties to this suit; that no equitable reasons are shown in the bill of complaint for depriving the said circuit court of the state of Maryland of the jurisdiction to administer said fund, and this proceeding should be dismissed and said fund permitted to be paid to these receivers, in order that the proper distribution of said fund should be determined by the court whose jurisdiction first attached, in connection with the claims of like nature which are now pending before said court."

As we have already stated, this plea was attacked by the plaintiffs by a motion to strike it out, upon the ground that it states no matter sufficient in law to show want of jurisdiction in the trial court to grant the relief prayed in the bill.

It may be remarked at this point that the plea makes no attempt to show want of jurisdiction in the trial court, but rather—

"that no equitable reasons are shown in the bill of complaint for depriving the said circuit court of the state of Maryland of the jurisdiction to administer said fund."

This implies a jurisdiction in the trial court, but urges that it should not be exerted under the circumstances revealed in the pleadings.

On behalf of the appellants the case has been presented on the theory that the fundamental question involved was whether the Maryland court had constructive possession of the property represented by the claim of the Noel Construction Company against the United States for the unpaid balance of the contract price for the building operation, and that question both in brief and argument has been exhaustively discussed. We do not think that question is involved, or a question that the jurisdiction of the trial court to grant relief could not be exerted, if it considered it necessary in the interest of justice to do so. The question is: Could the trial court refuse to take jurisdiction and leave the parties to assert their rights in the Maryland court where the property of the Noel Construction Company is properly to be administered in the dissolution proceedings? We think it could.

[1] It is clear that the sum due by the United States on the building contract, whatever the amount, was due to the Noel Construction Company, the contractor, even though it was subject to claims in favor of those who may have supplied labor and materials for the operation, or constituted a fund to which the contractor's sureties could resort for reimbursement, in the event that they paid any of such claims in fulfilling the obligation of their suretyship. It is equally clear that this right of the contractor passed to its receivers in the winding up proceedings in the home court of the corporation.

The Supreme Court in the case of United States v. Borcherling, 185 U. S. 223, 233, 22 Sup. Ct. 607, 611 (46 L. Ed. 884), quoted with approval the following language of Mr. Justice Story in Vaughan v. Northup, 15 Pet. 1, 10 L. Ed. 639:

" 'The debts due from the government of the United States have no locality at the seat of government. The United States in their sovereign capacity have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the United States, and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in

his own domicile,' and accordingly it was held, in that case, that 'the administrator of a creditor of the government duly appointed in the state where the creditor was domiciled at the time of his death, has full authority to receive payment and give a full discharge of the debt' 'due his intestate in any place where the government may choose to pay it, whether it be at the seat of government or at any other place where the public funds are deposited, and that moneys so received constituted assets under that administration, for which he was accountable to the proper tribunals of the state where he was appointed."

The court further states on page 233 of 185 U. S. (22 Sup. Ct. 611, 46 L. Ed. 884):

"That it was competent for a state court of the domicile of a creditor of the United States, and having jurisdiction over his person, to decide a controversy between his heirs and creditors as to the right to receive moneys held in trust by the United States."

We think the principle thus recognized applies to the facts of the present case. The Maryland court is a court of the domicile of the contractor corporation, which is a creditor of the United States, and that court is engaged through its instruments, the defendant receivers, in collecting the assets and property of the contractor wherever they may be found, and administering them for the benefit of its creditors and claimants in the order to which they may be entitled, and if there be a residue to distribute it to the stockholders.

[2] No question is presented in this case of local creditors to be protected, for the bill of complaint alleges (paragraph 8) that there are none such. There is no local citizen before the court claiming the fund or any part of it. The contest is between nonresidents, New York and Maryland court receivers. The plaintiffs can as effectively assert their claim in the Maryland court as in the Supreme Court of the District of Columbia. It is true that they complain that if the fund is allowed to go to the defendant receivers they intend—

"to apply the proceeds thereof to the payment of the claims of general creditors of the Noel Construction Company and to the heavy costs and expenses of their receivership, including large attorney's fees incurred by them in various suits or proceedings to which they, or the Noel Construction Company, were parties."

[3] But this is denied by said defendants in their answer, which is to be taken as true under the course the plaintiffs have seen fit to pursue in presenting their case; that is, by their motion to strike out and electing to stand upon that motion when overruled. Besides, it is not so certain that, if the fund was awarded to the plaintiffs, there would not be "costs and expenses of their receivership," including attorney's fees, and that the residue of the fund that would go to the defendant receivers ultimately, after satisfying the claim of the People's Surety Company, would be further depleted by the costs, etc., of that receivership.

[4] The appellants place much reliance on the rule laid down in Booth v. Clark, 17 How. 322, 15 L. Ed. 164; and Clark v. Clark, 17 How. 315, 15 L. Ed. 77, although conceding that the rule has been modified in certain respects, and now recognizes the right of statutory receivers to sue in foreign courts without leave by such courts or by

the courts which appoint them, and they point out that they are statutory receivers, and therefore not within the rule of the Supreme Court in the cited cases, which denied the right of a receiver appointed in a judgment creditor's suit in the state of New York to a fund in the treasury of the United States as against the claims of a Massachusetts judgment creditor and others, suing in the courts of the District of Columbia to subject such fund to the payment of their claims—this upon the ground that the District Courts could not recognize the claims of a receiver appointed without the District.

But this contention establishes as well the right of the defendant receivers to sue, for they, too, are statutory receivers appointed by a foreign court. See receivers' answer and 1 Code Md. 1888, p. 387 et seq., art. 23, § 264 et seq. It is true that they are not suing, but have been haled into the local court by the plaintiff receivers, who assert that they cannot be permitted to receive the fund, because of the rule of Booth v. Clark and Clark v. Clark. If that rule stands in the way so far as the defendant receivers are concerned, it is equally an obstruction to the plaintiffs. But we think it does not apply to the facts of this case, in its modified form, at least.

[5] In the final analysis, the record presents, we think, a case for the recognition of the well-established doctrine of comity between courts of foreign jurisdictions. The Maryland court, we are bound to assume, will do justice to all parties before it, and in winding up the affairs of the contractor corporation will accord all lawful preferences to the sureties, creditors, and claimants of the corporation. The defendant receivers have for years been endeavoring to adjust the controversy over the sum due to the contractor by the United States, and when this suit was filed it is clear that the controversy was drawing to an end, and it is equally clear that the appellants timed their application to the trial court, so as to avail themselves of the adjustment that the defendant receivers had about effected with the United States.

If they will go into the Maryland court with their claim, they will undoubtedly receive such preference or priority as, under the law, they may be entitled to, and with less cost to the estate of the contractor corporation, and perhaps to its other sureties, creditors, and claimants, than if the plaintiffs were permitted to take the fund under such an order or decree as they seek to obtain in this suit.

We conclude that there was no error in the decree dismissing the bill of complaint, and it is affirmed, with costs to the appellee.

Affirmed.

ROBB, Associate Justice, did not sit in the consideration or decision of this case.

NOTE.—Mr. Justice SIDDONS, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB.

WEST JERSEY & S. R. CO. v. COCHRAN.

(Circuit Court of Appeals, Third Circuit. August 14, 1920.)

No. 2539.

1. **Railroads ⇐282(9)—Refusal to direct verdict on conflicting evidence proper.**
   Where the evidence was conflicting as to whether a freight car moved by the consignee was defective, and as to whether the railroad company inspected it, it was proper to refuse a directed verdict for the railroad company, if it owed to plaintiff, consignee's employé, the duty to inspect the car.
2. **Railroads ⇐279—Failure to inspect car proximate cause of injury to employé of consignee in unloading.**
   A railroad company owes the duty to inspect a freight car to an employé of the consignee, who was engaged in moving the car to the place of unloading, or in unloading it, and the breach of that duty is the proximate cause of injury resulting from a defect in the car.
3. **Railroads ⇐279—Failure to inspect not proximate cause of injury to employé of shipper, using car in mill.**
   The failure of a railroad company to inspect a car before delivering it to the consignee is not the proximate cause of an injury to an employé of the consignee, resulting from a defect in the car while it was being used by the consignee for intra-mill traffic, after the original cargo had been unloaded.
4. **Pleading ⇐11—Pleading evidence is not proper.**
   Pleading payment of demurrage to a railroad as evidence of the railroad's assumption of the duty to inspect a car is not good pleading.
5. **Railroads ⇐275(1)—Collection of demurrage not proof carrier knew of use of car by consignee.**
   Collection of demurrage by a carrier on a car is not proof that the carrier knew the car was being used by the consignee in its intra-mill traffic, so as to render the carrier liable for the unfitness of the car for such traffic.
6. **Railroads ⇐282(9)—Evidence held to show conclusively carrier did not assume inspection of car used in intra-mill traffic.**
   Where plaintiff knew that defendant kept inspectors on duty at his employer's mill to inspect cars therein, and that his employer had no inspectors, but defendant introduced evidence, which was not disputed, that its inspectors only inspected inbound and outbound cars, the evidence was conclusive that the carrier had not assumed the duty to inspect a car used by the mill in intra-mill traffic, so that a verdict should be directed for it, where plaintiff's injuries were caused by a defect in the car while so used.

In Error to the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

Action by John T. Cochran against the West Jersey & Seashore Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Walter H. Bacon, of Bridgeton, N. J., for plaintiff in error.

Victor Frey and Augustus Trask Ashton, both of Philadelphia, Pa., and James M. Davis, of Camden, N. J., for defendant in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

WOOLLEY, Circuit Judge. E. I. Du Pont de Nemours Powder Company loaded a Mobile & Ohio freight car with nitro-cellulose at its plant at Hopewell, Virginia, and delivered it to the Norfolk & Western Railroad Company for shipment to its plant at Carney's Point, New Jersey. In its interstate journey the car passed over the roads of several intermediate carriers, and in due course came on the road of the West Jersey & Seashore Railroad Company, the terminal carrier. On May 30, 1916, this railroad company delivered the car to the Du Pont Company on its Interchange Track, located in the yard of its powder plant at Carney's Point. There, movement by the carrier ceased. From this track the Du Pont Company moved the car by its own engine and crew, and unloaded it on June 5. From that day until July 24, the Du Pont Company used the car, together with several hundred other cars similarly consigned, in its intra-mill service, without permission from anyone, yet paying the prevailing demurrage charges. During this period it was loaded and unloaded several times. On July 24, the car, loaded with cannon powder for the British Government, was being moved by the Du Pont Company in a train operated wholly by its employés, from a powder magazine to Deep Water Point, where the powder was to be transferred to a steamship. Cochran, one of the crew, in attempting to set the brake to prevent an impending collision with another car loaded with high explosives, pulled the brake wheel from the brake rod, and, falling to the ground, sustained injuries for which later he brought this suit.

Cochran brought this action, it is to be observed, not against his employer, but against that one of the several carriers engaged in the interstate shipment which had made delivery of the car to his employer, and charged it with negligence by two counts. By the first count he averred that the defendant carrier knew the Du Pont Company would cause the car to be moved and shifted about its private tracks by its employés; charged the defendant with the duty of inspecting the car before delivering it to his employer, relying upon Pennsylvania R. R. Co. v. Hummel (C. C. A. 3d) 167 Fed. 89, 92 C. C. A. 541, and McGinley v. Central Railroad of New Jersey, 235 Pa. 576, 84 Atl. 579, and alleged a breach of that duty by the defendant as the negligence which constituted the proximate cause of his injuries. The ground of action declared on by the second count, we shall consider presently. The court submitted the case to the jury on both counts. The verdict was for the plaintiff. To the judgment entered, the defendant sued out this writ of error.

[1] The questions of fact mainly controverted at the trial were whether the brake was defective; and, if so, whether the defendant had properly inspected it before delivering the car to the consignee. On these issues the defendant assigns as error the court's refusal to grant its motion for a directed verdict on the ground that no negligence on its part had been shown. The testimony on these issues was in sharp conflict and was clearly susceptible of opposite findings according as the jury believed the witnesses for one party or the other. The court therefore committed no error in submitting to the jury the question of the defective brake and of the defendant's failure to

perform its duty of inspection—if the defendant owed that duty to the plaintiff. Whether the defendant owed such duty to the plaintiff is the point on which we think the case turned and with reference to which we are of opinion the trial court fell into error.

[2, 3] If the injury to the plaintiff had occurred when, as an employé of the consignee, he was unloading the car, Pennsylvania Railroad Co. v. Hummel (C. C. A. 3d.) 167 Fed. 89, 93, 92 C. C. A. 541; Rick v. N. Y., C. & St. L. R. R. Co., 232 Pa. 553, 81 Atl. 650, or when, as such employé, he was engaged in moving the car from the delivery siding to an unloading siding, McGinley v. Central Railroad Co. of New Jersey, 235 Pa. 576, 579, 84 Atl. 579—unloading the car or moving it to an unloading track being in each instance a purpose for which the defendant had delivered the car—the duty of inspection which the defendant owed the consignee would manifestly have extended to its employé. So long as the car was held or used for one of these purposes, a breach of that duty by the defendant might with equal certainty have been the proximate cause of a consequent injury. But when the transaction of carriage had been completed by unloading the car, and the consignee had taken over the empty car for new purposes, such, as in this instance, for its own business of intra-mill transportation, there arose a new situation involving changed relations and new duties as affecting the employé of the consignee operating the car. The consignee, so using the car, then assumed the primary duty of a master to give his servant reasonably safe instrumentalities with which to work, and, such being a freight car, it owed him the duty of inspecting the car to that end. The consignee master could not in such case avoid performance of its duty of inspection because a like duty had previously devolved upon another; and if it failed in performing that duty, its failure, and not that of the other, was the negligence of which the employé should complain.

While a carrier's duty of inspection extends in some instances to an employé of a consignee, it would seem that it does so only when a duty of the consignee to exercise like care for its employé has not arisen. The Supreme Court of Pennsylvania in McGinley v. Central Railroad Co. of New Jersey, supra, and this court in Pennsylvania Railroad Co. v. Hummel, supra, expressly held the carrier in each case liable to an employé of a consignee for a breach of the duty of inspection because no intervening duty of inspection had at the time of unloading devolved upon the consignee. But when a duty of inspection by one other than the carrier afterward arises,—where, as here, a consignee takes over a car for its own purpose, a purpose entirely dissociated from that for which it had been delivered by the terminal carrier in the discharge of its business,—and the one owing that duty fails to perform it, that breach of duty, intervening between the injury and a previous breach of a like duty at one time owed by another, is the proximate cause of the injuries that follow. Fowles v. Briggs, 116 Mich. 425, 74 N. W. 1046, 40 L. R. A. 528, 72 Am. St. Rep. 537; Griffin v. Jackson L. & P. Co., 128 Mich. 653, 87 N. W. 888, 55 L. R. A. 318, 92 Am. St. Rep. 496; M. K. & T. Ry. Co. v. Merrill, 65 Kan. 436, 70 Pac. 358, 59 L. R. A. 711, 93 Am. St. Rep.

287; Glynn v. Central Railroad Co., 175 Mass. 510, 56 N. E. 698, 78 Am. St. Rep. 507; Sawyer v. Mpls. & St. L. Ry. Co., 38 Minn. 103, 35 N. W. 671, 8 Am. St. Rep. 648; 29 Cyc. 502. The proximate cause is the failure of that one who is under a duty immediately to the plaintiff. The failure of one whose duty is primarily to a third person, but not to the plaintiff, may, indeed, be a cause of the injury; but it is a remote, not a proximate, cause, and is therefore not actionable. Styles v. F. R. Long Co., 70 N. J. Law, 301, 57 Atl. 448; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455.

It thus appears that when the Du Pont Company assumed full control over the car, put it in its intra-mill transportation service, and there used it for forty-eight days between the day it was unloaded and the day of the plaintiff's injury—a use, so far as the evidence shows, not contemplated by the defendant upon delivering the car—it assumed the duty of inspection for the protection of its employés, and the defendant's responsibility for its failure previously to inspect and discover a defect not secret ceased, Glynn v. Central Railroad Co., 175 Mass. 510, 56 N. E. 698, 78 Am. St Rep. 507; and its liability to the plaintiff also ceased—unless the defendant assumed a duty of inspection after delivery, as by the second count of his complaint the plaintiff alleged it did.

By the second count the plaintiff averred that the defendant maintained in the Du Pont Company's yard inspectors in its own employ to inspect cars it had delivered, and thereby "took upon itself the duty of keeping said cars in proper repair"; and that, as the defendant collected demurrage charges it well knew that the car in question would be moved and shifted, and that, in consequence, it became "the duty of the defendant company to properly inspect the said car * * * and continue under the duty of inspection assumed by it, to keep the same in safe condition."

[4-6] It is not clear whether the matter with reference to the collection of demurrage charges was pleaded as evidence of the defendant's knowledge of the probable uses to which the car would be put after delivery or as consideration for the defendant's alleged assumption of continued inspection. If the former, it was, of course, not good pleading, or, if well pleaded, it did not, in the absence of further evidence, establish the knowledge imputed; if the latter, it availed nothing, for there is in the record no proof that the demurrage charges sprang from a contractual relation between the defendant and the Du Pont Company with reference to the use of the car or that they were anything more than penalties paid for detention, disbursed to the party entitled to receive them. Aside from the defendant's imputed knowledge of the uses to which the car would be put after delivery or to its alleged contractual relation with the Du Pont Company arising from the payment of demurrage charges (evidence of which was lacking), the real cause of action declared on in the second count was the defendant's assumption in fact of the duty of inspection after the car had been delivered and unloaded, and the defendant's failure to perform that duty. To sustain this cause of action, the plaintiff proved that the Du Pont Company had no inspec-

tors of its own and maintained no inspection of cars within its yard; and that the defendant railroad did have inspectors and did maintain inspection within the yard. By itself, this evidence was quite sufficient to establish prima facie the defendant's assumption of the duty of continued inspection, and amply justified the court's refusal of the defendant's motion for a nonsuit. When the defendant came to its proofs, it did not controvert this testimony; it admitted it. But the defendant went further, however, and explained this testimony by showing that the inspection it maintained in the Du Pont Company yard was of cars on its Interchange Track, located just within the gates, and extended only to inbound and outbound cars, and to no other cars in the yard. To the defendant's explanation the plaintiff made no reply. This was the case before the trial judge when moved by the defendant to direct a verdict in its favor, comprising evidence differing radically from that which was before him when the motion for a nonsuit was made. That evidence, standing alone and not explained, while true, disclosed only a part of the truth; yet when supplemented and explained by evidence produced by the defendant, in no respect unreasonable or improbable, but wholly consistent, we must assume in the absence of rebuttal evidence that the whole truth was that which was shown by the defendant. When the whole evidence is considered, it is susceptible of no other inference than that the defendant's inspection in the yard, which the plaintiff had proved, was nothing more than the inspection of inbound and outbound cars on the Interchange Track. Alpha Portland Cement Co. v. United States (C. C. A. 3d) 261 Fed. 339, 341. Certain it is, there was no evidence that would have sustained a finding that the defendant maintained inspection of cars after it had delivered them to the Du Pont Company on its Interchange Track and after the Du Pont Company had taken them over in its own business. It is this later inspection that the plaintiff charges the defendant with assuming, and out of which, if assumed, a duty arose from the defendant to the plaintiff. In failing to prove that the defendant assumed such inspection, the plaintiff failed to prove that the defendant owed him a duty of inspection, and, accordingly, he failed to prove his case under the second count.

Being of opinion that the trial court fell into error in refusing the defendant's motion to instruct the jury to render a verdict in its favor on both counts, Miller v. West Jersey & Seashore Railroad Co., 79 N. J. Law, 499, 76 Atl. 973, we direct that the judgment below be reversed and a new trial had in a manner not inconsistent with this opinion.

The decision in this case was made after the resignation of Judge HAIGHT.

KANSAS GAS & ELECTRIC CO. v. WICHITA NATURAL GAS CO.

(Circuit Court of Appeals, Eighth Circuit. July 15, 1920.)

No. 5542.

1. **Removal of causes ⊂=12—Diversity of citizenship not ground for removal, where neither party was incorporated in state.**
   Where plaintiff and defendant were both corporations, but neither was organized under the laws of the state where the suit was instituted, and therefore not citizens of that state, the cause could not be removed to the federal court for diversity of citizenship.

2. **Removal of causes ⊂=25(1)—Federal question must appear on face of complaint.**
   An action is not removable from the state court, as involving a question arising under the Constitution of the United States, unless such question appears on the face of the complaint.

3. **Removal of causes ⊂=12—Suit to enjoin violation of gas contract not removable as local action; "local suit"; "suit to enforce lien upon or claim to property."**
   A suit by one foreign corporation against another to enjoin the breach of a contract by defendant to deliver natural gas to plaintiff at a point within the state where the suit was instituted is not a "local suit," within Judicial Code, §§ 54, 55 (Comp. St. §§ 1036, 1037), or a "suit to enforce a lien upon or claim to property" within the district, maintainable under section 57 (section 1039), if there is diversity of citizenship, neither party residing within the district, and therefore such suit is not removable.

4. **Removal of causes ⊂=12—Suit must be one which could have been begun in that district.**
   Under Judicial Code, § 28 (Comp. St. § 1010), limiting right of removal from the state court to causes of which the District Court of the United States is given original jurisdiction, a suit is not removable unless it could have been originally instituted within the particular district.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by the Kansas Gas & Electric Company against the Wichita Natural Gas Company, begun in the state court and removed on petition of the defendant to the federal court. Motion to remand denied, and case dismissed for want of equity, and plaintiff appeals. Reversed, with directions to remand the cause to the state court.

H. L. McCune, of Kansas City, Mo. (McCune, Caldwell & Downing, of Kansas City, Mo., on the brief), for appellant.

Joseph G. Carey, of Wichita, Kan., and R. A. Brown, of St. Joseph, Mo. (John H. Brennan, of Bartlesville, Okl., R. R. Vermilion, Earle W. Evans, and W. F. Lilleston, all of Wichita, Kan., and H. O. Caster, of Bartlesville, Okl., on the brief), for appellee.

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

TRIEBER, District Judge. This is an appeal from a final decree dismissing the complaint of the appellant for want of equity. The complaint charges that the plaintiff is a corporation existing under the

laws of the state of West Virginia, and the defendant, the appellee, a corporation existing under the laws of the state of Delaware.

The object of the complaint and the relief sought is to enjoin the defendant from breaching its written contract with one J. O. Davidson, who had assigned it to the United Gas Company, and which latter company assigned it to the plaintiff. The complaint alleges that on October 10, 1905, J. O. Davidson was granted by the city of Wichita, Kan., a franchise to construct, maintain, supply, and operate a natural or artificial gas plant in said city of Wichita, and supply its inhabitants with gas for the term of 20 years; that on June 19, 1906, the said Davidson and the defendant herein entered into a written contract, by the terms of which the defendant agreed that it would lay and construct a pipe line for conveying natural gas from its gas fields in Kansas to a point at the city limits of the city of Wichita, and would for a term of 20 years supply and deliver at its reducing station, for delivery into the mains and pipes of the distributing system of the said Davidson, natural gas in a volume sufficient at all times to fully meet the demands for all purposes of domestic consumption in said city; that the said Davidson was to have the sole and exclusive agency to distribute, market, and sell the natural gas of the defendant for domestic consumption within said city, unless sooner terminated by the mutual consent of the parties thereto; that Davidson was obligated to build and construct a complete distributing system of pipe lines and necessary appliances to make proper connection with and attachments to the pipe lines of the defendant at its reducing station, to make all contracts for supplying natural gas to domestic consumers and customers in said city, and to conduct the business of furnishing natural gas to domestic consumers in said city. The contract provided what charge should be made by Davidson to the consumers, and pay to the defendant 66⅔ per cent. of the gross sales of natural gas for domestic consumption. There are other provisions in the contract, but in view of the conclusion reached it is unnecessary to set them out in this opinion.

On January 8, 1907, it is alleged a supplemental contract was entered into between the defendant and the United Gas Company, which had succeeded J. O. Davidson as the owner of the franchise and gas supply business in the city of Wichita which merely provided rates for factory and boiler consumption, and for churches, schools, hotels, and building blocks, but otherwise continued the first contract in full force; that the plaintiff became the owner of the contracts and the gas franchise on the 1st day of March, 1910. On January 2, 1912, the plaintiff and defendant entered into a supplemental agreement, which merely canceled the exclusive agency granted to J. O. Davidson, and the prohibition, contained in the original contract, that the defendant should not sell any natural gas to any other person than the plaintiff; that the plaintiff has fully complied with all the conditions in the contract, but that on January 14, 1919, the defendant notified the plaintiff in writing that it would raise the rates for the gas supplied, as fixed in the original contract, and, if not agreed to by the plaintiff, it would discontinue to supply gas. There are the usual allegations that, if de-

fendant is permitted to carry out its threat, the plaintiff would sustain irreparable loss, and therefore asks for an injunction restraining it from increasing the price of gas to be delivered to the plaintiff, and in excess of the rates fixed originally in the contract with Davidson.

The suit was originally instituted in the district court of Sedgwick county, state of Kansas, and on the petition of the defendant removed to the federal court. The petition states, as did the complaint, that the plaintiff is a corporation existing under the laws of the state of West Virginia, and the defendant is a corporation existing under the laws of the state of Delaware, that the amount involved exceeds $3,000, and as grounds for removal sets up that there is a federal question involved, as appears from the complaint.

After the transcript had been filed in the District Court of the United States, the plaintiff filed a motion to remand the cause, stating in the motion that it appears solely to move the court to remand this cause, and for no other purpose. The motion to remand was argued on June 3, 1919, and by the court taken under advisement. Thereafter on the same day the defendant filed a motion to dismiss, alleging as cause that the bill filed does not state a cause of action. This motion, and the motion to dissolve the temporary injunction, which had been granted by the state court, was heard and by the court taken under advisement. On June 14, 1919, the court overruled the motion to remand, sustained the motion to dissolve the temporary injunction, and held under advisement the defendant's motion to dismiss for want of equity. On October 30 the motion to dismiss the bill for want of equity was by the court sustained, and the final decree entered, dismissing the cause for want of equity.

Did the court err in overruling the motion to remand the cause to the state court? If the court should have remanded the cause, it was without jurisdiction to proceed.

[1] As neither the plaintiff nor the defendant was a corporation existing under the laws of the state of Kansas, the cause was not removable upon the ground of diversity of citizenship, in view of the decision of the Supreme Court in Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, although there was a diversity of citizenship. In that case it was held that a cause was not removable from a state to a federal court upon the ground of diversity of citizenship, unless either the plaintiff or defendant is a citizen of the state and resides in the district in which the action is pending. While this decision has been criticized by some of the District Courts, who have declined to follow it, we do not feel at liberty to disregard it, as the Supreme Court has never overruled that part of the decision.

[2] There is no substantial allegation in the complaint showing that there is a question arising under the Constitution and laws of the United States involved, and it is well settled that, unless that question appears from the face of the complaint, the action is not removable. Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; Minnesota v. Northern Securities Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870.

[3] But it is contended that the jurisdiction of the court may be maintained under the provisions of sections 54, 55, and 57 of the Judicial Code (Comp. St. §§ 1036, 1037, 1039). Sections 54 and 55 are clearly inapplicable. Section 54 provides that—

"In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides."

The defendant does not reside in the same state.

Section 55 provides:

"Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

This section only applies if the action involves property of a fixed character, which lies partly in one district and partly in another district within the same state, the action may be maintained in either district where some of the property is situated.

Section 57 of the Judicial Code permits an action to be brought in a District Court of the United States "to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought," if there is a diversity of citizenship, although neither the plaintiff nor defendant are citizens of that state and residents of the district in which the suit is brought. That section further provides that when one or more defendants shall not be an inhabitant or found within said district, or shall not voluntarily appear thereto, they may be constructively summoned. This section, after providing for the hearing and adjudication of a suit against a person thus summoned outside of the state in which the suit is pending, further provides:

"But said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

There is nothing in this complaint affecting any right, title, or interest to any real or personal property in the district. It is simply an action to enjoin the defendant from breaching a contract. As stated in Pomeroy's Equity Jurisprudence, § 1360:

"Injunction is a remedy which, above all others, necessarily operates in personam.".

As an injunction acts in personam only, courts of equity will grant injunctions, against parties domiciled or found within its limits and subject to its jurisdiction, to restrain them from prosecuting and maintaining actions in a foreign jurisdiction, if to do so would be inequitable. The leading English case on that subject is Penn v. Lord Balti-

more, 1 Ves. Sen. 444, 2 Lead. Cases in Equity (4th American Ed.) 1806, and authorities cited in the notes; Phelps v. McDonald, 99 U. S. 298, 25 L. Ed. 473; Cole v. Cunningham, 133 U. S. 119, 10 Sup. Ct. 269, 33 L. Ed. 538. For the same reason courts of equity will compel a conveyance of lands in another state, if the defendant is within its jurisdiction. Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Alexander v. Tolleston Club, 110 Ill. 65; Frank v. Peyton, 82 Ky. 150; Schmalz v. York Mfg. Co., 204 Pa. 1, 53 Atl. 522, 59 L. R. A. 907, 93 Am. St. Rep. 782. In Pennoyer v. Neff, 95 U. S. 714, 723 (24 L. Ed. 565) it was said:

"The state, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with."

In Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21, we held that an action for specific performance is a transitory action, and may be maintained in any court having jurisdiction. As neither of the parties to that action were residents of the state in which the suit was instituted, the jurisdiction of the court was sustained solely upon the ground that the plaintiff claimed a lien upon property situated in the state in which the suit was instituted; the court expressly holding that, an action for specific performance being an action in personam, the court would be without jurisdiction, if that was the only ground upon which it was invoked.

[4] Section 28 of the Judicial Code (Comp. St. § 1010) limits the right of removal of a cause from a state to a federal court to causes of which the District Courts of the United States are given original jurisdiction. Therefore, unless this suit could have been originally instituted in the District Court of the United States for the District of Kansas, it was not removable. In re Wisner, supra; Western Union Tel. Co. v. Southeast & St. Louis Railway Co., 208 Fed. 266, 125 C. C. A. 466. If this action could have been maintained by an original suit in the District Court of the United States for the District of Kansas, then under section 57 the defendant, if not found in the District of Kansas, could have been brought into court by substituted service of process in any other state in which he could be found, or, if his residence is unknown, by publication. If thus brought into court, could an injunction have been decreed, if it failed to enter its appearance?

As in the instant case there is no claim to any right, title, or interest in property, nor does the complaint allege facts which amount to a claim that it is sought to remove a cloud on the title of any property, real or personal, within the jurisdiction of the court, what decree could the court render, if the service of process had been in another district, as permissible under section 57? It certainly will not be contended that, upon such service, the defendant, if not having entered its appearance, the court would have jurisdiction to grant the injunction. An authority in point is Ladew v. Tennessee Copper Co. (C. C.) 179 Fed. 245, affirmed in 218 U. S. 357, 31 Sup. Ct. 81,

54 L. Ed. 1069. In that case it was sought to enjoin the defendants from maintaining, operating, or permitting, upon their land or premises in the state of Tennessee, what was alleged to be a nuisance, and injurious to the plaintiff's lands in the state of Georgia. The plaintiffs were citizens of the state of New York and West Virginia, and the Tennessee Copper Company a corporation of the state of New Jersey. As the alleged nuisance was maintained in the state of Tennessee, it was claimed that the District Court had jurisdiction under section 57 of the Judicial Code. But Judge Sanford, who delivered the opinion of the court, in dismissing the bill for want of jurisdiction said:

"On the whole, I am of the opinion that, as it appears from the concluding portion of this section that it relates entirely to suits of which property is the 'subject,' and as the words 'claim to * * * property' are evidently used in contracts to liens or incumbrances upon property, and are the only words in the section under which a claim to the direct ownership of property may be included, these words relate only to claims made to the property in the nature of an assertion of ownership or proprietary interest, or other direct right or claim to the property itself, such, for example, as the claim of ownership of an undivided interest in the property upon which a suit for partition may be based (Greely v. Lowe, 155 U. S. 58, 74, 15 Sup. Ct. 24, 39 L. Ed. 69), and do not include the assertion of a right which is not based upon an interest in the property itself, but seek merely to enforce a restriction which the law imposes upon the owner of the property in reference to its proper use, and therefore that a bill to abate or restrain a nuisance is not a suit to enforce a claim to the defendants' property within the meaning of the statute."

Mr. Justice Harlan, delivering the opinion of the Supreme Court affirming Judge Sanford's opinion, said:

"We are of opinion that under no reasonable interpretation of the eighth section can the plaintiffs' case be held to belong to the class of exceptional cases mentioned in that section. In no just sense can their cause of action be said to constitute 'a claim to' real property in the district. They cannot be regarded as having a 'claim to' the leased land or premises on which the alleged nuisance is maintained. It may be that what the defendant is charged with doing creates a nuisance. It may also be that the defendant company wrongfully uses and has used its property in Tennessee in such way as to seriously injure the property of plaintiffs, near by in Georgia, and that plaintiffs are legally entitled by some mode of proceeding in some court to have the alleged nuisance abated, and their property in Georgia protected in the manner asked by them. But it does not follow that they can invoke the authority of the Circuit Court of the United States for the protection of their property against the defendant's acts. The jurisdiction of the Circuit Courts is determined by acts of Congress enacted in pursuance of the Constitution. Apart from the powers that are inherent in a judicial tribunal, after such tribunal has been lawfully created, the Circuit Courts can exercise no jurisdiction not conferred upon them by legislative enactment. It is quite sufficient now to say, without discussion, that it would be a most violent construction of the eighth section of the act of 1875 to hold that the right to have abated the nuisance in question arising from the use in Tennessee of defendant's property, because of the injurious effects upon plaintiffs' real property in Georgia, creates, in the meaning of the statute, a 'claim to' real property within the district where the suit is brought. There is absolutely no foundation for such a position."

See, also, Jones v. Gould, 149 Fed. 153, 157, 80 C. C. A. 1; Lawrence v. Times Printing Co., 90 Fed. 24, 27; Stockbridge v. Phœnix Mutual Life Ins. Co., 193 Fed. 558.

In Jones v. Gould the court said:

"The statute contemplates that the action in which substituted service of process may be made must be one which relates to 'the title to real or personal property within the district,' language which imports a localized subject. Further, the action must be one to enforce some right in it, or to remove some obstruction to the enjoyment of it. It does not concern the rights to property which is intangible and transitory."

Counsel for appellee cite numerous authorities to sustain the contention that the court had jurisdiction under section 57 of the Judicial Code. But a careful examination of these authorities fails to sustain this contention. Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801, was an ancillary bill by a receiver, appointed by the national court, and the ordinances of the city, sought to be enjoined, it was alleged cast a cloud upon the franchises in the hands of receivers, to be administered under orders of the court.

In Thompson v. Emmett Irr. Dist., 227 Fed. 560, 142 C. C. A. 192, the object of the action was to remove a cloud on the title of bonds issued by the defendant. The court in the first sentence of the opinion states the object of the bill:

"They state a case for the removal of a cloud upon the title of personal property."

Consolidated, etc., Mining Co. v. Callahan Mining Co. (D. C.) 228 Fed. 528, was a possessory action; as stated by the court, "a claim that they have a right to take the property out of the defendant's hands." Blake v. Foreman Brothers Banking Co. (D. C.) 218 Fed. 264, was an action to enforce a lien on certificates of stock in a corporation, and it was held that it was within the provisions of section 57, and nonresident defendants may be brought in by constructive service of process. In Railroad Co. v. Irwin (D. C.) 252 Fed. 921, the action was to have an equitable lien declared on dividends paid, and it was held that, being an action to have a lien declared on such dividends in the hands of the defendant, it was within section 57, and that nonresident defendants could be brought in by publication. In Louisville & Nashville R. Co. v. Western Union Tel. Co., 234 U. S. 369, 34 Sup. Ct. 810, 58 L. Ed. 1356, the object of the suit was to remove a cloud on plaintiff's title, caused by a judgment, purporting to condemn portions of the railway's right of way, which judgment was alleged to be void on its face.

Without reviewing other authorities relied on, it is sufficient to state that each of them was an action, either to enforce a lien, to obtain possession of property, or to remove a cloud on plaintiff's title to property. None of them is pertinent to the facts in the case at bar. The object of this statute is clearly to enable a party to institute an action in a national court, when there is a diversity of citizenship, which, being of a local nature, as distinguished from a transitory action, can only be maintained in the district in which the property affected is situated.

The court erred in denying the motion to remand, and the cause is reversed, with directions to remand the cause to the state court, whence it was removed.

CLINTON MINING & MINERAL CO. v. BEACOM.*

(Circuit Court of Appeals, Third Circuit. July 13, 1920.)

No. 2543.

1. **Corporations ⇐239—Liability of stockholders for debts does not include liability for tort; "debt."**
   In a South Dakota statute providing that each stockholder shall be individually and personally liable "for the debts of the corporation" to the extent of the amount unpaid on his stock, and be subject to suit therefor by a creditor of the corporation, the word "debts" does not include a liability of the corporation for a tort.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Debt.]

2. **Corporations ⇐253—Reduction of claim to judgment does not affect liability of stockholder.**
   In an action by a judgment creditor of a corporation against a stockholder to enforce his statutory liability for debts of the corporation, defendant may go behind the judgment, and his liability depends on the nature of the claim against the corporation on which it is founded, which gains nothing from the fact that it has been reduced to judgment.

3. **Words and phrases—"Debt."**
   The word "debt" carries with it the requirement of certainty, the foundation of promise by express contract, and necessarily implies legality.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action at law by the Clinton Mining & Mineral Company against J. S. Beacom. From a judgment of nonsuit, plaintiff brings error. Affirmed.

For opinion below, see 264 Fed. 228.

Arthur O. Fording, of Pittsburgh, Pa., and Martin & Mason, of Deadwood, S. D., for plaintiff in error.

Sterling, Higbee & Matthews, of Uniontown, Pa., and J. M. Hodgson, of Casper, Wyo. (E. C. Higbee, of Uniontown, Pa., of counsel), for defendant in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. [1] In this case, the Clinton Mining & Mineral Company, a corporate citizen of Iowa and a judgment creditor of the Imperial Gold Mining & Milling Company, a corporation of South Dakota, brought suit to recover from James S. Beacom, a stockholder of said company and a citizen of Pennsylvania, the amount of such judgment. The alleged right to recover was based on a statute of South Dakota (Rev. Code 1919, § 8779), which provides:

"Each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him. Any creditor of the corporation may institute joint or several actions against any of its stockholders that have not fully paid the capital stock held by him, and in such action the court must ascertain the

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 254 U. S. —, 41 Sup. Ct. 9, 65 L. Ed. —.

amount that is unpaid upon the stock held by each stockholder and for which he is liable, and a several judgment must be rendered against each in conformity therewith. The liability of each stockholder is determined by the amount unpaid upon the stock or shares owned by him at the time such action is commenced, and such liability is not released by any subsequent transfer of stock. And in no other case shall the stockholders be individually and personally liable for the debts of the corporation."

At the close of the plaintiff's proofs, the court below entered a compulsory nonsuit, and to its subsequent refusal to take off such nonsuit plaintiff excepted and sued out this writ of error.

By reference to the opinions of this court in cases involving the Clinton Mining & Mineral Company which opinions are reported in 247 Fed. 449, 159 C. C. A. 503, Clinton Mining & Mineral Co. v. Cochran et al. and 256 Fed. 577, 167 C. C. A. 607, Clinton Mining & Mineral Co. v. Jamison, and to the opinion of the court below refusing to take off the nonsuit, which is printed in 264 Fed. 228, we obviate a present restatement of the facts of the case. From these several opinions it will be seen the plaintiff's claim was for the tort or wrong of the milling company for a wrongful and intentional taking of ore from the plaintiff's property. Such being the case, we naturally inquire whether the liability for such tort by the milling company made such liability a debt of the company, within the purview of this statute. After full consideration, we are of opinion it did not.

The statute was technical in its subject-matter, its purpose was to make the stockholder directly liable to the person to whom the company was indebted, and its method was to subject him to an individual suit brought directly against him for the debt of the company. Such liability to such direct suit did not theretofore exist, and the purpose of the statute was to impose such new liability and direct the means and manner by and in which it was to be enforced. Such being the case, it will be seen that the statute is one in which law terms, terms with well-understood legal meanings, would be and were used. For example, the phrases "individually and personally liable," "may institute joint and several actions," "in such action the court must ascertain," and "several judgments must be rendered against each," are all technical words of distinct legal significance. We are therefore justified in expecting that, when these legal words and technical terms were necessarily used in the act to define the steps of procedure to enforce liability, legal words with like well-understood technical meaning would be used to define the undertakings or liabilities of the company, for which the stockholder was now to be made for the first time directly and individually liable. Now, in defining the status of the stockholder for which he was to be held liable, the single word used was "debts," "the debts of the corporation," and in legal nomenclature the word "debt" means liability for a sum certain, and that liability one created by contract.

[3] Blackstone, the master of exact legal definition, says:

"The legal acceptance of debt is a sum of money due by certain and express agreement" (3 Comm. 155), or "any contract, in short, whereby a determinate sum of money becomes due to any person * * * is a contract of debt" (2 Comm. 464).

In legal dictionaries defining the word "debt," the consensus of definition is to give the technical meaning of certainty of amount as the earmark of a debt, and to contrast its specific promise by contract, with the uncertainty of general words, such as "obligation," "liability," and the like. But not only does the word "debt" carry with it the requirement of certainty, and the foundation of promise by express contract, but it necessarily implies legality, since the basis of its obligation is legality based on promise and lawful consideration, and hence it will be seen that, a debt being in its nature certain, contractual, and lawfully incurred, it is reasonable that a statute should enact that a stockholder should be held liable for debts a corporation would properly and legally incur. From all of which it would clearly appear that both from the uncertainty and indefiniteness of uncontracted for liability, and from the illegality and wrong from which it arises, that a tort or wrong on the part of a corporation stands in a wholly different relation to a stockholder than does a debt with its certainty of contract and its legality of consideration.

The corporation has no right to commit such tort or wrong. When the stockholder subscribed for its stock, it was not with the purpose of creating an agency that should commit a tort or wrong. Such acts were not incident to purposes for which it was formed, nor was the liability for such wrong which inured to the one wronged thereby, a right for which the latter bargained in the course of what the corporation was impliedly authorized by the stockholder to do. On the contrary, the wrong done was a wrong illegally done by the corporation, not only to the third party, but a wrong done equally and illegally to its stockholder. Such being the case, he who would make the word "debt" in this statute a synonym for tort, and thereby impose liability on the stockholder, is giving the word "debt" an effect which usage does not warrant nor reason justify. We are therefore of opinion that the tort of which the milling company was guilty in unlawfully mining the plaintiff's ore, was not a debt of the tort-feasor corporation, for which its stockholders were made personally liable by this statute.

[2] Seeing, then, that the relation of the plaintiff and the tort-feasor, milling company, was not that of debtor and creditor, and no other relation than that of debtor and creditor being made by the act ground of a suit against the stockholder personally, the case resolves itself into the question: Does a suit by the plaintiff against the milling company for such tort and reduction of the money damage to judgment make such tort, when merged in judgment, one "of the debts of the corporation," for which a stockholder is made liable by the statute at the suit of "any creditor of the corporation." Bearing in mind that we must, within the four corners of this statute, find liability expressly imposed on the stockholder, and, seeing that no liability for the milling company's tort was by use of such term imposed on the stockholder, it is quite evident that the burden is upon the plaintiff to show warrant for imposing by implication a tort liability under the statute which the statute does not impose by express words. The decided trend of decisions, where analogous questions have arisen, is against this contention. In Louisiana v. Mayor of New Orleans, 109 U. S.

288, 3 Sup. Ct. 211, 27 L. Ed. 936, the Supreme Court considered the question of the city's liability for its tort in suffering a mob to destroy plaintiff's property. Suit for the tort had been brought, the amount of damage fixed by judgment, and the Supreme Court was asked to treat this judgment as a contract, and as such covered by the constitutional inhibition that no state shall pass any law impairing the obligations of contracts. This the court refused to do, and went back to the original ground of liability, saying:

"But, however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject, like all other measures of policy, to any change the Legislature may see fit to make, either in the extent of the liability or in the means of its enforcement. And its character is not at all changed by the fact that the amount of loss, in pecuniary estimation, has been ascertained and established by the judgments rendered. *The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously.*"

Applying the principle of decision in that case to the present, where, as here, the amount of the tort "in pecuniary estimation has been ascertained, and established by the judgments rendered," we may say that the liability of the milling company for the tort, having originally, as we have seen, had no debt, and therefore no contract liability on it—

"has no more element of contract in it because merged in the judgments than it had previously."

We refer to this single case as establishing the general principle of the duty of a court, even in a case where the liability is not penal, to go behind the liquidating judgment and ascertain the real nature of the liability and whether it is contractual; and finding such is the holding of this case, we do not deem it necessary to discuss other cases bearing on the subject, many of which are referred to in the lower court's opinion, simply confining ourselves to saying that in no case do we find anything to limit, in the present case, the application of the general principle of Louisiana v. Mayor of New Orleans, supra. Seeing, then, as we do, that it was the duty of the court below to go behind the liquidating judgment, to ascertain the nature of the original liability, finding, as it did, that liability was not one in debt, but in tort, and holding, as it rightly did, that such tort of the milling company was not a debt of that company, the judgment below must be and is affirmed.

GAS & ELECTRIC SECURITIES CO. v. MANHATTAN & QUEENS TRACTION CORPORATION.

Petition of BEGG et al.

(Circuit Court of Appeals, Second Circuit. February 24, 1920.)

No. 30.

1. **Appeal and error ⟸71(3)—Order granting permanent injunction appealable as "final order."**
An order, made on application of receivers, making permanent a temporary injunction restraining a city from considering or adopting a proposed resolution affecting rights of defendant in the cause "pending further order in the action," *held* a "final order," and appealable within six months, under Comp. St. § 1647.

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

2. **Receivers ⟸73—Petition in receivership suit held proper remedy against stranger for protection of property.**
Receivers appointed for a street railroad company, defendant in a creditors' suit, may proceed by petition and rule in such suit to restrain a city, although not a party, from taking action to forfeit the franchise and property of defendant.

3. **Municipal corporations ⟸690—Granting and repealing of franchises exercise of legislative power.**
The board of estimate and apportionment of the city of New York, in the granting and repealing of franchises in the streets under authority vested in it by the city charter, acts in the exercise of legislative power and in a governmental capacity.

4. **Injunction ⟸77(1)—Not granted to restrain legislative action of municipality.**
The general rule is that a court of equity will not grant an injunction to restrain a municipal corporation from the exercise of legislative or governmental power, even though the contemplated action may be in disregard of constitutional restraints and may impair the obligation of a contract.

5. **Municipal corporations ⟸61—May exercise legislative power by resolution.**
A city's legislative power may be exercised by either an ordinance or a resolution, except as its charter or the general law otherwise provides.

6. **Street railroads ⟸61(1)—Franchise held subject to forfeiture for nonperformance of conditions.**
Under an ordinance granting a franchise, which constitutes a contract between a city and a street railroad company, and provides that on failure to construct and operate the railway within the time fixed "the right herein granted shall cease and determine," in order to prevent forfeiture the company is bound to perform in accordance with its terms, unless performance is rendered impossible by act of God, by the law, or by the other party.

7. **Municipal corporations ⟸690—In granting franchise, may prescribe terms and conditions.**
If the terms and conditions of a franchise which the Legislature has authorized a municipal body to grant have not been determined in advance by the Legislature, the terms and conditions of the grant and of its forfeiture are to be determined by the municipal body under its delegated authority, and in so doing it acts legislatively, both as respects the grant and the forfeiture.

8. Street railroads ⟸28(4)—Municipal order for extension held valid.

Under a franchise contract requiring a street railroad company to extend its line when ordered by the city, "provided that the title to the streets involved has been vested in the city and that said streets have been regulated and graded," the fact that certain small items of work, not preventing the extension, remained to be done before the streets were regulated and graded to their full width, *held* not to invalidate an order for the extension.

9. Street railroads ⟸61(2)—Franchise contract held to provide for forfeiture of entire grant.

In a franchise grant to a street railroad company, whose line it was intended by the parties should be built in sections as the territory to be served became settled, a provision that, on a failure to construct any portion of the road as required, "the right herein granted shall cease," *held* to apply to the entire grant.

10. Street railroads ⟸61(3)—Forfeiture of franchise held not waived by acceptance of taxes.

The acceptance of a street railroad company's payment of franchise taxes by the administrative officers of a city is not a waiver of rights of the municipality to claim a forfeiture of the franchise for nonperformance of its conditions.

11. Equity ⟸24—Cannot relieve from forfeiture provided for by express terms of statutory legislation.

While a court of equity may relieve from forfeiture in a proper case, it is without power to relieve a street railroad company from a forfeiture incurred by failure to comply with the terms of a franchise contract made under and by virtue of statutory legislation of the state.

12. Judgment ⟸216—"Interlocutory order" defined.

An "interlocutory order" is one entered between commencement and end of suit or action, which denies some point or matter, but which is not a final decision of the matter in issue.

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

13. Injunction ⟸132—"Interlocutory injunction" defined.

An "interlocutory injunction" is one granted prior to the final hearing and determination of the matter in issue, and which is to continue until answer, or until the final hearing, or until the further order of the court.

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

14. Judgment ⟸217—"Final decree" defined.

A "final decree" is not necessarily the last order in the case, as orders sometimes follow merely for the purpose of carrying out or executing the matters which the decree has determined; but, when it finally fixes the rights of the parties, it is final.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

15. Judgment ⟸216—"Interlocutory decree" defined.

A decree is "interlocutory," and not final, if the further action of the court in the cause, as distinguished from proceedings necessary to execute the decree, is necessary to give completely the relief contemplated by the court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interlocutory Decree or Judgment.]

16. Constitutional law ⟸50—"Legislative power" defined.

"Legislative power" is the authority exercised by that department of government which is charged with the enactment of laws, as distinguished from the executive and judicial functions.

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

17. **Constitutional law ⇐251—"Due process of law" does not invariably require formal judicial proceedings.**
Under ordinary circumstances, "due process of law" implies a formal judicial proceeding; but such a proceeding is not invariably required.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

18. **Highways ⇐70—Municipal corporations ⇐269(3)—"Grade" defined.**
To "grade" a street or highway, strictly speaking, is to establish a level by mathematical points and lines, and then to bring the surface of the street or highway to the level by the elevation or depression of the natural surface to the line fixed.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grade.]

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

Suit by the Gas & Electric Securities Company against the Manhattan & Queens Traction Corporation. In the matter of petition of William R. Begg and Arthur Carter Hume, receivers of defendant, against the City of New York. From the order, the City appeals. Reversed.

This cause comes here from the United States District Court for the Eastern District of New York, on order granting and continuing an injunction. The order was originally dated and entered on June 15, 1918, and was resettled and re-entered on August 24, 1918. The order from which the appeal is taken grants and continues an injunction until further order of the court against the city of New York, its board of estimate and apportionment, and all public officials, employés, and servants of the city of New York, from passing a proposed resolution forfeiting or affecting the franchise of the Manhattan & Queens Traction Corporation, dated October 29, 1912, and from taking all of the property of said corporation, then in the hands of receivers appointed by the United States District Court for the Eastern District of New York, without compensation and without proceedings at law or in equity, or from in any way interfering with that company. The above order was issued to enjoin the city of New York from passing a resolution forfeiting the franchise and railway of the defendant corporation on the ground that the corporation had not complied with the terms of the franchise contract and completed its line of road within the period prescribed. The facts more fully appear in the opinion.

William P. Burr, Corp. Counsel, of New York City (Vincent Victory, of New York City, of counsel), for appellant.

Frueauff, Robinson & Sloan, of New York City (Robert S. Sloan, of New York City, of counsel), for appellee receivers.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). It appears that the city of New York had entered into a franchise contract with the Manhattan & Queens Traction Corporation under date of October 29, 1912, which franchise contract was amended on July 21, 1913, and on January 21, 1916. In reliance upon this contract the Manhattan & Queens Traction Corporation constructed, equipped, and put in operation a double track street surface electric railway between the Long Island plaza of the Queensboro Bridge at Jackson avenue,

upon and along Thomson avenue and other streets and avenues in the borough of Queens, to the intersection of Sutphin road and Lambertville avenue, a distance of over 10 miles. The contract required that this part of the railway should be completed and in operation on or before May 1, 1916. The contract in this respect was complied with and the railway has been in continuous operation for this distance of 10 miles from April 26, 1916. Then as to the remainder of the line the contract under the amendment of January 21, 1916, provided that it was to be completed "within such time or times as may be directed by resolution of the board [of estimate and apportionment] upon recommendation of the president of the borough, provided that title to the streets involved has been vested in the city and that said streets have been regulated and graded." At a meeting of the board of estimate and apportionment held on February 16, 1917, the president of the borough of Queens offered and there was adopted a resolution which directed the Manhattan & Queens Traction Corporation to commence construction of the remaining portion of its street surface railway from the intersection of Sutphin road and Lambertville avenue to the intersection of Central avenue and Springfield road within 30 days, and to complete and put the same in operation within 6 months from the date of the approval of the resolution by the mayor. The resolution was approved by the mayor on February 23, 1917. Under the terms of the resolution, therefore, it was incumbent on the corporation to complete and put in operation the remaining portion of the line therein mentioned, and which comprised only 3.3 miles, on or before August 23, 1917.

That the line of railway was not completed in accordance with the resolution is conceded, and the explanation which is made for the failure to comply with it is that the resolution was void as the city of New York was not in a position to insist that the Traction Corporation should make the extension, owing to the fact that title to the streets involved in the extension was not at the time vested in the city, and all of the streets were not regulated and graded to their legal grade and full width, as was required by a condition precedent in the franchise contract. Whether these claims are well founded will be later considered.

That the city did not think that there was legal excuse for the failure to complete the road within the period specified is apparent; for on October 19, 1917, the board of estimate and apportionment passed a resolution directing the Traction Corporation to show cause on November 9, 1917, why a resolution declaring forfeited the contract, dated October 29, 1912, and its amendments, should not be adopted, and why said resolution should not provide that the railway constructed and in use by virtue of said contracts shall thereupon become the property of the city of New York without proceedings at law or in equity.

On October 19, 1917, the division of franchises of the board of estimate and apportionment prepared a form of proposed resolution of forfeiture to be submitted to the board, which appears in the

margin.[1] This resolution was to come up for action at a meeting of the board on December 21, 1917.

The receivers of the defendant corporation, being of the opinion that this threatened action of the city was contrary to the franchise contract as amended, and that it was illegal, unjust, and inequitable, petitioned the court below which was the court that had appointed them, for a temporary restraining order, which was granted. Thereafter they obtained the order appealed from, restraining the passage of the resolution above set forth.

[1] "Whereas, pursuant to a resolution of the board of estimate and apportionment adopted July 15, 1912, and approved by the mayor July 16, 1912, a contract, dated October 29, 1912, was entered into between the city of New York and the South Shore Traction Company for the construction, maintenance, and operation of a street surface railway upon and over the Queensboro Bridge and upon and along various streets and avenues in the borough of Queens, between said bridge and the Nassau county line, as is more fully set forth and described in section 2 of said contract; and

"Whereas, by resolution adopted by the board of estimate and apportionment November 21, 1912, and approved by the mayor November 22, 1912, said board granted consent to the South Shore Traction Company to assign, transfer, and set over all rights and privileges granted by said contract of October 29, 1912, so that the same should pass to and vest in the Manhattan & Queens Traction Corporation; and

"Whereas, such assignment of said rights and privileges was subsequently made, and said Manhattan & Queens Traction Corporation took possession of the property of said South Shore Traction Company, and took over the operation of the local service maintained on the Queensboro Bridge by said South Shore Traction Company, at midnight on December 27, 1912; and

"Whereas, pursuant to a resolution of the board of estimate and apportionment adopted July 3, 1913, and approved by the mayor on the same day, said contract of October 29, 1912, was modified and amended by a contract dated July 21, 1913, entered into between the city of New York and said Manhattan & Queens Traction Corporation; and

"Whereas, pursuant to a resolution of the board of estimate and apportionment adopted December 17, 1915, and approved by the mayor December 18, 1915, said contract of October 29, 1912, as amended by said contract of July 21, 1913, was further modified and amended by contract dated January 21, 1916, entered into between the city of New York and the said Manhattan & Queens Traction Corporation; and

"Whereas, section 3, seventh, of said contract of October 29, 1912, as amended by said contract of January 21, provides as follows:

" 'Seventh. The company shall complete and put in operation terminal of the Queensboro Bridge to the intersection of the tracks of the Long Island Railroad with Thomas avenue at or near Greenpoint avenue on or before February 13, 1913, from the intersection of the tracks of the Long Island Railroad Company with Thomson avenue to the intersection of Thomson avenue and Broadway on or before April 30, 1913, from the intersection of Thomson avenue and Broadway to the proposed new Long Island Railroad station in the former village of Jamaica, on or before January 31, 1914,

" 'The company shall complete and put in operation that portion of its railway herein authorized between the present terminus thereof at the Long Island Railroad Company's station at Jamaica, and the intersection of Sutphin road (Guilford street) and Lambertville avenue (Pacific street), on or before May 1, 1916, and the remainder of its said railways between said intersection of Sutphin road (Guilford street) and Lambertville avenue (Pacific street) and the city line at Central avenue within such time or times as may be directed by resolution of the board upon recommendation of the president of the borough: Provided that title to the streets involved has been vested in the city and that said streets have been regulated and graded.

" 'Upon the failure of the company to complete the construction and place

[1] Before considering this case on the merits, it is necessary to determine a preliminary question as to whether the appeal was taken within the time prescribed by the Judicial Code. It is elementary that at common law a writ of error lies only from final judgments, and that the remedy by appeal is unknown to the common law, being employed for the review of causes in equity. According to the practice in equity as administered in England, appeals lay from interlocutory as well as from final orders or decrees. But under the judicial system of the government of the United States from the beginning until

in operation any of the said portions of the railway on or before the date or time herein specified, the right herein granted shall cease and determine, and all sums or securities paid to the city, or deposited with the comptroller as security for performance by the company of the terms and conditions of this contract, as herein provided, shall be forfeited to the city without action by the city: Provided, however, that the board may extend the time within which to complete the construction and place the railway in operation as it may deem just and equitable.'

"Whereas, by resolution adopted by said board of estimate and apportionment February 16, 1917, and approved by the mayor February 23, 1917, said Manhattan & Queens Traction Corporation was directed to commence construction of that portion of its street surface railway authorized by said contract of October 29, 1912, as amended by said contract of July 21, 1913, from the intersection of Sutphin road and Lambertville avenue to the intersection of Central avenue and Springfield road, on or before March 23, 1917, and to complete and put in operation said portion of its street surface railway on or before August 23, 1917; and

"Whereas, said Manhattan & Queens Traction Corporation has failed or neglected to complete construction of and put in operation that portion of its street surface railway authorized by said contract of October 29, 1912, as amended by said contract of July 21, 1913, from the intersection of Sutphin road and Lambertville avenue to the intersection of Central avenue and Springfield road, on or before August 23, 1917; and

"Whereas, section 5, thirteenth, of said contract of October 29, 1912, provides as follows;

" 'Thirteenth. In case of any violation or breach of failure to comply with any of the provisions herein contained, this contract may be forfeited by a suit brought by the corporation counsel on notice of ten (10) days to the company, or at option of the board by resolution of said board, which said resolution may contain a provision to the effect that the railway constructed and in use by virtue of this contract shall thereupon become the property of the city without proceedings at law or in equity: Provided, however, that such action by the board shall not be taken until the board shall give notice to the company to appear before it on a certain day, not less than ten (10) days after the date of such notice, to show cause why such resolution declaring the contract forfeited should not be adopted. In case the company fails to appear, action may be taken by the board forthwith.'

"Whereas, at a meeting of this board held October 19, 1917, the following resolutions were adopted:

" 'Resolved, that the Manhattan & Queens Traction Corporation be and it is hereby notified, under and pursuant to section 5, thirteenth, of the contract dated October 29, 1912, by and between the city of New York and the South Shore Traction Company, which said contract was, with the consent of the board of estimate and apportionment given by resolution adopted November 21, 1912, and approved by the mayor November 22, 1912, assigned to the Manhattan & Queens Traction Corporation, to appear before the board of estimate and apportionment on November 9, 1917, at a meeting of said board to be held on said date, at 10:30 o'clock a. m., in room 16, City Hall, borough of Manhattan, and show cause why a resolution declaring forfeited the contract dated October 29, 1912, granting a franchise to the South Shore Traction Com-

the passage in 1891 of the act establishing the Circuit Court of Appeals an appeal would lie only from final judgments or decrees. Smith v. Vulcan Iron Works, 165 U. S. 518, 522, 17 Sup. Ct. 407, 41 L. Ed. 810. Act 1891, c. 517, § 7, provided that, where upon a hearing in equity an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, an appeal may be taken from such interlocutory order or decree to the Circuit Court of Appeals. In 1900 the act of 1891 was amended so that an appeal might also

pany and subsequently assigned to the Manhattan & Queens Traction Corporation, and the contracts dated July 21, 1913, and January 21, 1916, by and between the city of New York and the Manhattan & Queens Traction Corporation, amending said contract dated October 29, 1912, should not be adopted, and why such resolution shall not provide that the railway constructed and in use by virtue of said contracts shall thereupon become the property of the city of New York without proceedings at law or in equity; and be it further

" 'Resolved, that the secretary of this board be and he hereby is directed to forward to the Manhattan & Queens Traction Corporation copies of these resolutions, and notify said corporation, in writing, that on the aforementioned date, at said time and place, said corporation mentioned will be allowed a hearing before final action is taken.'

"And whereas, on October 19, 1917, a copy of the aforesaid resolution was forwarded to said Manhattan & Queens Traction Corporation and said corporation notified, in writing, that it would be allowed a hearing on November 9, 1917, before final action is taken; and

"Whereas, such hearing was held on November 9, 1917, upon request of the acting president of the borough of Queens was continued to November 16, 1917, when it was continued to December 21, 1917, when it was continued to January 18, 1918, when it was again continued and was concluded after hearing Robert S. Sloan, counsel to the corporation; and

"Whereas, in the opinion of the board of estimate and apportionment, the corporation has failed to comply with the provisions of said contract of October 29, 1912, as amended by said contracts of July 21, 1913, and January 21, 1916, the violation or breach of which provisions renders the said contracts liable to forfeiture; and

"Whereas, due deliberation having been had, the board of estimate and apportionment hereby determines that the Manhattan & Queens Traction Corporation has broken, and failed and neglected to comply with, the provisions of the contract dated October 29, 1912, as amended July 21, 1913, and the contract dated January 21, 1916, and said consents, franchises, and contracts should be forfeited to the city of New York on account of such violation, breach, and default, and the railway constructed and in use under and by virtue of said contracts shall thereupon become the property of the city of New York: Now, therefore, be it

"Resolved, that the board of estimate and apportionment, under and pursuant to the provisions of section 5, thirteenth, of the said contract dated October 29, 1912, herein and hereby declares forfeited to the city of New York the contract dated October 29, 1912, between the city of New York and the Manhattan & Queens Traction Corporation, granting a franchise to the said Corporation, and the contracts dated respectively July 21, 1913, and January 21, 1916, modifying and amending said contract dated October 29, 1912; and be it further

"Resolved, that the railway, constructed and in use by virtue of said contracts dated October 29, 1912, July 21, 1913, and January 21, 1916, shall, from and after this date, become the property of the city of New York without proceedings at law or in equity; and be it further

"Resolved, that the secretary of this board be and he is hereby directed to forward a copy of these resolutions to the Manhattan & Queens Traction Corporation."

be taken from an interlocutory order appointing a receiver. Act 1900, c. 803. With these exceptions the appellate jurisdiction of this court continues restricted to final orders or decrees.

It is said in this case that the appeal was not taken in time, and the receivers on that ground have moved to dismiss. The order granting and continuing the injunction was re-entered and resettled on August 24, 1918. The appeal therefrom was taken on December 5, 1918. The contention is that the order is an interlocutory one, and that as appeals from interlocutory orders are required by section 129 of the Judicial Code to be taken within 30 days from the entry of such order, the appeal was not in time. U. S. Compiled Statutes Ann. 1916, vol. 2, p. 1444, § 1121. If the order is a final one, it is admitted that the appeal was taken in time, as such appeals may be taken at any time within six months after the entry of the order. 26 Stat. p. 829; Barnes' Fed. Code 1919, § 1386; U. S. Compiled Statutes 1916 Ann. vol. 3, p. 3266, § 1647.

[12-15] An interlocutory order is one entered between commencement and the end of a suit or action, which denies some point or matter, but which is not a final decision of the matter in issue. Bouvier's Law Dictionary. An interlocutory injunction is one granted prior to the final hearing and determination of the matter in issue, and which is to continue until answer, or until the final hearing, or until the further order of the court. Its object is to maintain the status quo, to maintain the property in its existing condition and prevent further or impending injury, and not to determine the rights of the parties. In re Sharp, 87 Kan. 504, 124 Pac. 532, Ann. Cas. 1913E, 460; Nelson v. Brown, 59 Vt. 600, 10 Atl. 721. In Klein v. Independent Brewing Association, 231 Ill. 594, 83 N. E. 434, it is said that a final decree is not necessarily the last order in the case, as orders sometimes follow merely for the purpose of carrying out or executing the matters which the decree has determined; but when it finally fixes the rights of the parties it is final and may be reviewed. In Collier v. Seward, 113 Va. 228, 74 S. E. 155, a decree is said to be interlocutory, and not final, if the further action of the court in the cause, as distinguished from proceedings necessary to execute the decree, is necessary to give completely the relief contemplated by the court.

A preliminary injunction was issued on December 19, 1917, and the city was directed to show cause on December 26, 1917, why the temporary injunction should not be made permanent. After a full hearing on the merits the order as resettled and entered on August 24, 1918, reads as follows:

"Ordered and decreed that the motion of the receivers for a permanent injunction, brought on by the said order to show cause, dated and entered herein December 19, 1917, be and the same hereby is granted, without prejudice to any further or other application to this court for the enforcement of any claim or right of the city of New York as to said matters, and it is further ordered and decreed that the temporary injunction, granted December 19, 1917, be made permanent pending further order in the action."

The order enjoined the persons specified therein "from moving, considering, voting on, amending, adopting, or in any manner pass-

ing" the resolution heretofore referred to. The fact that the order was without prejudice to any further application to the court for the enforcement of any of the rights of the city certainly cannot have the effect of converting what is otherwise a final order into an interlocutory one. The injunction meant the end of the matter so far as the particular judge who issued it was concerned, except that it did not include a change of mind on his part. The order goes just as far and lasts just as long as the District Court is possessed of any authority to issue it, and is therefore "final," and therefore appealable within the six months period. It is clearly a final order within the rule laid down by this court in Odell v. H. Batterman Co., 223 Fed. 292, 295, 138 C. C. A. 534, 537. In that case the court below entered an order which denied a request to be permitted to sue the receivers in ejectment. This court held the order was a final order from which an appeal could be taken. We said:

"Under the decisions an adjudication is a final appealable order, if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief, except by recourse to an appeal. In the suit at bar appellant claims a legal right to immediate possession of the premises, and asserts that he is entitled to have that right determined with all reasonable speed. So much of the order appealed from as denied appellant's application was undoubtedly a final order, inasmuch as it definitely and conclusively determined the proceeding which appellant had instituted. The effect of the order, as we have pointed out, is to leave appellant without relief until the receivership is terminated. When that will be cannot be predicted. The receivership is a consent receivership and capable of indefinite duration."

We adhere to what was said in the above case, and think it decisive of this on the particular matter now under discussion.

[2] There remains to be considered, before passing to the merits, the question whether the receivers followed the proper procedure in bringing the matter before the court by a petition in the suit in which they were appointed, although the party against whom the petition is filed is not a party in the original action; and this question we think must be answered in the affirmative. The receivers were appointed in a judgment creditors' suit in equity brought in the United States District Court for the Eastern District of New York by the Gas & Electric Securities Company, a Delaware corporation, against the Manhattan & Queens Traction Company. The receivers entered on their duties on November 15, 1917, and found the city of New York threatening to take action on December 21, 1917, for the forfeiture of the franchise and the property of the company, over, which they were appointed receivers. To protect the property in their hands the receivers applied for injunctive relief by petition in the receivership action. The city claims that this was error, and that the receivers should have proceeded by plenary suit or by ancillary bill, and not in a summary manner on petition and rule made in the receivership action. The city relies on what is said in Blair v. City of Chicago, 201 U. S. 400, 449, 450, 26 Sup. Ct. 427, 50 L. Ed. 801, where the right to proceed in such a case by ancillary bill is asserted. The court did not, however, decide that an ancillary bill was the only way in which the receivers could proceed in such cases. In a case

in the Circuit Court of Appeals for the Sixth Circuit (City of Shelbyville, Ky., v. Glover, 184 Fed. 234, 106 C. C. A. 376), the receiver in a case like the present proceeded by petition in the suit in which he was appointed, although the proposed defendant was not a party to such suit. It was held that this is not an improper way to proceed, when the rights of the proposed defendant can be as fully protected in such proceeding as in a separate suit, which is a matter to be determined by the court in the exercise of its discretion. We are disposed to take the same view of the matter, at least in a case where the substance of the petition sets forth a matter which is really ancillary to the main action, so that an ancillary bill could have been filed; and that an ancillary bill might have been filed in this case we think is clear. See Pell v. McCabe, 256 Fed. 512, 515, 168 C. C. A. 18, where the purposes for which an ancillary suit may be maintained are stated; and see Hume v. City of New York, 255 Fed. 488, 166 C. C. A. 564.

[3] The petition being properly before the court, we are brought to inquire whether the court had power to restrain the board of estimate and apportionment from proceeding to declare the forfeiture. The franchise contract dated October 29, 1912, provided in section 5 that the grant to the company to construct, maintain, and operate its railway over the line therein defined "was subject to the following conditions, which shall be complied with by the company." Then followed the conditions, and among them was a provision that on failure to comply with any of the provisions of the contract the contract might be forfeited by a suit brought by the corporation counsel, or at option of the board by resolution of said board. The insertion of such a provision in the contract was required by the charter of the city, which contains the following:

"Every grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates. * * *" Greater New York Charter (chapter 378 of the Laws of 1897, as amended by chapter 466 of the Laws of 1901, and chapter 629 of the Laws of 1905) § 73.

The power of a municipal corporation to grant a conditional consent to a railroad in its streets is not open to controversy in the state of New York. Matter of Quinby v. Public Service Commission, Second District, 223 N. Y. 244, 259, 119 N. E. 433, 3 A. L. R. 685. The condition, if it touches the future operation of the road, has the force of a condition subsequent, and if its terms are not fulfilled the consent may be revoked. Matter of International Railway v. Public Service Commission, Second District, 226 N. Y. 474, 124 N. E. 123. What the city of New York was proposing to do was to revoke its consent, on the ground that the terms of the contract had not been complied with.

[16] The exercise of the power to grant and to revoke had been transferred by law from the board of aldermen or common council of the city to the board of estimate and apportionment by an amendment to the charter of the city. Laws N. Y. 1905, vol. 2, c. 629, p. 1535.

And in Wilcox v. McClellan, 185 N. Y. 9, 18, 77 N. E. 986, 987, it is said:

"If, in the judgment of the Legislature, the board of estimate and apportionment was the proper body to intrust with the granting of franchises, we are unable to see wherein any right of the board of aldermen or of any other officer or individual has been unduly invaded."

Under the legislation referred to the control of the streets, and the power of granting and repealing franchises of street railways, has been transferred to the board of estimate and apportionment, and in the exercise of that power the city claims that the board is in the exercise of legislative power. Prior to this legislation, and from the date of the Dongan Charter, the common council or board of aldermen had exercised the legislative power of the city of New York. Ghee v. Northern Union Gas Co., 158 N. Y. 510, 512, 516, 53 N. E. 692. By legislative power is meant the authority exercised by that department of government which is charged with the enactment of laws, as distinguished from the executive and judicial functions; and the right of municipal corporations to exercise the legislative function under authority conferred by the Legislature cannot be challenged.

In granting a franchise to occupy the streets, the board is acting in a purely governmental capacity. It certainly cannot be said to be acting in any private or proprietary capacity. In passing the resolution declaring the grant at an end, it equally acts in a governmental capacity, as the agent of the state, and for the promotion of the public good. Edson v. Olathe, 81 Kan. 328, 331, 105 Pac. 521, 36 L. R. A. (N. S.) 861.

[4] The general rule is that a court of equity will not issue an injunction to restrain a municipal corporation from the exercise of legislative or governmental power, even though the contemplated action may be in disregard of constitutional restraints and may impair the obligation of a contract. New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; Dillon's Municipal Corporations (5th Ed.) vol. 2, § 582; McQuillin's Municipal Corporations, vol. 5, § 2503, and volume 1, § 705.

In High on Injunctions (4th Ed.) vol. 2, § 1243, p. 1250, the rule is correctly stated when it is said to be—

"unquestionably true that purely legislative acts, such as the passage of resolutions, or the adoption of ordinances by a municipal body, even though alleged to be unconstitutional and void, will not be enjoined, since it is not the province of a court of equity to interfere with the proceedings of municipal bodies in matters resting within their jurisdiction, or to control in any manner the exercise of their discretion. * * * And while courts of equity will not enjoin municipal bodies from the passage of ordinances or resolutions, the courts may and will, on a proper case being shown, prevent their enforcement, and for this purpose may enjoin proceedings thereunder which would otherwise result in irreparable injury."

The subject is considered at some length in 5 Pomeroy's Equity Jurisprudence, §§ 339, 340, the conclusion reached being in accord with what has been above stated, and it is added that the doctrine is alike applicable to resolutions and ordinances. The opinion of Judge Magruder in Stevens v. St. Mary's Training School, 144 Ill. 336, 32

N. E. 962, 18 L. R. A. 832, 36 Am. St. Rep. 438, makes a most thorough examination of the question, reviews the decided cases, and reaches the same conclusion.

The court below in granting the injunction said:

"The injunction is not asked against the legislative power of the state, but against threatened action by the city in taking property as to which the resolution of the board of estimate would be a step in the acquisition of that property. Such an injunction is within the authority of the court and the motion will be granted."

[5] If this statement means that a distinction exists between the right to enjoin the legislative power of the state and that of a municipal corporation, we know of no authority for making the distinction. If it means that the passage of the contemplated resolution does not involve an exercise of legislative power, being a resolution, instead of an ordinance, we are unable to agree in that conclusion. A city's legislative power can be exercised by either an ordinance or by a resolution, except as its charter or the general law otherwise provides. Bouvier defines "resolution" as:

"An agreement to a law or other thing adopted by a Legislature or popular assembly."

And our attention has not been called to any provision in the charter of the city of New York which requires the board of estimate and apportionment to act otherwise than by resolution in such a matter as the one under consideration.

Counsel for the receivers say in their brief that—

"The act of the board of estimate and apportionment in granting a franchise to a private corporation is not a legislative act; a fortiori, the revocation of a franchise contract, for a claimed failure to comply with certain of its terms, is not a legislative act."

The granting of a franchise is not a judicial, and under our system not an executive, act. If it is not legislative, we do not know how its action is to be classified. It is certainly acting in a governmental capacity. To say that a state or a city does not legislate when it grants a franchise, because acceptance by the incorporators is necessary, is a proposition we are not prepared to adopt.

[17] We are aware that there are cases which tend to support the doctrine that the forfeiture of a franchise is a judicial question, to be adjudicated in a direct proceeding brought by the state through its Attorney General. There is also a strong line of decisions to the contrary. Under ordinary circumstances, due process of law implies a formal judicial proceeding; but such a proceeding is not invariably required. See Held v. Crosthwaite, 260 Fed. 613, 618, 625, —— C. C. A. ——.

[6] In the case now before the court the franchise contract expressly provided that, if the company did not complete the construction and place in operation the railway on or before the dates specified, "the right herein granted shall cease and determine." We are satisfied that the company did not comply with its contract. It did not construct and put in operation its railway within the time allowed it

for the purpose, and because it did not do so its franchise automatically ceased and determined. The reasons put forward for not having complied with the contract in the affidavits presented to the court afford no excuse for the failure to perform. The parties to a contract are bound to perform it according to its terms, unless performance is rendered impossible by the act of God, by the law, or by the other party. Performance is not excused by unforeseen difficulties, or because it has become unexpectedly burdensome. That times were hard, that the company was in financial difficulties, that labor and materials had excessively advanced, and that it was impossible in a business sense to go ahead with the work, may all have been reasons which might have been addressed to the city in an appeal to have the time for the completion of the contract extended, but they afforded no legal excuse for the failure to perform.

[7] The resolution which the board is enjoined from passing proposed two distinct things: A declaration of the forfeiture of the franchise, and a declaration of the forfeiture of the railway constructed and in use, which "shall from and after this date become the property of the city of New York without proceedings at law or in equity." The board, as we have seen, has been given the legislative power of granting a franchise, and directed by the law-making body of the state to make provision "by way of forfeiture of the grant." If the franchise is the only thing the city can legislatively grant, the franchise is the only thing it can legislatively forfeit; but if the terms and conditions of a grant, which the Legislature has authorized the municipal body to confer, have not been determined in advance by the Legislature, and in this case they had not been, the terms and conditions of the grant and of the forfeiture are to be determined by the municipal body under its delegated authority, and in so doing it acts legislatively, both as respects the grant and the forfeiture. In such cases it has been held that, if the company accepts the benefit of a grant, it takes subject to the conditions attached thereto, and is thereby estopped to contest the validity of the conditions, either as ultra vires the municipality or as beyond its own powers. Potter v. Calumet Electric St. R. Co. (C. C.) 158 Fed. 52; Rutherford v. Hudson River Traction Co., 73 N. J. Law, 227, 63 Atl. 84; People v. Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Chicago General R. Co. v. Chicago, 176 Ill. 253, 52 N. E. 880, 66 L. R. A. 959, 68 Am. St. Rep. 188.

The courts hold that a corporation cannot question the constitutionality of an act under which it is incorporated. Whether upon the same principle a street railroad company is estopped in all cases to question the validity of a franchise contract under which it operates, and the benefit of which it has received, and is estopped from questioning the terms and conditions of the grant and the terms and conditions of the forfeiture, we need not now determine. In this case the grant and the forfeiture grow out of the exercise of legislative power and of contractual obligation. It can make no difference that the franchise was forfeited automatically by the failure to complete the trolley line within the period prescribed, and that the forfeiture

"of the railway" to the city of New York is to become effective from the date of the passage of the enjoined resolution. The forfeiture of the one is as good as the forfeiture of the other. Just what is meant by the term "railway" in the resolution of forfeiture is not before us, and is not determined.

[8] The franchise contract, in making it incumbent on the Traction Company to complete the remaining portion of its line "within such time or times as may be directed by resolution of the board," made the obligation conditional by adding:

"Provided that title to the streets involved has been vested in the city and that said streets have been regulated and graded."

And it is said that on February 16, 1917, when the board passed its resolution directing the Traction Company to complete and put in operation its railway within 6 months from the date of the approval of the resolution, the title to the streets involved had not vested in the city, and the streets had not been "regulated and graded to their legal grade and full width." The words "legal grade and full width" are not the words used in the franchise contract. The words found there are simply "regulated and graded," and our attention has not been called to any decision holding that words so used in such contracts mean "regulated and graded to their legal grade and full width." There is no discussion of the matter in the court below. The opinion, however, states that—

"The city is not even now in a position to literally demand fulfillment by the railroad. While the streets and grades are so far advanced that the road and the city could, by working together, go ahead without modification of the contract, yet the city is not in a position where it can insist that the road must at its peril perform literally all parts of the agreement."

The record discloses that with certain exceptions, hereinafter referred to, the streets involved were graded to their full width and length. There were seven parcels on Lambertville avenue where the grading was not completed to the full width. But those parcels did not extend one-half way across the sidewalk of that street, and did not in a single instance touch or affect the grade of the 40-foot roadway, or interfere in any way with the construction of the trolley line. That portion of Lambertville avenue between Freehold street, and Medford street had a temporary grade, conforming to the grade of the Long Island Railroad Company's line, over which the city has a prior right of way, and the Long Island Road proposed to the Traction Company that it might operate its railway over a temporary trestle which might span its tracks until the Long Island Road elevated its tracks as required by the order of the Public Service Commission when Lambertville avenue and the Traction Company's road were to run thereunder.

We think, too, that it plainly appears that the title to the streets, except the crossing of the Long Island Railroad, is in the city, and as to that we have seen that there is no obstacle in the way of the construction of the trolley line by a trestle above. It appears, however, that there are perhaps 25 telephone poles which would possibly have

to be moved from the streets to be traversed, although in one of the affidavits the consulting engineer for the borough of Queens states that—

"Between Farmers avenue and Springfield boulevard several poles interfere and may have to be moved, but in my opinion no poles need be moved to allow the construction of this railway."

And it is said that, when a street is regulated and graded in the city of New York, it is the custom to move back all poles to an established line about 1½ feet inside of the established curb line, and it is estimated that the cost of the removal of the poles in this case would be approximately $675. It is said, too, that a few water hydrants would have to be moved, and that the overhanging branches of some 15 or 20 trees would have to be trimmed, so that they could not interfere with the wires of the trolley. We confess that these objections do not impress us. We do not find them justified by anything in the franchise contract which requires the streets to be "graded."

[18] To grade a street, or highway, strictly speaking, is to establish a level by mathematical points and lines, and then to bring the surface of the street or highway to that level, by the elevation or depression of the natural surface to the line as fixed, and we do not understand that the franchise contract under consideration means more than this as respects the city's duty to grade. In Smith v. Corporation of Washington, 20 How. 135, 148 (15 L. Ed. 858), Mr. Justice Grier, speaking for the court, said:

"Streets cannot be opened and kept in repair, or made safe or convenient for public use, without being made level, or as nearly so as the nature of the ground will permit. Hills must be cut down and hollows filled up, or, in other words, the road must be 'graded' or 'reduced to a certain degree of ascent or descent,' which is the proper definition of the verb 'to grade.'"

In Sedgley Avenue, 217 Pa. 313, 66 Atl. 546, it is said that "as a matter of fact the grading of a street is its physical opening." Then, the court adds, when the city is in funds, the physical grading is done, and sewers and water pipes and gas pipes are laid as part of the work; and it is said in that case that, when the physical opening and grading is done, those holding the title are entitled to be paid "for the grading; that is, for the depositing of dirt upon the street taken as a street, or the cutting out of dirt from that strip, according as the grading consisted of a 'fill' or a 'cut.'" We think the streets involved in the franchise contract were "graded," and we are not impressed by the claim that, because possibly a few telephone poles needed to be moved and a few trees needed to have their branches trimmed, the Traction Corporation was under no obligation to begin its work of construction. We find ourselves unable to accede to that view of the matter.

[9] The Traction Corporation claims, and the court below has held, that section 3, paragraph seventh, of the contract, did not comprehend a forfeiture of the entire grant. An examination of the franchise contract and its amendments shows that the intention of the parties was that the railway was to be constructed in separate sec-

tions, as the respective sections of territory to be traversed became populated and developed, and streets were established therein. Section 3, above referred to, provided that, upon the failure of the company to complete the construction and place in operation "any of the said portions of the railway" on or before the dates specified, the right herein granted shall cease. The court below thought it impossible to hold that the whole franchise was lost because a separable part or extension of the road was not completed on time. We do not so understand it. The right which "shall cease" is "the right herein granted," and "the right herein granted" was the franchise, and that was a single franchise, and not as many separate franchises as there were separate portions of the railway to be constructed. So section 5 of article 13 provides that in case of failure to comply with any of the provisions of the contract "this contract may be forfeited, either by a suit or by resolution of the board." Surely the intention is plainly indicated that the contract as a whole was to be terminated and come to an end by the failure to construct any separable portion of the line within the specified period.

[10] The comptroller of the city of New York, on November 1, 1917, accepted payment of taxes from the Traction Corporation for the year ending September 30, 1917, while August 23, 1917, was the date on which the extension of the trolley line was to be completed. It is said that the acceptance of these franchise taxes bars the city from claiming forfeiture of the franchise contract. The answer is that the receipt of moneys by the administrative officers of the city in the course of the city's business cannot have the effect of a waiver of the rights of the public or of the municipality. See Wisconsin Central R. R. Co. v. United States, 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399.

[11] In the last analysis, the petition which the receivers have filed is in reality a bill in equity to be relieved against a forfeiture which the Traction Company incurred prior to their appointment. There are undoubtedly cases in which equity courts did and do relieve from forfeitures. Relief is afforded in all cases of forfeiture arising from nonpayment of money and in cases where the damage incurred is susceptible of pecuniary measurement and therefore of compensation. But it is equally well established that there are causes in which no relief from forfeiture can be granted. It is settled that, where the parties have so stipulated as to make time of the essence of the contract, a failure to perform at the time agreed upon cannot be relieved from. Pomeroy's Equity Jurisprudence (3d Ed.) vol. 1, § 455. So equity gives no relief from forfeiture growing out of breach of covenant to do some specific act. Bispham's Equity (8th Ed.) § 181. And a court of equity is powerless to grant relief from a forfeiture provided for by the express terms of statutory legislation. Clark v. Barnard, 108 U. S. 436, 455, 456, 457, 2 Sup. Ct. 878, 27 L. Ed. 780. In this case time is of the essence of the contract, the thing to be done is a specific act, and the forfeiture is imposed under and by virtue of statutory legislation by the state of New York, as found in the charter of the city of New York. A court of equity is therefore with-

out power to grant to the petitioners relief from the forfeiture which was incurred by those whose estates they are administering.

To summarize our conclusions, it may be said that the order appealed from is a final order, and the appeal therefrom was well taken; that as the matter involved is ancillary to the main suit the receivers were entitled to proceed as they did by petition; that on the facts disclosed the receivers have not made out a case, either of compliance with the contract, or of legal excuse for noncompliance, or any grounds of relief from forfeiture.

The order granting the injunction is reversed, without prejudice, however, to the right of the receivers to renew their application after the adoption of the proposed resolution by the board of estimate and apportionment, if the receivers then have reason to believe that the city of New York is proposing to take into its possession any of the visible and tangible property which has come into their hands as receivers, and which they are advised the city of New York is not entitled to take from their possession by virtue of the resolution aforesaid.

It is so ordered.

THE CITY OF NORFOLK.*

THE HAWKHEAD.

(Circuit Court of Appeals, Fourth Circuit. April 6, 1920.)

No. 1763.

1. **Collision ⇐8—Local rule as to anchorage in channels supplanted by federal statute.**
   A Norfolk harbor rule, providing that "vessels * * * are forbidden to anchor in the channel," *held* supplanted by the federal statute (Act March 3, 1899, § 15 [Comp. St. § 9920]) providing that "it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels or craft."

2. **Collision ⇐69—When anchorage in channel is unlawful.**
   Act March 3, 1899, § 15 (Comp. St. § 9920), making it unlawful for vessels to anchor in channels in such manner as to prevent or obstruct the passage of other vessels, does not permit a vessel to anchor voluntarily in a channel when, although there is sufficient room for other vessels to pass, her presence there imperils them or requires more than ordinary skill or care in their navigation, and masters are charged with knowledge that the coming of fogs or storms may make an anchored vessel an obstruction, where it would not be in fair weather.

3. **Collision ⇐69—Vessel caught in fog may be justified in anchoring in channel.**
   A vessel caught in a dense fog while moving in a channel is justified in anchoring in the channel, giving the statutory signals, where that appears less dangerous under the circumstances and conditions than proceeding to the open sea or established anchorage grounds, and in case of collision while so anchored is entitled to the presumption in favor of a vessel at rest against a moving vessel.

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

 *Certiorari denied 253 U. S. —, 40 Sup. Ct. 584, 64 L. Ed. -.

4. Collision ⇐82(1)—Duty of vessel to proceed at "moderate speed" to anchorage or open sea.

"Moderate speed," with reference to the duty of a master and pilot of a vessel caught by a dense fog in a channel, in which the vessel at anchor would be an obstruction to another vessel navigated with due care, to get out of the way of other vessels by moving on with moderate speed to the nearest anchorage grounds or the open sea, means speed so slow that the vessel can be stopped within the distance at which another vessel can be seen.

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

Appeal 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 Frank Hand, master of the British Steamship Hawkhead, against the Chesapeake Steamship Company of Baltimore City, owner, and John Thomas, master, of the steamer City of Norfolk. Decree against the City of Norfolk, and her claimants appeal. Affirmed.

For opinion below, see 248 Fed. 780.

Floyd Hughes, of Norfolk, Va. (Hughes, Vandeventer & Eggleston, of Norfolk, Va., on the brief), for appellants.

Robert M. Hughes, Jr., of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellee.

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

WOODS, Circuit Judge. This appeal brings under review the decree of the District Court holding the Chesapeake Line freight steamer, City of Norfolk, solely at fault for collision with the British tramp steamer Hawkhead, at anchor in the channel of Elizabeth river about 7 o'clock in the evening of October 6, 1916.

The Hawkhead is 385 feet long, 56 feet 6 inches beam, 26 feet 5 inches deep. She left Lamberts Point pier, going to sea, about 5:30 in the afternoon, in charge of a Virginia pilot. Seeing a dense fog approaching, the pilot first attempted to turn the vessel, with the intention of going back to her pier; but before the turn could be made the fog became so dense and imminent that the effort to turn was abandoned. After consultation the master and pilot decided it would be safer to anchor than to return to Lamberts Point or to proceed to the anchorage ground in Hampton Roads, a mile to 2 miles distant. Accordingly the vessel was anchored near gas buoy 12, so that she was lying partly within and partly without the channel. This was at a time when the pilot knew the outgoing steamers were shortly to be expected. At the place of anchorage the channel for a width of 400 feet was 35 feet deep, and for 200 feet more 30 feet deep. At anchor the Hawkhead so extended into the channel as to leave fairway in the 35-foot channel not less than 75 feet wide, and in the 30-foot channel from 200 to 250 feet wide.

The City of Norfolk, a vessel 297½ feet long, 46 feet beam, 16 feet 2 inches deep, left Norfolk at 6:30. Proceeding in the fog, her offi-

cers and watch did not observe the Hawkhead in time to stop and avoid collision. Each vessel was in charge of an experienced master and pilot.

The District Court found:

"That the lookout on the City of Norfolk was grossly negligent in not hearing and reporting the fog bell sounded from the Hawkhead earlier than he did, and that the City of Norfolk was proceeding at undue speed, in utter disregard of the law and regulations prescribed for the control of her movements in fog."

Since this conclusion has abundant support in the testimony of witnesses who were before the court, it is not subject to review.

[1] Was the Hawkhead also at fault in anchoring in the channel and not proceeding to the usual anchorage grounds in Hampton Roads? The Norfolk harbor rule forbids anchoring in a channel in this language:

"Vessels entering the harbor and intending to come to anchor or dropping out from wharves or docks preparatory to departure, must anchor under direction of a harbor master, *and are forbidden to anchor in the channel.*"

The federal statute provides:

"It shall not be lawful to tie up or anchor vessels or other craft in navigable channels, *in such a manner as to prevent or obstruct the passage of other vessels or craft.*" Act March 3, 1899, c. 425, § 15 (Comp. St. § 9920).

Indisputably the absolute prohibition of the local rule would have been valid before the Congress had acted on the subject. On that subject the Supreme Court has said:

"The power of the city authorities to pass and enforce these two ordinances is disputed by the libelants. But regulations of this kind are necessary and indispensable in every commercial port, for the convenience and safety of commerce; and the local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there, where she may unload or take on board particular cargoes, where she may anchor in the harbor, and for what time, and what description of light she shall display at night to warn the passing vessels of her position and that she is at anchor and not under sail. They are like to the local usages of navigation in different ports, and every vessel, from whatever part of the world she may come, is bound to take notice of them and conform to them. And there is nothing in the regulations referred to in the port of Charleston which is in conflict with any law of Congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States." Owners of the Brig James Gray v. Owners of the Ship John Fraser, et al., 62 U. S. 184, 187.

The Congress had not legislated on matters regulated by the Charleston harbor rules, and they were therefore held valid. So, also, in Steamship Company v. Joliffe, 2 Wall. 450, it was held that the local rules regulating pilotage in San Francisco harbor were valid, because the act of Congress of 1852 did not cover the same subject, but related exclusively to ocean pilotage. The rule as to state statutes or regulations alleged to be inconsistent with federal legislation is thus stated in Gulf, Colorado, etc., Railway v. Hefley, 158 U. S. 98, 103:

"The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the

same subject-matter prescribe different rules. In such case one must yield, and that one is the state law."

"It may be conceded that, were there no congressional legislation in respect to the matter, the state act could be held applicable to interstate shipments as a police regulation. Railroad Company v. Fuller, 17 Wall. 560." Gibbons v. Ogden, 9 Wheat, 200, 6 L. Ed. 23; Gilman v. Philadelphia, 3 Wall. 713, 18 L. Ed. 96; Escanaba Co. v. Chicago, 107 U. S. 678, 683, 2 Sup. Ct. 185, 27 L. Ed. 442; The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264; Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 154, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

It was intimated in The Margaret J. Sanford, 213 Fed. 975, 130 C. C. A. 381, though the point was not necessarily involved in the decision, that the local harbor rule is not an absolute prohibition to anchor in the channel, but "impliedly extends to anchoring so as to obstruct the channel." Such a modifying implication to express language could only be based on the ground that it was required by the dominant federal statute.

In the case before us the local regulation covers the subject and makes an absolute prohibition against anchoring in a channel: the federal statute covers the same subject, and prohibits anchoring in a channel only when it will prevent or obstruct navigation. Stated conversely, the federal statute allows anchoring in a channel when it does not prevent or obstruct navigation, while the local regulation forbids it. If, while the local rule above quoted was in force, the board of harbor commissioners had made another rule in the terms of the federal statute, obviously the old rule containing the absolute prohibition would have been completely abrogated. Surely the act of Congress on the subject must have the same effect. We hold, therefore, that the local rule is supplanted by the federal statute of 1899.

[2] The general practical application of the statute is thus stated in The Margaret J. Sanford, 213 Fed. 975, 130 C. C. A. 381:

"If a vessel anchors at a point in the channel where, notwithstanding such anchorage, other vessels navigated with the care the situation requires can safely pass, then she has neither violated the statute nor rendered herself liable under the general rules applicable to navigation, even though she has to a certain extent obstructed the channel." The Job H. Jackson (D. C.) 144 Fed. 896; Ann. J. Trainer, 152 Fed. 1021, 82 C. C. A. 332; The Caldy, 153 Fed. 837, 83 C. C. A. 10; The City of Birmingham, 138 Fed. 555, 559, 71 C. C. A. 115; The Europe, 190 Fed. 475, 111 C. C. A. 307; The John G. McCullough (D. C.) 232 Fed. 637; The W. H. Gilbert, 232 Fed. 547, 146 C. C. A. 505.

This only means that almost every anchorage in a channel is in a sense an obstruction of a part of the channel, in that it excludes other vessels from that part; yet many channels are so wide that an anchored vessel in the daytime, or even at night with nothing to obstruct the view, is no true obstruction, because it does not really interfere with the navigation of other vessels. But the statute was intended as an explicit legislative statement that the dominant use of channels is for passage, and not anchorage, and it does not permit a vessel to anchor voluntarily in a channel, when her presence there imperils other vessels, or requires more than ordinary skill or care in their navigation. Obviously masters of vessels are charged with knowledge that the

coming of fogs or storms may make an anchored vessel an obstruction, when it would not be in fair weather.

[3, 4] The difficulty presented here is to define the duty of a vessel caught in a fog while moving in a channel. Should she go on until she reaches open water or safe anchorage ground, using the precautions required by subdivision (a) of article 15 and article 16 (Comp. St. §§ 7888, 7889), or anchor in the channel, ringing her warning bell, as required by subdivision (d) of article 15? Since a vessel anchored in a channel and not visible because of a fog is usually a dangerous obstruction to navigation, does the act of 1899 forbid anchoring in a channel in a fog? The authorities are hardly reconcilable. Having in view, however, the statutes, the current of judicial thought,[1] and the rule of reason, we think the matter may be thus stated: The first thought and object of the master and pilot of a vessel caught by a dense fog in a channel in which the vessel at anchor would be an obstruction to another vessel navigated with due care should be to get out of the way of other vessels by moving on with "moderate speed" to the nearest anchorage grounds or the open sea. In such navigation "moderate speed" means speed so slow that the vessel can be stopped within the distance at which another vessel can be seen. If the fog is so dense as to justify the master in believing that another vessel going at a moderate speed could not be seen at the distance in which he could stop his vessel, and that the two vessels would be in danger of collision, then the master should anchor and give the statutory signals. Even if he thus obstructs the channel, he is not responsible, because it is done under necessity. Doubt as to this necessity should be solved by weighing all the circumstances and conditions, such as the width of the channel, the flow of the tide, the force of the wind, the probability of meeting other vessels, the size of the ship, and distance and course to the nearest anchorage. If the navigator of the vessel, upon careful consideration of all the circumstances, reasonably concludes that necessity requires anchorage he should not be held in fault, and in case of collision should be held entitled to the presumption in favor of a vessel at rest against a moving vessel. The duty of the master of the approaching vessel is to stop as soon as he hears the fog signal.

The District Court in effect applied this test of necessity, and found as a conclusion of fact, on a conflict of evidence, that under the circumstances, the master and pilot of the Hawkhead exercised a wise

[1] The Pennsylvania, 86 U. S. (19 Wall.) 125, 22 L. Ed. 148; The Clarita, 23 Wall. 1, 23 L. Ed. 146; The City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84; The Martello, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637; The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Chattahoochee, 173 U. S. 540, 548, 19 Sup. Ct. 491, 43 L. Ed. 801; United States v. St. Louis, etc., Trans. Co., 184 U. S. 247, 22 Sup. Ct. 350, 46 L. Ed. 520; Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726; The Express (D. C.) 48 Fed. 323; Id., 61 Fed. 513, 9 C. C. A. 598; The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123; La Bourgogne, 86 Fed. 475, 30 C. C. A. 203; The Benjamin A. Van Brunt, 98 Fed. 131, 38 C. C. A. 668; The City of Lowell, 152 Fed. 593, 81 C. C. A. 583; The Annasona (D. C.) 166 Fed. 801; The Persian, 181 Fed. 439, 104 C. C. A. 187; The Georgia (D. C.) 208 Fed. 635; The Pocohuntas (D. C.) 217 Fed. 135; The Belfast (D. C.) 226 Fed. 362.

discretion in coming to anchor; that she put out lights and sounded her bell in accordance with the regulations; that the City of Norfolk would have passed in safety if she had been navigated with due care. The law having been properly applied, this court is bound by these findings of fact.

Affirmed.

UNITED STATES ex rel. RAKICS v. UHL, Acting Commissioner of Immigration.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 191.

1. **Habeas corpus ⇐113(1)—Judgment reviewable by appeal.**
   In the federal courts when there has not been a jury trial, an order discharging or remanding a prisoner in habeas corpus proceedings is ordinarily reviewable by appeal, and not on writ of error.
2. **Aliens ⇐54—Findings of fact on fair hearing in deportation proceedings conclusive.**
   An order for deportation of an alien under Act Oct. 16, 1918, § 1 (Comp. St. Ann. Supp. 1919, § 4289¼b[1]), on findings based on his own testimony, where he was given a fair hearing, cannot be reviewed on habeas corpus because he later denied some of the sentiments previously expressed; the findings of fact by the executive department being conclusive.
3. **Aliens ⇐54—Procedure summary in deportation proceedings.**
   Act Oct. 16, 1918, § 2 (Comp. St. Ann. Supp. 1919, § 4289¼b[2]), in providing for deportation of aliens who are members of anarchist, and similar classes, contemplates a summary investigation, and not a judicial trial, and the formalities of procedure and rules which govern the admissibility of evidence in a judicial trial are not controlling in such proceedings.

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

Habeas corpus, on the relation of Daniel Rakics, against Byron H. Uhl, Acting Commissioner of Immigration at the Port of New York. From an order dismissing the writ, petitioner appeals. Affirmed.

Charles Recht, of New York City (Walter H. Pollak, Charles Recht, and Ruth I. Wilson, all of New York City, of counsel), for appellant.

Francis G. Caffey, U. S. Atty., of New York City (David V. Cahill, Asst. U. S. Atty., of New York City, of counsel), for respondent.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This is a deportation proceeding. The relator was arrested on May 5, 1919, under a warrant issued by the United States Department of Labor. The warrant was issued pursuant to an application made by the inspector in charge of the Department of Labor at Cleveland, Ohio, based on statements made by the relator to a special agent of the Department of Justice, and on the minutes of a hearing accorded to him by the Department of Justice in March, 1919. On May 7, 1919, another hearing was accorded the re-

lator at Cleveland by the inspector of the Immigration Service of the Department of Labor. The findings of the inspector are summarized as follows:

"This alien admits guilt on all of the charges mentioned in the warrant of arrest, with the exception that he denied that he believes in violence. He states that he believes in revolution, does not believe in the present form of government of the United States, does not believe in organized government, and does believe in sabotage. Besides being of the anarchistic class he is an ordinary thief. It is strongly recommended that he be deported."

The minutes of the hearing, together with the findings of the inspector, were submitted to the Acting Secretary of the Department of Labor and were approved by him; and on May 26, 1919, that official issued a warrant of deportation addressed to the Commissioner of Immigration at Ellis Island, New York Harbor. The warrant states that the Acting Secretary of Labor has become satisfied that the relator—

"has been found in the United States in violation of an act approved October 16, 1918, for the following, among other reasons, to wit: That he believes in the overthrow by force or violence of the government of the United States; that he advocates the overthrow by force or violence of the government of the United States; that he advocates the unlawful destruction of property and that he disbelieves in all organized government."

And it commanded the Commissioner of Immigration to return the relator to Hungary, the country from which he came. Thereupon the relator applied to one of the District Judges in the Southern district of New York, he having been brought within the district under the deportation warrant, for a writ of habeas corpus directing the Commissioner of Immigration to produce the relator before the court for a hearing and determination concerning his unlawful detention.

The petitioner was brought into the District Court on October 11, 1919. No evidence was taken in that court, but the case was disposed of on the petition, return, and traverse. The court below dismissed the writ of habeas corpus and remanded the petitioner to the custody of the Commissioner of Immigration.

[1] The relator has appealed from the decree entered in the District Court dismissing the petition for habeas corpus. At the early common law it has been said that no appeal or writ of error was allowed from a judgment in a habeas corpus proceeding remanding or discharging a prisoner. Hammond v. People, 32 Ill. 446, 83 Am. Dec. 286; State v. Galloway, 5 Cold. (Tenn.) 326, 98 Am. Dec. 404. And even at the present time a conflict of opinion exists in the state courts upon the question whether a judgment in habeas corpus is appealable, and a number of the courts hold that in the absence of a statutory provision no appeal lies. People v. McAnally, 221 Ill. 66, 77 N. E. 544, 5 Ann. Cas. 590; Ex parte Cox, 44 Fla. 537, 33 South. 509, 61 L. R. A. 734; Bleakley v. Smart, 74 Kan. 476, 87 Pac. 76, 11 Ann. Cas. 125. In those jurisdictions where a decision in a habeas corpus proceeding is reviewable, the law is not uniform whether the remedy is by appeal, or by writ of error, or by certiorari. In the federal courts, in cases where there has been no trial by jury, ordinarily the remedy is by appeal, and not by writ of error. Hecht v. Boughton, 105 U. S. 235,

26 L. Ed. 1018; United States v. Union Pacific Railroad Co., 105 U. S. 263, 26 L. Ed. 1021. The Act of Congress of August 29, 1842, c. 257, expressly provides for appeals in cases of habeas corpus, and no question is raised in the present case as to the right to proceed in that manner.

[2] The petitioner is a native of Hungary, and he has never declared his intention to become a citizen of the United States. He came to this country from Germany in 1907, and since 1917 he has been a member of the Industrial Workers of the World. The warrant of deportation is issued under the Act of October 16, 1918, 40 Stat. part 1, p. 1012, c. 186 (Comp. St. Ann. Supp. 1919, §§ 4289¼b[1]–4289¼b[3]). Section 1 of that act (section 4289¼b[1]) provides as follows:

"That aliens who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the government of the United States or of all forms of law; aliens who disbelieve in or are opposed to all organized government; aliens who advocate or teach the assassination of public officials; aliens who advocate or teach the unlawful destruction of property; aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all organized government, or that advocates the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the government of the United States or of any other organized government, because of his or their official character, or that advocates or teaches the unlawful destruction of property shall be excluded from admission into the United States."

The relator, in his examination before a special agent of the Department of Justice on March 23, 1919, testified that he is married and has one child; that he is a member of the I. W. W., and for a time was secretary of one of its locals. He was asked whether he knew what the principles of the organization are, and replied that he did not know them all. Asked what the organization was striving for, he answered:

"They are striving for better conditions—abolish the wage system."

Then followed:

"Q. How do they intend to bring about these results? A. Organize the working people.

"Q. Organize them for what? A. For better conditions.

"Q. After the working people are organized, what steps does the I. W. W. expect to take to bring about these better conditions? A. I do not know.

"Q. Has no one in the I. W. W. ever told you of plans they had for bringing that about? A. They may have—I have forgotten.

"Q. Are you satisfied with the form of government which we at present have in the United States? A. I am not.

"Q. What is your opposition to it? A. I cannot answer.

"Q. Would you like to see the government of the United States overthrown? A. Yes—without bloodshed.

"Q. Do you believe it would be right to use force to overthrow the government of the United States? A. No.

"Q. Are you opposed to organized form of government in general? A. No.

"Q. Do you believe in the assassination of public officials? A. No.

"Q. Would you believe in the assassination of the President of the United States or any other particular official individual? A. No; I do not believe in anything like that at all.

"Q. Why do you wear a red necktie? A. Because this is our style.

"Q. Does it have any particular significance? A. Signifies internationalism.

"Q. Is it not also the symbol of the anarchist? A. No.

"Q. Are you an anarchist? A. No.

"Q. Did you understand the questions put to you yesterday in the other room? A. I was excited, and did not know what I was saying.

"Q. Do you know that you told us yesterday that you believed in the overthrow of the government of the United States by force? A. Yes; I know I said that; but I was excited and did not know what I was saying.

"Q. Who has visited you in jail? A. No one.

"Q. Has any one told you to deny what you told us yesterday? A. No.

"Q. Do you mean to tell me that yesterday you believed in the overthrow by force of the government of the United States, and that to-day you do not believe in it—that you have changed your mind? A. I said that yesterday because I was very mad.

"Q. You believed it yesterday, but to-day you do not? A. I was mad · that is why I said it.

"Q. Have you any property or any money in the bank? A. No."

On May 7, 1919, he was examined before the immigration inspector and testified in part as follows:

"Q. Did you belong to the radicals in Hungary before you came here? A. No.

"Q. When did you become a radical? A. Since the war started.

"Q. What made you a radical? A. When they sent the poor people to the butcher shop; that made me a radical.

"Q. What do you mean by sending the poor people to the butcher shop? A. Because the people could leave this war out and live like one family.

"Q. If the officers of the government, which are chosen by the people, as it is done in the United States, determine that it is for the interest of the country to go to war, don't you think it is the duty of the citizens and residents to back up the government in every shape and manner? A. Let those who declared war go and finish it, and not call on any one else. * * *

"Q. What are the principles of the I. W. W.? A. As I understand them, the principles are to educate the people and make free the working people.

"Q. Don't you consider the working people of this country free at the present time? A. No.

"Q. In what way are they not free? A. They work 10 and 12 hours a day, like a mule, without having a decent living.

"Q. Does this organization to which you belong advocate anarchy? A. Yes.

"Q. Do they advocate sabotage? A. Yes.

"Q. Do you believe in all of the principles of the I. W. W.? A. Yes; it does not teach you anything bad.

"Q. Now, I have shown to you and read to you a report by the special agent of the Department of Justice in reference to what you stated to him on March 23, 1919. I want to ask you if this agent reported the truth as to what he was told by you? A. I do not know.

"Q. Then I will call your particular attention to several of the points mentioned in this report. Did you state to this agent that the reason that you never declared your intentions to become a citizen of the United States was because you did not believe in the form of government here? A. Yes.

"Q. Did you further state that you did not believe in any form of government, only the soviet form of government, like that in Russia? A. Yes.

"Q. Did you tell this officer that you believe in sabotage and direct action? A. Yes.

"Q. Did you tell him that you believe that the form of government of the United States was wrong, and would like to see it changed? A. Yes.

"Q. Did you tell him that you thought it would be all right to start a revo-

lution to overthrow the present government of the United States? A. I did not tell him that way. He asked me if I wanted to see a revolution in this country, and I told him 'Yes.'

"Q. You were secretary of Local No. 606 of the I. W. W. for three months or more? A. Yes.

"Q. Were these things that you expressed to the Department of Justice agent your own convictions? A. Yes; I told him just what I thought.

"Q. Then, if this is so, the first allegations contained in the warrant of arrest, that you believe in the overthrow by force or violence of the government of the United States, is true? A. I never said I believed in using force.

"Q. But you do believe in the overthrow of the present form of government of the United States? A. Yes.

"Q. And the further allegation that you advocate the overthrow by force or violence of the government of the United States—do you believe that is true? A. Yes; that is all I know about sabotage.

"Q. What do you understand sabotage to be? A. I mean, if I ask for anything, and cannot get it in the right way, cannot get it peacefully, get it by strike, then return back. If I cannot get it by strike, go on back to work; but we do not work like we used to; we work slow; lay around; do not believe in destroying anything.

"Q. Another allegation contained in this warrant says that you disbelieve in all organized government. Is that so? A. Yes.

"Q. I note in this report, which I have shown and read to you, that you were arrested some time in March by a representative of the Bailey Company for shop-lifting. The agent states that you had some red neckties in your possession which were stolen from the counters of the Bailey Company store. Is this story true? A. Yes.

"Q. Were you fined? A. No; they let me go. * * *

"Q. As I told you in the beginning, the purpose of this hearing is to give you an opportunity to show cause why you should not be deported to the country of which you are a citizen on the grounds mentioned in the warrant of arrest. As you have waived your right to an attorney, I would like for you to give full reasons why you should not be deported. You can make as complete a statement as you please. A. I want to be deported. I do not want to be here, hanging around and knocking around from one place to another. If they do not want to deport me, give me a chance to get out; do not let my wife and child suffer."

Prior to his examination he was notified that he had the right to employ an attorney, and replied that he had no money to employ an attorney, and did not care for a lawyer. At the close of the examination he was asked whether he had been treated kindly, and replied: "Yes, sir."

The relator is in this court objecting that there is no proof that he believed in the overthrow by force or violence of the government of the United States, or that he advocates the unlawful destruction of property. The relator in his petition for the writ states:

"Relator was further asked whether he believes in the unlawful destruction of property, and stated that he does not; the record in this case, as relator is informed and verily believes, shows that relator's answer was in the affirmative. Relator states that he was asked whether he believes in sabotage, to which he answered that he believes in certain forms of lawful sabotage; but, as relator is informed, the record does not contain his answer, but simply states 'Yes' in answer to the said question. Relator was further asked if he believes in 'free love,' to which he answered that the questioner does not know what that means; instead of recording the answer as it was given, the record shows, as relator is informed, that the relator answered 'Yes.' Relator further states that the interpreter furnished did not correctly understand the language, and did not interpret his answers faithfully. Relator was, by reason of the facts herein set forth, not accorded a fair hearing, and

the warrant of deportation was unlawfully issued, not having been based upon a true and correct record of the proceedings actually had in the case."

In his traverse to the return the relator denies categorically that he ever said what the stenographic record made at the hearing declares he did say. But the fact of the relator's contradictions and his explanation of them were before the Acting Secretary of Labor at the time the warrant for deportation was signed. Moreover, the affidavit of the immigration inspector is in the record, and it states that the copy of the minutes of the hearing before the inspector is "a true copy." There is, too, a presumption that the official stenographer's minutes are correct. The allegations of the traverse were put in issue without a reply. In re Leary, Fed. Cas. No. 8,162. As they were thus controverted, the burden of proving them was on the petitioner, and no evidence to sustain them was offered.

The statutes provide:

"Sec. 760. The petitioner of the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

"Sec. 761. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Revised Stat. of U. S. (2d Ed.) 1878, p. 143 (Comp. St. §§ 1288, 1289).

The relator made no demand for the summary hearing authorized by section 761, and he offered no proof to sustain the allegations of the traverse. In his traverse to the return, relator sets forth the following question and answer with his denial:

"Did you understand the questions that I have asked you, and have you been treated kindly? A. Yes, sir."

As a matter of fact relator replied:

"I did not understand all, but most of the questions. You have treated me kindly, but agents of the Department of Justice and the persons in charge of the jail have constantly abused me, threatening that they would hang me and beat me, and used all kinds of abusive and vile language to me."

But the return before the Secretary of Labor disclosed the fact that the relator claimed that he had been abused, and that the abuse had made him mad, and that certain of his answers had been given erroneously because of his anger. His allegation has not been sustained by any testimony. This court has no doubt that there was evidence before the Department of Labor from which the Secretary of Labor might legally find that the relator believes in the overthrow of the government of the United States by force, and that he advocates the unlawful destruction of property. There was before the Department a telegram sent by a special agent of the Department of Justice which reads as follows:

"Daniel Rakies, Hungarian alien enemy, detained, admits he is anarchist, believes in sabotage; prominent member and official in Keeve Unman Unman. Full report being made."

It appears, too, that the relator stated that he believes in the soviet form of government, like that of Russia, and that he believes in sabotage and direct action, and that he believes it would be all right to start an armed revolution to overthrow the present government of the United States.

[3] The act under which this proceeding was instituted contemplates a summary investigation, and not a judicial trial. The formalities of procedure and the rules which govern the admissibility of evidence in a judicial trial are not controlling in such proceedings. A series of decisions in the Supreme Court has settled it that hearings, like the one in question here, and tried before executive officers, are conclusive when fairly conducted. To successfully attack them before the courts, it must appear that the proceedings were manifestly unfair, that the executive officers acted in such manner as prevented a fair investigation, or it must be shown that there was a manifest abuse of discretion. In other cases the order of the executive officer within the authority of the statute is final. Low Wah Suey v. Backus, 225 U. S. 460, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165.

It does not appear that the hearings of which the relator complains were "manifestly unfair," or that "a fair investigation" has been prevented, or that there has been any "manifest abuse" of discretion. On the contrary, out of his own mouth the relator has condemned himself, and is now seeking to escape therefrom by asking this court to decide that the Commissioner of Labor was bound to believe the relator when on his second examination he said that he would like to see the government of the United States overthrown without bloodshed, and that he did not believe that it would be right to overthrow it by force, but was bound to disbelieve him when on his first examination he said the exact contrary. This court has no such right. It is enough for this court that the Commissioner of Labor had before him evidence which, if he believed it, justified the action which he decided to take. The objection seems to be that upon the evidence the Commissioner of Labor should have come to a different conclusion. Such an objection was one which could not be entertained in the court below or in this court. We have nothing to do with the weight of the evidence. Sibray v. United States, 227 Fed. 1, 7, 8, 141 C. C. A. 555.

We shall not review in detail the various assignments of error. They are in our opinion without merit. The relator was given a fair hearing, and the proceedings for his deportation are in accordance with the laws, rules, and regulations governing the subject.

Order affirmed.

SMITH v. MISSOURI PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. June 28, 1920.)

No. 5504.

1. Courts ⟸508(2)—State court proceedings against purchaser from receiver can be enjoined under reserved powers.
Where the final decree in a proceeding in federal court made the purchaser liable for claims against the receiver for damages while operating railroad, but retained sole jurisdiction to determine such claims, an action against the purchaser in the state court for liability assumed under the decree can be enjoined by the federal court, notwithstanding Judicial Code, § 265 (Comp. St. § 1242), prohibiting the federal courts from restraining proceedings in the state court.

2. Courts ⟸493(2)—Claim for damages against purchaser from receiver held to be enforced in court decreeing sale.
One who sought to hold the purchaser from a receiver liable for damages caused by the receiver under the final decree cannot accept the benefits of that decree and avoid its burdens, and therefore must enforce his claim in the federal court, which retained sole jurisdiction to determine liability under the decree.

Appeal from the District Court of the United States for the Eastern District of Missouri; William C. Hook and David P. Dyer, Judges.

Suit by the Missouri Pacific Railroad Company against Belle Smith to enjoin the prosecution of a civil action in the state court. From a decree granting the temporary injunction prayed for, defendant appeals. Affirmed.

Alfred N. Gossett and Terrence J. Madden, both of Kansas City, Mo., for appellant.

Edward J. White, of St. Louis, Mo. (Thomas Hackney and Leslie A. Welch, both of Kansas City, Mo., on the brief), for appellee.

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

TRIEBER, District Judge. This is an appeal from a temporary injunction enjoining, until the further order of the court, the appellant, Belle Smith, defendant in the court below, from prosecuting her action in the circuit court of Jackson county, Mo., against the appellee, the Missouri Pacific Railroad Company, plaintiff in the court below. The temporary injunction was granted on a supplemental petition of the Missouri Pacific Railroad Company, in a cause pending in the District Court of the United States for the Eastern District of Missouri, in which the Guaranty Trust Company of New York and Benjamin F. Edwards, as trustees, are plaintiffs, and the Missouri Pacific Railway Company defendant. The facts, as they appear from the record, are:

That in an action of the Guaranty Trust Company and Benjamin F. Edwards, as trustees, pending in the District Court of the United States for the Eastern District of Missouri, against the Missouri Pacific Railway Company, B. F. Bush was, on August 19, 1915, appointed by that court receiver of the railway company and all its

effects. Having qualified as such receiver, he took legal possession of said property at the time. While he was operating the railway as such receiver, the defendant, Belle Smith, while a passenger on one of the trains operated by the receiver, claims to have been injured by reason of the negligence of the receiver. A final decree of foreclosure and sale of the railway property in the action in which the receiver was appointed was entered by the court on December 21, 1916. On February 23, 1917, the railway and all its effects were sold under that decree of foreclosure and purchased by the plaintiff, the Missouri Pacific Railroad Company. The sale was confirmed and approved by the court on March 6, 1917. Deeds were duly executed and possession of all the railway property surrendered to the purchaser by the receiver on June 1, 1917.

On August 3, 1917, the appellant, Belle Smith, to recover damages for the injuries sustained by her while a passenger on one of the trains operated by the receiver, instituted her action in the circourt court of Jackson county, Mo., against the appellee railroad company, claiming that by reason of the final decree, and purchase under it, of the property of the Missouri Pacific Railway Company, the appellee, the Missouri Pacific Railroad Company, became liable to her for the damages sustained by her while a passenger on the road while operated by the receiver, alleging in her complaint that the said receiver resided in the city of St. Louis, and had no agent in the county of Jackson, state of Missouri, or elsewhere outside of the city of St. Louis, Mo., on whom process could be served.

The final decree of foreclosure, under which the appellee claims, was introduced in evidence, and the parts which are material to the issues herein are as follows:

Article XXVII: "The purchaser of the property described in article VII of this decree, as part of the consideration for the property and as part of the purchase price thereof, and in addition to the sums bid by him and elsewhere in this decree required to be paid by him, shall take such property and receive the deeds or other instruments of conveyance and transfer thereof, upon the express condition that he or his successors or assigns shall pay, satisfy and discharge: * * * And also any unpaid indebtedness and liabilities of the receiver incurred in this cause or in said constituent causes, in the management or operation of the property purchased, and otherwise in the discharge of his duties as such receiver between August 19, 1915, the date of his appointment, and the date of the delivery by the receiver of possession of the property sold. * * * The parties to receive and pay, and the amounts to be paid and received, under this article, unless agreed upon by the parties in interest, shall be fixed and adjudged by this court, and this court reserves the right and retains the power and jurisdiction so to do, and the right, power, and jurisdiction to take back and resell any property that shall be sold under this decree, in case the purchaser or purchasers, or his or their successors, shall fail to pay any of the claims mentioned in this article, within 20 days after service of an order of this court requiring such payment, or, if an appeal be taken from any such order, within 20 days after service of written notice of final confirmation of such order upon appeal.

"In the event that any purchaser, after demand made, shall refuse to pay any of the above-mentioned indebtedness or liabilities which under the foregoing provisions of this article he is or may be required to pay, the person holding the claim therefor, upon 20 days' notice to such purchaser, may file a petition in this court to have such claim enforced against the property sold to such purchaser, in accordance with the usual practice of this court in rela-

tion to payments of a similar character; and such purchaser shall have the right to appear and make defense to any claim, debt, or demand or the priority thereof so sought to be enforced."

Article XXIX: "*Matters Reserved.*—All questions relating to the amounts of compensation, charges, allowances, costs, disbursements and expenses referred to in this decree are hereby reserved by this court for further hearing and determination, and all payments to be made therefor, unless agreed upon by the parties in interest, shall be hereafter determined, fixed, allowed, and settled by this court.

"All questions, issues, matters, and things not hereby disposed of, including the discharge of the receiver herein and the statement and settlement of his accounts, hereby are reserved by this court for its future adjudication. Any party to this cause, and any party to the constituent causes wherein Commonweath Steel Company and Guaranty Trust Company of New York and Benjamin F. Edwards, as trustees, are complainants, respectively, may at any time apply to this court for further relief at the foot of this decree in respect of the matters not herein specifically provided for."

[1] On the part of the appellant it is claimed that the court below was without jurisdiction to grant an injunction to stay proceedings in a state court, relying upon section 265, Judicial Code (Comp. St. § 1242). That is the real question in issue.

This section does not apply to an action of this nature. But for the fact that the court, in the decree rendered in the foreclosure proceeding, placed upon the purchaser the obligation to pay any unpaid indebtedness or liabilities of the receiver incurred in the management or operation of the property purchased, there would clearly be no liability on the part of the appellee for any indebtedness or liabilities of the receiver. Whether such an action as was instituted by the appellant in the circuit court of Jackson county, Mo., could be maintained, if that were the only provision in the foreclosure decree, it is unnecessary to determine in this cause. What we are concerned with is whether the provisions in the decree that all claims under article VII of the decree, "unless agreed upon by the parties in interest, shall be fixed and adjudged by this court, and this court reserves the right and retains the power and jurisdiction so to do," and the further provision that the court "retains the right, power, and jurisdiction to take back and resell any property that shall be sold under this decree, in case the purchaser or purchasers, or his or their successors, shall fail to pay any of the claims mentioned in this article," etc., do not reserve to that court the exclusive jurisdiction to determine all claims against the receiver, incurred while he was operating the railway.

In Julian v. Central Trust Co., 193 U. S. 93, 111, 24 Sup. Ct. 399, 407 (48 L. Ed. 629), the court said:

"It is obvious that by this decree of sale and confirmation it was the intention and purpose of the federal court to retain jurisdiction over the cause so far as was necessary to determine all liens and demands to be paid by the purchaser. It accepted the purchaser and thereby made it a party to the suit. Blossom v. Milwaukee & C. R. Co., 1 Wall. 655, 17 L. Ed. 673. The court reserved the right to retake the property, if necessary to enforce any lien that might be adjudged against the same. On the other hand, the purchaser agreed to pay only such demands as the Circuit Court might declare and adjudge to be legally due, with the right of appeal from such judgment. These provisions make apparent the purpose of the court to retain jurisdiction for the purpose of itself settling and determining all liens and demands which the

purchaser should pay as a condition of security in the title which the court had decreed to be conveyed. If the sheriff is allowed to sell the very property conveyed by the federal decree, such action has the effect to annul and set it aside, because in the view of the state court it was ineffectual to pass the title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the federal court and to render effectual its decree. Central Trust Co. v. St. Louis, A. & T. Co., 59 Fed. 385; Fidelity Ins. Trust & S. D. v. Norfolk & W. R. Co., 88 Fed. 815; State Trust Co. v. Kansas City, P. & G. R. Co., 110 Fed. 10. In such cases, where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding section 720, Rev. Stat. (U. S. Comp. Stat. 1901, p. 581), restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction."

And this has been consistently adhered to by that court, as well as all inferior courts of the United States. In Lang v. Choctaw, Oklahoma & Gulf R. Co., 160 Fed. 355, 360, 87 C. C. A. 307, this court had the identical question before it, and it was there held:

"The jurisdiction of a court over a subject-matter or a cause once lawfully acquired includes the power to enforce its judgment or decree, and to protect the title of those holding under it from every attempt to avoid or annul it [citing authorities]. A bill in equity dependent upon a former suit in the same court may be maintained by the purchaser under the decree or by any other party interested therein (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce, to enjoin the enforcement of, or to obtain an adjudication of liens upon or claims to property involved in the original suit. Brun v. Mann, 151 Fed. 145, 80 C. C. A. 513. And where a federal courts acts in aid of its own jurisdiction to render its decree or the title under it effectual it may, notwithstanding section 720, Rev. St. (U. S. Comp. St. 1901, p. 581), restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. Sharon v. Terry, 36 Fed. 337, 1 L. R. A. 572; French v. Hay, 22 Wall. 250; Dietch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 354; Julian v. Central Trust Company, 193 U. S. 112, 24 Sup. Ct. 399, 48 L. Ed. 629."

In Wabash Railroad v. Adelbert College, 208 U. S. 38, 55, 28 Sup. Ct. 182, 188 (52 L. Ed. 379), the court said:

"The effect of reservations in a decree of foreclosure, which to say the least were no broader than those in this decree, was before the court in Julian v. Central Trust Co., 193 U. S. 93, 48 L. Ed. 629, 24 Sup. Ct. Rep. 399. The reservations in that case are stated on page 110, and of them the court said (page 111): 'It is obvious that by this decree of sale and confirmation it was the intention and purpose of the federal court to retain jurisdiction over the cause so far as was necessary to determine all liens and demands to be paid by the purchaser.' And again (page 112): 'The federal court by its decree, reserved the right to determine what liens or claims should be charged upon the title conveyed by the court.' And again (page 113): 'The Circuit Court by the order made retained jurisdiction of the case to settle all claims against the property and to determine what burdens should be borne by the purchaser as a condition of holding the title conveyed.' Here was a clear determination by this court that the exclusive jurisdiction of claims against a res, which had arisen out of the possession of the res in judicial proceedings for foreclosure of mortgages, might be continued after sale and conveyance of the property for the purpose of deciding what claims were legally chargeable against it. This is precisely what the Circuit Court attempted to do with respect to the property now before us, and its right to do it is clearly supported by the decision in the Julian Case. Under the reservations in that case the Circuit

Court was held to have power to protect the property sold by its order from sale on an execution issued by a state court."

Other authorities to the same effect decided by this court are Mound City Co. v. Castleman, 187 Fed. 921, 924, 110 C. C. A. 55; Western Union Tel. Co. v. United States & Mexican Trust Co., 221 Fed. 545, 553, 137 C. C. A. 113; Ferguson v. Omaha & S. W. R. Co., 227 Fed. 513, 519, 142 C. C. A. 145; Swift v. Black Panther Oil & Gas Co., 244 Fed. 20, 23, 156 C. C. A. 448; South Dakota Cent. Ry. Co. v. Continental & Commercial Trust Co., 255 Fed. 941, 943, 167 C. C. A. 233, certiorari denied 250 U. S. 643, 39 Sup. Ct. 493, 63 L. Ed. 1186.

[2] As the appellant claims to have a right of action against the appellee by virtue of the foreclosure decree solely, she cannot accept the benefits of that decree, without submitting to the conditions, upon which this privilege is granted, the right of the court, which rendered the decree, to determine the liability of the receiver, to the exclusion of every other tribunal.

The principal case relied on for the appellant, Chicago Great Western Railway v. Hulbert, 205 Fed. 248, 250, 125 C. C. A. 98, is clearly distinguishable from the instant case. In that case the court did not in its foreclosure decree reserve to itself the sole right to adjudicate any claims which accrued while the railway was in the possession of the receiver, but imposed on the purchaser the liabilities "which are established." It left the right to choose the tribunal for the establishment of the claim to the claimant, while in the instant case the court which rendered the decree reserved the right to itself exclusively. The court had jurisdiction of the cause, and upon the facts the temporary injunction was properly granted.

The decree is affirmed.

EMPRESS THEATRE CO. v. HORTON.

(Circuit Court of Appeals, Eighth Circuit. July 15, 1920.)

No. 5543.

1. **Bankruptcy ⊜391(3)—Forfeiture of lease under its terms for bankruptcy of lessee cannot be restrained.**
   Where a lease without rent, granted in consideration of delivery of corporate stock of the lessee, provided for forfeiture of the lease on bankruptcy of the lessee, the trustee in bankruptcy of an assignee of the lease cannot have enforcement of the forfeiture clause enjoined, where there was no showing of fraud or mistake.

2. **Bankruptcy ⊜391(3)—Hardship to bankrupt and creditors because of forfeiture under lease not ground for injunction.**
   The fact that a bankrupt paid $9,000 for the assignment of a lease one year before his bankruptcy, and that his creditors, who advanced the money, would lose it, does not prevent the lessor from exercising its right of forfeiture under the terms of the lease, for bankruptcy of the lessee, where the assignee took the lease with full knowledge of that condition.

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3. Bankruptcy ⇐468—On reversing injunction against forfeiture of lease for bankruptcy, court can order delivery to lessor, etc.

The Circuit Court of Appeals, on reversing a decree of the District Court enjoining a lessor from enforcing its right to forfeit the lease for bankruptcy of the lessee, where the trustee had petitioned for determination of rights of parties, can, in order to settle the litigation, direct the trustee to surrender possession of the property to the lessor, determine the date when the lease was terminated by exercise of the lessor's option, and direct the trustee to pay the lessor the reasonable value of the use of the premises since such date.

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Petition by W. A. Horton, as trustee in bankruptcy, against the Empress Theatre Company, to restrain it from taking possession of leased premises under the terms of the lease. From a decree granting the injunction prayed for, the Empress Theatre Company appeals. Reversed and remanded, with instructions.

This appeal challenges a decree in equity against a lessor, the respondent below, upon the petition and at the instance of the trustee in bankruptcy of the estate of the lessee, which, in the absence of any mistake or accident, and of any fraud or wrong of the lessor, avoids and perpetually enjoins the performance of the express condition of the lease and the express covenants of the lessee therein, to the effect that in case of the insolvency or bankruptcy of the lessee the lease shall, on the election of the lessor, cease, its term shall end, the lessor may take immediate possession of the leased premises and put out all occupants and possessors thereof, and that no title, right, or interest in the leased premises under the lease shall pass without the consent of the lessor to any trustee in bankruptcy or by judicial process or by operation of law. The premises leased consist of the basement of a theater building in the city of Omaha. The lease was dated April 23, 1914. The Standard Limited, a corporation, was the original lessor, and the Empress Garden, a corporation, was the lessee. The purpose of the Standard Limited, in making the lease was to increase the patronage and business of the theater by securing the operation of a high-class café with special amusement features in this basement. To accomplish this object it took $42,000 of the corporate stock of the Empress Garden for this lease to the latter, and loaned it $80,000 to enable it to fit up the basement. This $42,000 of stock was the only consideration the Standard Limited or its successor in interest, the Empress Theatre Company, a corporation and the respondent here, to which it assigned its lessor interest on November 15, 1914, ever received and that stock became worthless through the insolvency and bankruptcy of the Empress Garden in 1915, and the latter corporation never paid any part of the loan to it of the $80,000, so that in fact neither the original lessor nor the respondent ever obtained anything of value from the Empress Garden for the lease.

At a sale by the trustee in bankruptcy of the estate of the Empress Garden of the lessee interest of that bankrupt corporation, one E. G. McGilton, as trustee of some lienholders, bought and secured an assignment of this lessee interest. Thereafter Philip H. Philbin borrowed $10,000 of Dr. J. T. Dwyer, used $9,000 of it to pay McGilton for his assignment of the lessee interest, and that interest was duly assigned to Philbin with the consent of the respondent on January 3, 1917. Philbin assigned this lease as collateral to secure his debt to Dr. Dwyer immediately after he acquired it.

Turning back, now, to the terms of the lease, it was a conditional lease, and it granted only a conditional term. It provided in its second paragraph that "the party of the second part is to have the use of the said leased premises, rent free, until the expiration of the said term, that is to say, until the 31st day of January, 1928"; but the following conditions and cove-

nants demonstrated the fact that it was only on condition that they were complied with and performed that the lessor was to have a lease of these premises for this long term. Thus the lease provided that the leased premises were to be used for restaurant and amusement purposes and that no part thereof should be used for any other or different purpose without the written consent of the lessor. The twelfth paragraph of the lease reads in this way:

"It is agreed that the covenants and agreements herein contained shall pass to and be binding upon the successors and assigns of the parties hereto: Provided, however, that this lease shall not be assigned, nor shall the said premises or any part thereof be sublet by the party of the second part, without the written consent of the party of the first part. No right, title, or interest upon this lease shall pass to any trustee in bankruptcy, or by judicial process, or by operation of law, without the consent of the party of the first part. The bankruptcy or insolvency of the party of the second part, or other tenant who may go into possession of the premises, with the written consent of the party of the first part, shall at the option of the party of the first part, work an immediate forfeit of the lease, and all interest of the party of the second part therein and thereunder, and the failure of the party of the first part to exercise its option and terminate the said lease on account of such bankruptcy or insolvency, in one case, shall not prevent its exercising its option in any subsequent case of like nature."

Observe that while the consent of the respondent to the assignment of the lessee's interest to Philip F. Philbin estopped it from electing to terminate the lease on account of the prior insolvency and bankruptcy of the Empress Garden and the claim of its trustee in bankruptcy to sell it, the last clause of this twelfth paragraph expressly reserves to it the right to exercise its option and election on the occurrence of the subsequent insolvency and bankruptcy of the second bankrupt Philbin. The eleventh paragraph of the lease contains these covenants of the lessee:

"The party of the second part agrees that at the expiration of the term of the lease, or at or upon any earlier termination of the same, in case it should be sooner terminated, it will quietly and peaceably yield up to the party of the first part the possession of the leased premises. * * * It is expressly agreed by and between the parties hereto that, if any condition or agreement herein contained on the part or behalf of the party of the second part be not fully complied with and performed, then and in such case the party of the first part may terminate the lease and retake immediate possession of the premises and property, and put out and remove therefrom any and all persons occupying or in possession of the same."

Philbin acquired the lessee interest in this lease January 3, 1917; he became insolvent early in 1918, and was adjudged a bankrupt on April 23, 1918. W. A. Horton, the petitioner herein, was elected and qualified as his trustee in bankruptcy. The possession of the leased premises was delivered over to this trustee by Philbin, and there that possession still remains. Upon learning of the insolvency and bankruptcy of Philbin, the respondent, the Empress Theatre Company, in due time and form notified Philbin, the trustee in bankruptcy, and the bankruptcy court, that on account of the insolvency and bankruptcy of Philbin it elected to terminate the lease, to end its term, to forfeit it, and to take possession of the leased premises pursuant to the provisions of the lease which have been recited. Thereafter the trustee received an offer of $12,000 for his assignment of the lease, if he had the lawful right to sell and assign it. The respondent demanded the possession of the premises, protested against any sale or assignment of any interest in them, or of the lease by the trustee, and notified those who thought of buying that the trustee had no title or interest to sell. Thereupon the trustee filed and presented a petition to the court below sitting in bankruptcy, in which he set forth his claim to sell the leased premises and to apply the proceeds to the payment of the debt of Philbin to Dr. Dwyer, and the remainder to the payment of Philbin's general creditors, and prayed that the court would take jurisdiction of, determine, and adjudge the claims of the trustee and the respondent respectively to rights and interest in the leased premises under the lease, and that it would finally decree that these leased

premises are the property of the trustee, that the respondent has no right, title, or interest therein, and that it be perpetually enjoined from seeking possession or use thereof, and from in any way interfering with the use, sale, or disposition thereof by the trustee, or by any one purchasing from him. The respondent set forth in its answer its claims to the possession and use of the property under the condition and covenants in the lease. Testimony was taken, and there was a final hearing of the issue by the referee in bankruptcy, and afterwards on a petition for review by the court below, and an order and decree was finally entered by that court against the respondent for the relief prayed by the trustee. From that decree the Empress Theatre Company has appealed.

Anan Raymond, of Omaha, Neb. (Francis A. Brogan, Alfred G. Ellick, and John U. Loomis, all of Omaha, Neb., on the brief), for appellant.

G. L. De Lacy, of Omaha, Neb. (J. A. C. Kennedy, Yale C. Holland, and Charles F. McLaughlin, all of Omaha, Neb., on the brief), for appellee.

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

SANBORN, Circuit Judge (after stating the facts as above). [1] If a lessor, for a gross consideration received by him at the time the lease is made, leases the valuable basement of a city building for a specific use free of subsequent rent for 15 years on the condition that in case of the insolvency or bankruptcy of the lessee, the term of the lease shall, at the election of the lessor, then terminate, the lease shall be forfeited, the lessor may take, and the lessee will deliver back to him, immediate possession of the leased premises, and no right, title, or interest shall pass to the trustee in bankruptcy of the lessor; if the lessee expressly covenants in the lease that, if any condition or agreement in the lease on his part is not fully complied with and performed, the lessor may terminate the lease and retake, and the lessee will deliver to him, immediate possession of the leased premises; if the lessee becomes insolvent and is adjudged bankrupt, if the lessor immediately elects then to terminate the term of the lease, to forfeit it, and to take possession of the premises on account of such insolvency and bankruptcy; if he gives due notice of his election and demands immediate possession of the premises—then may a court of chancery at the instance and on the prayer of the trustee in bankruptcy of the lessee, in the absence of any fraud or wrong of the lessor, and of mistake or accident, decree under the recognized principles and rules of equity jurisprudence that the condition and covenants of the lease recited be avoided and nullified, that the specific or other performance thereof be perpetually enjoined, and that the lessor, without receiving any equitable consideration therefor, be forever deprived of the use and the value of the use of the leased premises from the time of the insolvency and bankruptcy to the end of the 15 years? This is the question which this case presents. The contingencies of the question are the established facts here, and the referee and the District Court have answered it in the affirmative. It seems difficult,

however, to find among the principles and rules of equity any sound basis for this conclusion.

A court of equity may enjoin the performance of and set aside contracts, conditions, and covenants obtained by the fraud, deceit, or wrong of the respondent, but neither the Empress Theatre Company nor its predecessor in interest was guilty of fraud, wrong, or deceit. It may sometimes avoid conditions and covenants for mistake or accident, but there was neither in this case. The condition and covenants of the lease were natural, reasonable, and just. It clearly shows that when it was made the lessor and the lessee contemplated the possible, perhaps the probable, insolvency and bankruptcy of the lessee and of some of its successors in interest during the long 15 years then to come, discussed, carefully considered, and finally contracted and wrote into their lease their agreement what the effect of such insolvency and bankruptcy should be, to wit, the end of the term of the lease, its forfeiture, and the return to the lessor of the leased premises at its election. The basement leased was a valuable property. The purpose the lessor had in making the lease, to secure the operation in this basement of a high-class café with special amusement features, made the solvency of the lessee and hence its continuous operation of the café essential to the accomplishment of this purpose. Its insolvency or bankruptcy, placing the basement in the hands of a trustee for a long time during bankruptcy proceedings, and then sending it to an unknown purchaser, would undoubtedly to a large extent defeat the object of the lessor in making the lease, produce the vacancy or inadequate operation of the proposed café, and result in immeasurable damage to the leased premises and to the value of their use. It was to prevent this contemplated possibility that these parties wrote into their lease the condition and covenant that in case of the insolvency or bankruptcy of the lessee, at the election of the lessor, the term of the lease should end and the leased premises should be returned to the lessor free from the lease.

Nor was this an unconscionable or inequitable agreement. The lessor received and the lessee gave for this lease $42,000 of the corporate stock of the latter. The lessee received and the lessor gave the use of the basement for the term of 15 years on condition that the lessee or its successor in interest, approved by the lessor, remained solvent for 15 years, but that it should be terminable at the option of the lessor at any time within the 15 years when the lessee became insolvent or bankrupt. When the lease was made, the effect of the condition and covenants which the parties undoubtedly then contemplated was that, in case the lessee became insolvent or bankrupt, its $42,000 of stock which the lessor received would be worthless, and it would actually receive nothing for the lessee's use of the premises, the lessee's operation of the café would be so financially disastrous that it would, at its insolvency, have exhausted the lessee's means and rendered it incapable of operating or using the premises as a café, and the lessor would have the right then to end the term of the lease and take back the leased premises. And such was the actual

effect of the condition and covenants of the lease in about a year from the commencement of the lessee's operation under it, when it became insolvent and bankrupt. So it was that each party at the making of the lease foresaw the possibility, perhaps the probability, of the insolvency and bankruptcy of the lessee, agreed that the effect of such insolvency and bankruptcy should be to vest in the lessor the right at its election then to end the term of the lease and take back the premises, and then took its chance of such insolvency and bankruptcy and signed the lease. And, as the condition and covenants under consideration were in the lease, every one who has succeeded to any interest in or lien upon any interest in the lease has taken that interest or lien under and subject to that condition and those covenants, and has taken its or his chance of the insolvency or bankruptcy of the original or successor lessee thereunder.

Nor was there anything in the condition and covenants of this lease evil in itself, or prohibited by law, or contrary to the public policy of state or nation. The condition and covenants were not novel, but common provisions in leases. Conditions and covenants in leases of the same character have been repeatedly considered, and generally, nay almost universally, sustained and enforced, both by courts of equity and courts of law. Kann v. King, 204 U. S. 43, 54, 63, 27 Sup. Ct. 213, 51 L. Ed. 360; In re Georgalas Bros. (D. C.) 245 Fed. 129, 131, 132; Galbraith v. Wood, 124 Minn. 210, 212, 213, 215, 216, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, Ann. Cas. 1915B, 609; In re Frazin, 183 Fed. 28, 29, 105 C. C. A. 320, 321, 33 L. R. A. (N. S.) 745; Lindeke v. Associates Realty Co., 146 Fed. 630, 632, 636, 639, 641, 77 C. C. A. 56, 58, 61, 64, 66; Brewster v. Lanyon Zinc Co., 140 Fed. 801, 813, 815, 816, 817, 818, 72 C. C. A. 213, 225, 227, 228, 229, 230; Towle v. Pullen, 238 Fed. 107, 110, 112, 151 C. C. A. 183, 186, 188; Liggett Co. v. Wilson, 224 Mass. 456, 113 N. E. 184, L. R. A. 1917A, 205; White v. Huber Drug Co., 190 Mich. 212, 157 N. W. 60, 61, 63; Hepp Co. v. Deahl, 53 Colo. 274, 125 Pac. 491; Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468, 472; Klein v. Insurance Co., 104 U. S. 88, 92, 26 L. Ed. 662; Westbrook v. Schmaus, 51 Kan. 558, 559, 560, 33 Pac. 306.

In Kann v. King, 204 U. S. 43, 57, 27 Sup. Ct. 213, 51 L. Ed. 360, the lessee in a lease, whereby she was bound to pay the taxes every year, and the right of the lessee to terminate the lease and re-enter for breach of any of the conditions thereof was stipulated therein, brought a suit in equity against the lessor to enjoin the latter from maintaining landlord and tenant proceedings to recover possession of the premises, based upon the lessor's right of re-entry which had arisen from the failure of the lessee to pay the taxes. The Supreme Court first held that there was "no foundation for the contention that it was within the ordinary power of a court of equity to relieve from the forfeiture," then proceeded "to consider whether the case as made by the record is brought within the general authority of a court of equity to relieve in cases of fraud, accident or mistake" (204 U. S. 57, 27 Sup. Ct. 217, 51 L. Ed. 360), found no proof of accident or mistake, or of fraud or wrongdoing on the part of the lessor, re-

versed the decree against her, which had been rendered below, and directed the dismissal of the bill for want of equity.

The Circuit Court of Appeals of the Second Circuit in In re Frazin, 183 Fed. 28, 29, 32, 105 C. C. A. 320, 33 L. R. A. (N. S.) 745, had a case in which a paragraph of the lease before it was identical in effect and nearly so in words with the provisions of the lease in hand regarding the rights of the lessor in case of bankruptcy of the lessee and the appointment of a receiver or a trustee in bankruptcy. There, as here, the trustee in bankruptcy of the estate of the lessee applied to the District Court in the bankruptcy case for and obtained an order which prohibited the lessor from re-entering the leased premises by reason of the breach of the condition and covenants of the lease on this subject. The lessor filed a petition in the Circuit Court of Appeals to revise this order. That court heard and considered the question on its merits and reversed the order of the District Court, with costs. To the same effect was the decision of the District Court as to the rights of the lessor under a like condition and covenant with reference to the effect of the bankruptcy of the lessee in In re Georgalas Bros. (D. C.) 245 Fed. 129, 131, 132.

In Galbraith v. Wood, 124 Minn. 212, 213, 215, 216, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, Ann. Cas. 1915B, 609, the parties made a lease of a hotel for a term of 15 years; that lease provided that, if the lessee should be declared bankrupt or insolvent, the lessors might declare the term ended, re-enter the premises, take and hold them. When the lease was made the lessee paid to the lessor $20,000 on account of the rent for the third, fourth, and fifth years of the 15-year term. About 5 months after the making of the lease, the lessee was adjudged bankrupt, and the plaintiff was appointed his trustee in bankruptcy. On the same day the lessors gave notice to the lessee and trustee that they declared the lease ended, because the lessee was adjudged a bankrupt, and demanded possession of the premises. The trustee surrendered them, and sued the lessors for the $20,000 that the lessee had paid to them on the rent for the third, fourth, and fifth years of the term. The Supreme Court of Minnesota held that under the terms of the lease the lessors had the right to declare its term ended (124 Minn. 212, 215, 216, 144 N. W. 945, 50 L. R. A. [N. S.] 1034, Ann. Cas. 1915B, 609) and to re-enter and take possession of the premises, and that the trustee could not recover the $20,000.

In Brewster v. Lanyon Zinc Co., 140 Fed. 801, 813, 815, 816, 817, 818, 72 C. C. A. 213, Judge Van Devanter (now Mr. Justice Van Devanter of the Supreme Court) delivered the opinion of this court upon the turning points in the case in hand. In that case the lessor in an oil and gas lease brought a bill in equity against the lessee for a decree that the term of the lease was ended, that he was entitled to the immediate possession of the leased premises, that the lease was thenceforth void, and that it and its record be annulled, because the lessee had failed to perform its implied covenants in the lease to continue, after the first 5 years of the term thereof, with reasonable diligence, the work of exploration, development, and production, and

the lessor had notified the lessee that she elected to declare the lease void, and had demanded a surrender and cancellation thereof under the provision therein that "a failure of second party to comply with any of the above conditions renders this lease null and void." The District Court had dismissed the bill on a demurrer for want of equity. This court held: That there was no express, but that there was an implied, covenant in the lease on the part of the lessee to continue the exploration and development with reasonable diligence after the expiration of the first 5 years. That a covenant of that character was a condition of the lease, the breach of which entitled the lessor to avoid it (140 Fed. 812, 813, 815, 72 C. C. A. 213). To the same effect are Liggett v. Wilson, 224 Mass. 456, 113 N. E. 184, L. R. A. 1917A, 205; Gilchrist v. Foxen, 95 Wis. 428, 70 N. W. 585; Knutson v. Bostrak, 99 Wis. 469, 75 N. W. 156; Glocke v. Glocke, 113 Wis. 303, 89 N. W. 118, 122, 123, 57 L. R. A. 458). That, while relief against forfeitures may be granted where, as in failures to pay on time fixed money rents or installments of the purchase price of lands, damages from the breach are certain, and adequate compensation may be made, such relief is never granted where the damages from the breach because of which the forfeiture is incurred cannot be ascertained with reasonable certainty (140 Fed. 816, 72 C. C. A. 213). To the same effect are 1 Pomeroy's Equity Jurisprudence (4th Ed.) § 454; Geffert v. Geffert, 97 Kan. 57, 157 Pac. 384; Liddle v. Cook, 209 Fed. 182, 126 C. C. A. 130; Klein v. Ins. Co., 104 U. S. 88, 92, 26 L. Ed. 662; Westbrook v. Schmaus, 51 Kan. 558, 559, 560, 33 Pac. 306; Towle v. Pullen, 238 Fed. 107, 110, 111, 151 C. C. A. 183. That there is no insuperable objection to the enforcement of a forfeiture by a court of equity, and, when that is more consonant with the principles of right, justice, and morality than to withhold relief, or when there is full, clear, and strict proof of a legal right to a forfeiture, equity follows the law and enforces it (140 Fed. 819, 820, 72 C. C. A. 213). To the same effect are Brown v. Vandergrift, 80 Pa. 142, 148; Cherokee Const. Co. v. Bishop, 86 Ark. 489, 112 S. W. 189, 190, 192, 194; Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468, 472; Leach v. Leach, 4 Ind. 628, 629, 58 Am. Dec. 642. And this court reversed the dismissal of the bill and directed the court below to proceed to hear, determine, and adjudge the case in accordance with these rules.

[2] In view of the facts and decisions which have now been reviewed, why should the covenants of the lessee and the condition of the lease in hand be avoided, their performance prohibited, and the lessor deprived of the use of the leased premises that their terms assure to him? Counsel for the trustee of Philbin's estate answer, because it would be harsh and unconscionable not to do so. They say that, when Philbin bought the lessee interest in the lease, it provided that the lessee should have the use of the premises, rent free, for the remainder of the 15 years, which was about 8 years; that he paid to his assignor McGilton $9,000 for that use; that the trustee is now offered $12,000 for this use, if the court will avoid the condition of the lease and the covenants of the lessee, and adjudge it to

him exempt therefrom; and that for the benefit of the creditors of Philbin a court of equity ought so to do. All the rights and interest of the creditors of Philbin, if any, are derived from him. Against the lessor neither the trustee nor any creditor of Philbin has any greater right or interest in the leased premises or the lease than Philbin has, and the contentions of counsel in their behalf will therefore be discussed under his name. It is true that, when Philbin bought the lessee interest, the lease provided that the lessee should have the use of the premises, rent free, for the remainder of the term, but only on the condition that, if the lessee became insolvent or bankrupt, the lessor might at its election end the term of the lease and the lease itself, and take immediate possession of the premises free therefrom. Philbin bought subject to that condition, and assumed the covenants of the lease that on his insolvency or bankruptcy all his interest and right thereunder should cease at the option of the lessor. That this condition and these covenants did not render the lease or the contract it evidences harsh or unconscionable is demonstrated by the fact that Philbin paid $9,000, and another now offers $12,000, for the lessee interest in it, subject to this condition.

Under the terms of the lease it was indispensable to the validity of the assignment of the lease to Philbin that the lessor give its written consent thereto. Induced by this condition of the lease, and the lessee's covenants to surrender the lease and premises on his insolvency or bankruptcy, the lessor so consented. If there was such equity in the trustee's case here that the condition and covenants should be avoided, then the court ought certainly to avoid the lessor's consent to the assignment of the lease to Philbin and to put the parties as nearly as possible in their original positions, and in that case the trustee would have no more interest in the lease and the premises than if the covenants and the conditions were enforced. The fact is, however, that the contract was fair and just. Philbin and the respondent knew the condition and the covenants in the lease. He bought the chance of the use of the leased premises, rent free, for the 8 years, on the condition that he should not have that use after his insolvency or bankruptcy, if either occurred during the 15 years. The respondent consented to the assignment of the lease to Philbin in reliance upon the chance that he would soon become insolvent and bankrupt, and that then it could take back the premises. It is no ground for relief from a fair contract that a contemplated future contingency became an actuality somewhat earlier or later than the parties to the agreement as to the effect of its occurrence expected when they made it, and thus rendered the contract more or less beneficial than they respectively anticipated that it would be at that time. Marble Co. v. Ripley, 77 U. S. (10 Wall.) 339, 355, 356, 357, 19 L. Ed. 955; Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 21, 114 C. C. A. 21, 41. So it is that, if anything harsh or unconscionable crept into the situation of these parties, it did not inhere in the lease, or in its condition or its covenants, nor was it caused by any act or omission of the respondent. It was the early advent of the insolvency

and bankruptcy of Philbin, and that alone, which caused it, and for that advent the lessor was not responsible.

Counsel for the trustee contend that the decree below should be sustained, in view of the opinion and decision of the District Court in In re Larkey, 214 Fed. 867. There was in that case a condition in the lease similar to that in the lease here under consideration. An involuntary petition in bankruptcy was filed against the lessee and the District Court appointed a receiver thereunder. The leased premises were and continued to be in the possession of third parties under a sublease from the lessee that had been made with the consent of the lessor. The lessor filed a petition in the bankruptcy proceeding for the recovery of the premises on account of the breach of the condition and covenants of the lease, and there was a hearing thereon; but before the court filed its opinion an adjustment had been made between the lessee and his creditors, and there never was any adjudication in bankruptcy. The court held, first, that there had been no breach of the condition; and, second, that if there had been, nevertheless, in view of the facts which have been stated, and especially of the fact that the sublessees, whom the lessor had approved and who offered ample security for the payment of the rent, were in possession of the premises, the equity of the lessor's claim was not such as to successfully invoke the action of a court of equity. In view of the authorities that have been cited, the facts of this Larkey Case differ too radically from those of the case at bar to make it indicative of the conclusion which ought to be reached in this case. Many other decisions, opinions, and statements in textbooks have been cited and discussed by counsel for the trustee. They have not escaped our careful perusal and consideration. None of them, however, has been found which sustains such a decree as that in hand upon a similar state of facts, and they and the exhaustive arguments of counsel have failed to persuade that there is any equity in the claim, petition, or proof of the trustee in this case. The record presents full, clear, and strict proof of the right of the respondent, as a matter of law, to the termination of the term of the lease and the lease itself, and to the return of the leased premises to it upon the service of its notice of election to enforce that right, and in such a case equity ought to and it does follow the law and enforce the right. The decree and orders below must therefore be reversed.

[3] The trustee, however, in his petition has prayed for more. He has prayed that the court determine the rights of the respondent and of the trustee respectively in the leasehold estate. The leased premises are in the possession of the trustee. The respondent cannot take possession of them from him or from the court below without the order of that court or of this court. That court therefore had, and on this appeal this court has, jurisdiction of the property in controversy and of the parties to this litigation, and where a court of equity has such jurisdiction it has the power, and in the interest of the speedy administration of justice it is often its duty, to determine the rights of the parties, direct the disposition of the property, and end the litigation. It is thought, upon consideration, that this course ought

to be pursued in this case to that end. All the arguments, suggestions, and authorities of counsel have received consideration, and it is decided and concluded that the term of the lease involved in this controversy terminated when the respondent's notice, dated May 10, 1918, of its election to declare the lease forfeited and the term thereof ended, was served on or first came to the notice of Philbin or the trustee; that since that date, as against the respondent, the Empress Theatre Company, neither Philbin nor the trustee has had any right, title, or interest in the leased premises or under the lease, or any right to the possession or use thereof, but that the respondent has had since that time and still has the right to the exclusive possession and use of the premises; that the respondent is entitled to the immediate delivery to it by the court below and the trustee of these premises, and to the payment to it by the trustee as a part of his expenses of handling the estate of the bankrupt, of the reasonable value of the use thereof from the termination of the term of the lease aforesaid to the time of such delivery, and to the payment of its costs in the proceedings in the court below and in this court which he instituted by the filing of his petition for the relief granted by the orders reversed.

Let the order and decree of the court below, and the order of the referee referred to therein, be reversed, and let this case be remanded to the court below, with instructions to take further proceedings in accordance with the views expressed herein.

FISHER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 6, 1920.)

No. 1776.

Prostitution ⇐1—Interstate transportation of girl not within White Slave Traffic Act; "interstate commerce."

Where defendant had illicit relations with a girl, who was domiciled in one state, his taking her in an automobile across the line into another state for a brief visit with relations, returning the same day, after which their relations continued, *held* not a transportation in interstate commerce for an immoral purpose within the meaning of White Slave Traffic Act June 25, 1910, § 2 (Comp. St. § 8813).

[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 West Virginia, at Wheeling; Alston G. Dayton, Judge.

Criminal prosecution by the United States against George E. Fisher. Judgment of conviction, and defendant brings error. Reversed.

Martin Brown, of Moundsville, W. Va., for plaintiff in error.

Harry H. Byrer, Asst. U. S. Atty., of Martinsburg, W. Va. (Stuart W. Walker, U. S. Atty., and C. N. Campbell, Asst. U. S. Atty., both of Martinsburg, W. Va., on the brief), for the United States.

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

KNAPP, Circuit Judge. Plaintiff in error, hereinafter called defendant, was convicted of a violation of the White Slave Traffic Act (Comp. St. §§ 8812–8819). The indictment contains four counts. There was a verdict of guilty on the first two counts and of not guilty on the remaining counts. The trial court overruled a demurrer to the indictment, and this is assigned as error. As applied to the counts on which defendant was convicted, the objections to the indictment seem to us so wanting in merit as not to require discussion. The offense charged is set out substantially in the language of the statute, and the allegations fully apprised defendant of the charge he was called upon to meet. It is enough to say that in our opinion the first two counts are sufficient in form and substance, and the demurrer was properly overruled.

On the merits the case for the government briefly stated is this: Defendant lived near Benwood, which appears to be a suburb of Wheeling, W. Va. Across the river is the town of Bridgeport, in Belmont county, Ohio. The prosecuting witness, a girl barely 16 years old, lived in that county a few miles out in the country from Bridgeport. The defendant became acquainted with her in the latter part of July, 1918, at a carnival in Bridgeport. They went out riding in his automobile that night, with some other persons, and did not return until 3 or 4 o'clock in the morning. Two days later he made an appointment by telephone to meet her that evening on the road near her home, and took her on an automobile ride. Their illicit relations commenced during that ride. There was a similar meeting the next and following nights. On Saturday evening, the 3d of August, they went to Bellaire, Ohio, where they stopped at a hotel and spent the night; he registering them as man and wife. The next morning he took her to a point near her home, and made an arrangement to meet her again in the afternoon at the same place. She joined him there, with a suit case in which she had packed her clothing and other belongings, and he took her in his automobile across the river to Wheeling, where he procured a room for her at a boarding house kept by a Mrs. Davis. He paid for her lodging for a week in advance, and at its expiration paid for another week. During her stay there of some 10 days, and later at a house next door, he visited her almost every evening and remained until a late hour. He frequently took her out to ride in his automobile, and on one such occasion they crossed the river to call on her mother, not at her home, but at the house of her sister, with whom she was staying. They returned a few hours later to the boarding house in Wheeling, and their illicit intercourse continued thereafter the same as before.

The defendant's version of their first meeting and subsequent relations was not materially different from the girl's own testimony, except that he stoutly denied having taken her in his automobile over to Wheeling on the Sunday in question, or having had anything to do with her going there at that time. On the contrary, he says he drove

her to Bridgeport, where he left her, and returned alone by another bridge, and that he was surprised to find her in Wheeling when he got there. In short, he asserts that she went to Wheeling that day without his knowledge or connivance and wholly against his wish.

The question of how and why she first went to Wheeling is the only question of substantial dispute which the record discloses. We need only say that this issue was properly submitted to the jury, and that on her testimony and related circumstances the jury were amply warranted in finding that she was transported by the defendant in interstate commerce for the purpose prohibited by the act; and if that were the only question we should have no hesitation in affirming the judgment of conviction.

As just stated, the defendant, whilst vigorously denying that he had anything whatever to do with the girl's first going to Wheeling, gave practically the same account as she did of what happened afterwards, including his visits to and intercourse with her at the boarding house, and their frequent automobile rides into the country, on one of which they crossed the river into Ohio to visit her mother, as above related. Having reference to his testimony in this regard, the learned trial judge charged the jury as follows:

"And even if you should believe his statement entirely, that he did not aid or transport or cause to be transported for this purpose the woman or girl alleged from the state of Ohio to West Virginia, for this unlawful purpose, yet if you believe what he has substantially admitted, that after she was over here in West Virginia he transported her back to Ohio, and then brought her back to West Virginia, for the purpose of having illicit commerce with her, he has violated this statute, and it is your duty to find him guilty."

The jury evidently understood this to mean that the mere fact of going into another state with the girl and returning, under the circumstances stated, established the defendant's guilt, if he thereafter continued to have intercourse with her. We are unable to give assent to this proposition. To do so would in our opinion put a construction upon the act not permitted by its terms or embraced within its intended scope, to say nothing on the point that the statute so construed would probably be beyond the power of Congress to enact. When the girl first went to Wheeling, whether of her own accord or transported there by defendant, she took her clothing and other personal effects with her and became domiciled in the state of West Virginia; and she continued to reside there for a considerable time, as appears, at least until after the defendant was arrested. When she left her boarding place on the day they visited her mother in Ohio, she did not abandon her place of temporary abode, or take her belongings with her, or go to the home where she had formerly lived with her parents. In short, she obviously intended when they set out to come back to Wheeling the same day, and we think it cannot be said upon the undisputed testimony that defendant brought her back for the "purpose" prohibited by the act. The crossing into Ohio and returning on that occasion was a mere incident of their asssociation, which did not bring about or in any way contribute to the immoral conduct that followed. We are convinced that a violation of the statute cannot be predicated upon

such an incident. Granted that he may have had in mind at the time that he would continue to do what he had been doing, it does not follow and cannot in reason be held that this trip was the interstate transportation of the girl for the purpose of engaging in immoral practices. It was not a means to that end, and therefore not of itself a violation of the statute. As the Supreme Court says in the Caminetti Case, 242 U. S. 470, 491, 37 Sup. Ct. 192, 197 (61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168):

"It may be conceded, for the purpose of the argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. But this act is not concerned with such instances. It seeks to reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purpose prohibited."

That is to say, the interstate transportation denounced by the act must have for its object, or be a means of effecting, or at least of facilitating, the sexual intercourse of the parties. But the mere fact that a journey from one state to another is followed by such intercourse, when the journey was not for that purpose, but wholly for other reasons, to which intercouruse was not related, cannot be regarded as a violation of the statute. And so this court held, in Van Pelt v. United States, 240 Fed. 346, 153 C. C. A. 272, L. R. A. 1917E, 1135, a case involving the same principle, that where an interstate journey was taken definitely for another purpose, and would have been taken in any event, the fact that illicit intercourse took place in the course of the journey, as an incidental occurrence, did not bring the case within the meaning and intent of the statute, and would not sustain a verdict of guilty against the accused. See, also, Welsch v. United States, 220 Fed. 764, 136 C. C. A. 370.

We need not pursue the argument. In view of defendant's denial that he transported the girl to Wheeling in the first instance, and the testimony of witnesses to her declarations that she went there by herself and of her own accord, it is manifest that the verdict of the jury may have been based upon, or at least influenced by, the instruction of the court that the subsequent automobile ride into the state of Ohio and back to Wheeling, which the defendant admitted, was of itself a violation of the act, for which it was the duty of the jury to find him guilty. If that instruction was erroneous, because it involved an unwarranted construction and application of the statute, the conclusion is unavoidable that he was wrongfully convicted; and so we are constrained to hold.

Inasmuch as the instruction here considered was virtually the only proposition of law laid down by the court, we are of opinion that an exception to the charge as a whole was sufficient to raise the question. Even if this were not so it would nevertheless be our duty in a case like this to notice "a plain error not assigned."

The judgment will be reversed, and the cause remanded, with instructions to grant a new trial.

Reversed.

GRIFFIN et al. v. LENHART et al.

In re SEMANS.

(Circuit Court of Appeals, Fourth Circuit. April 17, 1920.)

No. 1730.

1. **Bankruptcy ⟸217(3)—State court has jurisdiction to enforce attachment liens established more than four months prior to bankruptcy.**
Where attachments were issued by a state court, levied on lands, judgments rendered for plaintiffs, and their attachment liens established, more than four months before bankruptcy of defendant, the jurisdiction of the state court to enforce the liens cannot be interfered with by the bankruptcy court.

2. **Bankruptcy ⟸217(3)—Liens which state court has exclusive jurisdiction to enforce.**
Where a state court has obtained complete jurisdiction by hostile proceedings, which creditors have instituted for the enforcement of their demands, and in which creditors have acquired liens on property more than four months before the filing of the petition in bankruptcy, the disposition of the property for payment of the liens should be left to the state court, without interference from the court of bankruptcy.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling, in bankruptcy; Alston G. Dayton, Judge.

In the matter of Isaac W. Semans, bankrupt; C. E. Lenhart, W. W. Parshall, and Frederick G. Kay, trustees, etc. Lily M. Griffin, as committee for Sheridan R. Griffin, an insane person, and others appeal from an order of the District Court. Reversed.

See, also, 266 Fed. 675.

M. G. Sperry and George M. Hoffheimer, both of Clarksburg, W. Va. (R. S. Douglass and E. Bryan Templeman, both of Clarksburg, W. Va., on the brief), for appellants.

John J. Coniff, of Wheeling, W. Va. (E. C. Higbee, of Uniontown, Pa., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. A petition in bankruptcy was filed against Isaac W. Semans in the District Court for the Western District of Pennsylvania May 29, 1917, and he was adjudicated bankrupt July 31, 1917. A petition was also filed against Josiah V. Thompson in the same court August 20, 1917, and he was adjudicated bankrupt September 10, 1917. Ancillary proceedings were instituted in the District Court for the Northern District of West Virginia, where both bankrupts had property. About two years prior to the adjudication of Semans and Thompson as bankrupts, the several appellants obtained, in chancery suits brought by them, respectively, in the circuit court of Harrison county, W. Va., attachments against the property of Semans, and, except in the cases of Supler and the Empire National Bank, against the property of Thompson. These attachments were levied on tracts of

land owned by Semans and Thompson, situated in various counties in West Virginia. The orders of attachment were duly returned, notice of lis pendens filed, and the attachment suits proceeded to decrees that Semans and Thompson were indebted to the respective appellants (except Supler, John W. Brown, Buena W. Brown, and Empire National Bank) in the sums of money ascertained by the court, with interest and costs, that property had been attached as above mentioned, and that the respective appellants were entitled to have the property so attached, or so much thereof as might be necessary for that purpose, sold to pay the debts so ascertained, with interest and costs. The court did not order or decree the sale of the attached property, but of its further directions and decrees in the premises the court took time to consider.

On May 10, 1917, the above-mentioned decrees having been entered by the state court, all the appellants and the other attachment creditors of Thompson in that court (except one William Morgan) moved that all the attachment suits be heard together, and that all of the causes be referred to a commissioner in chancery to ascertain and report all of the attached property and the liens thereon. After argument, the circuit court took time to consider the motion. This motion is still pending and undetermined, because of the pendency of several consecutive injunction writs. As to these injunction proceedings it is only necessary to say that they have been dismissed, and that until they were dismissed they prevented further proceedings in the attachment suits.

On January 21, 1919, C. E. Lenhart, Frederick G. Kay, and W. W. Parshall, trustees of the estate of Semans, bankrupt, filed a petition in the United States District Court for the Northern District of West Virginia, setting forth an agreement entered into between themselves and J. M. MacDonald for the sale at a valuation of $800 an acre of the undivided one-half interest of Semans in a tract of coal land located in Harrison county, W. Va., which was included in the attached property of Semans. The trustees asked in their petition that the agreement for sale to MacDonald be ratified and confirmed, alleging that the property of Semans within the jurisdiction of the court greatly exceeded in value the amount of liens and incumbrances against it and that it was advantageous to consummate the sale.

On February 18, 1919, the appellants in this case filed jointly a motion in the District Court to dismiss the petition of the trustees and an answer thereto, setting forth in their answer that under proceedings in the circuit court of Harrison county the attachments had been levied more than four months prior to the filing of petition in bankruptcy, and that that court had acquired prior and exclusive jurisdiction over the property of the bankrupt for the enforcement of the attachment liens by sale. On March 29, 1919, the District Court overruled the motion to dismiss, and ordered the consummation of the sale to MacDonald. The decree directed that the sale be free of all the attachment liens, which liens were transferred to the purchase price subject to such defenses as might be made against them. This ruling we are asked to review.

[1] In brief, the case is this: Under attachment liens acquired in the state court on the land more than four months before the filing of the petition in bankruptcy, the state court, in equitable proceedings instituted by creditors to enforce the attachments more than four months before the filing of the petition, had adjudged the amounts due and was proceeding to enforce the attachment liens by sale of the land. The question is whether the court of bankruptcy should by the order appealed from take the control of the attached property from the state court.

Doubtless it might have been held with strong reason that the court of bankruptcy upon adjudication drew to itself for the purpose of administration all the assets and liabilities of the bankrupt of every form, giving, however, full effect to all liens lawfully acquired more than four months before the filing of the petition. But the Supreme Court, considering the reasons stronger for a different view, laid down the general rule that, where a state court has obtained complete jurisdiction by proceedings, either legal or equitable, instituted by creditors for the enforcement of their demands, and under which they have acquired liens upon the property more than four months before the filing of the petition, the state courts should proceed with the enforcement of the liens and a final disposition of the property and of the cause without interference from the bankruptcy court. Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Pickens v. Dent, 106 Fed. 653, 45 C. C. A. 522 (4th Circuit); Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128. The authority of Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, is recognized, and the distinction between an attachment or any other liens created more than four months before the filing of the petition and one created within the four months period, is restated in Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555; Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583; Stellwagen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215, 62 L. Ed. 507; New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881, 91 C. C. A. 559 (4th Circuit); Bank of Andrews v. Gudger, 212 Fed. 49, 128 C. C. A. 505 (4th Circuit); Blair v. Brailey, 221 Fed. 1, 136 C. C. A. 524. The rule stated is in no wise affected by In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933. In that case, under a bill filed in the state court about December 28, 1902, by a creditor alleging the insolvency of Zier & Co., a receiver was appointed, and creditors were called in and enjoined from bringing other actions. About a month after February 6, 1903, the petition in bankruptcy was filed by a creditor, and a receiver appointed by the federal court. The proceedings by which the state court acquired custody were begun, and the lien of creditors on the assets by virtue of the proceedings therein accrued within four months of the filing of the petition. The court, in holding that the property should be surrendered to the bankruptcy court, said:

"The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, where property involved in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

But the case decides nothing as to the effect of the lien of an attachment or the appointment of a receiver in a state court more than four months before the filing of the petition in bankruptcy.

In United States Fidelity Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055, nothing more was decided than that the bankruptcy court had exclusive jurisdiction of questions arising in that court and of the disposition of funds in its hands, and that it had no power to direct the determination of these matters in a separate suit.

In Commercial T. & S. Bank v. Busch-Grace Co., 228 Fed. 300, 142 C. C. A. 592, the trust deed involved, considered as a general assignment, was executed December 31, 1914. On January 6, 1915, unsecured creditors filed a bill under a state statute in a state court, charging insolvency, praying receivership and distribution of assets among creditors. The state court had ordered a reference to ascertain creditors, but had not taken custody, by receiver or otherwise, of property when the petition in bankruptcy was filed June 2, 1915. It was held that the bankruptcy court had exclusive jurisdiction, for the distinguishing reason that the proceedings in the state court, under the law of Tennessee, did not constitute a lien; that there was no prior lien and no custody of the property by the state court. Thus the court expressly distinguished the case from Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128 and Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122.

In Union Electric Co. v. Hubbard, 242 Fed. 248, 155 C. C. A. 88, this court expressed the view that, even when the conditions exist under which the court of bankruptcy could remove the assets from the state court, it would decline to do so when it was perfectly evident that no benefit could result to creditors. This was on the ground that a court should not exercise its power to do a futile thing.

[2] We shall not undertake the hopeless task of reconciling the apparently conflicting reasoning of the courts in other important cases bearing on the subject. We venture to think, however, that there is a distinction under which the cases relied on by appellees will, in actual adjudication, turn out to be entirely consistent with each other, and with all the cases above cited. It is this: Where a state court has obtained complete jurisdiction by hostile proceedings, which creditors have instituted for the enforcement of their demands, and in which creditors have acquired liens on property more than four months before the filing of the petition in bankruptcy, the disposition of the property for payment of the liens should be left to the state court, without interference from the court of bankruptcy. In such case the trustee in bankruptcy is interested only in the surplus proceeds of sale, and in having the suit in the state court pressed with due diligence.

But this rule does not apply to protective proceedings instituted in a state court. The principle of the bankruptcy statute paramount to all others is that all creditors shall have the right to a speedy winding up of the bankrupt business and distribution of the assets. No creditors can be deprived of this right by a proceeding instituted at any time in a state court by an insolvent or any of his creditors, for the purpose

of continuing his business or protecting the assets against creditors, or in any way delaying creditors. This is none the less true, although one of the objects of the creditors' proceedings in the state court be to acquire a lien, and the actual result be the creation of a lien more than four months before the filing of the petition in bankruptcy.

Protective proceedings of that nature were involved in Bank of Andrews v. Gudger, 212 Fed. 54, 128 C. C. A. 505, where creditors were not parties. In that case the court said:

"Such a case is entirely apart from those cases in which a creditor has gone into the state court and established or acquired by his suit a legal or equitable lien on the property in the hands of the court four months before the filing of the petition in bankruptcy. In such cases the courts have held that the creditor is entitled to enforce his lien in the first court that acquired jurisdiction. The distinction is also evident between this case and those cases where the state court held the property by its receiver, and there was no question of the subsequent coming into existence of facts giving rise to the right to invoke the exclusive jurisdiction of the federal court."

In Graham Mfg. Co. v. Davy-Pocahontas Coal Co., 238 Fed. 488, 151 C. C. A. 424, the same principle was involved. Though creditors were parties to the proceedings in the state court instituted more than four months before the petition in bankruptcy was filed, the main purpose was to protect the debtor or corporate stockholders against the immediate enforcement of the claims of creditors, and to carry on the business, either permanently or to convenient liquidation.

In the case now before us it appears from the record that the attaching creditors were at all times pressing the enforcement of their liens acquired in proceedings instituted in the state court more than four months before the filing of the petition in bankruptcy, in an attitude of hostility to the debtors. In such a case the state court must be allowed to carry forward to completion the enforcement of the attachment liens, without interference from the court of bankruptcy.

Reversed.

GRIFFIN et al. v. LENHART et al.

In re SEMANS.

(Circuit Court of Appeals, Fourth Circuit. April 17, 1920.)

No. 1719.

Bankruptcy ⇐440—Order reviewable by appeal.

An order directing sale of real estate of bankrupt over objection of creditors, who had established attachment liens on the property by judgment of a state court more than four months prior to the bankruptcy, *held* made in a controversy arising in bankruptcy proceedings, and reviewable by appeal, and not by petition to revise.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Northern District of West Virginia, at Wheeling, in Bankruptcy; Alston G. Dayton, Judge.

In the matter of Isaac W. Semans, bankrupt. Petition by Lily M. Griffin, as committee for Sheridan R. Griffin, an insane person, and others, to revise an order of the District Court. Dismissed.

See, also, 266 Fed. 671.

M. G. Sperry and George M. Hoffheimer, both of Clarksburg, W. Va. (R. S. Douglass and E. Bryan Templeman, both of Clarksburg, W. Va., on the brief), for petitioners.

John J. Coniff, of Wheeling, W. Va. (E. C. Higbee, of Uniontown, Pa., on the brief), for respondents.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. This was a controversy arising in a bankruptcy proceeding, and therefore the decree of the District Court is reviewable by appeal. The appeal has been sustained in an opinion filed this day. 266 Fed. 671. The petition to superintend and revise is therefore dismissed.

Dismissed.

LEDERER, Collector of Internal Revenue, v. STOCKTON.*

(Circuit Court of Appeals, Third Circuit. July 8, 1920.)

No. 2547.

Internal revenue ⊂=7—Fund in fact owned by hospital not subject to income tax.

Where a testator bequeathed his residuary estate to a hospital, to be held by a trustee, subject to payment of certain life annuities, and the trustee invested the fund in a loan to the hospital, which was its owner, on payment of sufficient interest to cover administration charges and the small annuity to the sole surviving annuitant, the income of such fund *held* not subject to tax under Act Oct. 3, 1913, or under Act Sept. 8, 1916, (Comp. St. § 6336a et seq.), both of which by pertinent provisions expressly declare the purpose to exempt from tax the income of any "corporation or association organized and operated exclusively for * * * charitable * * * purposes" (section 6336k).

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

Action by Alexander D. Stockton, sole surviving trustee under the will of Alexander J. Derbyshire, deceased, against Ephraim Lederer, Collector of Internal Revenue. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 262 Fed. 173.

Charles D. McAvoy, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa., for plaintiff in error.

James Wilson Bayard and Prichard, Saul, Bayard & Evans, all of Philadelphia, Pa., for defendant in error.

J. C. Rogers, of Williamsport, Pa., for Bureau of Internal Revenue.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

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

*Certiorari granted 254 U. S. —, 41 Sup. Ct. 15, 65 L. Ed. —.

BUFFINGTON, Circuit Judge. In the court below, Stockton, trustee under the will of Alexander J. Derbyshire, brought suit and recovered a verdict against Lederer, United States collector of internal revenue, to recover income taxes illegally, as he alleged, collected from him. On entry of judgment on such verdict, the defendant sued out this writ.

By his will Alexander J. Derbyshire, who died in 1879, devised his residuary estate to "the contributors to the Pennsylvania Hospital," a corporation of Pennsylvania created for charitable uses and purposes, and no part of the net income thereof is for the benefit of any private stockholder or individual. The devise was subject to the payment to certain annuitants, all of whom, save one, have died. The residuary estate amounts to several hundred thousand dollars, its annual income is substantially $15,000 and upwards, and the remaining annuity is for a few hundred dollars per year. The construction of the will came before the Supreme Court of Pennsylvania in Biddle's Appeal, 99 Pa. 525, wherein the title to the residuary estate was adjudged vested in the hospital; the court saying:

"The residuary devise, being in trust for a charitable use and purpose, comes within the proviso to the ninth section of the act of April 18, 1853, and therefore is not within the prohibitory clause of the section forbidding accumulations after the death of the testator for a term longer than therein specified."

The court further held that it should not be paid to the hospital until after the death of all the annuitants. As stated by the court below in its opinion:

"Resort was then had to the practical expedient of the trustee investing the funds of the estate in the form of a loan to the institution representing the charity, upon which loan the charity paid an interest sufficient to take care of the administrative charges and the payment of the annuities. The annuities have all fallen in, except one small one."

It will thus be seen that, while the residuary estate remains theoretically and for purposes of accounting in the hands of the trustee, it is already in the possession of the hospital in the shape of money loaned on mortgage, and upon such loan the hospital is paying to the trustee only such interest as takes care of administrative charges and the surviving annuity. Under such circumstances, the collector assessed and collected, under protest, from the trustee on June 26, 1917, the sum of $4,273.42, being on the income of the residuary estate for the years 1913, 1914, 1915, and 1916, and on June 11, 1918, an income and excess profit tax of $6,842.02 upon the income of the residuary estate of 1917. It is, of course, apparent the trustee has no financial interest in the residuary payment, and while this large sum is in theory assessed as a tax on income received by the trustee or the testator's estate, the whole sum is paid at the expense, and from the property, of the hospital. The question, then, in substance and practice, resolves itself into this: Is this hospital liable for income tax?

In view of the fact that Congress in the pertinent taxing act of 1913 (Act Oct. 3, 1913, c. 16, 38 Stat. 168, 172) said:

"All persons, firms, companies, copartnerships, corporations, joint-stock companies or associations, and insurance companies except as hereinafter provided, in whatever capacity acting, having the control, receipt, disposal, or payment of fixed or determinable annual or perodical gains, profits, and *income of another person subject to tax*, shall in behalf of such person deduct and withhold from the payment an amount equivalent to the normal income tax upon the same and make and render a return. * * * Nothing in this section shall apply * * * to any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual"

—it follows that he who construes and applies that statute to warrant taxation of a charity is doing what Congress said should not be done, viz. "that nothing in this section shall apply," etc. So, also, when Congress in the act of 1916 (Act Sept. 8, 1916, c. 463, 39 Stat. 756) again said:

"That there shall not be taxed under this title any income received by any * * * corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

—it follows that he who taxes, under this statute, the income of a hospital, is taxing that which Congress expressly said should not be taxed, viz. "that there shall not be taxed under this title any income received by any * * * corporation for * * * charitable * * * purposes." Section 11 (Comp. St. § 6336k).

As justification for assessing this tax, it contended, however, that as the act of 1916 forbids taxation on "any income *received* by any * * * corporation * * * for * * * charitable * * * purposes," that the income of this residuary estate was not exempt because it has not been "received," but remains in the hands of the trustee. But, apart from the fact that the corpus of the residuary estate has in fact already been "received" by the hospital in the shape of a mortgage, and the hospital itself is pro forma paying to its own trustee the money which, pro forma, constitutes the income here taxed, the construction thus urged and the effect given to the word "received" does not commend itself to our judgment. The sections in question in the acts of 1913 and 1916 are to be considered and construed jointly. They concern the same subject-matter, and that of 1916 was evidently meant to continue the broad and absolute purpose and provisions of the act of 1913 "that nothing in this section shall apply * * * to any corporation * * * operated exclusively for * * * charitable * * * purposes." Such being the case, the residuary estate which produced this income being the property solely of the hospital, no one but the hospital owning the income thereof, and the temporary holding of the income being by a trustee, who was the agent and representative solely of the hospital, it is clear that when substance and spirit, and not mere form and words, are the interpreters of the statute, the receipt of this income by the hospital's agent and representative was in truth and reality a receiving by the hospital, for he who acts by the hand of another himself acts. If this income was received from a third person by the trustee and after-

wards lost, surely the hospital could never have collected it again from such third person on the theory the hospital had never received it. Moreover, it will also appear that, if the trustee had, without protest, used the money of the hospital to pay this income tax, such trustee could not, on settlement of his trusteeship, have justified such payment under section 2 of the act of 1913, for that section only warrants such deduction and withholding where the income is the "income of another person subject to tax," and elsewhere, as we have seen, the same section provided "that nothing in this section shall apply * * * to any corporation * * * operated exclusively for * * * charitable * * * purposes."

From the above, it is clear to us, first, that the United States, the taxing power and real defendant in this case, speaking by its legislative branch in plain language enacted its purpose and will to exempt from taxation the income of "any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which enures to the benefit of any private stockholder or individual"; second, that the action of the United States by its executive officer, in this case the collector of internal revenue, in assessing and collecting this income tax from the hospital, was not warranted by the taxing statutes; and, third, that it is the duty of the United States, acting by its third agency, the federal courts, to prevent its executive branch from illegally defeating its expressed will in the law enacted by its legislative branch.

It follows, therefore, that the judgment entered by the court below in favor of the hospital and against the collector should be and is affirmed.

HOFKIN et al. v. UNITED STATES SMELTING CO. et al.

(Circuit Court of Appeals, Third Circuit. July 8, 1920.)

No. 2546.

Corporations ⇐334—Corporation held not "insolvent," so as to make directors liable for declaration of dividend.

A manufacturing corporation, which at the time a dividend was declared and paid had a prosperous business, a small indebtedness, and a surplus exceeding the sum of the dividend and indebtedness but which shortly afterward became insolvent through the unforeseen decline in price of its raw material, for purchase of which it then had outstanding contracts, *held* not "insolvent" when the dividend was declared, nor rendered insolvent by its payment, within Act Pa. April 29, 1874 (P. L. 102) which makes the directors declaring a dividend in either such case liable for the debts of the corporation.

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

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

Suit in equity by the United States Smelting Company and others

against Mendel Hofkin and others. Decree for complainants, and defendants appeal. Remanded. For opinion below, see 261 Fed. 546.

Francis Shunk Brown and Alfred Aarons, both of Philadelphia, Pa., for appellants.

R. Stuart Smith, Alfred T. Steinmetz, and Albert L. Moise, all of Philadelphia, Pa., for appellees.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. This case concerns the application to its facts of a statute of Pennsylvania (Act April 29, 1874 [P. L. 102]) which provides:

"If the directors of any company declare any dividend when the company is insolvent, or the payment of which would render it insolvent, they shall be jointly and severally liable for all the debts of the company then existing, and for all thereafter contracted, so long as they respectively continue in office: Provided, that the amount for which they shall be liable shall not exceed the amount of such dividend."

The American Galvanizing Company was a corporation of Pennsylvania. On May 31, 1916, its directors declared a dividend, payable June 3, 1916, which necessitated the withdrawal from its treasury of $50,000. Some time thereafter the company went into the hands of a receiver, whereupon the United Smelter Company, a corporation of Maine, filed its bill in equity against Hofkin and others, who were directors of the Galvanizing Company and citizens of Pennsylvania, and thereby sought, by virtue of the provisions of the quoted statute, to hold the defendants individually liable for the indebtedness to it by the Galvanizing Company. On final hearing the court below entered a decree adjudging the defendants so liable. From this decree they appealed to this court.

The facts of the case are practically undisputed. No fraud is alleged; the court stating, in its opinion holding them responsible, that—

"The finding made against them involves no finding of moral turpitude and no finding of fraud in that sense."

Such being the fact and finding, the determination of this case narrows to a question of fact, namely, whether the defendant directors did, in the words of the statute, "declare any dividend when the company is [was] insolvent, or the payment of which would render it insolvent."

The pertinent proofs are summarized in the extract quoted in the margin from the court's opinion.[1] The plaintiff company was among

[1] "Before the declaration and payment of this dividend the corporation had done a prosperous business, and at that time was in a prosperous condition. It had net assets, including the contributions to its capital, valued at $71,134.99, and a surplus applicable to the payment of dividends of $58,940.85. There is nothing to impeach the integrity of this statement of its financial condition, although of course its plant (and properly so) in this balance sheet summary was put at its value as a going concern, and not at its liquidating value as a bankrupt venture. It had outstanding contracts for the

those referred to in the court's finding quoted below, in that at the time of the declaration of the dividend it had a contract with the Galvanizing Company by which the latter had bought from the Smelting Company, for delivery during the summer, quantities of spelter (zinc). At the close of business on May 10, 1916, the Galvanizing Company's assets amounted to over $71,000, and its accounts payable to less than $2,200. Its surplus was nearly $59,000. Of its assets, over $25,000 was cash in hand, and its accounts and notes receivable were nearly $19,000. From this summary, it is clear the company was not insolvent when the dividend was declared, and its subsequent payment did not leave it insolvent, or make it so. It will therefore be seen that the first requirement of a statutory liability on the part of the director defendants, namely, their declaring a "dividend when the company is insolvent," is not proven to have existed.

We therefore pass to the second statutory ground on which liability of the directors was conditioned, and address ourselves to the inquiry whether the dividend declared was one "the payment of which would render it [the corporation] insolvent." We have already seen that the withdrawal of the dividend actually left the company possessed of assets to pay all claims that could be then made upon it, and therefore such payment did not, and indeed could not, render it insolvent. But, when the further facts on which the court below based its conclusion

purchase of spelter, the raw material which it used in its manufacturing processes. These contracts proved the undoing of the company, as the drop in the price of spelter, which followed the making of the contracts to purchase, entailed a destructive loss upon the purchaser.

"It is urged with earnestness, however, that at the time the dividend was declared there was not only nothing to indicate the imminence of a loss, but, on the contrary, much to found the expectation of a profit from these contracts, because the trend of the market prices of spelter was at that time upward. The facts affecting this phase of the inquiry were not sufficiently developed to enable us to make any definite findings. This is because the plaintiff was seeking to get the facts through cross-examining of the defendants, and proceeded with a noticeable wariness, and the defendants' trial tactics were (as they would be expected to be) dictated by the policy of imposing upon plaintiff the burden of proving its case. It is not wholly clear whether the purchase of spelter, in the quantities in which it was bought, were speculative or for manufacturing uses, nor is it by any means clear what the promise of the market as to future ranges of prices was at the time the dividend was declared.

"The plaintiff was in position, however, to have made this last-mentioned feature entirely clear, and, as it had failed to do so, the defendants have a right to the finding (which is now made) that there is no evidence of the price of spelter being below the contract price at the dividend date. The market was, however, so feverish and fluctuating, and the general condition such, that there could not be said to be any stable market, and the difficulties of securing supplies so great that there was uncertainty in respect to future market conditions affecting the supply and price of spelter, and an even greater uncertainty respecting the prospects of the manufacturing business in which the corporation was engaged. The debts of the company then presently demandable did not exceed $2,200 in amount. The total indebtedness at the time of bankruptcy, a few months afterwards, was many thousands, but none of this (beyond the $2,200) had on the dividend date matured into a presently payable debt, and existed only in the form of obligations resting upon executory contracts in the form of purchases of spelter for future delivery."

of liability are analyzed, it will be seen that the subsequent insolvency of this company resulted from other causes, and those of such an unseen and overpowering character that, had the dividend not been paid, its retention would not have prevented the company from becoming insolvent by reason of these further causes. Those other causes were that the Galvanizing Company used, in its manufacturing operations, spelter or zinc, a material largely in demand, due to the then existing war conditions, and had made, at favorable prices, contracts for the delivery to it during the summer of large quantities of this commodity.

As found by the court below, there was "no evidence of the price of the spelter being below the contract price at the dividend date." Indeed, the situation was such as indicated rising prices, for the competition of the different allied governments for spelter was keen, and bade fair to further enhance its value. But during the summer the allied governments, instead of continuing to compete with each other in the market in the purchase of spelter and other needed war material, established a joint buying agency. As a result of this unexpected step, the price of spelter gradually declined, with the result that, on account of its inability to accept the deliveries and finance payments, as it had theretofore been able to do, the Galvanizing Company during the summer, in order to prevent the sacrifice of its assets, was compelled to go into the hands of a receiver. As the price of spelter continued to still further decline after the receivership, and its losses on its contracts under maturing conditions grew larger and larger, the Galvanizing Company eventually became insolvent.

It will be seen that this insolvency was due to the decline thus brought about in the price of spelter by the allied governments and their unexpectedly eliminating competition for it. Such being the real cause of insolvency, and not the payment of the dividend, it follows that neither of the averred statutory grounds for holding the directors liable were established, and therefore the decree entered below, which held them responsible under the statute, was in error.

It will therefore be vacated, and the cause remanded to the court below, with instructions to dismiss the bill.

OEHRING et al. v. FOX TYPEWRITER CO. et al.

(Circuit Court of Appeals, Second Circuit. May 12, 1920.)

No. 234.

Appeal and error ⊜1234(5)—Cost bond on appeal covers costs of trial court.

A bond given on appeal, which is not a supersedeas, but what is commonly called a cost bond, but conditioned that appellant "shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good," *held* to cover costs of the trial court as well as of the appellate court.

Ward, Circuit Judge, dissenting.

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

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

Suit in equity by August J. Oehring and another against the Fox Typewriter Company and the Ætna Casualty & Surety Company. From an order of the District Court, complainants appeal. Reversed.

See, also, 163 C. C. A. 578, 251 Fed. 584; 166 C. C. A. 220, 254 Fed. 774.

Prior to May 26, 1917, the District Court entered a decree in this cause, adjudging the recovery of certain moneys from defendant by plaintiff; the action being the ordinary suit against an infringer of a patent. From this decree defendant appealed to this court, and on such appeal gave a bond in the sum of $500, with the Ætna Company as surety, of which the condition was as follows: "If the said Fox Typewriter Company shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue."

Upon the appeal this court modified plaintiff's recovery of upwards of $11,000 in some respects, and, as so modified, affirmed the decree, without in any way disturbing the award of District Court costs contained in the decree appealed from. Upon the filing of the mandate in the District Court, plaintiffs made application for the issuance of execution against the surety to recover said District Court costs. Execution against the Fox Typewriter Company, both for the money decree and the costs, had been returned unsatisfied. Upon this application the Ætna Company appeared and urged that the bond in question, not being a supersedeas bond, secured nothing but the costs of the appellate court. The District Court so held, and entered an order to that effect. This appeal followed.

Hans v. Briesen, of New York City, for appellants.

Fred L. Chappell and Chappell & Earl, all of Kalamazoo, Mich., and Philipp, Sawyer, Rice & Kennedy, of New York City, for appellee Fox Typewriter Co.

James B. Henney, of New York City, for appellee Ætna Casualty & Surety Co.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Undoubtedly the bond given was not a supersedeas bond. The discrepancy between the recovery and the security negatived any such inference. Lee v. Jackson, etc., Co. (C. C. A.) 261 Fed. 721. The question submitted, therefore, is whether, when what in this circuit is commonly called a bond for costs on appeal is given, such bond, when in the language of this instrument, affords security for the costs of the trial court, as well as for those of the appellate tribunal. It is well to remember that all costs, trial as well as appellate, are creatures of statute, old as the original statutes may be. This subject is historically treated, amply and interestingly, in Re Rule No. 37, 5 Pet. 724, 8 L. Ed. 288; Day v. Woodworth, 13 How. at page 371, 14 L. Ed. 181; Cameron v. Paul, 11 Pa. 277; Lehigh Valley, etc., Co. v. McFarland, 44 N. J. Law, 674

The nature and history of what are commonly called "supersedeas bonds" in the practice of the United States courts has been set forth in Rederiaktiebolaget Amie v. Universal, etc., Co., 245 Fed. 282, 157 C. C. A. 474. The bond which is the subject of this appeal was given pursuant to what was at its date rule 13 of this court (235 Fed. vi, 148 C. C. A. vi), since October 16, 1918, rule No. 12. This regulation follows in its language rule 29 of the Supreme Court (32 Sup. Ct. xii)

and the obligation of the bond literally follows the language of the rule.

The question whether a bond thus worded, commonly called a cost bond, and never thought to work a supersedeas, covers trial costs, is so far as we know new in this circuit. It is probable that the practical usage of the bar has been in accord with the ruling below. The exact point here argued, however, was presented to the Court of Appeals of the Third Circuit in Fidelity, etc., Co. v. Expanded Metal Co., 183 Fed. 568, 106 C. C. A. 114, and it was there held that a bond, which, not being a supersedeas, left the parties successful wholly at liberty to issue execution, notwithstanding an appeal, did furnish security for costs accrued before it was given; i. e., trial costs. The Fifth Circuit has followed this ruling in a criminal cause (American Surety Co. v. United States, 239 Fed. 680, 152 C. C. A. 514), and the Ninth Circuit has approved it in Pacific, etc., Co. v. Harvey, 250 Fed. 952, 163 C. C. A. 202, and again in Johnson v. United States (C. C. A.) 260 Fed. 783.

A majority of this court incline to approve the reasoning and conclusion of Cross, J., in the Expanded Metal Case, but are strongly of the opinion that, the matter being one of practical construction, as to which uniformity between the several circuits is highly desirable, we should adhere to the ruling now so widely accepted.

It is accordingly directed that the order appealed from be reversed, with costs, and the matter remanded, with directions to grant plaintiff's application.

WARD, Circuit Judge (dissenting). The Circuit Court of Appeals for the Third Circuit in Fidelity Co. v. Expanded Metals Co., 183 Fed. 568, 106 C. C. A. 114, is the first of such courts to construe the concluding words of section 1000, Rev. Stat. (Comp. St. § 1660), "or all costs only where it is not a supersedeas as aforesaid." The construction adopted by that court and approved by the majority opinion is that the words "all costs," in a bond on appeal which is not a supersedeas, cover costs of the lower courts as well as of the appellate court. This being wholly inconsistent with the long-established practice of this circuit, further consideration of the question may be excused.

It is, of course, clear that a supersedeas bond under our rule 12 and Supreme Court rule 29 covers and should cover the costs of both courts; this because the successful party is deprived of his right of issuing execution on his judgment pending appeal and because he should also be secured for his costs on appeal if the judgment be affirmed. But I think that the defeated party has a right to an appeal, if it in no way prejudices the present rights of the successful party and does secure him for his future costs if the appeal fail. It is upon this theory that the practice in this circuit has always been to fix the amount of a bond on appeal, which is not a supersedeas, with reference only to the costs of this court or of the Supreme Court on appeal to it. No attention whatever is paid to the costs of the District Court, which are almost always more than the costs either of the Circuit Court of Appeals or of the Supreme Court. The bond on appeal to this

court, and from the Circuit Court of Appeals to the Supreme Court, is almost invariably in the sum of $250. Of course, if the bond in the Supreme Court is to cover, not only its costs and costs of the Circuit Court of Appeals and of the District Court, such an amount is absurdly inadequate. This very case is typical of the practice. The costs of the District Court were $716.63 and yet the bond on appeal was but for $500, so that it cannot have been intended to cover more than the costs of the appellate court.

Appeals should be as far as possible matters of right, and we ought not to impute to Congress an intention to discourage them, by making it a condition that the appellant shall secure the costs already incurred for which the successful party may issue execution, as well as the costs he may be entitled to in the appellate court, unless the language of the statute compels it. If the bond on appeal covers the costs of the lower court, then it is really a supersedeas as to them, and the successful party should not be allowed both to have a bond and to issue execution pending the appeal.

The Circuit Court of Appeals for the Third Circuit arrives at its conclusion by holding that the words "all costs," in the case of a bond that is not a supersedeas, must be the same costs as are covered by a supersedeas bond, viz. the costs of both courts. Admitting that the words are capable of this construction, they are also capable of being construed as all costs of the appellate court, which as it seems to me better reconciles the protection the successful party should have with the right of the defeated party to an appeal.

Surety companies generally have adopted a form of appeal bond for costs containing the condition that the appellant "shall prosecute its appeal to effect, and answer all damages and costs, if it fails to make its plea good." This is the wording of the bond in this case, and was of the bond in the case in the Third Circuit. It is the language of a supersedeas bond, and the Circuit Court of Appeals for the Third Circuit pointed out that the word "damage" should not have been included. But the real test whether a bond is a supersedeas or for costs only is whether the amount secures the amount of the judgment and costs. The word "damages" is inserted in bonds for costs to cover the damages, which are not costs, awarded in case of appeals taken for delay under our rule 30 (150 Fed. xxxv, 79 C. C. A. xxxv) and Supreme Court rule 23 (32 Sup. Ct. xi).

I think the order should be affirmed.

WINSTON et al. v. WYOMING COUNTY COURT.

(Circuit Court of Appeals, Fourth Circuit. April 6, 1920.)

No. 1770.

Highways ⇐113(4)—Order of county court justified discontinuance of work under contract.

Where plaintiffs contracted with a county to build a road at specified prices for work and materials, and had done a large amount of work thereon, the service upon them and other contractors of an order of the county court that, "it appearing to the court that all the funds available for the construction of roads have been exhausted, it is ordered that all work on all the roads heretofore contracted be suspended," *held* to justify plaintiffs in discontinuing the work, although the order contained a further direction to the county engineers to "measure and make up at once a final estimate on all such roads, except" the road covered by plaintiff's contract.

In Error to the District Court of the United States for the Southern District of West Virginia, at Bluefield.

Action by James O. Winston and others, partners as Winston & Co., against the County Court of Wyoming County, W. Va. Judgment for defendant, and plaintiffs bring error. Reversed.

Alfred G. Fox, of Bluefield, W. Va., and W. J. Henson, of Roanoke, Va. (Sanders & Crockett, of Bluefield, W. Va., and Jackson & Henson, of Roanoke, Va., on the brief), for plaintiffs in error.

D. E. French, of Bluefield, W. Va. (R. D. Bailey, of Baileysville, W. Va., and French & Easley, of Bluefield, W. Va., on the brief), for defendant in error.

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

WOODS, Circuit Judge. Winston & Co. filed a declaration against the county court of Wyoming county, W. Va., on October 22, 1919, making these allegations: On April 4, 1916, the county court of Wyoming county made a contract with the plaintiffs to build a road known as the "Pineville-Oceana Road," at prices specified for the details of the excavation and other work and for the material. The plaintiffs sublet the work to Vaughan & Redd. The subcontractors moved upon the premises their outfit of implements and tools, and did work under the contract which aggregated in value $94,798.10, of which the defendant paid $87,926.26, leaving due $7,051.94. On February 6, 1918, the county court for Wyoming county made the following order, which was duly served on Winston & Co.:

"It appearing to the court that all the funds available for the construction of roads have been exhausted, it is ordered that all work on all the roads heretofore contracted be suspended, and the various engineers in the employ of the county are directed to proceed at once to measure and make up at once a final estimate on all such roads except the road from Pineville to Oceana.

"The clerk of this court is directed to make certified copies of this order and mail to each contractor."

The plaintiffs construed this order as a notice that the county court had no funds with which to pay for the continuance of the work, and as a requirement that they should discontinue it. Accordingly the work was discontinued, and the subcontractors moved away all their instruments and tools and entered into a contract with other parties, thus making it impossible for them to renew the contract work on the Pineville-Oceana road. After this had been done, on March 5, 1918, the county court made another order, reciting that it appeared from a letter from Winston & Co. that they had misunderstood its former order, and declaring that it was the intention of the court in the order of February 6 "to except and reserve from the operation and effect of the provisions of the same said road from Oceana to Pineville, in so far as the same provides for suspending work of construction." This order of March 5 contained a direction that Winston & Co. proceed at once to carry out their original contract, and a notice to Winston & Co. that as soon as the work of construction should be completed the court was ready and anxious to make settlement and payment. This order was duly served on the plaintiffs.

The plaintiffs aver that they were justified in discontinuing work on the first order, and that the second order under the circumstances was of no effect. The demand is for the balance of $7,051.94 alleged to be due under the contract for the work already done.

The defendant demurred to the declaration, and the plaintiff joined in the demurrer. The court sustained the demurrer, and dismissed the action.

We think the plaintiffs' understanding of the order of February 6, 1918, was in accordance with strict grammatical construction. The requirement of the county court "that all work on all the roads heretofore contracted be suspended" covered the work of all contractors, including the plaintiffs. The first clause of the order was direct and specific, perfectly clear in its meaning, and was directed to contractors exclusively, requiring all of them without exception to cease work. It was served on the plaintiffs, presumably under the authority of the county court, and this fact indicated also that the plaintiffs were intended to be included in its terms. The second clause of the sentence, separated from the first by a comma and relating apparently to a different subject, had also a complete meaning, and was not dependent in construction on the first clause. It was directed to the engineers exclusively, requiring them "to measure and make up at once a final estimate on all such roads"—that is, on all the roads on which all the contractors had been ordered to stop work—"except the road from Pineville to Oceana." Not only did the position in the order of the exception indicate that it applied only to the measurement and estimate, but the connection imported that the road from Pineville to Oceana was one of "such roads" on which the work was to be stopped, excepted only from the requirement of measurement and estimate. The allegation of the service of this order of February 6, 1918, on the plaintiffs, the discontinuance of the work in reliance on it, the removal of the machinery, and undertaking other work, which made impossible the completion of the work under the contract of April 4, 1916, and

the presentation of the account and demand for its payment, were sufficient to constitute a cause of action. The second order of the county court of March 5, 1918, after the plaintiffs in reliance on the first order had disqualified themselves from completing the road, did not affect the rights of the plaintiffs which had already accrued. We therefore think that the demurrer should have been overruled.

This, however, is by no means conclusive of the case. The evidence of extraneous circumstances and conditions may present the matter in an entirely different light, and show that the plaintiffs either knew or should have known that the county court did not mean to stop work on the road for which they had contracted, or the evidence may show that the plaintiffs for other reasons are not entitled to recover. Upon that subject we express no opinion. All that we intend to hold is that the complaint states a cause of action. The proof may fail to establish it.

Reversed.

DILLON et al. v. LINEKER et al.*

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920.)

No. 3465.

1. **Damages ⟸23—Special damages may be recoverable for breach of contract to pay money.**
   While, in general, damages for breach of a contract to pay a specific sum of money are measured by the sum stipulated to be paid, the rule is otherwise where the obligation to pay is special and has reference to objects other than the mere discharge of a debt, in which case special damages may be recovered according to the actual injury.
2. **Courts ⟸328(9)—Damages for breach of contract held to exceed jurisdictional amount.**
   A federal District Court *held* to have jurisdiction of an action for damages for breach of a contract by which, in consideration of a loan by plaintiff to defendant of $2,850, which plaintiff borrowed on mortgage, defendant agreed to pay the mortgage debt, which at maturity exceeded $3,000.
3. **Contracts ⟸71(3)—Forbearance of suit good consideration.**
   Actual forbearance of suit, without a promise to forbear, is sufficient consideration for a promise, if at the request of the promisor and in reliance on his promise.
4. **Husband and wife ⟸268(1)—Community property liable for wife's debts contracted prior to marriage.**
   Under the law of California the separate property of a wife and the common property of both husband and wife are equally liable for the debts of the wife contracted previous to her marriage.

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 at law by Norvena Lineker and Frederick V. Lineker against Mary J. Dillon (formerly Mary J. Tynan) and Thomas B. Dillon. Judgment for plaintiffs, and defendants bring error. Affirmed.

The defendants in error were the plaintiffs in an action in the court below, in which they alleged that on or about June 20. 1910, Norvena Lineker, then

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

*Rehearing denied October 18, 1920.

Norvena Svensen, at the request of the plaintiff in error Mary J. Dillon, borrowed $2,850 from one McColgan, to secure which she executed a trust deed of certain described real property, which she owned, subject to a life estate in her father, and that she turned over the said sum of money to William Winter, the son of Mary J. Dillon, for the use and benefit of said Mary J. Dillon; that on or about April 22d McColgan demanded the payment of the said sum of $2,850 and interest thereon, and notified Norvena Lineker that if she did not pay the same he would cause her interest in said real estate to be sold; that she then went to Mary J. Dillon and demanded of her that she pay and satisfy said note and interest, in default of which she, the said Norvena Lineker, threatened to bring action against her and William Winter to recover the amount thereof; that they importuned her not to bring said action, and promised that, if she would refrain from instituting the same, she (the said Mary J. Dillon) would cause said debt and interest to be paid and discharged, and would indemnify and save her harmless from any loss or damage in connection with said note and trust deed; that, relying upon said promise, Norvena Lineker refrained from bringing any action against said Mary J. Dillon or her son; that Norvena Lineker had no money or property other than said real estate. The complaint then alleged that Mary J. Dillon failed to perform her said promise, and that all the interest of Norvena Lineker in said property was sold under the trust deed to pay said sum of $2,850, together with interest, expenses, and attorney's fees, whereby she lost said property and was damaged in the sum of $35,000, which was alleged to have been the value of said real estate. The answer denied the material allegations of the complaint and alleged that the value of the property was not more than $24,000. The jury returned a verdict for the plaintiffs in the action in the sum of $32,000, which was subsequently reduced by the order of the court to $28,000, for which judgment was entered.

Samuel M. Shortridge, of San Francisco, Cal., for plaintiffs in error.
John L. Taugher, of San Francisco, Cal., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The case comes to this court upon the judgment roll and without a bill of exceptions. The plaintiffs in error contend that upon the allegations of the complaint the amount in controversy was but $2,850 and interest, and that therefore the court below was without jurisdiction. It is true that in general, where a contract to pay a specific sum of money is broken, the damages are measured by the sum stipulated to be paid; but the rule is otherwise "where the obligation to pay money is special, and has reference to objects other than the mere discharge of a debt, in which case special damages may be recovered, according to the actual injury." 17 C. J. 863; Green v. Gregory (Tex. Civ. App.) 142 S. W. 999; Scheele v. Lafayette Bank, 120 Mo. App. 611, 97 S. W 621; Bixby-Theisen Co. v. Evans, 174 Ala. 571, 57 South. 39.

[2] In the present case the complaint shows that Norvena Lineker was without money or resources other than her incumbered real estate, which was subject also to an outstanding life estate, and that perforce she depended wholly upon Mary J. Dillon to protect her property. The case is not unlike those which are above cited. But, even if the amount of damages here is to be measured by the "amount stipulated to be paid," it is clear that the amount which Mary J. Dillon stipulated to pay was in excess of $3,000. This is not an action to recover the amount of the loan of Norvena Lineker to Mrs. Dillon's son. It is an

action to recover damages for the breach of Mrs. Dillon's promise to hold Norvena Lineker harmless against the threatened sale of her property under the trust deed for the nonpayment of the principal and interest of her debt to McColgan. The amount recoverable as damages was at the very least the sum which, at the time when the promise was made, would have been necessary to pay to redeem the property from the trust deed. That amount, principal and interest, was at that date more than $3,000.

[3] We find no merit in the contention that the complaint fails to state a cause of action. The fact that Mrs. Dillon received the use and benefit of the money which her son borrowed from Norvena Lineker constituted a good and sufficient consideration for her promise to hold the latter harmless from the trust deed and to pay McColgan's claim, a promise which Norvena Lineker accepted, relied upon, and acted upon. She forbore to sue Mrs. Dillon, and in that forbearance Mrs. Dillon received additional consideration for her promise to pay. Johnson & Higgins v. Harper Transp. Co. (D. C.) 228 Fed. 730. It was not necessary that Norvena Lineker should have made a promise to forbear. Actual forbearance, without a promise to forbear, is sufficient, if such forbearance is at the request of the promisor and in reliance upon his promise." 13 C. J. 348; In re All Star Feature Corp. (D. C.) 232 Fed. 1004.

[4] Error is assigned to the judgment, in that it directs that the same be satisfied, not only out of the separate property of Mary J. Dillon, but also out of the community property of her and her husband; the contention being that the community property is not subject to the payment of such a judgment, where the marriage occurred after the date of the wife's contract. But in Van Maren v. Johnson, 15 Cal. 308, 313, the court said:

"The separate property of the wife and the common property of both husband and wife are equally liable for the debts of the wife contracted previous to her marriage."

See, also, Henley v. Wilson, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160.

The judgment is affirmed.

STANDARD OIL CO. OF NEW JERSEY v. UNITED STATES et al.

RAYMOND CONCRETE PILE CO. v. STANDARD OIL CO. OF NEW JERSEY et al.

(Circuit Court of Appeals, Fourth Circuit. May 10, 1920.)

Nos. 1759, 1760.

Indemnity ⇐6—Provision for indemnifying contractor for work construed.

The construction of a provision of a contract for construction work, requiring the employer to pay any expense incurred in connection with any accident or damage to persons or property, *held* not affected by the fact that the provision also covered the cost of insurance and that the contractor did not charge the employer with the cost of fire insurance on

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

its machinery and appliances, which were used on the work for only a part of the insurance term.

Appeals from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Consolidated suits in admiralty by the United States and others against the Standard Oil Company of New Jersey, the Raymond Concrete Pile Company, and others. From a decree for libelants, defendants appeal. Affirmed.

Cletus Keating, of New York City (Ritchie, Janney & Stuart, of Baltimore, Md., Kirlin, Woolsey & Hickox, of New York City, Robert W. Williams, of Washington, D. C., and James H. Herbert, of New York City, on the brief), for Standard Oil Co. of New Jersey.

William L. Marbury, of Baltimore, Md., and Martin Conboy, of New York City (Griggs, Baldwin & Baldwin, of New York City, and Marbury, Gosnell & Williams, of Baltimore, Md., on the brief), for Raymond Concrete Pile Co.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

On Further Testimony Taken by Leave of Court on the Question of Insurance.

WOODS, Circuit Judge. In an opinion filed January 6, 1920 (264 Fed. 66), this court held that the Standard Oil Company of New Jersey was primarily liable to the exemption of the Raymond Concrete Pile Company for losses to the libelant by fire which occurred in Baltimore harbor on November 22, 1918. This holding was based on a provision in a contract for the construction work to be done by the Raymond Company for the Standard Oil Company that "the cost of insurance and any expense incurred in connection with any accident or damage to persons or property" should be borne by the Standard Oil Company, supplemented by a subsequent stipulation "that any expense incurred in connection with any accident or damage upon person or property, not covered by insurance, shall be considered a part of the cost of this work; but no fee shall be paid the contractor on such cost." On the subject of insurance the opinion contains the following paragraph:

"The point is made on the appeal, apparently for the first time, that the obligation assumed by the Oil Company was limited to losses from accident not covered by insurance and that there was no evidence as to the insurance. The question of the burden of proof on this subject is of minor importance. This being an admiralty case, upon due notice and proper showing, this court will entertain a motion by either party made within 20 days for leave to take testimony on the subject of insurance before this court or the District Court."

On motion of appellant, Standard Oil Company, a commissioner was appointed to take the testimony on the subject of insurance. The testimony reported shows that the Raymond Company had insurance against injuries to persons in the prosecution of the work, but no insurance to cover injuries to property of third persons. It fol-

lows that the liability of the Standard Oil Company for the loss to the libelants was not affected by the provision as to insurance.

The appellant at the argument called the attention of the court to the fact, brought out at the reference, that the Raymond Company carried insurance on its own machinery and appliances rented to the Standard Oil Company for the purpose of the work, and that it did not charge the premiums paid for that insurance to the Standard Oil Company as a part of the expenses of the work. It was insisted that this circumstance was such newly discovered evidence as would require the court to reconsider the construction of the contract and the whole question of the liability of the Standard Oil Company. Even unexplained, the fact would not be of such significance as to warrant a retrial of the issue. It is satisfactorily explained, however in the following testimony of the secretary of the Raymond Company:

"The fire insurance policies were written covering one year, and as the pile drivers were used in this work for only a few days at a time the item seemed too small to apportion, and hence no part of the insurance premiums were charged to this work."

A decree will be entered, affirming the decree of the District Court. Affirmed.

In re CRAIG LUMBER CO.

COBB v. MacDONALD-WIEST LOGGING CO.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920.)

No. 3468.

Bankruptcy ⇐440—Remedy by appeal, where given, is exclusive of petition to revise.

An order of a District Court in bankruptcy, reversing an order of a referee disallowing a claim, is reviewable by appeal under Bankruptcy Act, § 25a (Comp. St. § 9609), and the remedy of the trustee by appeal is exclusive of a petition to revise.

Petition for Revision in Matter of Law, of an order of the District Court of the United States for Division No. 1 of the Territory of Alaska.

In the matter of the Craig Lumber Company, bankrupt. Petition by E. L. Cobb, trustee, to revise order of District Court permitting proof of claim of the MacDonald-Wiest Logging Company. Petition dismissed.

J. H. Cobb, of Juneau, Alaska, for petitioner.

John Rustgard, of Juneau, Alaska, Thomas R. White, of San Francisco, Cal., and Arthur I. Moulton, of Portland, Or., for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This matter is brought to this court upon a petition for a revision and review of an order of the District Court for Alaska, reversing a decision of the referee in bankruptcy, and remanding the matter for further proceedings.

The Craig Lumber Company was adjudged a bankrupt. The MacDonald-Wiest Logging Company, a Washington corporation, filed a claim for $27,871.50 and interest against the estate of the bankrupt. The trustee objected, and contended that the claim was not provable in bankruptcy, for the reason that the claim was for sums alleged to be due under a contract between the claimant and the bankrupt made and to be performed in Alaska, and that at the time of the making of the contract, and thereafter, the claimant had not complied with the laws of Alaska governing foreign corporations doing business in Alaska, and that the contract made the basis of the claim was void. The referee held that the claim was not provable in bankruptcy, and disallowed the claim; but the District Court, upon a petition for review, reversed the decision of the referee and remanded the matter. The respondent moved this court for the dismissal of the petition for revision for lack of jurisdiction, and makes the point that the sole and exclusive remedy of the petitioner was by appeal under the provisions of section 25 of the Bankruptcy Act, and that, inasmuch as more than 10 days elapsed after the making of the order of reversal by the District Court, jurisdiction was lost.

Petition for revision was brought under the provisions of section 24b of the Bankruptcy Act (Comp. St. § 9608), under which the Circuit Court of Appeals is given appellate jurisdiction to revise in matter of law the proceedings of a court of bankruptcy. Under section 25a (section 9609) appeal, as in equity, may be taken to the Circuit Court of Appeals "from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." Such appeal must be taken within 10 days after the judgment appealed from has been rendered. Section 25a, Bankruptcy Act.

In the Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, the Supreme Court held that under section 24b the Circuit Court of Appeals has authority to superintend and revise any matters of law in proceedings of the inferior courts of bankruptcy, but that subdivision "b" was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act, and that the proceeding under section 24b, permitting review of questions of law arising in bankruptcy, was not intended as a substitute for the right of appeal under section 25. The court said:

"Under section 24b, a question of law only is taken to the Circuit Court of Appeals; under the appeal section, controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under section 25 a review by petition under section 24b. The object of section 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate."

Inasmuch as under section 25a appeal as in equity is specially allowed from a judgment allowing or rejecting a claim of $500 or over, it must be held that an appeal in the present matter was exclusively the remedy available to the trustee. Pindel v. Holgate, 221 Fed. 342, 137 C. C. A. 158, Ann. Cas. 1916C, 983; Wuerkel v. Commercial Ger-

mania, etc., Bank, 238 Fed. 342, 151 C. C. A. 285; Brandenberg on Bankruptcy, § 1651.

The petition is dismissed, at petitioner's costs.

DEAN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920.)

No. 3459.

Poisons ⟸9—Indictment for unlawful sale of narcotic sufficient.

An indictment charging defendant with purchasing, selling, and distributing cocaine from a certain tin box, which was not the original stamped package containing said cocaine, and that he had such box containing cocaine, which did not bear appropriate tax-paid stamps in his possession, *held* to state an offense, under Harrison Antinarcotic Act, § 1, as amended by Act Feb. 24, 1919, § 1006 (Comp. St. Ann. Supp. 1919, § 6287g), making such purchase or sale, except from original stamped packages, an offense, and possession of unstamped packages prima facie evidence of such offense.

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 Harry Dean. Judgment of conviction, and defendant brings error. Affirmed.

See, also, 266 Fed. 695.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., and Gordon Lawson, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted on two counts of an indictment, which charged him with violation of the Harrison Narcotic Act, as amended by Act Feb. 24, 1919, 40 Stat. 1057, and sentences of imprisonment for terms to run consecutively were imposed by the court. No demurrer or other objection was interposed to the indictment in the court below, but it is now contended that the first count is fatally defective for failure to state facts sufficient to constitute an offense. Act Feb. 24, 1919, provides in part as follows:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found." Comp. St. Ann. Supp. 1919, § 6287g.

The first count charged:

That the plaintiff in error did knowingly, etc., "purchase, sell, dispense, and distribute cocaine in and from a certain tin box, which said tin box was not then and there the original stamped package containing said cocaine."

The count goes on:

"That is to say, the said defendant" did have in his possession the said tin box containing cocaine, consisting of about one-half an ounce, and that the "said tin box then and there containing said cocaine did not then and there bear and have affixed thereon appropriate tax paid stamps as required by the act of Congress approved December 17, 1914, known as the Harrison Narcotic Law."

The plaintiff in error contends that no offense against the act as amended is involved in the charge that the plaintiff in error had cocaine in his possession, and that a violation of the statute can only be committed by purchasing, dispensing, and distributing narcotics from packages which have not affixed thereon appropriate tax paid stamps. It may be conceded that the purpose of the statute is to prohibit the purchase, sale, and distribution of narcotics; but it is also clear that it provides that prima facie proof is made of the violation of the statute by evidence that the accused had the possession of prohibited narcotics to which are not affixed appropriate tax paid stamps. In this respect the offense is not dissimilar to some other offenses against the United States, such as the offense of having in possession dies adaptable to counterfeiting (Baender v. United States [C. C. A.] 260 Fed. 832), or having possession of imported opium (Gee Woe v. United States, 250 Fed. 428, 162 C. C. A. 498). We find no merit in the objection to the indictment, nor is there merit in the contention that the term "original stamped package," as used in the act of 1919 is meaningless. Its meaning is made sufficiently clear by the terms of the act and the amendment thereto.

The judgment is affirmed.

DEAN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920.)

No. 3460.

Poisons ⇐9—Indictment for unlawful sale of narcotics sufficient.

An indictment under Harrison Antinarcotic Act, § 1, as amended by Act Feb. 24, 1919, § 1006 (Comp. St. Ann. Supp. 1919, § 6287g), for selling morphine and cocaine from paper bags and boxes which were not the "original stamped package" containing said drugs, *held* sufficiently specific as against objection first taken in the appellate court.

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 Harry Dean. Judgment of conviction and defendant brings error. Affirmed.

See, also, 266 Fed. 694.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., and Gordon Lawson, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. Error is assigned to the judgment on the ground that the indictment failed to charge an offense against the United States. No objection was made to the indictment in the court below. It charged:

That the plaintiff in error did knowingly, etc., "sell, dispense, and distribute morphine and cocaine in six paper bags, ten small cardboard boxes, one small celluloid box, and one metal box, which said bags and boxes and either and each of them were not then and there the original stamped packages containing said morphine and said cocaine."

It is said that to charge that the receptacles were not the "original stamped package" is not equivalent to charging that there was failure to pay the special tax required, that the words might mean many things, such as a reference to the label or brand of the package, or the date of purchase stamped upon the receptacle, and that they fail to apprise the accused of the crime charged. When the words are construed with reference to context and the other provisions of the law, there can be no question of their meaning. If they seemed obscure or indefinite to the plaintiff in error, he had his remedy in the court below by demanding a bill of particulars. Having gone to trial upon the indictment as sufficiently charging an offense, he cannot in this court take advantage of any defect or imperfection in matter of form only which did not tend to his prejudice.

The judgment is affirmed.

UNITED STATES v. WESTWOOD et al.

(Circuit Court of Appeals, Fourth Circuit. April 27, 1920.)

No. 1789.

Seamen ⇐7—Shipping articles must describe intended voyage.

Shipping articles are mercantile documents, and entitled to a liberal construction to accomplish the purpose the parties had in mind; but under Rev. St. § 4511 (Comp. St. § 8300), they must, to be valid, inform the seaman, in general terms at least, what kind of voyage is then planned, reserving on their face, if need be, sufficient latitude for changes to meet subsequent exigencies.

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

Suit in admiralty by C. G. Westwood and others against the United States. Decree for libelants, and the United States appeals. Affirmed.

For opinion below, see 261 Fed. 414.

Hiram M. Smith, U. S. Atty., of Richmond, Va., for appellant.

Henry Bowden, of Norfolk, Va., for appellees.

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

ROSE, District Judge. The appellees were the libelants below and will be so styled here.

On the 3d of April, 1919, they shipped at Baltimore on the Shipping Board's steamship Quoque, "from the port of Baltimore, Md., to such

ports and places in any part of the world, via an American port, as the master may direct, and back to a final port of discharge in the United States, for a term of time not to exceed six calendar months." Shortly after the articles were signed, the ship, with a cargo of coal, sailed for Molendo, Peru, and there delivered it. It next went to Guayquille, and then to Mantes, both in Ecuador, and took on a new cargo. Thereupon it set out for Havre, France, via Norfolk, where it stopped for bunker coal. At the last-mentioned port the libelants, apparently construing the shipping articles to mean that if the ship touched at an American port it was to be while outward bound, demanded their discharge and payment in full, on the ground that the voyage for which they had shipped had ended. Upon the ship's refusal to accept this view they instituted these proceedings.

In the District Court and here the question as to the construction of the articles was replaced by the more fundamental one as to their validity, no matter what they meant. The learned judge below held that they were void, because they did not comply with the requirements of section 4511 of the Revised Statutes (Comp. St. § 8300) and the form of shipping articles thereto annexed. It is there provided that they shall contain, among other things, the nature and as far as practicable the duration of the intended voyage or engagement, and the port or country at which the voyage shall terminate, and, if it can be done, the places at which it is to touch. Congress, in the legislation in question, recognized that at the inception of a voyage it would often be commercially impracticable to define with precision all that it may in the course of events come to include.

Shipping articles are mercantile documents, and are entitled to a liberal construction in order to accomplish the purpose the parties had in mind. They are not to be scrutinized as if they were legal pleadings. Nevertheless it is clear that the Legislature has directed that the articles a seaman is asked to sign shall tell him in general terms, at least, what kind of a voyage the master is then planning to undertake, reserving on their face, if need be, sufficient latitude for the changes which may subsequently arise from the exigencies of a successful participation in the world's carrying trade. Tested by even this liberal rule, the articles at bar are plainly insufficient. The master knew he was going to a port on the west coast of South America, but the articles did not tell the seamen so. For all that appears upon them, the ship might have been bound to any port in the seven seas.

The plain purpose of the statute cannot be thus ignored.

Affirmed.

PERFECTION DISAPPEARING BED CO., Inc., et al. v. MURPHY WALL BED CO., et al.*

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920.)

No. 3456.

1. **Patents ⇐136—Failure to make claims cover entire invention; "inadvertence" authorizing reissue.**
   In the absence of fraud, the failure of an inventor or his solicitor to put the claims in such form as will cover the entire invention is "inadvertence," within the meaning of the statute, which will authorize a reissue, although the original patent is not inoperative.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inadvertence.]

2. **Patents ⇐73—As anticipative patent speaks from date of issuance.**
   For the purpose of anticipation, a patent speaks from the date of its issuance, and not from the date of the application.

3. **Patents ⇐328—1,068,806, and reissue 13,428, for disappearing bed, valid and infringed.**
   The Murphy patents No. 1,068,806 and reissue No. 13,428, each for a disappearing bed, *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suit in equity by the Murphy Wall Bed Company and the Marshall & Stearns Company against the Perfection Disappearing Bed Company, Incorporated, and others. Decree for complainants, and defendants appeal. Affirmed.

Waldo F. Postel, of San Francisco, Cal., for appellants.
William K. White, of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellants appeal from a decree wherein they were adjudged to have infringed claims 9, 10, 13, and 14 of reissue letters patent No. 13,428, issued to Wm. L. Murphy on April 13, 1912, for a "disappearing bed," and claim 1 of patent No. 1,068,806, issued to Murphy on July 29, 1913, for "disappearing bed."

Claims 13 and 14 of the reissue letters patent were upon the reissue added to the original patent. The appellants contend that those claims are void for failure to comply with section 4916, Rev. Stat. (Comp. St. § 9461), which provides:

"Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee. * * * But no new matter shall be introduced into the specification."

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

*Rehearing denied October 18, 1920.

It is contended that there was no error, mistake, or inadvertence in the original patent, and no defective or insufficient specification therein, and that claims 13 and 14 introduced new matter.

The Murphy disappearing bed, as disclosed in the original patent, marked a distinct advance in the art. The invention relates to means for concealing a bed in such a way as to leave no suggestion of its use in the room in which it is to be used. Many previous devices for this purpose were in the field, when Murphy conceived the idea that a bed might be adapted to be moved about a vertical axis through an opening of less width than the bed, and shifted laterally with respect to such opening, and concealed in an ordinary closet, behind an ordinary closet door only three feet in width. In the original patent the claims covered two methods in which this might be accomplished. One was by attaching the bed to a door which opened outwardly from a small closet or an adjoining room. The other was by attaching a bed by pivotal means to the wall at one vertical side of the door opening. In claims 13 and 14 of the reissue patent a third method was added—that of pivoting the bed upon a vertical axis adjacent to one side of the opening. All of these methods were adapted to accomplish the same result, and to carry out the idea which was the gist of Murphy's invention. The leading case construing the statute here involved is Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, where Mr. Justice Brown reviewed the decisions and said:

"From this summary of the authorities, it may be regarded as the settled rule of this court that the power to reissue may be exercised, when the patent is inoperative by reason of the fact that the specification as originally drawn was defective or insufficient, or the claims were narrower than the actual invention of the patentee, provided the error has arisen from inadvertence or mistake, and the patentee is guilty of no fraud or deception."

The court went on to say that the reissue must be for the same invention as the original patent, as shown in the specification and claims thereof, and that the courts will not review the decision of the Commissioner upon the question of inadvertence, accident, or mistake, "unless the matter is manifest from the record." The court said:

"To hold that a patent can never be reissued for an enlarged claim would be not only to override the obvious intent of the statute, but would operate in many cases with great hardship upon the patentee."

This conclusion was reached in view of the fact that inventions are often placed in the hands of inexperienced persons to prepare the specifications and claims.

[1] From the foregoing decision and others it is obvious that the words "inadvertence or mistake" are used in the statute as the antitheses to "fraudulent intent," and that in the absence of fraud the failure of an inventor or his solicitor to put the claims in such form as will cover the entire invention is "inadvertence," within the meaning of the statute, and that to justify a reissue it is not necessary that the original patent shall be inoperative, but it is sufficient if it fail to secure to the patentee the whole of his invention. We think it clear in this case that claims 13 and 14 are not beyond the scope of the invention shown in the original specification. The reissue letters pat-

ent but add another method of expressing Murphy's original conception.

There is no evidence that any one could have been injured by the reissuance, or that the object of the reissuance was to cover improvements which had come into use or had been invented by others after the original issue. The appellants' suggestion that the reissuance was obtained in order to take advantage of the Anderson patent, letters patent No. 1,015,376, is not sustained by the facts. Murphy's original application was filed on January 3, 1911, and the patent was issued on October 31st of the same year. Anderson applied for his patent on August 28, 1911. But in the meantime, on April 8, 1911, Murphy had applied for a second patent for a disappearing bed, setting forth five claims, two of which were identical with claims 13 and 14, subsequently inserted in the reissue patent. In May, 1911, the Patent Office allowed all the claims of Murphy's second application. But thereafter Murphy canceled therefrom the two claims which were transferred to the application for the reissue patent and became claims 13 and 14 thereof. This was done obviously for the reason that those two claims were thought to be germane to the original invention. No other reason appears. On June 18, 1912, Murphy received letters patent No. 1,030,201, covering the three remaining claims of his application of April 8, 1911.

[2] The second patent in suit was issued on July 29, 1913, upon an application filed April 13, 1912. The first claim reads:

"In combination with a wall having an opening, a standard arranged adjacent to one side of said opening, and adapted to move forward and backward in said opening, and a bed connected intermediate its sides to said standard."

It is contended that this claim is void (1) for double patenting; and (2) that it is anticipated by patent No. 1,086,744, issued on February 10, 1914, to Anderson, upon an application filed February 1, 1912, and prior to the date of the application for Murphy's third patent. There are two reasons why the defense of anticipation cannot avail the appellants. In the first place, it was not pleaded; and, in the second place, for the purpose of anticipation, a patent speaks, not from the date of the application, but from the date of its issuance. Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68; Dubois v. Kirk, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895; American Roll Paper Co. v. Weston (C. C.) 45 Fed. 686, 689; Anderson v. Collins, 122 Fed. 451, 58 C. C. A. 669; General Electric Co. v. Allis-Chalmers Co. (C. C.) 190 Fed. 165, 170; Turner Brass Works v. Appliance Mfg. Co. (C. C.) 203 Fed. 1001.

The defense that the second patent in suit is void for the reason that both the Murphy patents are for the same invention is made for the first time in this court. Claim 1 of the second patent differs from the claims of the reissue patent, in that it calls for a standard which is movable forward and backward in the door opening. We are not convinced that the claim is void. The reissue letters patent specified only a fixed axis. The second patent introduces a movable axis. But, conceding that a movable axis might have been claimed in the reissue patent, that fact affords no ground for reversing the decree. The suit was brought upon both patents. The bill alleged that the appellants

have infringed "them and each of them." The decree finds that the appellants "have infringed and contributed to the infringing of both said letters patent and of each of them." If the later patent is void, for the reason that it is a second patent for the same invention, it does not follow that the decree should be disturbed, for in that case it may, in equity, rest wholly upon the claims of the reissue patent.

There can be no question but that the appellants have infringed the claims of both patents, as was found by the court below. The structures made by the appellants come within the appellees' claims. It is urged that there is substantial difference, sufficient to avoid infringement, in that claims 9 and 10 of the reissue patent call for pivotal means for connecting the bed to the wall at one of the vertical sides of the opening; whereas, in the appellants' device, the vertical axis is supported by the floor or by the floor and the top of the opening. This slight alteration in construction does not avoid infringement. It is but a change of form, not a change in principle.

The decree is affirmed.

BEATTIE MFG. CO. v. HEALD et al.

(District Court, N. D. New York. July 8, 1920.)

Patents ⇐328—For folding machines valid and infringed.

The Maitland & Beattie patents, No. 713,230, for a folding machine for collars and cuffs, and No. 1,071,677, for improvement on the same, the Smith patent, No. 972,272, and the Beattie patents, No. 972,495 and No. 972,320, all relating to folding machines, *held* valid and infringed.

In Equity. Suit by the Beattie Manufacturing Company against Margaret L. Heald, doing business as the E. H. Brown Manufacturing Company, and Ida Maitland, executrix of the will of John Maitland, deceased. On final hearing. Decree for complainant.

Suit in equity to restrain alleged infringement of United States letters patent Nos. 713,230, 972,320, 972,495, 972,272, and 1,071,677, all relating to folding machines, and for an accounting; also a motion to dismiss on the ground of laches, and a motion to strike out the testimony of Walter J. Beattie, for refusal to produce him for further cross-examination.

Frank C. Curtis, of Troy, N. Y., for plaintiff.

Walter E. Ward, of Albany, N. Y., and Harry Hayward Allen, of Washington, D. C., for defendants.

RAY, District Judge. This suit was originally brought by the plaintiff, the Beattie Manufacturing Company, against the defendant Margaret L. Heald, trading and doing business under the name and style of E. H. Brown Manufacturing Company, upon all of the patents above recited, except No. 972,272.

Upon taking proofs in the prima facie case, plaintiff found that a part of the technical legal title to patent No. 713,230 remained in Ida Maitland, executrix of John Maitland, one of the joint inventors up-

on whose application said patent was granted, and that another of plaintiff's patents, No. 972,272, also alleged to have been infringed by the defendant, had been inadvertently omitted from the original bill. The court thereupon, on motion and the payment of costs, permitted the bill to be amended to bring in the omitted patent and to make Ida Maitland, executrix, a party defendant; she having declined to join as party plaintiff.

Thereafter the defendant, who had already answered the original bill, filed an amended answer to the amended bill, setting up the usual defenses to a patent suit, and Ida Maitland, executrix, filed a separate answer, admitting all of the facts charged in the amended or supplemental bill, and disclaiming all interest in the matter in controversy in favor of the plaintiff. Proofs were thereupon taken by deposition, in accordance with a stipulation entered into by the parties, which was approved by the court for cause shown.

The five patents in suit relate to various features of folding machines, such as are commonly used for folding or inturning the edges of fabric blanks in the manufacture of collars, cuffs, and the like. The charge of infringement is based upon the manufacture and sale by the defendant of two types of machine in evidence, respectively, as "Plaintiff's Exhibit Defendant's Band Machine" and "Plaintiff's Exhibit Defendant's Top Machine"; the band machine being adapted for folding or inturning the edges of a blank on all of its sides in making the band of a collar, while the top machine is adapted for folding or inturning the edges of the blank upon three sides only, leaving the fourth side unturned for insertion between the blanks or plies of the band, as in the manufacture of fold collars.

Patent No. 713,230.

Patent No. 713,230 is dated November 11, 1902, issued on an application filed April 5, 1902, by John Maitland and Walter J. Beattie, joint inventors. Claim 3 is the only claim in issue. This feature of the machine relates to the supporting of the thin sheet metal die plate or former plate, which determines the shape of the folded blank and over the edge of which the edge of the blank is inturned by the folders. This former plate is of very thin sheet metal and requires an immediate support, to which it is attached, which support can be readily mounted upon the die head or former head of the machine. The former head or die head is provided with a slideway or seat, which is adapted to interchangeably receive and support the former blocks for all forms of former plate; that is, while the former plates themselves must differ in outline according to the blank to be folded, the former block, where attached to the die head, should always be the same, in order to be interchangeable with other former blocks, but that portion of the former block to which the thin former plate is directly attached should conform generally to the form of the edge of the particular thin former plate. These thin former plates, adapted for folding the bands of collars, are very narrow and very irregular in outline, so that to machine a solid piece of metal into a former block of such complex shape that one portion of it will be of standard form interchangeable

with other former blocks in attachment to the die head, while the portion to which the irregular former plate is directly attached shall conform to the shape of the thin former plate, is a difficult and expensive task. This difficulty is overcome by the construction set forth in claim 3 of this patent, No. 713,230, which reads as follows:

"3. In a folding machine, former mechanism, comprising in part a former plate and a former block split part way of its length, one member thereof being bent to conform to the edge of said former plate and secured thereto, and the other member being provided with means for securing the same to a supporting member of said former mechanism, substantially as described."

By splitting the former block part way of its length, one of the members thus formed can be left in its original straight form, while the other member can be readily bent to conform to the shape of former plate which is to be attached to it. This is done by bending this member of the split former block without machine work upon the same. All of the former blocks thus have the members whereby they are attached to the die head of the same shape and dimensions, while their other members, to which the thin former plates are attached, can be made of different forms, in each case corresponding to the shape of former plate to be attached thereto.

Defendant's expert has been able to find no prior art reference against this claim. The utility of the construction seems too clear for argument, and defendant's expert admits that he finds in "Plaintiff's Exhibit Defendant's Band Machine" the construction called for by this claim 3.

Patent No. 972,272.

Patent No. 972,272 is dated October 11, 1910, issued on an application filed February 14, 1908, by George W. Smith, inventor. Claims 1, 2, and 7 only of this patent are in issue. Each of these claims recites the general construction of the folding machine, including the bed plate, die, and infolders. The invention consists broadly in providing separate heating means for the bed and for the infolders. The prior art shows no disclosure of separate means for heating the bed and for heating the infolders. For the purpose of the present suit claims 1, 2, and 7, are substantially alike. Claim 1 is as follows:

"1. In a folding machine, a rigid frame, a bed plate movable within the frame, means within the bed plate for heating the same, a die plate adapted to co-operate with the bed plate for clamping between them a blank to be folded, slidable infolders for folding the edges of a blank over the die plate, each inforder being provided with means for the insertion of heating means, means for simultaneously operating the infolders, and means for pressing the bed plate and die plate into co-operative relation, turning the edges of the blank over said die, and forcing said bed and die against the infolders to press the turned edges of the blank."

The gist of the invention is recited in this claim as follows:

"Means within the bed plate for heating the same," and "each infolder being provided with means for the insertion of heating means."

In claim 2, these features are referred to in the following language:

"Means within the bed plate for heating the same," and "each infolder being provided with means for the insertion of heating means independent of the bed plate heating means."

In claim 7 these features are referred to in the following language:

"A bed plate adapted to be heated," and "each of said infolders being provided with means for the insertion of heating means separate of the bed plate heating means."

This invention permits the infolders to be more highly heated than the bed. It is, of course, desirable to have the folding elements heated to the highest temperature which can be employed without scorching the goods. In the folding operation the blank is in contact with the bed for a considerably longer period than it is with the infolders, because the blank must be laid upon the bed before the infolders move in over the edges of the blank, and cannot be removed from the bed until after the infolders have been fully withdrawn. The infolders, therefore, can be safely more highly heated than the bed, because they are in contact with the blank for a less time than the blank is in contact with the bed. Furthermore, it is safer to play closely to the maximum temperature of the infolder than it is to the maximum temperature of the bed, because a slight scorching of the face of the blank from an overheated bed is exposed on the surface of a finished collar, whereas a slight scorching of the inturned edges of the blank from an overheated infolder would be concealed between the two blanks of the collar when stitched together.

No details of the particular form of heating mechanism to be used in the infolders and in the bed are shown in this patent, and the claims are not limited to any particular form of heating mechanism, electric or otherwise. However, the first statement of the objects of the invention (line 10, page 1, of the patent) says:

"To construct a folding machine in which the bed plate and the infolders will be heated by electricity."

It appears from the testimony that prior to the date of the application for this patent Simplex heating units had been commonly known and could be obtained from the Simplex Electric Heating Company of various sizes as might be desired. These units comprised each a casting hollowed out to receive the electric resistance coils imbedded in a body of insulating material, and such units could be mounted by means of screws or bolts upon a desired part of a machine. In view of this there is no difficulty in understanding the specification of this patent, beginning at line 91, page 1, where it states:

"The under sides of the infolders, *12*, have hollow spaces, *15*, adapted to receive suitable electric heating means."

Nor the statement beginning at line 79, page 1:

"Attached to the under side of the bed plate, *10*, is a box, *14*, in which are placed suitable resistance coils for generating heat by electricity."

Whether the box, *14*, is the hollow casting of an electric heating unit, like a Simplex heating unit, or whether it is simply a box forming a chamber into which a complete electric heating unit is installed, seems entirely immaterial, and the argument that the box, *14*, is not part of the bed, within the meaning of these claims, is not worthy of serious consideration. The electric heating mechanism for the in-

folders in "Plaintiff's Exhibit Defendant's Top Machine" comprises an electric resistance coil mounted within the hollowed out infolder; the particular construction being hereinafter described more in detail in connection with patent No. 972,495. The electric heating mechanism in the bed of "Plaintiff's Exhibit Defendant's Top Machine" comprises an electric resistance coil placed in a recess formed in the underside of the bed plate and closed by a bottom plate, which is clamped to the bed plate. The ends of the coil project down through the bottom plate, where they are connected with the circuit wires. The bed itself thus forms the box or housing for the coil, instead of having the coil imbedded in a separate complete heating unit. The reference in the claims to this feature is, "Means within the bed plate for heating the same," which expression is employed in all three claims in issue. The heating mechanisms for the infolders and for the bed in "Defendant's Top Machine" clearly come within the description of each of claims 1, 2, and 7, and said exhibit clearly embodies the substance of the invention of these claims.

Defendant has introduced some testimony in an endeavor to show that Eugene H. Brown, the predecessor in business of the defendant Margaret L. Heald, as early as 1902 or 1903, employed Simplex or similar heating units in the folders of a folding machine, making the unit of considerable length and using it as the slide connection between two folder plates. This evidence is not satisfactory or convincing, and is not borne out by the records of the Simplex Electric Heating Company, nor by the correspondence which passed between Brown and the Simplex Company in 1908, which shows that as late as 1908 Brown had not learned how to satisfactorily make such a heating unit.

Patent No. 972,495.

Patent No. 972,495 is dated October 11, 1910, issued on an application filed August 15, 1908, by Walter J. Beattie, inventor. Claim 1 only is in issue. This patent is properly considered in connection with the Smith patent, No. 972,272, because it relates to the working out of the most practical means for incorporating the electric heating resistance coils in the infolder.

It appears that the Simplex heating units had to be made of such thick castings that they were slow in conducting the heat to the thin sheet metal plates mounted upon the folder blocks. Beattie's solution of the problem was to make the folder itself the housing for the resistance coils, instead of incorporating the coils in a separate complete unit to be attached to the folder block. He accomplished this by dividing the folder block into two parts, separably screwed or bolted together; one or both of the members thus formed being hollowed out, forming between the members a chamber within which the resistance coil was mounted, with the terminals of the coil projecting out from between the two block members. None of the references referred to by defendant's expert shows an electrically heated infolder, nor do any of the references suggest the construction set forth in claim 1 of this patent, No. 972,495, which reads as follows:

"1. In a machine for folding collar and cuff blanks, a heated bed plate, a die adapted to press blanks upon said bed plate, infolders adapted to move inwardly and fold the edges of the blanks over said die, each of said infolders being chambered and formed in two parts separably connected together, and an infolder plate attached to one of said parts, electric heating means within said chambers adapted to be supplied with current by electric wires from without, whereby the infolder plate of each infolder may be independently heated, means for moving said infolders to fold blanks over the die, and means for pressing the said blanks between the heated bed plate and the folder plates."

In the defendant's top machine each infolder block comprises a casting hollowed out on its underside, with a thin bottom plate to complete the closing of the chamber for the heating coil. The bottom member of defendant's folder block is thinner than the bottom member of the folder block shown in this patent, but the two members complete the chamber which receives the heating coil in substantially the manner called for by this claim. The claim involves invention, and is not avoided by the immaterial differences in the form of the two members of the folder block, nor by the fact that the terminals of the coil are led out from between the block members at the end, instead of at the side of the folder block.

Patent No. 972,320.

Patent No. 972,320, is dated October 11, 1910, issued on an application filed May 21, 1908, by Walter J. Beattie, inventor. Claims 6 and 8 only are in issue. These read as follows:

"6. In a machine for folding collar and cuff blanks, a vertically movable bed plate, a die of thin sheet material comprising a fixed section and a slidable section, said die adapted to clamp blanks upon the bed plate, slidable folder plates adapted to fold the edges of said blanks over the edges of said die, means for raising the bed plate to press the folded blanks against the folder plates, means for supporting and lowering said die, and connections operated by said means for moving the slidable die section endwise to lengthen the die as said die is lowered."

"8. In a machine for folding collar and cuff blanks, a die therefor of thin sheet material formed of a plurality of sections, one of which is slidable longitudinally of the die, a swinging die head supporting said die, means engaging said slideable die section to move the same, and a connection attached to said moving means and hinged to a fixed part of the machine eccentric to the axis of oscillation of the die head."

The construction called for by these claims provides for automatically expanding and contracting a partly collapsible die. The importance of the improvement is due to the fact that it accomplishes a very material saving of time in the folding operation. This is accomplished by automatically expanding the die to full dimensions by the downward movement of the die into engagement with the blank on the bed, permitting the die to remain expanded throughout both the folding and pressing operations, and automatically contracting one end of the die by the upward movement of the die as it rises from the bed with the folded and pressed blank retained upon the die plates.

The prior patents in evidence show that it was not new with Beattie to automatically expand and contract a die in a folding machine, such

a construction being shown, for example, in the Fenwick patent, No. 688,460, which is selected by defendant's expert as the best reference to said claims; but in all of these prior constructions the die-operating mechanism was constructed so as to contract the die to withdraw the die plates from beneath the folded edges of the blank before the folded edges were pressed to fix the fold, and with the method of folding thereby made necessary the folded and pressed blank was left upon the bed, to be picked therefrom by the operator after the naked die had been raised from the bed. The patent to Fenwick, No. 688,460, does not disclose the simple mechanism shown in this patent to Beattie for contracting and expanding the die, but Beattie's invention consisted not so much in providing the particular means for expanding and contracting his die at the proper times as in the conception that a collapsible die could be operated in a manner to accomplish the folding of a blank by a new method or series of steps whereby a material saving in time would be accomplished. "The invention consisted rather in the idea that such change could be made, than in making the necessary mechanical alterations." Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586.

The sequence of steps in folding blanks upon machines of the general type in controversy as formerly constructed with a collapsible die was as follows: Pick up unfolded blank, place same on bed, lower die, move infolders in, contract die, press, remove folded blank from bed, place same on pile, etc. The sequence of steps in folding blanks by these machines embodying the subject-matter of these claims is as follows: Pick up unfolded blank while pressing previous blank, place same on bed, remove previous blank from raised die, place same on pile, lower die, move infolders in, press while picking up next blank, etc.

It will be seen that by the employment of Beattie's improvement the time formerly required by the operator in contracting the die is eliminated, while the operations of pressing a blank upon the bed and picking up the next blank to be folded are performed simultaneously.

Infringement of each of these claims is admitted as to both Defendant's Top Machine and Defendant's Band Machine.

Patent No. 1,071,677.

Patent No. 1,071,677 is dated August 26, 1913, issued on an application filed August 18, 1905, by John Maitland and Walter J. Beattie, joint inventors. This patent shows a quite complicated power folding machine, but the only feature here in issue is that referred to in claims 8 and 9, which are as follows:

"8. In a folding machine, the combination with two folder plate sections, on one side of the machine, provided with a slide connection extending lengthwise of the plate sections; of a single actuating crank connected by a close-fitting connection with each section whereby a circular motion is imparted to the plate sections; and means for operating the cranks, substantially as described.

"9. In a folding machine, the combination with two folder plates adapted to fold one side of a blank and portions of two other and oppositely disposed sides; of a slide connection between the plates extending lengthwise of their

neighboring parts and transversely of the other parts, which are adapted to fold portions of the opposite sides of the blank; a plate actuating crank connected by a close-fitting connection with each of such folder plates whereby a circular motion is imparted to the plate sections; and means for operating the cranks, substantially as described."

In the specification reference is made to prior patent No. 713,230, issued to the same inventors, and which has hereinbefore been discussed, but not with respect to the feature now under consideration. In said prior patent are two infolders on the front side of the machine and two infolders on the rear side of the machine. The two infolders on the front side co-operate to fold the front edge of the blank, and the neighboring ends, or portions thereof, of the blank. The two rear infolders co-operate in the same manner with respect to the rear edge and neighboring end portions of the blank in folding blanks on all sides as for bands of collars. Where blanks for the tops of collars are to be folded, one pair of these infolders is omitted. The infolders of such a co-operative pair, in folding a longitudinal side and neighboring end portions of a blank, are moved longitudinally toward each other as well as inwardly and outwardly transversely of their length. In folding corner portions of a blank, most satisfactory results are obtained by moving the infolders each in the path of an arc of a circle, whereby the surplus of fabric at the folded-in corner of the blank is more uniformly and smoothly distributed.

Such a movement was provided for in said prior patent, No. 713,230, by providing two eccentrics with suitable operating mechanism therefor for each infolder of such a pair. These eccentrics required accurate adjustment, and also required to be operated accurately in unison with each other. The improvement set forth in patent No. 1,071,677, with respect to claims 8 and 9 thereof, consisted in providing a slide connection extending lengthwise of the pair of infolders, referred to in these claims as plate sections, and a single actuating crank connected by a close-fitting connection with each section, whereby a circular motion is imparted to the plate sections by operating these two single cranks. By a proper adjustment of these two cranks, precisely the same circular movement will be imparted to the respective infolders or plate sections as by the use of the four cranks (two for each infolder) in the early patent. All of the advantages of the earlier construction were thus attained, while eliminating two of the four cranks, with their operating mechanism, consisting of beveled gears. The advantage of the improvement are obvious.

The best reference, and practically the only reference relied upon by defendant's expert, is the Fenwick patent, No. 688,460; but a careful examination of this Fenwick patent fails to show, or even suggest, the mechanical movement called for by these claims. Fenwick employs four cranks, and necessarily so; two of these cranks being required to move the infolders longitudinally, and the other two to move the infolders transversely. Fenwick's construction can impart straight-line movements only to the infolders, whereas the object of the invention of these two claims is to impart a circular motion to the infolders or plate sections. In Fenwick the cranks are merely pull-

ing and pushing devices, while in the Maitland and Beattie construction the two cranks have a guiding function whereby the circular motion is imparted to the infolders. These two mechanical movements could hardly be more dissimilar.

The contention that the reference to the close-fitting connection between the cranks and the plate sections is new matter, not disclosed in the original specification, is without foundation. This expression merely means that the cranks operatively connect with the infolders without substantial lost motion, just as do the cranks in the prior patent, No. 713,230, which was referred to in the original specification, and patent No. 713,230 refers in like manner back to a still earlier patent, No. 666,766, granted to the same inventors.

The expression in claim 9, "portions of two other and oppositely disposed sides," clearly includes some portions less than the whole of these ends, as well as all portions of the ends of the blank. Defendant's expert admits infringement of each of these claims 8 and 9 by "Plaintiff's Exhibit Defendant's Band Machine."

It is immaterial, if true, that the cranks for these machines were furnished by Cluett, Peabody & Co., or that the machines were made pursuant to instructions from that company. The defendant Heald, who built the machines, is not relieved from liability for infringement because of the fact that another may have contributed to the infringement.

The motion to dismiss on the ground of laches is denied, as there is no evidence to sustain the charge.

The motion to strike out the testimony of Walter J. Beattie is also denied; he having been twice produced for cross-examination in the prima facie case. He could have been called as defendant's witness, had his further testimony been deemed material.

Plaintiff is the sole owner of each of the patents in suit. Claim 3 of patent No. 713,230, and claims 8 and 9 of patent No. 1,071,677, are valid, and infringed by Defendant's Band Machine. Claims 1, 2, and 7 of patent No. 972,272, and claim 1 of patent No. 972,495, are valid and infringed by Defendant's Top Machine. Claims 6 and 8 of patent No. 972,320 are valid, and infringed by Defendant's Band Machine and also by Defendant's Top Machine.

Plaintiff is entitled to a decree in the usual form for injunction and accounting, except at to patent No. 713,230, which has expired since the final hearing. This should be included in the accounting, but no injunction should be issued with respect thereto.

McAVOY v. CAMDEN SHIPBUILDING CO.

THE PACIFIC.

(District Court, E. D. Pennsylvania. July 13, 1920.)

No. 14.

1. **Wharves ⇐20(2)—No duty to warn uninvited vessels of danger.**
There is no obligation of duty on the part of the owner of a private wharf to give notice of an existing danger to vessels which may make use of the wharf, although not invited by the owner to do so; but the duty is on the uninvited user to make inquiry.

2. **Wharves ⇐20(2)—Owner not liable for injury to tug using wharf without invitation.**
Owner of a private wharf in a slip used as an entrance to its marine railway *held* not liable for injury to a tug, which entered the slip and went to the wharf on its own business without invitation, but as permitted, and fouled its propeller on a wire cable that had been used by the owner and left in part under water.

In Admiralty. Suit by P. W. McAvoy, managing owner of the tug Pacific, against the Camden Shipbuilding Company. Decree for respondent.

Willard M. Harris, of Philadelphia, Pa., for libelant.
Howard M. Long, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. The principle of law which controls the determination of this cause does not readily lend itself to concise statement. One who is injured in person or property by the negligent act, either of commission or omission, of another, has a clear cause of action. The obligation of duty, on the part of one who invites another to come upon his premises, to give notice of the presence of danger known to him, but of which the other is ignorant, is equally clear. Such obligation exists, whether the danger is of negligent origin or not. The liability to respond in damages is not based upon responsibility for the existence of the danger, but upon the neglect of the duty to make the danger known.

The damage in the instant case was suffered, not by one who was invited to use respondent's wharf, but by one who used it uninvited, in pursuance of a permissive use. The libelant was not a trespasser. On the other hand, the use made of respondent's property was the wholly voluntary act of the libelant. The broad facts out of which the questions raised arise are that the respondent owned a slip with a wharf landing. The slip was maintained as an entrance to a marine railway. Vessels were permitted to enter the slip and tie up at the wharf. A wire cable had been in use to handle a ferryboat in getting her clear of the railway. The ferryboat had been taken to the side of the slip, and the cable had been left still attached to the ferryboat and extending to the landing, when the end of it was there coiled. The part of the cable between the landing and the ferryboat was under water. The libelant tug entered the slip and proceeded to the landing. In the attempt to leave the landing, her propeller became entangled in

the cable, causing the damage of which complaint is made. The tug entered the slip and went to the wharf for her own purposes. Such use of the slip had been made for the time previous without objection from the respondent. The cable, as it was left, was an obstruction to navigation to a vessel making use of the landing, but not otherwise of the slip.

[1] The question, broadly stated, is whether there is an obligation of duty on the part of the owner of a private wharf to give notice of an existing danger to vessels which may make use of the wharf, although not invited by the owner to do so. The principle is one of some importance. The case may arise of the owner of a private wharf, having no further use for it, permitting it to be used by others by not objecting to such use, and permitting it also to become so out of repair that damage may result from such use. What obligations does such owner assume toward those who may for their own purposes use his wharf? Are the obligations such that in practical effect he must remove the wharf, when he has no further use for it, keep it in repair, although he has no use for it, or give notice to every uninvited user that its use is dangerous? Must the owner, in a very practical sense, protect the user, or must the user protect himself?

Without prolonging the discussion, we see at least no greater obligation on the part of the owner to warn the unexpected user than on the part of such user to inquire whether it is safe to use before using. The obligation of the latter is more easily met. He knows he is about to use, and may inquire; the owner does not know. The distinction which ordinarily exists between an obstruction existing without negligence and one which is the creature of negligence has no practical value in its application to the owners of private wharves, because the distinction is practically eliminated, in that there is no negligence in the owner obstructing his own premises, unless he owes the duty of protection to others to the extent that he is bound to anticipate that they may encounter the danger by making uninvited use of his premises.

[2] There is the usual conflict of testimony with which we are met in physical damage cases. The following facts clearly appear: The respondent had been using and had left the cable as already stated. Vessels were lying across the entrance to the adjoining slip. Employés of respondent were there at work. The libelant tug entered the railway slip and proceeded to the landing on the south side. She came there uninvited, and for her own purposes, but such use of the slip was permitted. The tug made no inquiry respecting obstructions. The only disputed fact is whether warning of the obstruction was given. In view of the admissions of the answer, this fact is found against respondent. This does not carry the implication of a discredit of the testimony of witnesses for respondent. What the witnesses meant is that they spoke of the existence of the obstructions. It does not mean that the tug received warning. The place from which to have given this was the landing.

A decree dismissing the libel, with costs, may be submitted in accordance with the findings made and filed herewith.

UNITED STATES v. WILSON.

(District Court, E. D. Tennessee, S. D. June 3, 1920.)

No. 4292.

Prostitution ⇐1—White Slave Traffic Act; transportation between points in same state through another state not violation of "interstate commerce."

Transportation of a woman from a point in a state to another point in the same state is not an interstate transportation, within the meaning of White Slave Traffic Act June 25, 1910, § 1 (Comp. St. § 8812), because the route taken incidentally passes through another state.

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

Criminal prosecution by the United States against C. R. Wilson. Judgment of conviction set aside.

The defendant was indicted on the charge of violating the White Slave Traffic Act, tried, found guilty, and judgment of imprisonment rendered. No question was made, before or at the trial, but that the transportation of the woman alleged and proved was an interstate transportation within the meaning of the act. Shortly thereafter, this question having arisen in the mind of the court, a memorandum was handed down requesting counsel to submit briefs on the question whether, on account of insufficiency of the indictment in this respect, the judgment should not be set aside and arrested by the court upon its own motion.

W. T. Kennerly, U. S. Atty., of Knoxville, Tenn.

J. H. Daly, of Chattanooga, Tenn., for defendant.

SANFORD, District Judge. I have carefully considered the briefs filed in response to the request contained in my memorandum of May 22, 1920.

The indictment alleges that the woman in question was "transported in interstate commerce from Nashville, Tennessee, through the State of Tennessee and the State of Alabama by way of Stevenson, Alabama, and into Hamilton County, Tennessee, over the lines of the Nashville, Chattanooga & St. Louis Railroad Company." In other words, it merely charges the transportation from one point in Tennessee to another point in Tennessee, as the points of origin and destination, respectively, with an intermediate and incidental carriage, enroute, through Alabama.

Generally speaking interstate commerce includes a continuous transportation from a point in one State to another point in the same State, partly by way of another State. Hanley v. Kansas City Ry., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, affirming Kansas City Ry. v. Railroad Commissioners (C. C.) 106 Fed. 353; United States v. Erie Railroad (D. C.) 166 Fed. 352, 354.

However, the White Slave Traffic Act specifically provides that the words "interstate commerce," as used in the Act, shall "include trans-

portation from any State or Territory * * * to any other State or Territory." Act of June 25, 1910, c. 395, § 1, 36 Stat. 825 (Comp. St. § 8812). This definition necessarily excludes, by implication, transportation from one point in a State to another point in the same State; the words "from" and "to" as used in the Act manifestly referring to two different States or Territories as the respective points of origin and final destination of the transportation, and not to a State through which the woman is carried as a mere incident of the through transportation. See, by direct analogy, United States v. Gudger, 249 U. S. 373, 375, 39 Sup. Ct. 323, 63 L. Ed. 653, and Jones v. United States (6th Circ.) 259 Fed. 104, 106, 170 C. C. A. 172, involving a construction of the word "into" as used in the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a–10387c). Hence, as the indictment merely charges transportation of the woman from one point to another in Tennessee, through Alabama, and does not charge that she was transported from Alabama as the point of origin to Tennessee, it necessarily follows that it does not state a case of transportation in interstate commerce, as defined in the White Slave Traffic Act.

And I may add that the proof showed that the transportation was in fact, as alleged, one from Nashville, Tennessee, to Chattanooga, Tennessee, with a merely incidental passage through Alabama, and not a transportation from Alabama to Tennessee within the meaning of the Act.

It hence becomes my duty, upon my own initiative, to adjudge the indictment insufficient, under the true construction of the statute on which it is based, and to set aside the judgment rendered against the defendant and arrest judgment under the indictment; and it will be so ordered.

UNITED STATES v. MARESCA et al.

(District Court, S. D. New York. February 27, 1920.)

1. **Courts ⟸55—May order officers to return property unlawfully taken for another.**
   Whenever an officer of the court has in his possession or under his control books or papers or other articles in which the court has an official interest, and of which any person, whether a party or not, has been unlawfully deprived, such person may petition the court for a restitution of property.

2. **District and prosecuting attorneys ⟸1—Attorneys are officers of court, who can be ordered to return papers in their possession.**
   Attorneys are officers of the court, so that the district attorney as such officer, and not as an officer of the United States, can be ordered by the court to return papers in his possession of which another has been unlawfully deprived.

3. **Courts ⟸55—Can order return of papers, though no prosecution is pending.**
   Courts can order a return of papers in the possession of their officers to a person from whom they were unlawfully taken, though no prosecution to which the papers relate is pending, or they may in their discretion remit the person to plenary suit for such papers.

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4. District and prosecuting attorneys ⟸1—Papers will not be returned merely to prevent use in evidence against owners.

The only ground on which a motion for return of papers in possession of the district attorney can rest is that they were unlawfully seized by an unreasonable search, in violation of Const. Amend. 4, or without due process of law, in violation of Const. Amend. 5; the possibility of their use in evidence thereby compelling the owner to give evidence against himself contrary to Const. Amend. 5, not being ground for such motion.

5. Searches and seizures ⟸7—Securing papers by fraud is not "unreasonable search or seizure."

The unreasonable searches and seizures against which a person is protected by Const. Amend. 5, are those involving force, and that amendment does not apply where possession of a paper was obtained by fraudulent representation that it could be taken by force, if not voluntarily delivered.

6. Criminal law ⟸1023(3)—Order denying return of seized books not reviewable.

An order denying return of papers seized from defendant in a criminal prosecution is not reviewable at the instance of defendant, since it is a mere interlocutory order.

7. United States commissioners ⟸7—Are for many purposes justices of the peace of the United States.

United States commissioners, who under Act May 28, 1896, c. 252, succeeded to the powers and duties of commissioners of circuit courts, including the powers of arresting, imprisoning, and bailing offenders, under Rev. St. § 1014 (Comp. St. § 1674), are for many purposes, including the issuance of warrants, justices of the peace of the United States.

8. United States commissioners ⟸7—Procedure follows legal methods of state.

In exercising the powers of a justice of the peace in respect to arresting, imprisoning, and bailing offenders, granted by Rev. St. § 1014 (Comp. St. § 1674), United States commissioners follow the usual legal methods of the states in which they sit.

9. Searches and seizures ⟸8½, New, vol. 11A Key-No. Series—Common-law method of review of issuance was by action of trespass.

The common-law method of reviewing the action of a magistrate in issuing a search warrant was by an action of trespass; appeals from such magistrates being unknown at common law.

10. Searches and seizures ⟸8½, New, vol. 11A Key-No. Series—Certiorari will not issue to review issuance of search warrant by United States commissioners.

Since certiorari to review the issuance of search warrant by magistrate was unknown at common law, and is not authorized by act of Congress, that method of review does not exist.

11. United States commissioners ⟸7—Issue process as part of the proceedings of the District Court.

United States commissioners, who succeeded to the powers and duties of the commissioners of the Circuit Court, and who by tradition and general practice hold a court, issue criminal process, including search warrants, in and as part of the proceedings of the District Court.

12. Searches and seizures ⟸8½, New, vol. 11A Key-No. Series—Order of commissioner directing return of seized property is judgment of the District Court.

An order by a United States commissioner, directing return of property seized under search warrants issued by him, is a judgment of the District Court from which the writ of error lies to the Circuit Court of Appeals.

13. **Courts ⊂=518—District Court cannot set aside order of United States commissioner directing return of seized property.**
A District Court cannot set aside an order of the United States commissioner directing a return of property seized under his search warrant any more than one District Judge can set aside an order entered by another.

14. **Searches and seizures ⊂=3—Issuance of search warrant and its subsequent discharge are not res judicata.**
The issuance of a search warrant and its subsequent discharge by a United States commissioner are not res judicata as to the right to the warrant, but subsequent application for a similar warrant may be made to the District Judge.

15. **Criminal law ⊂=230—Committing magistrate should obey statute, unless plainly unconstitutional.**
A committing magistrate must obey the statutes, in so far as they are constitutional, and is bound to refer a charge that a statute enlarging a power to search and seize is unconstitutional to the higher courts, unless the constitutional question is extraordinarily plain.

16. **Constitutional law ⊂=48—Committing magistrate should construe statutes to avoid unconstitutionality.**
If one construction of an act enlarging the power to search and seize is plainly constitutional, and another is with difficulty reconcilable to the Constitution, the committing magistrate must incline to the former construction.

17. **Searches and seizures ⊂=3—Warrant issues only for actual probable cause.**
A warrant for search and seizure, which is allowed by the Constitution only for probable cause, issues only where there is actual probable cause, not merely a verified assertion of suspicion, and the magistrate may inquire into the truth of the affidavit offered as a basis for the warrant.

18. **United States commissioners ⊂=7—Proceedings for arrest and search warrants should follow state proceedings.**
The ascertainment of probable cause for the issuance of an arrest or search warrant is a judicial function, which under general statutes the United States commissioner should exercise in conformity with state statutes.

19. **Searches and seizures ⊂=5—In application for return of property, question is whether evidence then admitted shows cause when warrant was issued.**
On the hearing of a motion for the return of property seized under a search warrant, much latitude as to the evidence should be permitted, and the question for determination is whether, under the evidence then admitted, there existed probable cause when the warrant was issued.

20. **Searches and seizures ⊂=5—If property is claimed under right additional to warrant, return should be directed, so far as based on the warrant.**
Where, at the hearing on an application for return of property seized on search warrant, it appears that there was not probable cause for the issuance of the warrant, but the person in possession claims right to the property on some ground other than the seizure under the warrant, the order should direct the return of the goods in so far as they are held by virtue of the search warrant.

Enrico Maresca and others were indicted for conspiracy to commit an offense against the United States. On motions by the named defendant under an order to show cause why the district attorney should not return a book to the petitioning defendant, and motion under another order to show cause why an order of the commissioner direct-

ing a return of certain seized documents to a defendant should not be set aside. Both motions denied.

The indictment is for conspiracy to commit an offense against the United States, and also (in other counts) for various substantive offenses, which may loosely be described as using alcohol for unlawful purposes. Under the docket number of this indictment, and therefore prima facie in this litigation, two motions have been made and argued before me.

Motion No. 1 arises under an order to show cause signed February 6, 1920, served upon the United States attorney for this district, and requiring that official, as also George F. Anderson, United States internal revenue agent, or Daniel E. Porter, supervising revenue agent for the district of New York, to show cause why the said attorney and the said revenue agents should not "forthwith redeliver and return" a certain book to the petitioning defendant (Henry F. or Enrico) Maresca.

Motion No. 2, brought under the same case number, arises under another order to show cause, likewise signed February 6, whereby the defendant Promotion Sales Company is required to show cause why an order should not be entered "vacating [an] order of Commissioner Samuel M. Hitchcock," which order was entered February 5, 1920, entitled in this court under the caption "United States v. Promotion Sales Co., Inc."

The commissioner's order shows that on November 19, 1919, a search warrant was issued by him, under R. S. 3462 (Comp. St. § 6364), authorizing and directing G. F. Anderson, internal revenue agent, "to enter and search room 206 of the building No. 1482 Broadway, borough of Manhattan," and further authorizing said Anderson "to secure and seize all books, records, or documents pertaining to the possession or sale of nonbeverage alcohol, if the same be found on the premises."

Anderson made a return to this search warrant, setting forth that he had, pursuant thereto, seized certain books and papers, which are enumerated and described in the order. Thereupon Promotion Sales Company filed a document or pleading which "controverted the material allegations of the affidavit upon which the search warrant was issued."

The commissioner then held a hearing, and, having taken the testimony of witnesses, concluded that there was "no sufficient evidence of the existence of probable cause to support the said search warrant"; whereupon the order complained of directed "that all the books, papers, records, and documents * * * which were seized by virtue of the said search warrant * * * be returned forthwith to the Promotion Sales Company, Incorporated, or their duly authorized representative."

Forthwith the order to show cause in motion No. 2 was procured, and by that order it is provided that pending the decision of this motion all the books and papers which the commissioner had ordered to be returned to the Promotion Sales Company be "impounded and placed in the custody of the clerk of this court." It is understood that the clerk now has them.

Hirson & Bertini, of New York City (H. Snowden Marshall, Roger B. Wood, and John J. Curtin, all of New York City, of counsel), for petitioner.

Francis G. Caffey, U. S. Atty., and Ben A. Matthews, Asst. U. S. Atty., both of New York City.

(1) Remarks on the Practice.

HOUGH, Circuit Judge (after stating the facts as above). Motion No. 1 is simplified by an admission in open court that the one book which is the subject of that motion is in the physical possession of the United States attorney. Therefore the motion seems to be strictly within the procedure approved in Weeks v. United States, 232 U. S. 383 and described at page 387, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R.

A. 1915B, 834, Ann. Cas. 1915C, 1177. It is a proceeding in the case whose caption is at the head of this memorandum..

Motion No. 2 cannot be procedurally a part of this case. This indictment was of course, never pending before Commissioner Hitchcock; indeed, no indictment had been found when the search warrant issued in November, 1919. The order now complained of was entered in a proceeding against the Promotion Sales Company only, and it cannot be that that order was in, or a part of, proceedings under indictment 8043 and recorded in Docket C–20, page 466.

I regard this order to show cause as an independent, original proceeding, having no recognized name, but based upon a theory of procedure which must be capable of being stated as follows: Any action or order by a United States commissioner, while discharging duties imposed upon him or permitted to him in his capacity as an examining or committing magistrate (e. g., Judicial Code, § 270 [Comp. St. § 1247]; Rev. Stat. § 1014 [Comp. St. § 1674]), may be summarily reviewed, corrected, or set aside by the District Court for the district in which the commissioner functions.

It is further noted that although the motion is in form to vacate the commissioner's order, such vacation of order would now be an idle ceremony, for the order to show cause itself in effect superseded and held for naught the commissioner's order, when it impounded the books and papers in controversy and directed their deposit with the clerk of this court. It is plainly intended that whatever becomes of the books, etc., will depend wholly on an order of this court directed to its own clerk.

This court having thus possessed itself summarily of the subject-matter of controversy, the motion of the United States attorney is in substance that it shall now proceed to adjudicate the disposition of the books after considering (1) the evidence taken before the commissioner and (2) such other evidential matter as it permits to be adduced; in other words, treat the matter either like an admiralty appeal (which is a new trial) or a case removed from a justice's to a court of record, which is a proceeding de novo.

(2) The Law Underlying Motion No. 1.

[1] Whenever an officer of the court has in his possession or under his control books or papers, or (by parity of reasoning) any other articles in which the court has official interest, and of which any person (whether party to a pending litigation or not) has been unlawfully deprived, that person may petition the court for restitution. This I take to be an elementary principle, depending upon the inherent disciplinary power of any court of record.

[2] Attorneys are officers of the court, and the United States attorney does not by taking office escape from this species of professional discipline. Thus power to entertain this motion depends on the fact that the party proceeded against is an attorney, not that he is an official known as the United States attorney. It is further true that the right to move does not at all depend on the existence of this indictment; it might be made, were no prosecution pending.

[3] Further, it does not depend on the presence or absence of any especial kind of illegality; the petitioner may be and often is remitted to plenary suit; sometimes it is better in the exercise of discretion to proceed summarily. This especial motion asserts as the illegality complained of that certain internal revenue agents "demanded" the book in question, while informing petitioner that "they were authorized to seize and carry away any papers and documents" from No. 138 Prince street, New York City, where the book was. This is the guarded language of the petition which in form charges that the revenue agents did then "take and carry away" the book in question, but does not allege a seizure by force.

[4] Since Weeks v. United States, supra, and Flagg v. United States, 233 Fed. 481, 147 C. C. A. 367, it seems to be thought that, if the prosecutor is found in possession of any documents (especially) of evidential value that once belonged to an accused, a motion to get them back should prevail, apparently because the United States attorney ought to be prevented from using the papers in evidence in violation of the Fifth Amendment. I am not advised of any holding to that effect and fail to see how the evidence clause of that amendment can be invoked before any evidence is given.

The only ground on which this or any similar motion can rest is that the prosecutor's possession of the book or paper is the result of an "unreasonable search and/or seizure" (Fourth Amendment), or of a deprivation of property "without due process of law" (Fifth Amendment). This must always, and here does, present a question of fact.

(3) Facts in Motion No. 1.

In my opinion the following is the truth: As above set forth, Agent Anderson had a search warrant for a room in a building other than 138 Prince street; he executed that warrant, and in so doing met (if he did not already know) Maresca. Him Anderson impressed with the latter's official station and wide general powers, and Maresca wished to propitiate so great a man. Therefore he took Anderson in his motor to 138 Prince, a place occupied by the Promotion Sales Company, against whose office the search warrant had issued.

There, without force, but under the impression that Anderson had right to take the book if resistance was made, and believing it would be better for him to give it up with a show of willingness, Maresca gave Anderson the volume in question, and the latter gave it to the United States attorney. Maresca's present opposition arises, and this motion results, from later advice of counsel.

(4) Decision of Motion No. 1.

[5] There is as yet no authoritative decision that obtaining papers or property by fraud or guile is a violation of the Fourth Amendment. Nor, so far as I know, has any court gone quite that far in emasculating the prosecution of offenders. Detectives and the like, of course, regard their frauds as pious, and the law has used the fruits thereof time out of mind. Probably the earliest reported instance of that particular kind of fraud was Jacob's method of obtaining a blessing (Gen. xxvii, 15–29).

The true doctrine, as we are informed by Silverthorne, etc., Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. ——, is set forth in Flagg v. United States, 233 Fed. at page 483, 147 C. C. A. 367, and there the position of the court rests on the use of force—it was the force that produced an unreasonable seizure.

Here, to put it plainly, Maresca was cheated into giving up the book of Promotion Sales Company; therefore no violation of the constitutional rights under the Fourth Amendment occurred, and Motion No. 1 is denied.

(5) Effect of This Decision.

[6] Using the word "effect" as meaning lasting or permanent influence, this decision has no effect of importance. It permits the United States attorney to keep the book, and is not reviewable (Coastwise, etc., Co. v. United States, 259 Fed. 847, 170 C. C. A. 647); but the reason why an application of this kind by a party cannot be reviewed is that the order on this decision is interlocutory, as nothing can be interlocutory that is not between the parties to the suit. Veeder v. United States, 252 Fed. 401, 164 C. C. A. 338 (certiorari refused 246 U. S. 675, 38 Sup. Ct. 428, 62 L. Ed. 933), illustrates the distinction taken by our Circuit Court of Appeals, for Veeder was a stranger, it is said, to the suit or intended suit.

Whether the decision and its distinction is right or not, it is the ruling in this circuit; wherefore, if and when this book is offered in evidence, it seems that the defendant affected can either rest on the error he will believe to exist in this "interlocutory" ruling of mine or renew his argument by appropriate objection to admission in evidence, or do both. At all events, nothing is or can be settled either by this decision or any immediate review of it.

The question whether Anderson's stratagem was an unreasonable seizure or became one (as has been claimed, though not in this instance) by the United States attorney's "ratification" of his act can be raised again and in this case. The only way I could settle it would be to grant the motion, relying on the government's inability to appeal.

That is another peculiarity of the "interlocutory" doctrine. If the motion were granted there would be no appeal for one reason; and if the prosecution failed for lack of the book as evidence, the net result would necessarily be a judgment from which the government could not appeal at all, because it would occur after the defendant had been put in jeopardy.

(6) Motion No. 2—The Office of U. S. Commissioner.

[7] No consideration can be given to this motion without a study of the history and nature of the commissioner's office. It is strange how seldom reported cases have considered this matter, except when adjusting fees—a subject too narrow for broad study. While the title of United States commissioner is no older than the act of 1896 (29 Stat. 184), they were then created to "have the same powers and perform the same duties as are now imposed upon commissioners of the

Circuit Courts, * * * and all [existing] acts and parts of acts applicable" to the former Circuit Court commissioners (except as to appointment and fees) were specifically made applicable to United States commissioners.

Only a year earlier, in 1895, the Supreme Court had reviewed these acts in United States v. Allred, 155 U. S. 591, 15 Sup. Ct. 231, 39 L. Ed. 273, and as it is well known to the older bar that the same men continued to perform the same duties after 1896, the effect of the statute of that year may be said to be no more than a change of title and of fee scale, plus the infusion of a supervisory power on the part of the Attorney General. For the essential nature, scope, and legal relation of the office one must look farther back.

It does not seem useful to tabulate the numerous statutes giving special duties (e. g., matters of extradition) to commissioners, but their development as examining and committing magistrates is relevant to this motion. Since the Judiciary Act of 1789 (1 Stat. 91) every "justice and judge of the United States" (in the original phrase) has had the power of ordering arrests and holding the accused to prison or bail. This is the essence of magistracy, and the power to commit implies and includes the power to examine and discharge.

Considering the extent of country and the fewness of judges, the original act empowered practically every state magistrate, and especially justices of the peace, to act in holding offenders for the United States courts. The substance of this part of the old act became R. S. § 727, and is now Judicial Code, § 270 (Comp. St. § 1247).

The early files of this court contain many commitments by local justices of the peace of the state of New York, and Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151, shows how that system worked (or did not) in revenue cases where search warrants were needed.

It did not take long for experience to demonstrate the difficulty and inutility of the borrowed and grudgingly given services of state officials, and in 1793 (1 Stat. 334) the Circuit Courts were authorized to appoint "discreet persons learned in the law" to take bail in criminal causes.

So far as I can discover, it was from this seed that "commissioners" grew; the title was assumed, but was recognized by the act of 1817 (3 Stat. 350), which in enlarging the powers of the "discreet persons" of 1793, speaks of the "commissioners who now are or hereafter may be" appointed.

Next after the original statute of 1789 the most important Judiciary Act of the first century of the republic was the statute of 1842 (5 Stat. 516), which in its first and second sections expressly gives to the commissioners of the Circuit Courts the powers of a justice of the peace in respect of "arresting, imprisoning or bailing" offenders against laws of the United States, and the substance of this grant is now R. S. § 1014.

It follows that for many purposes, including the consideration of the powers under review on this motion, the United States commissioner is a justice of the peace of the United States.

(7) The Procedure Before Commissioners.

[8] There is agreement that under the wording of R. S. § 1014, as well as earlier acts, the mode and manner of exercising this jurisdiction is to follow the "usual"; that is, legal methods of the state in which the commissioner sits, provided, of course, that some other method has not been imposed by Congress. United States v. Harden (D. C.) 10 Fed. 802; United States v. Martin (D. C.) 17 Fed. 150; Re Eaves (C. C.) 30 Fed. 21; United States v. Collins (D. C.) 79 Fed. 66; United States v. Beavers (D. C.) 125 Fed. 780, which last citation is a decision of this court.

These rulings are entirely consistent with the nearest approach to definition of a commissioner's status ever given (to my knowledge) by the Supreme Court, viz.: He is "an adjunct of the court, possessing independent, though subordinate, judicial powers of his own." Grin v. Shine, 187 U. S. at page 187, 23 Sup. Ct. 98, 101 (47 L. Ed. 130).

(8) The History and Nature of a Search Warrant.

It is believed that no one has been able to supplement or controvert the assertion of Lord Camden, made in 1765 in the case of the general warrants, that search warrants had imperceptibly crept into the common law.

This I take to mean that the search had crept into the warrant, as "warrant" is the ancient common-law name for the written authority to arrest, and, by the time Lord Camden gave his historic judgment, justices of the peace had at common law authority to issue search warrants, which originally and properly were instruments authorizing both the arrest of the alleged offender and the seizure of the goods found by search in daytime on described premises, where (sub silentio) the offender would (it was hoped) be found with the goods, usually stolen. The seized goods were to be delivered to an officer of the law, for restoration to their proper owner or other lawful disposition; but on this point the old cases are inconveniently vague.

The foregoing is thought to find ample support in the text and citations of Bouvier's Law Dict., sub nom. Search Warrants; Bishop's New Crim. Proc., under the same title, and also Warrants; the historical part of Justice Bradley's opinion in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; and Lord Halsbury's Laws of England (volume 9, p. 310), where also may be found a truly amazing list of recent British statutes extending and amplifying the scanty traditional law on the subject of search warrants.

(9) Remedies at Common Law for Illegal Search Warrants, or Illegal Acts Done under Color Thereof.

[9] In considering any matter rooted in the common law, it must be remembered that, especially on the criminal side, our most ancient system of jurisprudence knew nothing of appeals, and no effort to "ap-

peal," in our modern sense, from a justice's action would have been understood by a lawyer of days before our Revolution.

But no book of American reports is old enough to reflect a system where one judge and one jury constituted the final arbiter of fate; and it is therefore, I think, of great moment to note that the early state reports reveal no effort directly to review a justice's actions as a magistrate issuing warrants or search warrants; the sole remedy was an action of trespass, wherein the right to issue such documents was most narrowly construed and the acts of those executing them most jealously scrutinized. Of this Frisbie v. Butler, Kirby (Conn.) 213, decided in 1787, Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200, Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151, and Bell v. Clapp, 10 Johns. 263, 6 Am. Dec. 339, are sufficient and illuminating examples.

(10) The Possible Use of Certiorari.

[10] The general right of this court to issue that writ is recognized in Re Chetwood, 165 U. S. at page 461, 17 Sup. Ct. 385, 41 L. Ed. 782; but if used, there is an implication that it goes to a tribunal, or at least an official, separate from, independent of, and in some way inferior and subordinate to, the issuing court, unless it be used, as has often been the case, as an adjunct to some other process, usually habeas corpus. Of this last Judge Lacombe's action in an extradition matter, related in Re Oteiza, 136 U. S. at page 336, 10 Sup. Ct. 1031, 34 L. Ed. 464, is a good example. There the commissioner was exercising a special statutory power, one independent, and which no court could exercise, but into which a habeas could examine, if the liberty of the citizen was denied by confinement.

That a certiorari may issue to an "inferior court" is undoubted, and the decision in White v. Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60, goes on this ground alone, for by the law of that state it is said a justice of the peace is "a court of limited powers." But it does not follow that a certiorari must issue, and as against a magistrate exercising only the arresting and committing powers, it ought not to issue, and, unless imposed by statute, cannot issue under customary law, as is well and I think conclusively shown by Magie, J., in Farrow v. Springer, 57 N. J. Law, 353, 31 Atl. 215.

There is no statutory imposition of that remedy by Congress, and therefore, in my opinion, it does not exist in this matter.

(11) In What Court Does a Commissioner Sit?

[11] No statute furnishes a direct reply. Undoubtedly the official when taking testimony in equity or assessing damages in admiralty, is sitting in the District Court. In my opinion, when exercising the power of issuing a warrant in extradition, he is not sitting in or holding any court, and, when considering under a special statute the status of an alleged Chinese laborer, he is holding a court of his own, which is by statute inferior to the District Court. But these illustrations do not fix his status as a federal justice of the peace without civil jurisdiction, but with committing powers, and it was as such official he was acting when the warrant to search the office of Promotion Sales

Company was issued in November, 1919—a time when no other legal proceeding (known to me) was on foot by the United States against any defendant in indictment 8043.

Farrow v. Springer, supra, sufficiently points out the identity between an arrest by warrant and a search and seizure by warrant; the two acts are but parts of the same exercise of power, and are to be tested by the same rules and in the same way. It may first be noted that Mr. Hitchcock thought he was sitting in the District Court; the very caption of the order complained of shows it. Further, examination of files, shows that his predecessors for generations have entertained similar ideas, if the form of their papers proves anything. Also he had the powers of a commissioner of the Circuit Court, a title which for 80 years certainly suggested that the holder was part of that court; and, finally, the United States has never created any other court for him to sit in, nor declared that he sat in no court. Yet, by decision and tradition, he is and must be, when acting as a committing magistrate, a judicial officer, and as such he returns all his proceedings to this court.

These considerations also lead to a denial of certiorari, for I do not need to be "made more certain" of what has been done. Are not all the written records entitled in the court in which I am now sitting? Remembering that nothing but an act of Congress can make an inferior court of the United States, that no act makes a commissioner's court, and that by tradition an examining and committing magistrate, especially a justice of the peace, holds a court, I am compelled to the conclusion that, when a commissioner issues criminal process, including a search warrant, he does it in and as part of the proceedings of the District Court.

[12] But he does the act, not by virtue of any grant of power to the court as such, but by grant directly to him, and it is the same power which is given by the same statutes, and given personally to Justices of the Supreme Court and Circuit and District Judges, each of whom may sit as magistrates, with the same and no other powers. The view that this entire matter of issuing a search warrant and then directing the return of what was seized thereunder is a District Court proceeding is confirmed by study of the nature and history of the case reported as Veeder v. United States, 252 Fed. 414, 164 C. C. A. 338, certiorari refused 246 U. S. 675, 38 Sup. Ct. 428, 62 L. Ed. 933. There a District Judge issued the search warrant, held a hearing after seizure made, and refused to direct return of what was seized. A direct writ of error was then taken to the Circuit Court of Appeals, which reversed, whereupon the United States applied for a certiorari, challenging the right of the Circuit Court of Appeals to review—a proposition in my judgment clearly right, unless that which was reviewed and reversed was a final order or judgment of the District Court; for no grant to the Circuit Court of Appeals can be found giving it power to review orders of District Judges merely as such. They must speak for, in, and on behalf of the District Court, and it is the court's action that is reviewed.

The foregoing, with the aid of counsel, I have spelled out of the

Veeder record; there is no discussion in the reports. Just how a refusal of certiorari is to be regarded is, of course, uncertain; but I will adhere to a dictum of Judge Lacombe to the effect that such refusal means that the Supreme Court is content to let the law alone. Consequently I regard the Veeder result as a holding that an order refusing to return goods seized under a warrant is a judgment of the District Court. But if, as is clearly the case, the same and equal powers be given by statute to judges and commissioners when acting as committing magistrates, it must follow that a writ of error would lie to the Circuit Court of Appeals from Commissioner Hitchcock's order. That in this circuit such writ by either party might run afoul of the "interlocutory" theory does not affect the matter, and that any writ by the United States would be resisted as an attempted appeal in a criminal cause can furnish no reason for attempting what is practically an appeal by means of this order to show cause.

(12) Decision on Motion No. 2.

[13] The motion is denied, the order to show cause vacated, and the clerk of court directed to return the books, etc., impounded to the person from whom he received the same. The grounds for this decision, summarily stated, are that the whole proceeding in re Promotion Sales Company's books was in the District Court by a judicial officer, subordinate, but independent, sitting as a committing magistrate, having equal power with any judge authorized to hold a District Court. I have no more power to grant this motion than I would to issue an order to show cause why an order sustaining a demurrer to an indictment entered at the same term before another judge should not be vacated and held for naught.

(13) Effect of Decision on Motion No. 2.

[14] I have not expressed any opinion on the legal correctness of the commissioner's rulings, because I conceive myself not entitled to review them in this court. On the other hand, the issuance of a warrant and its subsequent discharge is not res adjudicata. Another warrant might be applied for, and application made to me, and I would not be debarred by absolute rule from causing arrest or seizure, where the commissioner had denied it. The power is personal, in the sense of attaching to judicial existence, as in habeas corpus, where a man may (theoretically) go from one judge to another until he has exhausted the list, and then begin over again, yet always present the same questions of law and fact. This leads to an expression of the views which will guide my own conduct as a committing magistrate in this district.

(14) Powers of the Committing Magistrate.

[15] He must obey the statutes in so far as they are constitutional. If any statute enlarges the power to arrest or search and seize, and it is alleged that such statute infringes constitutional guaranties, he is bound by repeated decisions to refer that matter to the higher courts, unless the constitutional question be extraordinarily plain.

[16] Yet if one construction of an act is plainly harmonious with the Constitution, and another with difficulty reconcilable thereto, he must incline to the former.

[17] Since the Constitution plainly requires warrants, whether for arrest, or search and seizure, or both, to issue only upon probable cause supported by oath—the words "probable cause," though used in a statute, are to be interpreted in harmony with the meaning assignable to them in the Fourth Amendment. Therefore there must be actual probable cause, not merely a bald, though verified, assertion of suspicion, and to that end the magistrate may inquire into the truth of the affidavit offered as a basis for warrant.

[18] But the rule is general that proceedings for arrest—which include seizures under warrants—shall (in this district) be agreeable to the procedure of New York. R. S. § 3462 (Comp. St. § 6364), may be regarded as a special grant of authority; but there is nothing to take away the natural meaning of probable cause (24 Op. Attys. Gen. 585), and the ascertainment of probable cause is a judicial function, which, under the general and not inharmonious statutes, must be exercised as in New York. Therefore, even under section 3462, the procedure of New York (Code Crim. Proc. § 791, et seq.) is applicable, not perhaps because it is in the Code, but because it is declaratory of historic or common law. People v. Kempner, 208 N. Y. 16, 101 N. E. 794, 46 L. R. A. (N. S.) 970, Ann. Cas. 1914D, 169.

In this district the question whether the new and general provisions for search warrants, contained in the Espionage Act, govern warrants issued under Rev. St. § 3462, or the kindred customs, counterfeiting, and postal acts, is academic, because this recent United States statute (40 Stat. 228) is but a copy of the material portions of the New York Law. Therefore I would proceed as did Commissioner Hitchcock, though for a different reason, viz.: I deem the New York law plainly applicable, and, as it is the same as the recent federal statute, am not at present concerned with the latter's possible or probable application.

[19] When, after seizure, an application for return or other disposition is made, the question is of actual probable cause, not merely whether the original affidavit was sufficient. What is a sufficient affidavit seems to me well considered in Jones v. German, [1896] 2 Q. B. D. 418; on appeal, [1897] 1 Q. B. 374.

On the question whether there was probable cause for search and seizure, much latitude as to evidence should be permitted; and if, at time of hearing, the magistrate is then of opinion that there existed probable cause when warrant issued, he should sustain the seizure. This was the holding of Judge Manton in the Case of Gouled, 253 Fed. 770, and I agree therewith. This does not mean that knowledge gained by the very act of seizure, or from the thing seized, can be used to support a finding of probable cause.

[20] If at the hearing the prosecutor offers to show that the property obtained by the party to whom the warrant issued was as matter of fact obtained by gift, or at all events not by virtue of the warrant, the first thing to look at is the return. The person executing the

warrant is bound by his return. If some gift, or surrender, or estoppel, subsequent to return, is relied on, it is immaterial and irrelevant to proceedings under the warrant, because the magistrate is concerned with nothing but the propriety of his own act. If the party whose property was wrongfully seized gave it away, that is not the magistrate's business. Let the rightful possessor keep it, but he cannot ask the magistrate to adjudicate in his favor. If the alleged rightful possessor is the man who wrongfully executed the search warrant, his right depending on transactions after the return on the wrongful seizure, it is none the less true that such question of subsequent transfer is not before the magistrate, who should frame his order so as to direct a return of the goods, if held, or in so far as they are held, by virtue of his search warrant. Then if the claim of title, or to possession, be ill founded, all defenses based on the warrant are swept away, and the parties remitted to their common-law rights and remedies. No statute has ever tried to make the magistrate a chancellor to dispose of the res; his powers and duties are confined to his own process.

I am quite aware that this fourteenth paragraph of what I have written is not a "decision" in any sense, but I have ventured to express my personal opinion because requested so to do.

CORONA COAL CO. v. SOUTHERN RY. CO.

(District Court, N. D. Alabama, S. D. July 15, 1920.)

1. Carriers ⇐34—Suit relating to distribution of coal cars not within jurisdiction of court.

A suit to enjoin a practice of a railroad company, in time of a shortage of coal cars, to deliver assigned cars, whether its own or those of other railroads or private owners, to mines with which the owners had contracts for coal, counting them against the quota of such mines under their respective ratings, under Interstate Commerce Act, § 1, par. 12, as amended by Transportation Act Feb. 28, 1920, and distributing commercial cars only to fill such quotas, *held* to present an administrative question for determination by the Interstate Commerce Commission, and not within the jurisdiction of the District Court.

2. Appeal and error ⇐458(3)—Continuance of dissolved injunction pending appeal denied in court's discretion.

Where a preliminary injunction, granted by a state court ex parte, without notice, is dissolved by a federal court after removal of the cause and a hearing, on the ground that neither court has jurisdiction of the subject-matter, the court will not, in the exercise of its discretion, allow a supersedeas to continue the injunction in force pending an appeal.

In Equity. Suit by the Corona Coal Company against the Southern Railway Company. On motion to dismiss bill and motion for supersedeas. Motion to dismiss granted, and motion for supersedeas denied.

Johnston & Cocke, of Birmingham, Ala., and Rush C. Butler, of Chicago, Ill., for plaintiff.

S. R. Prince, of Mobile, Ala., and J. T. Stokely, of Birmingham, Ala., for defendant.

CLAYTON, District Judge. The plaintiff, a Delaware corporation engaged in the business of mining coal, filed its bill in the circuit court of Jefferson county, Ala., against the defendant railway, a Virginia corporation. A state judge granted an interlocutory injunction as prayed for in the bill. The case was removed to this court, and is now submitted on the defendant's motion to dissolve the injunction and on the pleadings, the bill and the answer, each verified, and affidavits in support of and in opposition to the motion.

[1] The basis of the plaintiff's complaint is that the defendant, in the distribution of coal cars to mines located on its railroad in the Birmingham mining district, is violating, to the injury of the plaintiff, the provisions of paragraph 12 of section 1 of the Interstate Commerce Act, as amended by the Transportation Act of February 28, 1920, which paragraph is in these words:

"(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

The pleadings, affidavits, and arguments show that the real issue between the parties is on account of the practice pursued by the defendant in respect to "assigned cars"; that is to say, the defendant delivers its own cars to mines with which it has contracts for fuel for its own use, and delivers the cars belonging to other railroads and privately owned cars committed to it for transportation to mines with which said other railroads and owners have contracts for fuel. It is established—indeed, it is not controverted—that such cars are counted against the distributive share of the mines to which assigned, and that such mines are not given a share of the cars available for ordinary commercial shipments, unless, and to the extent only, that the assigned cars fail to equal the distributive share of these mines, which receive the assigned cars. The defendant contends that it has the right to deliver its own cars in any number which may be necessary to obtain fuel to operate its trains, and that the other railroads and private owners have the right to require that the defendant deliver their cars to the mines with which they have contracts for coal—that the possession of such cars was committed to it in each case for that specific purpose. It is further urged by the defendant that during the period of a car shortage the practice complained of by the plaintiff is necessary, in order to enable the defendant and the other railroad companies to comply with their contracts for fuel supply, and that, if a different course be pursued during the periods of car short-

age, the defendant and the other railroads would violate their contracts, and be compelled to go into the open market for the fuel necessary for the operation of their railroads, and compete in the purchase of coal with industrial enterprises and domestic concerns, and would probably have to pay whatever price the coal operators might demand at the time, or else the defendant and such other railroads would be forced to confiscate coal for the operation of their trains. It is conceded that confiscation is a vicious practice, and not justifiable, except in case of extreme necessity.

The defendant urges that the practice complained of is not only in the exercise of a right, but is in pursuance of the duty it owes to the traveling and shipping public to operate its trains, and that, if such other railroads and owners of cars committed to defendant for the specific purpose stated could not have the use of their cars, they would cease to deliver them to the defendant, and that in the case of the said other railroads and owners of private cars the defendant owed the duty to carry out the purpose for which the cars were committed to it, and, further, that the defendant has the common-law right to pursue such practice, and has the authority of the Interstate Commerce Commission, clothed with power in such matters, to do this, which authority is in the form of the notice of April 15, 1920, as follows:

"Interstate Commerce Commission.

"Washington, April 12, 1920.

"Notice to Carriers and Shippers.—The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal productions and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein, to read as follows:

"The Commission recommends that, until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that rule 8, as contained in said circular, should be amended to read:

"'8. Private cars and cars placed for railroad fuel loading in accordance with the decision of the Interstate Commerce Commission in R. R. Com. of Ohio et al. v. H. V. Ry. Co., 12 I. C. C., 398, and Traer v. Chicago & Alton Railroad Co. et al., 13 I. C. C. 451, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.'

"The Commission is of the opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph 15 of section 1 of the Interstate Commerce Act, as amended by section 402 of the Transportation Act, 1920, hereby suspends the operation of the existing rule 8, and directs the observance by all carriers by railroad subject to the Interstate Commerce Act of rule 8, modified as above, effective April 16, 1920, and until further direction or order of the Commission.

"By the Commission: George B. McGinty, Secretary."

The answer and motion to dissolve the injunction raises the question of whether or not the coal company has appealed to the proper tribunal for redress of the alleged grievance. The railroad insists that

the coal mining company should have first gone with its complaint to the Interstate Commerce Commission, which, it is contended, has primary jurisdiction over the controversy between the plaintiff and defendant. The decision of the question turns upon the effect to be given to paragraph 12, § 1, of the Interstate Commerce Act, as amended by section 402 of the Transportation Act of 1920, hereinbefore set out.

In considering the effect and scope of this paragraph, the high and comprehensive administrative powers and duties of the Interstate Commerce Commission must not be forgotten; and it is well to remember that the acts of Congress furnish repeated evidence of a legislative policy to broaden and add to, rather than to narrow and subtract from, the powers and useful work of the commission. Again it is to be borne in mind that the Supreme Court of the United States has often, in interpreting the Interstate Commerce Act (24 Stat. 379) and the amendments thereto, given judicial recognition of this legislative policy.

I think the paragraph 12 quoted should be considered and construed in the light of this knowledge, as well as in pari materia with the other related sections of the Interstate Commerce Law. Let it be observed that before the passage of the act of 1920 it was often held by the commission and the courts that the carrier should observe just and reasonable rules, regulations, and practices with respect to car service, and as a corollary, unjust and unreasonable practices were condemned as unlawful; and the reported cases furnish abundant evidence that the commission has repeatedly, in cases somewhat, at least, resembling this, given redress where just complaints sustained by the evidence have been made.

In the argument of this case, it was admitted by the plaintiff that it had been given by the defendant its proper rating as one of the coal mines on the defendant's railroad. It was also conceded by both parties during the argument that neither the plaintiff nor any other coal-mining company in the same district and on the same railroad had in any case, during the present car shortage, received a full quota of cars according to the rating of the mine; and it was shown that the defendant did not have a sufficient number of cars to meet the demand of its coal mining patrons.

Prior to the amendment of the Interstate Commerce Law by the insertion in paragraph 12 of the words "and to count each and every car furnished to or used by any such mine for transportation of coal against the mine," this rule, now statutory, had been by order of the Interstate Commerce Commission a rule of long standing for the government of railroads, and it had been often sanctioned by the courts in adjudicated cases. So it can be said that this approved rule, in effect already law, was by the Transportation Act of 1920 merely crystallized into statutory form. Can it be urged that the fact it is now imbedded in the Transportation Act gives it any more far-reaching or controlling influence over the commission than it had as a sanctioned rule? Does it subtract from the powers and duties of

the Interstate Commerce Commission to see to it in every case that the transportation companies, in the matter of car service, follow just and reasonable practices? The Interstate Commerce Commission promulgated the rule as to assigned cars, the courts sanctioned it, and Congress has approved it. Now, must this rule, recognized by the courts as having the force and effect of law, simply because it is at this time a part of the statute, control the question here, as the plaintiff insists, or must it be allowed to operate in harmony with the other provisions of the Interstate Commerce Law, as it has heretofore, and to the end that the commission shall have the power to compel the transportation companies to conduct business in a fair, just, and reasonable way, in view of all the circumstances arising in the case of car shortage?

Let it be remembered that it was said in Penn. R. R. Co. v. Puritan Coal Co., 237 U. S. 121, 35 Sup. Ct. 484 (59 L. Ed. 867):

"That * * * it must be borne in mind that there are two forms of discrimination—one in the rule, and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule or practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power, which have been vested by Congress in the commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the commission has declared the rule to be unjust, redress must be sought before the commission or in the United States courts of competent jurisdiction, as provided in section 9. But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved; the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage."

This case draws the line of demarcation between that class of complaints which may be heard by the courts and the other class that must be dealt with by the commission. If the practice itself is attacked as unfair and discriminatory, the exercise of the judgment and discretion of the commission is called for; but until that body had declared the practice to be discriminatory and unjust no court has jurisdiction of an interstate carrier (defendant here is such) for damages (this bill seeks damages as well as injunction) occasioned by the operation of such practice.

I think it is clear in the instant case that the bill attacks the practice itself, and not the unequal application by the defendant of such practice. Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Baltimore & Ohio R. Co. v. Pitcairn Coal Co., 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; Morrisdale Coal Co. v. Penn. R. R. Co., 230 U. S. 304, 33 Sup. Ct. 938, 57 L. Ed. 1494; Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 36 Sup. Ct. 228, 60 L. Ed. 517. And, if so, this court is without jurisdiction at this time to grant relief to the plain-

tiff. This must be true, unless paragraph 12, quoted, takes the case from under the influence of the decision in adjudicated cases, and out of the primary jurisdiction of the Interstate Commerce Commission during a period of car shortage, such as is shown to exist at this time. It is to be noted that this paragraph 12 provides that—

"During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished and used by any such mine for transporation of coal against the mine."

Also that paragraph 6 of section 400 of the Transportation Act of 1920 makes it the duty of common carriers to establish, observe, and enforce reasonable and just classification of property for transportation and all other matters relating to or connected with the receiving and transporting of the same, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. Paragraph 10 defines car service to include the use, control, distribution, exchange, return of locomotive, cars, etc.; further, paragraph 11 makes it the duty of the carrier to furnish safe and adequate car service, and to establish, observe, and enforce just and reasonable rules and regulations with respect to car service. Paragraph 13 authorizes the commission to require all carriers to file with it rules and regulations with respect to car service, etc. Paragraph 14 empowers the commission, "on a complaint or upon its own initiative," to establish reasonable rules, regulations, and practices with respect to car service by carrier, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using it, etc. And paragraph 15 authorizes the commission, in case of shortage of equipment, congestion of traffic, or other emergency, upon complaint or upon its own initiative, to suspend the operation of any or all rules, regulations, or practices with respect to car service for such time as may be determined by the commission, to make just and reasonable direction with respect to car service, without regard to the ownership, during such emergency, which will best promote the service in the interest of the public, and upon such terms of compensation as between carriers as they may agree upon, or as the commission finds to be just and reasonable, and to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, and to modify, change, suspend, or annul them. Paragraph 17 provides that the direction of the commission as to car service and to the matters referred to in paragraphs 15 and 16 may be made through and by such agents or agencies as the commission may designate and appoint for that purpose.

An examination of the Transportation Act shows that Congress has not declared, in paragraph 12 or elsewhere, that in a case like the one now here the pro rata plan of distribution shall be applied to assigned cars according to mine rating as in the case of ordinary commercial cars; but the statute says no more than such "as-

signed cars shall be counted against the mine receiving them." What shall be done in a case like the one before me, where most of the available cars are assigned cars, Congress has not declared, but has left it, I think, as a matter to be examined into, heard, adjusted, and settled, or at least passed upon, by the Interstate Commerce Commission. The effect of the plaintiff's contention is that during the period of inadequate car supply the carrier must maintain and apply reasonable ratings of the mines which it serves, and distribute all available cars in proportion of such ratings, whether such cars, or any or all of them, be assigned cars.

The origin and history of the phrase "apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mines for transportation of coal against the mines," shows the reason for its adoption by the commission and its incorporation afterwards into the statute. Congress knew that at one time assigned cars were not taken into account in the distribution by the carriers to mines served by them, and that the mines receiving assigned cars were given the same pro rata share of the ordinary commercial cars as were given to the mines that received no assigned cars, and that the assigned cars were not counted against the mines favored with them. In the Hocking Valley Case, 12 Interst. Com. R. 398, and in the Traer Case, 13 Interst. Com. R. 451, this practice was complained of and held to be unjust and not to be allowed. When the question came before the Supreme Court of the United States, the decision was upheld in I. C. v. Ill. C. R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280. It is well to read the opinion in the Traer Case, rendered by Commissioner Clark, now Chairman of the Interstate Commerce Commission. It may be ventured that Congress did not intend to change the meaning of the phrase "count against the mine," or to enlarge the scope of the rule which is referred to in the Ill. C. R. R. Co. Case, supra, and the Morrisdale Coal Co. Case, supra.

In the argument of this case the statement of Commissioner Clark made before the House committee on interstate and foreign commerce, when it had under consideration the Esch-Cummins Bill, which put into statutory law the rule found in paragraph 12 hereinbefore referred to, was read to me, and at the same time the pertinent part of the report of the House committee was stated. Undoubtedly this report shows that the House committee understood what the language, "and to count each and every car furnished to or used by such mines for transportation of coal against the mine," meant and gave legislative sanction, so far as it could, to the application of this rule theretofore adopted by the commission and approved by the courts; and from the hearings of the committee and its report it is evident that it was not intended to say assigned cars should in any event be prorated among the mines.

It must be said that the opinions of the Interstate Commerce Commission in giving the working construction of the Interstate Commerce Act and its amendments, while not binding upon the court, is

nevertheless deserving of serious and deferential consideration. The fact that the commission made the ruling of April 15, 1920, which is hereinbefore set out, shows it did not consider that paragraph 12 ousted the commission of its jurisdiction, in the matter of coal car distribution during the periods of car shortage, or, in other words, that the commission was deprived of its administrative power in making distribution of cars in the case of car shortage. As I have said, the statute does not declare that assigned cars shall be prorated. Certainly it does not say that they shall stand idle on the side tracks of the railroad until the ordinary commercial cars received by mines which have no assigned cars shall equal the number of assigned cars received by and counted against the mines furnished with assigned cars. Moreover, there is forceful evidence of the commission's construction of paragraph 12, found in the words of the chairman of the commission; for in the inception of this controversy, and before this bill was brought, this plaintiff here applied to the chairman of the commission and received an informal hearing of the very matter involved in this case. At that time the following statement was made by the chairman (Mr. Clark):

"The Chairman: Let me say, in order that there may be no misunderstanding of our view, that some reference has been made to the Transportation Act requiring that the railroads shall count against the mines assigned cars, which left me with the impression that it was believed that that act, properly construed, means that a railroad may not use assigned cars, if such use results in giving a mine more than its pro rata distribution. Now, we do not accept that interpretation of it at all. We are very certain that it does not mean that at all. It means just what this commission laid down as the rule in the Traer Case. That is the intention of the act, and this is the interpretation we place upon it."

On consideration of paragraph 12 and the other provisions of the Transportation Act, and the purpose for which the Interstate Commerce Commission was created and clothed with authority, I am constrained to believe that the plaintiff has presented a case for administrative intervention, and not one calling for the exercise of a judicial function. At the expense of repetition, I must say that paragraph 12 does not call for a pro rata division of assigned cars, nor does it say what shall be done with them, except that they shall be counted against the mines to which they are assigned. If the plaintiff's interpretation of paragraph 12 should be followed, it would be to read into the statute a provision which it does not contain, and which it seems clear that Congress failed or refused to write there or elsewhere as a part of the act. It would have been a very easy matter, if Congress had adopted the plaintiff's view, to have added to paragraph 12 words of this purport:

"There shall be distributed to the mines their proportionate number of cars according to mine ratings, whether or not the cars or any of them be assigned cars."

Congress did not adopt such idea, and for the courts to adopt it would be to add to the statute, and would, in effect, also greatly tend

to destroy the power and usefulness of the Interstate Commerce Commission in time of distress and car shortage, and cause confusion in the distribution of cars in the mining districts. This condition would probably extend as a consequence to other industries. Moreover, for the courts to assume jurisdiction over cases like the one presented by the plaintiff would be a suggestion that the courts be invited to interfere in all similar controversies between mines and railroads. This would force the courts to go very largely into the business of railroad and mine administration, and thereby, to the extent of such interference, would be imposed insuperable work of mere direction and management and not of a judicial character. The courts are not fitted for such duties, but the Interstate Commerce Commission is especially and well designed for that field of usefulness.

It was also suggested in the argument, in a parenthetic way, but not insisted upon, that the bill is without equity, because the plaintiff has a plain and adequate remedy at law. For whatever injury the plaintiff might sustain by the alleged conduct of the defendant, it might be that damages could be recovered in an action at law; and probably it would be no answer to say that the facts presented here operate to place the plaintiff's cause among that class of rare cases where a court of equity may assume jurisdiction of a controversy in order to prevent a multiplicity of suits. See the authorities referred to in M. L. & W. Power Co. v. Charles (D. C.) 258 Fed. loc. cit. 726, 727. In the view I have taken of this case, it is not necessary for that question to be decided.

I have concluded that the real purpose of paragraph 12 was to carry into the statute what had been a requirement of the Interstate Commerce Commission; that is, that each car must be counted against the mine to which assigned, in determining whether the assigned cars equal or exceed the distributive share of such mine; and I believe that all other pertinent questions arising in such a case as this pending one were left to the discretion and judgment of the Commission.

The plaintiff's grievance should have been taken to the Interstate Commerce Commission, and therefore this court is without jurisdiction. The motion to dissolve the injunction issued out of the circuit court of Jefferson county, Ala., is granted, and the appropriate order will be entered.

Supplemental Opinion.

On the defendant's motion to dissolve the interlocutory injunction heretofore issued out of the state court, this court has heretofore rendered an opinion holding that it is without jurisdiction of the subject-matter involved in the bill, and announced that the motion to dissolve the interlocutory injunction would be granted, and requested the attorneys to agree on the form of the order. Thereupon the attorney for the plaintiff suggested a final decree dismissing the bill for want of jurisdiction, in order that the case may be taken directly to the Supreme Court of the United States under section 238 of the

Judicial Code (Comp. St. § 1215). The defendant's attorney expressed a willingness to co-operate to this end, and has accordingly on this day filed a motion to dismiss the bill under equity rule 29. There can be no objection to the suggested course.

[2] The cause is now before the court on the plaintiff's application to supersede the decree dissolving the injunction and to restore the injunction during the pendency of its appeal to the Supreme Court. A reading of the equity rules, the pertinent sections of the Judicial Code, and the decisions of the federal courts make it clear that the granting of such motion to continue the injunction in force pending an appeal rests in the sound discretion of the court. Equity rule 74, 198 Fed. xxxix, 115 C. C. A. xxxix; Judicial Code, § 129 (Comp. St. § 1121); In re Manufacturing Co., 147 U. S. 525, 13 Sup. Ct. 527, 37 L. Ed. 266; Masses Publishing Co. v. Patten, 245 Fed. 102, 157 C. C. A. 398; Chemical Co. v. Chalmers, 242 Fed. 71, 155 C. C. A. 15.

The court has heard and carefully considered the argument of the attorneys for the parties and the considerations urged in support of and in opposition to the application. In the view which I have taken of the case, as announced in the opinion rendered herein on yesterday, I am forced to the conclusion that, if the bill had originally been filed in this court, and application made for interlocutory injunction, the injunction, after notice and hearing as provided in equity rule 73, 198 Fed. xxxix, 115 C. C. A. xxxix, would have been denied. In those circumstances the plaintiff could not, of course, have had the benefit of an injunction pending an appeal. The fact—the mere fact—that the interlocutory injunction was inadvertently granted (it was granted on ex parte showing without notice to defendant) by the state court on the filing of the bill, before the case was removed to this court, should not, it seems to me, alter the substantial rights of the parties. A federal judge could not have granted the injunction in this case, upon an ex parte showing without notice to the defendant, without disregarding the statutes and rule which govern in such case.

The court is mindful of the fact that the continuation of the injunction pending the suggested appeal would be calculated to encourage other mine operators in a situation similar to that occupied by the plaintiff, to seek redress in the state court as that sought there by the plaintiff. Such a course would tend to render nugatory the rules of car distribution established by the defendant under the sanction of the Interstate Commerce Commission and in conflict with the action of this court. I have held that the court, any court, has no jurisdiction of the controversy presented by the bill. Having taken such view of the case, this court could not, in the exercise of sound judicial discretion, consistently keep in force the interlocutory injunction. In my view, such a course would be illogical, and would be but another way of allowing the plaintiff injunctive relief, which I have denied.

That the shortage of cars adversely affects the coal-mining company is fully understood, and that the interests of the plaintiff may

to a greater or less extent be injured by the refusal of the court to keep in force the injunction, is appreciated. But the answer to this suggestion is that, under the view of the case which the court has taken, the plaintiff can apply for, and doubtless receive, immediate redress from the Interstate Commerce Commission, which, as the court has held, has jurisdiction of the subject-matter of the plaintiff's complaint, and is designed and equipped to grant relief upon proper showing being made.

Order will be entered denying the motion to supersede the decree dissolving the injunction.

UNITED STATES v. WATSON.

(District Court, N. D. Florida, at Pensacola. May Term, 1920.)

1. **Constitutional law ⊂=42—Witness subpœnaed cannot question constitutionality of statute.**
   A witness duly subpœnaed to testify before a grand jury is not entitled to raise the question of the constitutionality of the statute authorizing the investigation or the authority of the grand jury to call witnesses to ascertain any infraction of such statute.

2. **Searches and seizures ⊂=7—Subpœna duces tecum not unreasonable search and seizure.**
   A subpœna duces tecum, issued by a grand jury investigating violations of Lever Act Aug. 10, 1917, § 4, as amended by Act Oct. 22, 1919, § 2, to an officer of a corporation, requiring him to produce all invoices received by the corporation "covering shipments of shoes of all grades and kinds to said corporation since July 1, 1919, including all books of account and invoices covering stocks of shoes now on hand," *held* not so broad and general as to amount to an unreasonable search and seizure, in violation of the Fourth Amendment to the Constitution.

3. **Witnesses ⊂=16—Officer of corporation amenable to subpœna duces tecum.**
   An officer of a corporation is amenable to a subpœna duces tecum, when not unreasonable in its scope.

At Law. Proceeding by the United States against W. W. Watson. On answer of W. W. Watson, witness summoned before the grand jury, inquiring in and for the body of the Northern District of Florida, on subpœna duces tecum requiring testimony of said party and production of certain records of Watson, Parker & Reese Company, a corporation, filed in response to a rule nisi issued and served upon a presentment by the above grand jury, at the May, A. D. 1920, term of the District Court at Pensacola, Florida. Answer to the rule nisi held to state no defense.

John L. Neeley, U. S. Dist. Atty., and George Earl Hoffman, Asst. U. S. Dist. Atty., both of Pensacola, Fla.

W. H. Watson and Samuel Pasco, Jr., both of Pensacola, Fla., for defendant.

SHEPPARD, District Judge. This matter grows out of an investigation undertaken by the grand jury at the May term, 1920, of this court to investigate any unreasonable rate or charge for any necessaries

pursuant to the Act of August 10, 1917, as amended by the Act of October 22, 1919, c. 80, § 2, 41 Stat. 298, which reads as follows:

"That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries. * * * Any person violating the provisions of this section shall be fined not exceeding five thousand dollars," etc.

The amendment of October 22, 1919, referred to, included among the necessaries described wearing apparel. This amendment, as shown, provides a penalty, and after its adoption, October 22, 1919, a violation of the act constitutes a criminal offense. The grand jury, proceeding under the authority of the amendment, issued a subpœna to W. W. Watson to—

"produce all and sundry the invoices received by Watson, Parker & Reese Company, a corporation, covering shipments of shoes of all grades and kinds to said corporation since July 1, 1919, including all books of account and invoices covering stocks of shoes now on hand."

The matters in controversy arise upon the answer of the said W. W. Watson, president of the corporation, which challenges the authority of the grand jury to make the attempted investigation: (1) Because the law, the so-called Lever Act, is unconstitutional and void; (2) because the subpœna calling for the books and invoices of the corporation is so broad and general in its terms as would amount to an unreasonable search and seizure, in violation of the corporation's rights under the Fourth Amendment to the Constitution of the United States; (3) that the matters proposed for personal interrogation of the witness Watson are so vague and indefinite as would violate and encroach upon the privilege of the witness under the Fifth Amendment, which furnishes immunity from self-incrimination.

[1] The first general proposition that the statute (Lever Act) under which the grand jury was acting in the attempt to investigate the rates and charges made for necessaries by Watson, Parker & Reese Company, a corporation, is unconstitutional and void, is premature at this time, and may not in such a proceeding be raised by the defendant, since it has been held by the Supreme Court that a witness duly subpœnaed to testify before a grand jury is not entitled to be heard upon an exception to the jurisdiction of the court, and is not entitled to raise any question about the constitutionality of the act authorizing the investigation or the authority of the grand jury to call before it a witness to ascertain any infraction of such statute. Blair v. United States, 250 U. S. 273, 39 Sup. Ct. 468, 63 L. Ed. 979.

[2] The further the contention is made that the requirements of the witness' subpœna to produce "all and sundry the invoices received by Watson, Parker & Reese Company, a corporation, covering shipments of shoes of all grades and kinds to said corporation since July 1, 1919, including all books of account and invoices covering stocks of shoes now on hand," is so general and sweeping as to be tantamount to an unreasonable search and seizure of the company's records, and would violate the immunity of the Fourth Amendment. It is urged with forensic zeal and confidence, and the argument is not without

merit, if the terms of the subpœna would, as is asserted, amount to a dragnet for evidence against the company. It also is objected that to comply with the requirements of the subpœna would for all practical purposes denude the offices of the company of its records, except its individual ledgers. The answer avers that the company is engaged in a general merchandise business, and that there are no separate books of account kept by the company in connection with its shoe department, and that to comply with the subpœna would compel the company to transfer all its records to the grand jury room.

Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, is invoked as authority against the broad and comprehensive character of the subpœna, and in that case it was held that a corporation is merely a collective body of individuals with a definite legal entity, and by its incorporation waives no constitutional immunity, and, although it cannot refuse to produce its books and papers, is entitled to the privilege against unreasonable search and seizure; but from comparison of the instant subpœna with the general terms and indefinite scope of the subpœna in the Hale Case it may be seen the latter was far more general and searching in character, in that it called for—

"all understandings, agreements, arrangements, or contracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings, between the particular corporation and six others, from the date of its organization, as well as all correspondence, by letter or telegram, between the corporation and six other firms, also all reports and accounts rendered by the six companies to the principal company, and any agreements or arrangements, however evidenced, between the corporation and four other named companies, and all letters received by the corporation since its organization from thirteen other companies named, and located in different parts of the country, together with all correspondence with such companies."

It will be noted that this subpœna duces tecum was without limitation, but was obviously a fishing expedition for about everything, irrespective of relevancy, and was clearly repugnant to what seems to be the judicially adopted test of reasonableness in such requirements. It was held in the Hale Case that this requisition by the grand jury was so general as would amount to an unreasonable search and seizure, and therefore plainly indefensible. It will be observed in that case that there was no such particularization as here, namely, to invoices and books of account pertaining to the one single subject, shoes. Here no other documents of the Watson, Parker & Reese Company are sought, save those having reference to shoes on hand and those purchased from a date certain. That it may be inconvenient or work a temporary hardship to produce the invoices, because they may be indiscriminately filed with other records in the office and would require time to locate them, or that the record evidence of the shoes in stock may be intermingled with accounts of other commodities carried or handled by the corporation, does not appear to render the task of producing them so impracticable or difficult as to make compliance with the subpœna so unreasonable as to amount in the present investigation to an unlawful seizure. The law, it is said, takes no account of the difficulties which a party may have in producing his testimony. The inquisitorial authority of a grand jury should not be lim-

ited, impeded, or thwarted by what may appear to the witness as impracticable or irrelevant. A production of the invoices from the date specified and such books of account as would disclose stocks of shoes on hand, or such portions of the books of account as would furnish the required information, might suffice the test of reasonableness and furnish adequate compliance.

[3] That an officer of a corporation is amenable to the requirements of the subpœna duces tecum when not unreasonable in its scope is now too well settled to admit of question, the corporation not enjoying the same immunity as private persons under the ægis of the Fifth Amendment against self-incrimination. Hale v. Henkel, supra; Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558. It is not meant, of course, by this, that incriminating evidence disclosed by the records of a corporation could be used in a prosecution against an officer of the corporation as such over his objection. Silverthorn Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. ——. By the weight of judicial construction it is settled that Congress has visitorial authority over corporations of state organization in vindication of its own laws, and the inhibition of unreasonable rates and charges by those dealing in necessaries may warrant such investigation as might disclose evidence of infractions of the statute, and for the duration of the war corporations may be required to submit their books to the grand jury for their scrutiny, when the subpœna is specific and properly limited in its scope, and this duty or requirement of an officer of the corporation he may not refuse, even though he kept the books and the disclosures might tend to incriminate the officer, notwithstanding his constitutional privilege to refuse to answer questions which would tend to incriminate him personally. Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

Sufficient, therefore, is indicated by what has been said that the subpœna duces tecum directed to W. W. Watson is not subject to the objections interposed by the answer. The nature of the questions propounded to the witness which are objected to is not presented by the record, but enough is said to make clear the rights and privileges of the officer producing the documents called for, that he will not be required by the subpœna to produce any documents or records of a private or personal nature, or disclose any parts of any documents, books, or records which may be of a personal character, and which might be used in evidence against such officer or person, or answer any questions during the investigation of the grand jury which would tend to violate his constitutional exemption from self-incrimination.

Concluding, therefore, the answer of the witness to the rule to show cause sets up no sufficient defense, the motion to strike the answer will be granted, and an order entered directing W. W. Watson, president of the Watson, Parker & Reese Company, a corporation, to obey the subpœna duces tecum by producing the documents called for.

UNITED STATES v. SMITH et al.

(District Court, E. D. Oklahoma. May 15, 1920.)

No. 2499.

Indians ⇐15(2)—Restrictions on alienation removed by Secretary in particular case not reimposed by statute.

Section 19, Act April 26, 1906, providing that "no full-blood Indian * * * shall have power to alienate * * * in any manner any of the lands allotted to him for a period of 25 years from and after the passage and approval of this act, unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress," *held* to have the effect of reimposing restrictions theretofore removed by operation of law, but not to render invalid a subsequent conveyance by a full-blood Cherokee Indian of his surplus allotment, where previous to the passage of the act, under a prior law, the Secretary of the Interior had approved the recommendation of the Indian agent, made after a quasi judicial investigation, and removed the restrictions in the particular case, and his approval had been recorded in the same manner as patents are recorded.

In Equity. Suit by the United States against F. M. Smith and others. On motion to strike defendants' answer. Overruled.

Archibald Bonds, U. S. Atty., and L. K. Pounders, Sp. Asst. U. S. Atty., both of Muskogee, Okl.

O. L. Rider, of Vinita, Okl. and Joseph A. Gill, of Tulsa, Okl., for defendants.

WILLIAMS, District Judge. The land to which title is involved in this action was allotted to Ben Carpenter, a full-blood Cherokee Indian, as his surplus. Thereafter, to wit, on January 9, 1906, said allottee made application to the United States Indian agent at the Union Agency for the Five Civilized Tribes for the removal of restrictions as to said surplus allotment. Said agent, having made due investigation thereon, recommended that restrictions on said land as to alienation be removed, which said recommendation was approved by the Secretary of the Interior on March 27, 1906, "to be effective 30 days from date." This operated to remove restrictions as to alienation of said surplus allotment effective on April 25, 1906. Lanham v. McKeel, 244 U. S. 582, 37 Sup. Ct. 708, 61 L. Ed. 1331. However, in the view taken of this case when the instrument removing restrictions had been recorded as in case of the patent and delivered to the allottee prior to April 26, 1906, it is immaterial as to whether it became effective prior to, on, or subsequent to said date.

Section 19 of Act April 26, 1906 (34 Stat. 137), provides:

"That no full-blood Indian * * * shall have power to alienate * * * in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than

homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, that conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to the removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: Provided further, that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

The question here is whether the alienation by Ben Carpenter, an enrolled full-blood Cherokee Indian, as to his surplus allotment, the removal of restrictions as to which had been made by the Secretary of the Interior and become effective prior to April 26, 1906, is within the prohibition of said section 19, so as to suspend said act of the Secretary. An act of alienation might be clearly within the prohibition of the language of the statute contemplating the reimposing of restrictions removed by legislative act, and yet not be within the prohibition when it relates to the removal of restrictions as to the alienation of surplus allotment of a full-blood member of the Five Civilized Tribes by an act of the Secretary of the Interior, which was preceded by a quasi judicial investigation. Before we decide whether the particular act is within the words of the statute, we should first consider whether the particular class of acts to which this belonged is within the purpose of the statute. Holy Trinity Church v. United States, 143 U. S. 467, 12 Sup. Ct. 511, 36 L. Ed. 226; United States v. Union Bank of Canada (C. C. A.) 262 Fed. 91; De Hasque v. A., T. & S. F. Ry. Co. (Okl.) 173 Pac. 73, L. R. A. 1918F, 259.

It is a well-recognized rule for the construction of statutes that the terms employed by the Legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be reasonably given to them, unless the expressed intent is so clear as to remove it from the domain of the application of rules of construction. This rule should also apply to legislation by Congress relating to Indians, when at the same time the expressed public policy of the government towards such wards is followed. Such policy is that such wards shall be under the direct supervision of the Department of the Interior. By section 19, the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior, and such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior,

upon proof of such inability, may authorize the leasing of such homesteads under such rules and regulations.

Section 18 of said act authorizes the Secretary of the Interior to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits.

Section 20 provides that after the approval of said act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes shall be in writing and subject to approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval, with the proviso that allotments of minors and incompetents may be rented or leased under order of the proper court.

Section 21 provides that, if any allottee of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes die intestate, without widow, heir or heirs, or surviving spouse, seized of all or any portion of his allotment prior to the final distribution of the tribal property, and such fact shall be known by the Secretary of the Interior, the lands allotted to him shall revert to the tribe and be disposed of as therein provided for surplus lands; but if the death of such allottee be not known by the Secretary of the Interior before final distribution of the tribal property, the land shall escheat to and vest in such state or territory as may be formed to include said lands.

Section 22 provides that the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory, and in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

That it was the policy of the federal government through the instrumentality of the Secretary of the Interior and the department of which he is the head to supervise the estates of the members of the Five Civilized Tribes is thus disclosed. However, section 19 not only reimposes, but also extends, restrictions, as will hereinafter be pointed out, for a fixed period until "such restriction shall, prior to the ex-

piration of said period, be removed by act of Congress." Such removal of restrictions as to alienation by act of the Secretary of the Interior as to members of the Five Civilized Tribes under section 1 of the act of May 27, 1908, 35 Stat. 312, extends to homesteads of said allottees enrolled as mixed-blood Indians having one-half or more than one-half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods and all lands of enrolled mixed-bloods of three-fourths or more of Indian blood, including minors of such degrees of blood, the reservation as to restrictions thereon being:

"Shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

Said section 1 had the effect of repealing by substitution section 19 of the Act of April 26, 1906.

What is meant by "the Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore"?

"When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation." Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738.

The Seminole Agreement, adopted by said tribe on December 16, 1897, and ratified by act of Congress July 1, 1898 (30 Stat. 567), prohibits the sale, disposition, or incumbrance of any allotted lands of said tribe prior to date of patent, and when so made such instrument is to be void. Goat v. United States, 224 U. S. 462, 32 Sup. Ct. 544, 56 L. Ed. 841; Godfrey v. Iowa Land & Trust Co., 21 Okl. 298, 95 Pac. 792. No restrictions as to alienation of lands in the Seminole Tribe whatever were removed prior to act of April 21, 1904.

Section 28 of what is known as the Original Creek Agreement (31 Stat. 869) provides:

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eight, eighteen hundred and ninety-eight, * * * shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands * * * the lands * * * to which he would be entitled, if living, shall descend to his heirs. * * *"

Sections 7 and 8 of the Supplemental Creek Treaty (Act June 30, 1902, 32 Stat. 500) each provide:

"* * * And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

The lands, when allotted by virtue of said sections of said treaties, vested free from restrictions as to alienation. Skelton v. Dill, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. 198; Adkins v. Arnold, 235 U. S. 417, 35 Sup. Ct. 118, 59 L. Ed. 294; Rentie v. McCoy, 35 Okl. 78, 128 Pac. 244.

Section 22 of the Supplemental Agreement with the Choctaws and Chickasaws (Act July 1, 1902, 32 Stat. 641) provides:

"If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall * * * descend to his heirs: * * * Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. * * *"

Such allotted lands descended to the heirs free from restrictions. Mullen v. United States, 224 U. S. 453, 32 Sup. Ct. 494, 56 L. Ed. 834; Brader v. James, 246 U. S. 89, 38 Sup. Ct. 285, 62 L. Ed. 591.

Section 20 of the Cherokee Agreement (Act Cong. July 1, 1902, 32 Stat. 716) provides:

"If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall * * * descend to his heirs: * * * Provided, that the allotment thus to be made shall be selected by a duly appointed administrator. * * *"

Such lands descend to the heirs free of restrictions. Talley v. Burgess, 246 U. S. 104, 38 Sup. Ct. 287, 62 L. Ed. 600. At the time of the passage of the act of April 21, 1904 (33 Stat. 189), all land in the Cherokee, Chickasaw, Choctaw, and Creek Nations, other than those allotted under said section 28, Original Creek Treaty, and sections 7 and 8, Supplemental Creek Treaty, and section 22, Choctaw and Chickasaw Supplemental Agreement, and section 20, Cherokee Agreement, were then restricted as to alienation, except where such restrictions had been removed from the land by death occurring subsequent to allotment. Under the Original and Supplemental Creek Agreements (31 Stat. 869; 32 Stat. 500), Original and Supplemental Agreements with the Choctaws and Chickasaws (30 Stat. 505; 32 Stat. 641), and Cherokee Agreement (32 Stat. 716), none of the periods prescribed for the freeing of either the homesteads or surplus allotments from restrictions by operation of law had expired on April 26, 1906. So at the time of the passage of the said act of April 26, 1906, no allotted lands in the Five Civilized Tribes had been freed from such restrictions subsequent to April 21, 1904, by operation of law or otherwise, except where occasioned by the subsequent death of the allottee or through recommendation of the Superintendent of the Five Civilized Tribes at the Union Agency, by a quasi judicial hearing and investigation in particular cases, and the approval of the Secretary of the Interior. Such quasi judicial investigation and determination was under the following requirements of Congress:

That *"upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions*

is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded." (Italics mine.) 33 Stat. 204.

Can it be said that a consideration of these acts in pari materia demonstrates the purpose of Congress to invalidate the removal of restrictions in particular cases as to the surplus allotments when same had been removed by the Secretary of the Interior, where the allottee had not granted or conveyed such land for value prior to April 26, 1906? The approval of the Secretary in writing prior to April 26, 1906, "to be effective thirty days from date," and recorded in the same manner as the patent or patents for such land, when delivered to the allottees prior to April 26, 1906, though said 30 days had not elapsed prior to said date, is as effective as the approval, recording, and delivery at a prior date, where such 30 days had elapsed before April 26, 1906, and no conveyance theretofore had been executed and delivered; for such, as a completed act, was beyond recall by the Secretary, unless it be in cases of fraud practiced in securing such approval or removal of restrictions. Congress is not presumed to have intended to work an injustice. Such removal or approval having been made and recorded in the manner as the patents to such land, purchasers would reasonably and in all probability act upon that chain of title and make an outlay thereon. The terms employed in said act should not receive an interpretation which would conflict with acknowledged principles of justice and equity, when at the same time a construction may be adopted harmonizing with principles of justice and equity, and also according with the expressed public policy of the government in having the lands and the property of its wards under the supervision and administration of the Secretary of the Interior.

Another analogous principle in rules of construction supports this conclusion. The particular act of the Secretary of the Interior in removing restrictions or approving recommendations for such purpose as it relates to the general act in reimposing restrictions removed by virtue of said section 28 of the Original Creek Agreement and sections 7 and 8 of the Supplemental Creek Agreement and section 22 of the Supplemental Choctaw and Chickasaw Agreement, as it amended the original agreement with the Choctaws and Chickasaws, and section 20 of the Cherokee Agreement, and the extending of the period for the removal of restrictions as fixed by said agreements, bears the same analogy by relation as a special to a general act of legislation.

It is a prevailing rule in the construction of statutes that specific legislation relating to a particular thing is not effected by general legislation in regard to classes or subjects of which that covered by the specific or particular thing is one, unless it clearly appears that the general legislation is so repugnant to the special legislation that the legislators must be presumed thereby to modify or repeal it. The special and the general legislation must stand together, the former as the law of the particular object or subject, and the latter as the general law upon other subjects or classes within its terms.

The order of removal of restrictions and approval of the recommendation by the Superintendent for the Five Civilized Tribes at the Union

Agency, after a full investigation and when he was satisfied such removal of restrictions was for the best interest of the allottee, was recorded in the same manner as the patent and delivered to the allottee. There is neither allegation of fraud nor that the purchase money was not actually paid. Said section had the effect, such being both within the letter and purpose of the act, of reimposing restrictions which had been removed by operation of law, and without the intervention of a hearing in which the exercise of judicial power was applied by an administrative agency (section 28, Original Creek Agreement; sections 7 and 8, Supplemental Creek Agreement; section 22, Supplemental Choctaw and Chickasaw Agreement amending the original agreement; section 20, Cherokee Agreement), and also of extending the restriction period as fixed in said agreements, but not of nullifying or suspending the act of the Secretary of the Interior in removing restrictions in the case at bar.

An order will be entered, overruling plaintiff's motion to strike defendant's answer.

UNITED STATES v. YUGINNI et al.

(District Court, D. Oregon. July 13, 1920.)

No. C. 8905.

Internal revenue ⊂=4—Laws relating to operation of distilleries repealed by Prohibition Act.

The National Prohibition Act *held* to repeal by implication the provisions of the internal revenue laws relating to the operation of distilleries.

Criminal prosecution by the United States against Boze Yuginni and Cousin Boze Yuginni. On motion to quash indictment. Motion granted.

A. F. Flegel, Jr., of Portland, Or., Deputy U. S. Atty.

Barnett H. Goldstein, of Portland, Or., for defendants.

BEAN, District Judge. In the case of United States v. Yuginni there are two defendants indicted for a violation of the Internal Revenue Act (38 Stat. 745). They are charged with engaging in the business of a distiller without having paid the tax required by the statute, and without having exhibited the sign of a registered distillery, and without giving a bond, as required by the Revenue Act.

Demurrer has been filed, and motion to quash the indictment on the ground that it appears from the face of the indictment that the alleged crime was committed after the National Prohibition Act (41 Stat. 305) went into effect. It is argued that this act was intended by Congress to cover the entire subject of the manufacture and sale of intoxicating liquors, and that it is inconsistent with the Revenue Act, which provides for the levying of a tax upon distilleries and upon the liquor manufactured at such places.

The Prohibition Act is very comprehensive. It provides that no person shall, on or after the date when the Eighteenth Amendment goes into effect, manufacture, sell, barter, import, export, deliver, furnish, or possess any liquor, except as authorized in this act, and

then provides for the issuance of permits to manufacture liquor of certain grades and quality, provides the method of its manufacture, the labeling of the packages, the disposition of the liquor.

It is intended, as I take it, to cover the entire subject, and in my judgment supersedes and operates as a repeal of the previous act governing the operation of distilleries. It is true section 35 of title 2 of the Prohibition Act provides that it shall not relieve any one from paying any tax or other charges imposed upon the manufacture or traffic in liquor, and also provides that there shall be exacted and collected of any person responsible for the illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retailers and $1,000 on manufacturers.

It would seem, therefore, that Congress intended that one who manufactured liquor in violation of the Prohibition Act should nevertheless be liable for the tax thereon. In that event, however, it seems to me such a manufacturer must be proceeded against under the Prohibition Act, and not the revenue statute.

This conclusion is in harmony with that arrived at in United States v. Windham (D. C.) 264 Fed. 376. The reasoning of the opinion in that case appeals to me as sound.

The motion to quash will be allowed.

SOUTHERN BRIDGE CO. v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, S. D. Alabama. July 3, 1920.)

1. **Pleading ⟸106 (1)—Plea in abatement merely to give better writ to plaintiff.**
   Plea in abatement is merely to put the instant suit out of court, and to give a better writ to plaintiff for another suit.
2. **Removal of causes ⟸112—From state to federal court does not recreate suit.**
   Removal of suit from a state court to the federal District Court does not recreate it, and if the state court had no jurisdiction, it is the duty of the District Court so to declare; the question being properly raised by plea in abatement, though such suit might have been brought in the District Court.
3. **Evidence ⟸23 (1)—Interest of government in building ships to meet submarine menace commonly known.**
   It is matter of common knowledge that at the time of creation of the Emergency Fleet Corporation the government was greatly interested in the building of ships to overcome the German submarine menace.
4. **Courts ⟸489 (10)—Emergency Fleet Corporation a governmental agency, not to be sued in state court.**
   In view of the Shipping Act (Comp. St. §§ 8146a–8146r), and Act Cong. March 9, 1920, Emergency Fleet Corporation of United States Shipping Board *held* an instrumentality of the federal government, not to be sued in a state court, but in a federal District Court, under Judicial Code, § 24, subd. 20 (Comp. St. § 991[20]).

At Law. Suit by the Southern Bridge Company, a corporation, against the United States Shipping Board Emergency Fleet Corporation. On hearing of demurrer to plea in abatement. Demurrer overruled.

Smiths, Young & Leigh, of Mobile, Ala., for plaintiff.
A. D. Pitts, of Selma, Ala., and Harry T. Pegues, of Mobile, Ala., for defendant.

ERVIN, District Judge. This was a suit brought by the plaintiff in the state circuit court of Mobile county, and claimed in three counts certain sums of money as due by the defendant to plaintiff. The suit was removed from the state to the federal court under a petition, in which it was set up that the suit is of a civil nature at common law, and arises under the laws of the United States, and does not sound in tort, and further sets up that this suit is a suit against the United States.

Upon the filing of the papers in the federal court, a plea in abatement was filed by the defendant, in which it was set up that the defendant corporation was organized under a law of Congress, for the District of Columbia, by Act March 3, 1901, c. 854, 31 Stat. 1284, in pursuance of the authority of the Shipping Act of September 7, 1916 (Comp. St. §§ 8146a–8146r), and that the said corporation was an appointee of the President of the United States and representative of the United States, and that this is a suit against the United States, wherefore the circuit court of the state of Alabama, had no jurisdiction of the suit against the defendant.

There was a second plea, setting up merely that the United States Shipping Board Emergency Fleet Corporation is the agent or representative of the United States, and that the said circuit court of Mobile county had no jurisdiction of a suit against it. There were demurrers filed to these pleas to test their sufficiency, so that the question for determination is whether the defendant, the United States Shipping Board Emergency Fleet Corporation is such an agent or representative of the United States government as that a suit against it is in fact and in effect a suit against the government.

At the outset, it is urged that, whether the state court had jurisdiction or not, this court unquestionably has, and hence, as the case has been removed here to a court having jurisdiction, that it should now proceed, regardless of whether the state court had jurisdiction or not. I can see no difference between the raising of the question here after its removal to this court and the question being raised in the Supreme Court of the United States, by way of appeal, if it should be decided adversely to this contention in the state courts, because in either event it would be finally determined in the federal court.

[1] The purpose of a plea in abatement is merely to put out of court the instant suit, and give a better writ to the plaintiff in another suit which may be begun. There is no difference between this plea and any other plea in abatement, if the facts set up show that there was no jurisdiction in the state court.

[2] Bringing the case here from the state court does not recreate it, or give any more life to the original complaint which was filed in the circuit court, than it then had. It merely removes what, if any, suit was pending in the state circuit court, and, if that court had no jurisdiction of the suit which was removed here, then it would be my

duty to so declare on the question being properly raised, even though such a suit might have been brought in this court in the first instance.

The question for determination really is whether the state courts have any jurisdiction of a suit against the United States Shipping Board Emergency Fleet Corporation. I have been unable to find any case in which this question has been determined, nor has any such case been cited to me in argument.

It is true that in at least two cases, recently decided, it has been held that the defendant is subject to suit. Gould Coupler Co. v. Emergency Fleet Corporation (D. C.) 261 Fed. 716; Commonwealth Finance Corporation v. Landis, Emergency Fleet Corp. (D. C.) 261 Fed. 440. In neither of these cases was the question considered as to the right to sue the company in a state court, though in the Landis Case, as here, the suits were originally brought in the state court and removed to the federal court.

I agree both with Judge Dickinson in the Landis Case and with Judge Hand in the Gould Case in holding that the defendant is liable to suit in the federal courts. Judge Dickinson, on page 444, of 261 Fed., says:

"If the obligations incurred were the obligations of the United States, it has so far laid aside the robes of sovereignty as to permit the question of the existence of such obligation to be determined by the Court of Claims and within limits by the District Courts."

Judge Learned Hand, in the Gould Case, on page 718 of the same volume, says:

"I have no doubt that the Fleet Corporation, certainly when acting as the President's delegate, is a governmental agency, and that a fraud upon it is a fraud upon the United States. That is nothing to the point, which is whether Congress has indicated that in this, as in its other activities, its disputes with citizens shall be justiciable in the courts, no doubt only United States courts."

Tracing the history of the Emergency Fleet Corporation, we find first passed by Congress what is denominated the Shipping Act. 39 Statutes at Large, 728. Any one examining this act, even in a cursory manner, will be struck by the fact that its purposes and the broad powers given as to taking over and managing the ships and shipping, and the powers to inquire into all shipping contracts, and to regulate and control them, and finally to inquire into alleged breaches of the terms of the act, must conclude that the functions of the board thereby provided for were governmental, and not those of a private business concern. Section 11 of this act (section 8146f) says in part:

"That the board, if in its judgment, such action is necessary to carry out the purposes of this act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States."

[3, 4] It is common knowledge that the government was at that time greatly interested in the building of ships to be used by it for the transportation of men, munitions, and supplies, because of the great destruction of shipping by the German submarines. The Emergency Fleet Corporation was chartered pursuant to this power, and Con-

gress has there declared that this corporation was created and was necessary to carry out the purposes of the Shipping Act, which certainly were governmental. I do not doubt that in the management of the Fleet Corporation much of its business is of the same character as that of private business corporations, but the moving cause of its creation was to aid the government in the purposes which the Congress considered to be of public need. The fact of its organization as a private corporation, however, would not prevent this corporation acting as the agent or representative of the federal government in its general and ordinary procedure.

"Where an officer or an agency of a state purchases goods for a state, suit against such officer or agency, is a suit against the state." Murray v. Wilson, 213 U. S. 151, 29 Sup. Ct. 458, 53 L. Ed. 742; Cunningham v. M. & B. R. R., 109 U. S. 447, 3 Sup. Ct. 292, 609, 27 L. Ed. 992.

The question for determination really is whether this corporation is doing private business or a public one, intended to serve the uses of the federal government. I have called attention to the language in the Shipping Act which provided for its creation, to show that the Congress intended this corporation as a governmental agency.

If this was a mere private business corporation, the fact that the United States was a stockholder would not prevent its being sued as any other corporation, for, as said by Chief Justice Marshall, in speaking for the court in Bank of U. S. v. Planters' Bank of Georgia, 9 Wheat. 907, 6 L. Ed. 244:

"It is, we think, a sound principle that, when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act."

Since the decision in this case, however, there are a number of decisions by the Supreme Court, where a state has undertaken to act through some agency, corporation, or medium in the performance of their public functions, and, whenever this has been undertaken, the courts have uniformly held that such agency, corporation, or medium cannot be sued except in such manner and in such courts as the states have agreed to permit suits to be brought. So that the question revolves itself into whether the state has invested in the stock of a corporation doing a private business, or whether the state has had organized a corporation nominally a private one, but designed to perform the functions of the state, or to act as its agent or creature. When the business undertaken by the corporation is that of the state, and not a mere private business, the fact that the government uses

the medium of a private corporation in conducting this business, instead of conducting it in its own name, should make no difference, and the government cannot be then sued by suing the corporation, any more than the government could be sued directly.

In Cunningham v. M. & B. R. R., 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992, where it was sought to have a receiver appointed for a railroad company, and to foreclose a mortgage and apply the proceeds to the payment of certain bonds, it appeared on the face of the bill that the state had indorsed bonds of the company under the provisions of a statute passed by it, which bonds were to operate as a prior mortgage upon all the property of the company, which could be enforced by a sale by the Governor upon default in payment of the bonds so indorsed, or interest on them as it fell due; that there was default in the payment of these bonds, and the state had taken up the bonds and had given her own bonds in place of these she had taken up; and that there had been an advertisement by the Governor of the state and a sale made by him under the power in the mortgage, and this sale was attacked by the bill as voidable, because, as contended under the statutory and executed mortgages, the state was trustee of the property mortgaged for the benefit of the bondholders, and her purchase could be set aside by the beneficiaries under the trust, when they elected to do so. The Governor and certain other state officials, who had been made parties, demurred to the bill, because it was an attempt to make the state of Georgia a party. The court, in concluding its opinion, says:

"As was said in Barney v. Baltimore, 6 Wall. 280, there are persons who are merely formal parties without real interest, and there are those who have an interest in the suit, but which will not be injured by the relief sought, and there are those whose interest in the subject-matter of the suit renders them indispensable as parties to it. Of this latter class the court said, in Shields v. Barrow, 17 Howard, 130: 'They are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience.' 'In such cases,' says the court in Barney v. Baltimore, 6 Wall, 280, 'the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction.' In the case now under consideration, the state of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued has a personal interest in the matter or any official authority to grant the relief asked."

Among other cases where the state was acting through certain private agencies, and it was held that they were not liable to suit, was Shields et al. v. Barrow, 17 How. 130, 15 L. Ed. 158, and Ballaine v. Alaska Northern Railway, 259 Fed. 184, 170 C. C. A. 252.

"Where a state has given its consent to be sued in certain courts or under certain conditions, suit can be maintained only in the court and under the conditions as named; and where consent has been given by a state to be sued in its own courts, suit cannot then be maintained against it in the federal courts." Smith v. Reeves, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140; Chandler v. Dix, 194 U. S. 590, 24 Sup. Ct. 766, 48 L. Ed. 1129; Murray v. Wilson Distilling Co., 213 U. S. 172, 29 Sup. Ct. 458, 53 L. Ed. 742.

Referring again to the source from which this corporation sprung, and the language of this source, as found in the Shipping Act, we see

that the government considered this corporation as necessary to carry out the purposes of the Shipping Act, which were governmental. We find, by the act approved March 9, 1920, that section 9 of the Shipping Act (section 8146e), which was relied on by the Supreme Court in the case of the Lake Monroe, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 62, as authorizing the seizure of vessels belonging to the Shipping Board, has been changed so that such seizure shall no longer he had, but that a libel should be instituted in personam against the *United States* or against *such corporation.* (Italics mine.) This statute again shows a recognition by Congress and a declaration by it that this corporation was an agency of the government, for it permits a suit directly against the government on an obligation incurred by the corporation. The statute provides:

"Such suits shall be brought in the District Court of the United States, for the District." etc.

—and regulates the service of process, etc.

The decision of the Supreme Court in The Lake Monroe Case states that the total stock of $50,000,000 was owned by the United States. It is therefore manifest that, as the United States owned all the stock, all of the properties in the name of the corporation belonged to the United States, and none of it could be levied on and sold, except to the detriment of the government. While it is true the United States is not a nominal party on this record, yet, as was said in Hagood v. Suthern, 117 U. S. 67, 6 Sup. Ct. 615, 29 L. Ed. 805:

"Though not nominally a party, * * * it [the state] is the real and only party in interest; the nominal defendants being the officers and agents of the state, having no personal interest in the subject-matter of the suit, and defending only as representing the state. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is therefore substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.'"

Applying these words to the present suit, there can be no question that the suit is to compel the payment by the United States out of its property for a contract which it made in the name of the Emergency Fleet Corporation with the plaintiffs.

Taking the provisions of the Judicial Code, subdivision 20 of section 24 (Comp. St. § 991 [20]), which gives jurisdiction to the District Courts, concurrent with the Court of Claims, of certain suits against the United States, I conclude, as did Judges Dickinson and Hand, that the United States have provided that this defendant could be sued in the United States District Court; but there is nowhere that I can find any authority for suing such corporation in a state court, and, as I further conclude that this corporation is a governmental agency of the United States, I find that the state court had no jurisdiction to entertain a suit against it.

The demurrers to the plea in abatement will therefore be overruled.

LEWISTON MILLING CO., Limited, v. CARDIFF et al.*

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920. Rehearing Denied September 7, 1920.)

No. 3400.

1. **Commerce ⇐40(1)—Food and Drugs Act not applicable to intrastate sale.**
The Food and Drugs Act (Comp. St. §§ 8717–8728) has no application to a contract for sale and purchase of a food product to be performed in the state where made, because the purchaser may intend to use the product in interstate commerce.

2. **Trial ⇐219—Not necessary for instruction to define commonly understood word "adulterated."**
An instruction submitting to the jury the question whether a food product was adulterated, within the meaning of Food and Drugs Act, § 7 (Comp. St. § 8723), which is practically identical with Rem. & Bal. Code Wash. § 5455, providing that an article shall be deemed to be adulterated if it contain any added deleterious ingredient "which may render such article injurious to health," *held* not erroneous because it did not define the word "may" as including any possibility of injury; the word having a commonly understood meaning and being so used in the statute.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adulterate.]

3. **Sales ⇐179(1)—In sale by sample, acceptance after inspection is conclusive.**
Where a sale is by sample, and there has been an acceptance after inspection of the commodity, or there has been a reasonable opportunity for inspection, either before or after delivery, to determine whether the commodity conformed to the sample, the sale is concluded, and the purchaser is bound by his contract of purchase.

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

Action at law by Ira D. Cardiff and others, partners as Ira D. Cardiff & Co., against the Lewiston Milling Company, Limited. Judgment for plaintiffs, and defendant brings error. Affirmed.

This writ of error is prosecuted by defendant below, and for convenience reference will be made to the parties litigant as plaintiffs and defendant. Recovery is sought of part of the purchase price alleged to be yet due plaintiffs upon a sale to the defendant of dehydrated potatoes. The contract upon which the action is based is in writing, of date March 18, 1918, and by the terms thereof the plaintiffs agreed to sell and the defendant to purchase all of the output of dried, unpeeled potatoes then on hand and to be produced by plaintiffs at their plant, theretofore conducted by the Washington Evaporated Food Company, at Yakima, Wash., from the 1917 crop. Delivery was to be made at the plant. Defendant is an Idaho corporation, but was at the time engaged in the operation of a flourmill, also at Yakima. The potato chips, when delivered, were taken to the defendant's milling plant in Yakima for milling into flour. Plaintiffs allege performance on their part, and that, on the other hand, defendant refused to receive a large amount of dehydrated potatoes manufactured by plaintiffs under the contract, or wholly to pay for such as had been delivered and manufactured ready for delivery.

The defendant denies that it and plaintiffs entered into a written contract for the manufacture and delivery to defendant of dehydrated potatoes as alleged in the complaint, but alleges affirmatively that, on and prior to March 18, 1918, certain negotiations were had between plaintiffs and defendant, at

Yakima, Wash., upon the subject of manufacturing flour from potatoes, to be used as a substitute for wheat flour, with a view to defendant's entering into a contract with plaintiffs whereby plaintiffs should, at an agreed price, furnish defendant potatoes of the crop of 1917, processed and manufactured in the way of cleaning, slicing into chips, and drying, so that the same would be ready for use by defendant, to be ground and manufactured into potato flour, to be sold by defendant in interstate commerce as food for human beings, and designed to take the place as such of wheat flour to as large extent as possible, to meet the exigencies of the war; that defendant, as a result of such negotiations, agreed to purchase from plaintiffs potatoes of the crop of 1917, to be processed and manufactured, and delivered to defendant for manufacture into flour, and to be sold for food in interstate commerce, the amount so purchased to be limited to such as might be produced within 90 days from February 23, 1918; that it was further agreed "that the product as produced and manufactured and delivered by the plaintiffs to the defendant under such contract should be and would be warranted by plaintiffs as a high quality product, free from the least damage in the processing and manufacturing process to be applied by the plaintiffs, and suitable and marketable for making the best grade of potato flour, and of marketable quality as a food product." It is then further averred, in effect, that the alleged contract set up in the complaint was signed by R. D. Stanley, as manager of defendant, but without authority to execute such contract or agreement in behalf of defendant, and that such contract does not express the real agreement of the parties, as above indicated. Reformation of the contract is sought, to conform to such alleged understanding and agreement.

Defendant asserts that plaintiffs breached the agreement in several particulars, namely: That the potatoes delivered and sought to be delivered were rotten, and contained black, decayed spots, bitter to the taste, which, when ground with the healthy portions into flour, would render the product bitter to the taste; that such potatoes were scorched in drying, giving the flour product a burnt taste and odor, and a red color, thus rendering it unmarketable; that plaintiffs employed filthy and unsanitary methods in drying the potatoes, such as to render them unfit for food; and that in processing them plaintiffs used an excessive amount of sulphur, and thereby further rendered them unfit for food for human consumption. The further defense is advanced that, by reason of the use of sulphur in processing, the potatoes were rendered injurious to health, and therefore adulterated, in violation of the pure food laws of the United States and of the state of Washington, and, further, that such potatoes were misbranded within the meaning of such laws.

The cause went to the jury under the theory that the sale was by sample, resulting in a verdict and judgment for plaintiffs.

James E. Babb, of Lewiston, Idaho, and E. B. Velikanje, of Yakima, Wash., for plaintiff in error.

Orland & Lee, of Moscow, Idaho, and Voorhees & Canfield, of Spokane, Wash., for defendants in error.

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

WOLVERTON, District Judge (after stating the facts as above). The first question presented for our consideration is whether the court erred in refusing to instruct the jury, at the close of the testimony, to return a verdict for defendant. Counsel assert insufficiency of the evidence to carry the case to the jury in several particulars, namely: That corporate execution of the written contract is not shown; that the product furnished did not conform to sample; that it appears that the sulphur dioxide used by plaintiffs in processing the potatoes is an added in-

gredient, which may have rendered the article injurious to health; and that the containers of the product sold were not labeled as required by the Food and Drugs Act (Comp. St. §§ 8717–8728).

As it relates to the corporate execution of the agreement, the court instructed that the defense had been abandoned, and that the written contract put in evidence is the contract of the parties. There was no exception reserved to this instruction, and it must be taken to be a true interpretation of the acts of the defendant in the conduct of the trial. Aside from this, a reading of the record lends ample support to the court's position.

The larger question, and the one about which the real controversy hinges, is whether the testimony was sufficient to compel submission to the judgment of the jury touching the use of sulphur dioxide in treatment of the potatoes in the process of dehydration, namely, whether it constitutes a deleterious ingredient, which may have rendered the product injurious to health, in view of the statute of the state of Washington relative to the adulteration of articles of food and drugs. The question is presented in another form by exceptions to failure to give requested instructions in the language employed, and to instructions of the court respecting the same subject-matter.

[1, 2] As a premise to the discussion, in view of the record, it may be affirmed that the United States pure food and drugs legislation does not come into the case, for the reason that the controversy does not involve interstate commerce. The processed potatoes were to be delivered to the defendant at plaintiffs' place of business in Yakima, Wash., and what the defendant may have desired or intended to do with the potatoes when received, whether to deal with them intrastate or interstate, could not affect or otherwise dominate the instant sale or transaction between the parties. We may therefore turn our attention exclusively to a consideration of the question in the light of the local statute. The result must be the same, whether the one or the other statute is applicable, as the statutes themselves are practically alike.

The fifth subdivision of section 7 of the federal Food and Drugs Act (34 Stat. 769 [Comp. St. § 8723]), is practically identical with the fifth subdivision of section 5455, R. & B. Statutes of Washington. By these statutes an article is deemed to be adulterated "if it contain (in case of food) any added poisonous or other added deleterious ingredient which may render such article injurious to health." This clause has received the interpretation of the Supreme Court of the United States in United States v. Lexington Mill Co., 232 U. S. 399, 34 Sup. Ct. 337, 58 L. Ed. 658, L. R. A. 1915B, 774. This case involved the application of the "Alsop process," by which nitrogen peroxide gas, generated by electricity, was mixed with atmospheric air, and the mixture then brought into contact with flour. It was claimed that the process added to the flour product a poisonous or other deleterious ingredient, "which might render the flour injurious to health." After stating that the purpose and intent of the statute was to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances, which might render such articles injurious to

the health of consumers, the court goes on to define the clause "which may render such article injurious to health," as follows:

"The word 'may' is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, 'an auxiliary verb, qualifying the meaning of another verb, by expressing ability, * * * contingency or liability, or possibility or probability.' In thus describing the offense Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. It may be consumed, when prepared as a food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the act."

In view of this rendition of the statute, which is authoritative as well for the interpretation of the state statute, the court having been cited to no different interpretation by the state courts, we may now consider the question heretofore stated.

A large amount of evidence of an expert nature was adduced pro and con as to the supposed deleterious effect that the sulphur dioxide had upon the dehydrated potato product as an article of food. Some of the testimony tended to show that the added ingredient was deleterious, and much of it the contrary, so that there was a direct and persistent conflict respecting the subject-matter of the inquiry. The witness Kimball, after having been advised of the probable, and we might say the possible, amount of sulphur dioxide that went into the product, was very positive that it could not, by any possibility, prove injurious to the health of the consumer. This is his language:

"That dose would not hurt a man, if he took it for 40 years every day. I might add to that—I want to make it plain—that a man takes that amount, more than that amount, into his system every day with his food."

The testimony of other witnesses tends strongly to corroborate him in the statement. So that, under the statute as interpreted by the Supreme Court, there was ample evidence to go to the jury from which they might reasonably infer that the sulphur dioxide, used in the quantity which the evidence tends to show, could not possibly be injurious to health. Such being the case, a directed verdict for defendant plainly would not have been warranted or proper. A further discussion of the evidence upon the subject could only lead into the domain of the jury, wherein there is no necessity to venture.

As it relates to the labeling of the containers of the product, no such duty devolved upon plaintiffs under the statute. The defendant was to furnish the containers, and the product was not to go into general use, except as the defendant might put it upon the market when manufactured into flour at the defendant's plant at Yakima. The plaintiffs, therefore, were not chargeable with a misbranding, and it was not an issue germane to the controversy.

The proposition that the testimony was insufficient to show that the product furnished conformed to the sample is not maintainable, as

there is ample evidence in the record tending to show that it did so conform, and the question was clearly one for the jury.

This brings us to a consideration of whether the question of alleged adulteration was properly submitted to the jury under the instructions of the court. The following requested instruction was not given in the language submitted:

"The court instructs the jury that, in order to defeat plaintiffs' right of recovery, it is not necessary for defendant to show that the sulphur dioxide contained in the potatoes, or that the filthy or decomposed condition of said potatoes, if the jury shall find they, or any substantial portion of them, were decomposed or filthy, would in fact be harmful to health of any person consuming them or the flour or bread product thereof, but it shall be sufficient if defendant shows that it may or might possibly or probably be harmful to health of consumers."

Respecting the same subject-matter, the court gave in its general charge the following instructions:

"It is admitted, gentlemen, that before the contract was entered into Mr. Cardiff, acting for the plaintiff company, knew that the defendant, in contracting for these potatoes, intended to use them for the making of potato flour; so you will assume that to be true. If he knew that, and defendant did not know the process employed in producing the samples, the plaintiff, through Mr. Cardiff, impliedly agreed that the potatoes would not be processed in such a manner as to render them unwholesome or deleterious when used in the intended manner for human food. It is admitted that the sulphur process was employed, and that as a result the chips contain a small percentage of sulphur dioxide or sulphite—not sulphate, but sulphite. The amount naturally varies more or less in the different samples analyzed, but there seems to be little controversy as to the general range of percentages.

"With regard to this, plaintiff contends that the process employed is in common use, and is generally recognized as legitimate and proper, and that in the process of making bread the sulphite is wholly expelled or turned into sulphate, which is entirely harmless, and that, even if carried forward and contained in the bread after it was baked without diminution, the percentage is so small that, when the highest practical amount of potato flour is mixed with the necessary amount of wheat flour, the quantity of the sulphite that a person using such bread would consume in a day is so small as to be negligible, and could not possibly produce harmful results. The contrary position is maintained by the defendant, and the issue is for you to determine. If, under the instructions I am giving you, the plaintiff did impliedly warrant that it would not so process the potatoes as to make them unwholesome or harmful—that is, would not add to them any elements which might, when the flour was used for the making of bread, be harmful or injurious to the consumer—and you find, further, that the product which defendant declined to receive would under some circumstances be harmful, when used for such purpose, or unwholesome, because of such sulphur ingredient, then you should find that defendant was not bound to accept or pay for such products.

"To a large extent the same consideration applies to the issue touching the sanitary conditions obtaining in the plaintiff's plant while the process and processing and the handling were going on. If, as the pleadings admit, plaintiff knew that the defendant was to use the chips for flour-making purposes, it impliedly warranted and promised that the potatoes would be processed under such sanitary conditions as would not render the product unwholesome as an ingredient of food, that nothing would be added to or done with the potatoes which would under the circumstances of possible, practicable use in making bread, make the bread harmful, and that it would not use rotten or filthy potatoes; and if this implied agreement was not kept by plaintiff, it could not require the defendant to take the product. There is considerable conflicting testimony upon the point, and the question is submitted to you.

It is for you to say, gentlemen, whether or not the processing was carried on under reasonably sanitary conditions, and that due care was used to avoid using rotten or filthy potatoes, or permitting filth to get into the finished product, and for you to say, as I have already suggested, whether or not the sulphuring process was harmful, or might be harmful, under the conditions in which it was to be used. In passing upon this last question, you may consider the scientific or expert testimony upon the subject, and further the fact, if it be a fact, that the sulphur method is in common use, and that the government inspectors passed and permit the shipment of products so produced. I say, if the evidence shows that such are the facts, you may consider them as bearing upon the general question as to whether or not the sulphur process produces a product which may be harmful, and all other facts and circumstances in evidence, and, viewed in the light of your own observation and common sense, in the practical affairs of life."

Since the question of implied warranty as to wholesomeness became an issue in the case, a matter which the court left to the jury, the burden was cast upon plaintiffs to show that their product was such as did not come within the interdiction of the statute. Merriman v. Chapman, 32 Conn. 146; Gardiner v. Davis, 110 Me. 310, 86 Atl. 176. It was on this hypothesis that the court instructed the jury that plaintiffs could not recover, if they found that the product might be harmful; that is, injurious to health.

The use that was to be made of the potato product by defendant was to grind it into flour, and this flour was to be used in combination with wheat flour at a ratio of 8 to 15 per cent. of the potato flour. The investigations of the experts proceeded upon this hypothesis, and the testimony all the way through took into account the purpose of the defendant in combining potato flour with wheat flour in these percentages. The inquiry, it should be said, also extended minutely respecting the effect the added ingredient would have upon the potato flour, without combination with wheat flour.

Having premised as much, it is the strong contention of counsel for defendant that the court should have instructed the jury in the language of their requested instruction, namely, that it was sufficient to defeat the action if it was shown that it (the added ingredient, sulphur dioxide) "may or might possibly or probably be harmful to health of consumers." In view of the fact that the statute was designed to protect the public health from possible injury, the Supreme Court has, and rightly so, it seems to us, given it a broad construction, to render it effective in its utmost intendment.

Supplementing the definition of "may" as given by the Supreme Court in the Lexington Mill Case, and extending it to the word "might," the word comprises all the possible rather than the reasonably probable consequences. State v. Denny, 17 N. D. 519, 523, 117 N. W. 869.

"The word 'might' is the preterit of the word 'may,' which, according to the best lexicographers simply means 'to be possible,' and 'might' is defined by Webster as equivalent to 'had power' or 'was possible.'" Owen v. Kelly, 6 D. C. 191, 193.

The court, in I. W. Scott & Co. v. Railway Co., 172 Pa. 646, 652, 33 Atl. 712, 713, in speaking of the word "possible," has this to say

(quoting from Railway Co. v. Trich, 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672):

"But things or results which are only possible cannot be spoken of as either probable or natural; for the latter are those things or events which are likely to happen, and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference."

Assuming, without deciding, that the requested instruction was one proper to have been given, it was not reversible error not to give it, if it was adequately covered by the general charge. The court, in its charge, adopted, in effect, the language of the statute in defining the particular issue and in advising the jury as to what they were called upon to decide. It did not go further to define the word "may" as the courts have defined it, nor did it say to the jury that it comprised possible consequences, as well as probable, as the language of the requested instruction imports. The language of the court, as that of the law, is not couched in technical terms, but is plain, simple, and understandable to the common mind.

"The law does not require courts to define ordinary words and phrases. An intelligent juror understands what they mean." Akin v. Bradley Engineering & Machinery Co., 51 Wash. 658, 99 Pac. 1038.

"May" and "might" are words of most common use, and it would be an aspersion upon the intelligence of a jury to affirm that they did not understand their meaning and significance; nor does the context of the instruction or of the law render them less understandable. If we should interpolate the word "possibly" in the context of the law, making it read "may possibly" render such article injurious to health, we would only express what the word "may" implies by its common significance, and what every person of common intelligence must be presumed to know and understand, and we must presume that the jury did so understand its meaning, when given to them in the plain language of the court. Furthermore, the significance of the word "may" or "might" is not to be taken as including every conceivable possibility, but must be reasonably applied, having in mind the purpose of the statute and the injury or possible wrong which it was designed to prevent.

So, in the present case, the issue was whether the added ingredient, the sulphur dioxide, might render the product harmful to health. The facts and circumstances attending the controversy were all to be taken into account, and in view thereof it was to be considered whether it might reasonably be anticipated by considerate persons, mindful always of conserving the health of the consumer, that the product would, in the ordinary course of human events, possibly prove harmful or injurious to health. We think that the jury was not only not misled by the instruction, but that they adequately understood what was required of them in deciding the issue.

It follows that the court committed no error in refusing the requested instruction, and in giving those here considered. What we have said applies as well to the issue relative to filth, which it is alleged rendered the product impure and unhealthful.

The criticism of the use of the language "some circumstances be harmful" is hypercritical. The words "some circumstances," of course, do not include all circumstances; but they may comprise the stronger within the bounds of the inquiry, against the use of the added ingredient.

The defendant's second and sixth requested instructions are clearly covered by the general charge.

As to the fourth requested instruction, the court submitted to the jury, first, whether there was an implied warranty on the part of plaintiffs that the potatoes would not be processed in such a manner as to render them deleterious to health; and, if they so found, second, whether the product as processed was in fact detrimental to health. This was all defendant could ask, and it was not important that the statute rendered the sale unlawful, if the product was unhealthful.

All other exceptions to the general charge are either covered by instructions given, or are without cogency, unless it be the exception to the forms of verdict submitted, on the ground that neither of them authorized a recovery of damages on the part of defendant under the assumption that there was an implied warranty that the product was not decomposed or filthy, or not adulterated with the sulphur dioxide, so as to render it injurious or deleterious to health. The exception, by its wording, relates to a certain amount of the product still on hand and in the possession of the defendant at the time the action was instituted. An issue was tendered by a further and separate answer, and defendant claimed damages by reason of noncompliance with the alleged warranty in this respect. The question of defendant's alleged right of recovery on that ground was really never submitted to the jury by the instructions of the court. There was, however, no exception reserved to the lack of instruction upon the question, and no requested instructions were submitted covering the supposed issue.

We are of opinion that exception to the mere form of the verdict was insufficient to present the question here of the want of proper instructions covering the issue tendered by the pleadings. But, however this may be, the court having amply covered by its general charge the question of an implied warranty as to the wholesomeness of the potatoes as a food product, in so far as it related to their alleged filthy condition and adulteration with an added ingredient, namely, sulphur dioxide, and the jury having found for plaintiffs on the issue, as they must necessarily have done in rendering a general verdict for plaintiffs, the failure to instruct as to defendant's right to recover, should the jury find in its favor under the warranty, it is obvious, resulted in no injury to the defendant, and the error, if one were committed, is not reversible in character.

We may now turn our attention to the court's rulings during the trial. The first assignment of error relates to matter that the court made use of for illustration; the second, to remarks of counsel which were construed by counsel for defendant as intended to prompt the witness; the third, to certain testimony of Cardiff, wherein he was permitted to refer to his books for the information sought. The fourth

relates to an inquiry as to why plaintiffs purchased No. 1 potatoes instead of No. 2, so designated; the fifth, to the manner of handling the potatoes while being prepared for drying; and the sixth, to the court's refusal to permit cross-examination as to a matter involved by the examination in chief. In all these, there was clearly no error in the court's action.

Assignments 7 and 28 relate to some experiments of witnesses in placing sliced potatoes in water, to prevent oxidization, the purpose of which seemed to be to prove that it was unnecessary to use sulphur dioxide to preserve the white color. The attempted inquiry was immaterial, as sulphur dioxide had been used, and the real question was whether such use rendered the potatoes unfit for food consumption. There was no error in rejecting the testimony.

As to assignments 8 to 22, inclusive, it is sufficient to say that we have examined them in detail, and find no error. To state the issue involved by each of these assignments, and to discuss them severally, would unduly prolong the opinion of the court.

Assignments 27a and 28a (which we so designate to distinguish them from preceding assignments numbered 27 and 28), are untenable, on the grounds, first, that the witnesses White and Marshall were not shown to be qualified to answer; and, second, the hypothetical questions propounded to them were not based upon the facts proven.

The twenty-ninth assignment relates to an attempted reformation of the contract involved by the controversy. The witness Stanley was asked to narrate the conversation he had with Cardiff at the time the samples were produced, but prior to March 18th, the date of the execution of the agreement; that is, the conversation leading up to the agreement. An objection was sustained to the question, to which defendant excepted. Then this further question was asked:

"Was there any mistake in the reduction of that contract to writing and getting in the terms of the agreement that you had really made?"

To which, also, an objection was sustained. To get the effect of the instant controversy, the colloquy of counsel may well be recited. Plaintiffs' counsel interposed,

"I object, if the court please, if it has relation to the making of the terms of the contract. If there was any conversation relative to the sample, we have no objection to it. If it is an attempt here, under the guise of bringing out a conversation on one subject, to alter the terms of a written contract, we want to save our objection."

To which, after the ruling by the court, defendant's counsel replied:

"The defendant excepts to the ruling. I will state, if your honor please, probably I should more expressly, it is our purpose to show that there are some differences between this contract as it was written up and signed and what they had really agreed upon, and we think there was a mistake in that regard. The contract was drafted wholly by them and presented for our signature, and we want to show that, and to have the contract reformed to that extent; the mistake being in leaving out the agreement that was made, express agreement, as to the quality."

Assuming, without deciding, that it was legally competent to have the contract reformed in a court of law, the question really presented

was whether defendant was entitled to have it reformed, so as to introduce an express warranty of high quality of the commodity sold. The court adopted the theory, and we think properly, having in view the development of facts as the case proceeded under the evidence, that the sale was by sample, but submitted the question to the jury whether it was or not. If by sample, the sample became the measure as to kind and quality, and there was no need of reformation. The testimony shows beyond question, and the defendant admits, that its representative took samples of the potato chips, two in number, one of a smaller and another of a much larger amount, and experimented with them to his satisfaction, before the contract was finally consummated, or reduced to writing and signed. The controversy is slight, but one proper to submit to the jury, touching whether the parties entered into the contract with reference to the sample. We think, in view of the record, there was no error in the course pursued by the court.

Assignment 34 relates to a controversy touching whether Stanley, a witness called for defendant, should be permitted to testify as to the effect the color of potato flour would have upon its sale in the market. The court at the time was inclined to the opinion that the testimony was not pertinent, and, the witness having injected into his answer matter that was deemed not responsive, the court said, "Mr. Stanley, did you willfully add that last statement?" The witness replied, "No, your honor, I did not." Later, when it came to the rebuttal, plaintiffs' counsel called one Masters, and was about to interrogate him respecting the effect that dark color would have upon the flour in the market, to which defendant objected. Thereupon, at the court's suggestion, defendant was permitted to recall Stanley, who then testified respecting the matter that was ruled out when he was first on the stand.

It was insisted that Stanley should first testify, before Masters was permitted to proceed with his rebuttal. Complaint is made that, because of the supposed reprimand of the witness Stanley by the court, and the confusion resulting from the proceeding whereby Stanley was not permitted to testify, the proceeding was prejudicial and harmful to defendant's cause. It is by no means clear that such was the case. The court has a discretion in directing the method of procedure at the trial, to meet the ends of justice, and we find no abuse of such discretion attending the immediate controversy. It is obvious that what the court said to the witness was designed rather to control the drift of the particular inquiry than to reprimand him before the jury.

In this relation, we turn to assignments 40 and 44. The complaint is that plaintiffs were permitted to introduce evidence in rebuttal which was a part of their case in chief. The court most insistently confined the witness to the fitness of the dehydrated potatoes for human consumption as an article of food; the witness being permitted to take into consideration the sanitary condition of the plant at the time. The testimony was clearly in rebuttal, and there was no error.

Assignments numbered 26, 27, 30, 31, 33, and 36 involve largely an inquiry sought to be made touching the quality of the potatoes delivered as to color, and certain supposed faults, as black spots, including dry rot, and the use of green potatoes in the course of dehydration. Testi-

mony was offered with the purpose of showing that these conditions existed as respects the product that was delivered to the defendant, which in general was rejected by the court. It was the contention that the testimony was admissible and pertinent, because it was insisted that there was, if not an express, an implied, warranty attending the contract as to the merchantability of the product and its fitness for the uses and purposes for which it was purchased by defendant; that is to say, its manufacture into flour, its use in combination with wheat flour, and its sale upon the market to meet the demands of war conditions.

To clarify the situation somewhat, a restatement of the salient features of the case will not be amiss. A portion of the product, perhaps the larger part, was delivered to the defendant. The remainder was never so delivered, but after being manufactured was retained for the defendant in plaintiffs' warehouse; it being claimed that this portion in all respects conformed to the contract, and that defendant, although refusing to take it, as agreed, from the warehouse, was bound to accept it under the terms and conditions of the contract. As the trial proceeded, the very pertinent question arose as to whether, under the development of the facts and circumstances attending the contract, the sale was not by sample, and obviously the court was of the opinion that the cause should be submitted to the jury upon that theory, leaving it to the jury to say whether such was the case or not. The court furthermore submitted to the jury the question whether there was an acceptance by the defendant of the part of the product delivered to it.

Defendant stoutly insists that, notwithstanding all this, and aside therefrom, there was at least an implied warranty of fitness and merchantability, and that the remedy for a breach thereof even "survives acceptance of the goods sold." Generally, where goods are sold to be delivered, the rule supported by the weight of authority is that—

"If the goods, upon arrival at the place of delivery, are found to be unmerchantable in whole or in part, the vendee has the option either to reject them, or receive them and rely upon the warranty; and, if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods." English v. Spokane Com. Co., 57 Fed. 451, 6 C. C. A. 416; Tacoma Coal Co. v. Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

It is said by the court in Grisinger v. Hubbard, 21 Idaho, 469, 471, 122 Pac. 853, Ann. Cas. 1913E, 87, that the "acceptance of the goods does not waive the warranty, and the warranty survives the acceptance." This was not a sale by sample. It is however, a rule of equal significance that, if the goods conform to the contract between the parties, the vendor has his right of action for goods sold and delivered, without any formal acceptance by the buyer. Brigham v. Hibbard, 28 Or. 386, 387, 43 Pac. 383, and cases therein cited. Sale of goods to be manufactured is governed by the same rule; but, in order that title may pass, the goods must conform as to quantity and quality with the specifications of the order or contract. In case they do not so conform, an acceptance by the purchaser would be necessary to complete the sale. Johnson v. Hibbard, 29 Or. 184, 188, 44 Pac. 287, 54 Am. St.

Rep. 787. The authorities speak of a sale by sample as usually accompanied by an implied warranty—more properly, a condition precedent—that the bulk delivered shall conform to the sample by which the sale is made, in kind, character, and quality. 10 Am. & Eng. Enc. of Law (1st Ed.) 165; Pope v. Allis, 115 U. S. 363, 372, 6 Sup. Ct. 69, 29 L. Ed. 393; Wadhams v. Balfour, 32 Or. 313, 51 Pac. 642; Beirne v. Dord, 5 N. Y. 95, 55 Am. Dec. 321. In this last case, it is said, in effect, that if the goods do not conform to the sample the purchaser may either rescind the contract, by returning the goods in proper time, or keep them and recover damages for breach of such warranty.

Implied warranty, as applied to sales by sample, is really a matter of terminology. "Strictly speaking," says the court in Gunther & Rodewald v. Atwell, 19 Md. 157, 167, "a contract of sale by sample is not a warranty of quality, but an agreement of the seller to deliver, and of the buyer to accept goods of the same kind and quality as the sample. The identity of the goods sold, in kind, condition, and quality, with that of the sample is of the essence of the contract; and where the goods sold do not correspond with the sample, there would seem to be no performance of the contract."

[3] It must be conceded, however, that where the sale is by sample, and there has been an acceptance after inspection of the commodity, or there has been reasonable opportunity for inspection, either before or after delivery, to determine whether the commodity conformed to the sample, the sale is concluded, and the vendee is bound by his contract of purchase; and while it may be said that an implied warranty of kind and quality accompanies the purchase, there must be a time when the controversy comes to an end, and it is unreasonable and unusual for the purchaser to insist that, at any time after acceptance, however remote, he has a right to resort to the warranty for recoupment of damages. The principle should not be lost sight of that, where the commodity conforms to the sample, there is complete performance of the contract of sale.

In the instant case a controversy arose, as the evidence amply indicates, after a large amount of the potato chips had been delivered and taken to the defendant's mill, touching whether they conformed in kind and quality to such as the defendant purchased, and, after some correspondence and conference between the parties, many of the chips were returned to plaintiffs, and others delivered in their place. Negotiations finally went so far that the defendant, at the invitation of plaintiffs, sent an agent to the plaintiffs' warehouse, with authority to inspect the chips as they were being delivered, so that all the chips received by defendant were thus submitted to a rather careful and minute inspection by the defendant. The case really turned upon whether there was an acceptance as corresponding to sample, and the matter sought to be introduced thereby became irrelevant and immaterial, and we think there was no error in the assignments last noted.

The two letters covered by assignment 35 constitute certain demands by the defendant upon the plaintiffs, and are of no evidentiary value for the purpose for which they were offered.

Assignments 59 and 60 relate to the refusal of the court to permit expert witnesses to read from scientific books published by the Harvard University Press. Under the conditions prevailing, the court was right in its ruling. Davis v. United States, 165 U. S. 373, 17 Sup. Ct. 360, 41 L. Ed. 750.

We are satisfied, from a careful review of the entire record, that defendant has had a fair trial, and that no reversible error was committed.

Affirmed.

NG FUNG HO et al. v. WHITE, Immigration Com'r.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920. Rehearing Denied September 7, 1920.)

No. 3462.

1. **Aliens ⟸21—Chinese aliens who may be deported under Immigration Act 1917.**
   Under Immigration Act Feb. 5, 1917, § 19 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 4289¼jj. 4289¼u), an alien, who shall have entered or who shall be found in the United States in violation of the Chinese Exclusion Laws (Comp. St. § 4290 et seq.), may at any time within five years after entry, and irrespective of the time of entry, whether before or after passage of the act of 1917, be taken into custody on the warrant of the Secretary of Labor and deported.

2. **Aliens ⟸32(8)—Evidence insufficient to warrant deportation of Chinese alien.**
   That a Chinese alien was arrested for gambling and fined on a plea of guilty some years after his entry on a merchant's certificate, which was not impeached, *held* not sufficient to warrant his deportation on the ground that he had criminal tendencies or was likely to become a public charge at the time of entry.

3. **Aliens ⟸32(5)—In proceeding for deportation of Chinese, burden held to rest on government.**
   Where Chinese were admitted as citizens on evidence that their father was a native of the United States, the burden of attack rests on the government; but, where the evidence is sufficient to show that the original certificates granted them were obtained by fraud, deportation may follow.

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

Habeas corpus by Ng Fung Ho, otherwise known as Ung Kip, and others, against Edward White, Commissioner of Immigration for the Port of San Francisco. From an order quashing the writ, petitioners appeal. Affirmed in part, and reversed in part.

Geo. A. McGowan, of San Francisco, Cal., for appellants.

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.

HUNT, Circuit Judge. The appellants, Ng Fung Ho (alias Ung Kip), Ng Yuen Shew, Lui Yee Lau (alias Louie Pon), Gin Sang Get, and Gin Sang Mo, are five Chinese persons who have been ordered deported from the United States under executive deportation procedure for violations of the Chinese Exclusion Law (Act May 6, 1882, and amendments [Comp. St. § 4290 et seq.]). All of the appellants arrived in the United States prior to May 1, 1917, on which date an amendatory statute, known as the General Immigration Law (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 959, 960, 4289¼a, et seq.), became effective.

[1] The first question for decision is whether the Secretary of Labor, under sections 19 and 38 of the Immigration Act of 1917 (sections 4289¼jj, 4289¼u), and within the limitations stated therein, had authority to arrest and deport on departmental warrant, alien Chinese persons found within the United States in violation of the Chinese Exclusion Law, where entry was made prior to the date the above referred to act went into effect; i. e., May 1, 1917. Pertinent excerpts from the two statutes are as follows:

Act Feb. 20, 1907, c. 1134, § 20, 34 Stat. 898, 904, 905: "That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of * * * Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States."

Section 21: "That in case the Secretary of * * * Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section 20 of this act."

Act Feb. 5, 1917, § 19: "That at any time within five years after entry, * * * 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, * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: * * * Provided further, that the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States" (third proviso).

Section 38: "This act, except as otherwise provided in section 3, shall take effect and be in force on and after May 1, 1917: * * * Provided, that this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent except as provided in section 19 hereof: * * * Provided, further, that nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section 19 hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect."

It will be seen that section 38 contains two exceptions:

First, "except as provided in section 19 hereof;" and second, "except as mentioned in the third proviso of section 19 hereof."

Inasmuch as these exceptions were not included in sections 43 and 28 of the earlier act of Congress (1907), it is to be assumed they have

relation to the sections of the act of 1917 wherein they appear. Their effect is to modify and restrict the provisions of which they are a part, and we think that they accomplish this by excluding from the other provisions of the provisos the classes of aliens enumerated in section 19, to which the exceptions have reference. Section 19 at great length enumerates the classes of aliens subject to arrest and deportation by warrant of the Secretary of Labor and fixes the time where a limit is specified within which aliens subject to arrest may be taken into custody and deported and by the third proviso hereinbefore quoted, with the "exceptions hereinbefore" noted, the provisions of section 19 are applicable to the classes of aliens mentioned without regard to the time of the entry of such classes into the United States. The classes of aliens are not enumerated in the proviso to section 19, but they are clearly referred to. They are also included within the exception to the first proviso of section 38 by reference to the exception as provided in section 19, and also in the exception to the second proviso of section 38, where again reference is made to the exceptions mentioned in the third proviso of section 19.

We gain assistance as to the intent of Congress from the report of the Senate committee on immigration, which had under consideration the bill for the Immigration Act of 1917. The committee (64th Congress, Senate Report No. 352), referred to the provision of section 19 as being made retroactive, "with certain exceptions." It is true that the committee failed to express what "certain exceptions" it had in mind, but the context shows that the exceptions referred to were those "hereinbefore noted," as referred to in the third proviso of section 19. Among the exceptions noted and referred to are these: An alien who shall have entered or who shall be found in the United States in violation of the act of February 5, 1917; an alien who is hereafter sentenced to imprisonment for one year or more because of conviction in the United States of a crime involving moral turpitude committed within five years after the entry of the alien into the United States; an alien who is hereafter sentenced more than once to a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry. The statute is prospective as to those aliens who enter the United States in violation of the act, while as to the other classes the act is retroactive as to the time of the entry of the alien, but prospective in relation to conviction.

Notwithstanding the difficulty of construction, it is quite evident that the purpose of the proviso was to make section 19 applicable without regard to the time of entry into the United States. By changing the language used in the act of February 20, 1907, so as to make the act apply, not only to those "who shall enter," but to those "who shall have entered," there is evidence of intent to make the provisions of section 19 retroactive. Again, the report of the committee helps to clearer understanding by the statement that it was intended to continue the practice established under the act of 1907—

"of expelling aliens who enter or are found here in violation of the Chinese Exclusion Law, adapting the administrative process of the Immigration Act to that class of cases wherever the proceedings are instituted within the periods of limitation specified therein."

Considering it in all its words and in the light of the Senate report, we construe the law to be that an alien, who shall have entered or who shall be found in the United States in violation of the Chinese Exclusion Law, shall, at any time within five years after entry, and irrespective of the time of entry, whether before or after the passage of the act of 1917, be taken into custody on the warrant of the Secretary of Labor. In Mayo, Commissioner v. U. S. ex rel. Lee Wong Hin, 251 Fed. 275, 163 C. C. A. 431, the Court of Appeals for the Fifth Circuit, Judge Walker dissenting, expressed a different view. It does not appear, however, that the learned court had the benefit of the report of the Senate committee as an aid in the construction of the provisions of the act. But, however that may be, the conclusion we have reached seems to us to be correct and to call for decision in favor of the jurisdiction exercised by the Secretary of Labor. United States v. Woo Jan, 245 U. S. 552, 38 Sup. Ct. 207, 62 L. Ed. 466, cited by appellants, was decided after the Immigration Act of 1917 was passed and made no reference to the amended or new Immigration Law.

Ng Fung Ho, alias Ung Kip, and Ng Yuen Shew were arrested on warrants issued by the Assistant Secretary of Labor, dated September 20, 1917, charged with being found in the United States in violation of the Chinese Exclusion Law. They were duly arraigned, notified of their rights, had counsel, waived the right to have witnesses subpœnaed, and presented their claims by brief filed by counsel. Thereafter the aliens were ordered deported, and warrants of deportation were issued. There was evidence from which the conclusion was authorized that Ng Fung Ho, alias Ung Kip, at the time of his departure for China, was not a merchant within the meaning of the law, but was a laborer, and had been a laborer for years before his departure for China and that when he returned to the United States he again became a laborer. It was therefore found that his re-entry was accomplished by falsehood and fraud, and that he could not re-enter as a laborer, and did not have a laborer's certificate as provided by law. Inasmuch as the right of son, Ng Yuen Shew, to enter depended upon the status of the father, the decision that the son could not enter must be sustained. Ng Leong v. White, 260 Fed. 749, 171 C. C. A. 487.

[2] Lui Yee Law was arrested on departmental warrant dated February 16, 1918, and charged with being in the United States in violation of the Chinese Exclusion Law, in that he was a laborer not possessing a certificate of residence; that, though entering as a merchant, he has become a laborer; and also that he was a person likely to become a public charge at the time that he entered the United States. He had originally entered in 1915 as a merchant with a section 6 certificate. He was arraigned, had a hearing, was represented by counsel, and in due course was ordered deported, and warrant issued. In a judicial proceeding, had some time before the present proceeding, it was held that, although the mercantile status of the alien when he entered the United States had not been successfully challenged, nevertheless there was evidence to sustain the Department of Labor in holding that the man was a gambler, and had been a gambler for some months before his arrest, and thus the question was raised whether he was a person

likely to become a public charge. The evidence tended to show that about January, 1918, the alien lived in Texas, where he was a professional gambler; that about that time he was arrested in a gambling room; that he pleaded guilty to the charge of gambling and was fined $25. We agree with the ruling that there is nothing to show that the alien obtained his section 6 certificate by fraud or that it was untrue. Lui Hip Chin v. Plummer, 238 Fed. 763, 151 C. C. A. 613. But upon the evidence we are unable to find that the alien was likely to become a public charge at the time he entered the United States. Having entered in 1915, after producing a section 6 certificate, and not having been a public charge, we cannot see that an arrest in January, 1918, and a plea of guilty, and the payment of a fine of $25 tend to prove that the alien had criminal tendencies when he arrived in the United States, or was likely to become a public charge. Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114; Howe v. United States, 247 Fed. 292, 159 C. C. A. 386; Ex parte Hill (D. C.) 245 Fed. 687; Ex parte Mitchell (D. C.) 256 Fed. 229.

In Howe v. United States, 247 Fed. 292, 159 C. C. A. 386, the Court of Appeals for the Second Circuit held that the words "likely to become a public charge" are meant to exclude only those persons who are likely to become occupants of almshouses for want of means with which to support themselves in the future. This ruling was followed in Ex parte Mitchell (D. C.) 256 Fed. 229; the court citing Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114. We agree with those constructions, and therefore conclude that the appellant Lui Yee Lau is entitled to a reversal of the judgment against him and to an order of discharge.

[3] Appellants Gin Sang Get and Gin Sang Mo, claiming to be brothers, were arrested under warrants dated in November, 1917, charging that they were Chinese laborers found in the United States in violation of section 6 of the Chinese Exclusion Law of 1892 and amended in 1893 (Comp. St. § 4320), and that they had entered "without inspection by means of false and misleading statements." Hearing was had before the immigration authorities, and in due course the Assistant Secretary of Labor ordered the aliens deported; the record also shows that Gin Sang Get entered the United States July 24, 1916, and Gin Sang Mo on April 28, 1917. The aliens were examined at the time of entries, and thereafter admitted to the United States as citizens thereof. The evidence given at the time of their admission tended to show that they were brothers, and were the foreign-born sons of a Chinaman who had theretofore been discharged as a native of the United States by the United States court at San Francisco. The record further shows that, soon after the aliens were admitted, upon investigation it was discovered that certain employés of the Immigration Service at San Francisco had removed the original transcript of evidence concerning the alleged father's landing record.

We need not state the evidence at length; suffice it to say that the immigration authorities discovered that a Chinaman had testified in 1917 that he was the father of the two aliens above mentioned, had testified in 1902 that he was not married, and had testified in 1909 that

he was married, and had named his children, but failed to include Gin Sang Get and Gin Sang Mo. Opportunity was given to the aliens to produce the testimony of their alleged father, and although it was shown that he was in San Francisco, or in the vicinity of that city, he did not appear. The fact that the aliens were admitted into the United States, and that certificates of identity were issued to them, did not foreclose the right of the immigration authorities to institute new proceedings, provided they had sufficient reason to believe that the original findings had been founded upon evidence which was false and perjured, and that the aliens were not lawfully within the United States. In view of the fact that certificates had been issued, the burden of attack is upon the government; but, if, as in this matter, evidence sufficient to show that the original certificates were invalid has been introduced, deportation may follow. Wong Yee Toon v. Stump, 233 Fed. 194, 147 C. C. A. 200; Lui Hip Chin v. Plummer, 238 Fed. 763, 151 C. C. A. 613.

In conclusion, the orders of the District Court, quashing the writ of habeas corpus and remanding petitioners to the custody of the immigration authorities, are affirmed as to all except Lui Yee Lau. As to him the order is reversed, and he is ordered discharged.

Affirmed in part, and reversed in part.

JACKSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920. Rehearing Denied September 7, 1920.)

No. 3405.

1. **Criminal law ⇐1170½(5)—Exclusion of cross-examination as foundation for impeachment held harmless error.**
   Error in excluding cross-examination as to whether witness did not make a certain statement contradictory of his testimony, in the presence of persons named, *held* not prejudicial, where such persons subsequently testified that the witness did make the statement.

2. **Forgery ⇐48—Instruction as to presumption of intent approved.**
   In a prosecution under Act Aug. 29, 1916, § 41 (Comp. St. § 8604u), for forging of bills of lading with intent to defraud, an instruction that a finding that the bills were delivered to defendant without the signature of the railroad agent, and that he negotiated them to secure money, would raise a presumption that he forged the agent's signature with intent to cheat and defraud, *held* not erroneous, where it expressly charged that such intent was essential and that guilt must be established on the whole evidence beyond a reasonable doubt.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Criminal prosecution by the United States against S. C. Jackson. Judgment of conviction, and defendant brings error. Affirmed.

Jackson was convicted under two counts of an indictment for violation of the act of Congress relating to bills of lading in interstate commerce, approved August 29, 1916 (39 Stat. p. 538 [Comp. St. § 8604u]). The charge was that

he forged certain interstate bills of lading, dated, respectively, September 15, 1917, and September 18, 1917, each bill purporting to represent a certain shipment of milk from Newberg, Or., to New York. In one count the shipment was charged to have been in car No. S P 91268, and in the other count car No. S P 93659. Shipment was alleged to have been made from the Western Condensed Milk Company, consignor, to order of Logan Commercial Company. There was evidence tending to show the following state of facts:

The Western Condensed Milk Company, consignor, had a plant at Newberg, Or. The Scio Milk Company had a plant at Scio, Or. The Logan Commercial Company owned a controlling interest in the two milk companies. F. L. Daggett was local manager of the Western Condensed Milk Company and of the Scio Milk Company. Jackson was an owner in, and president and treasurer of, the Logan Commercial Company. Logan and Jackson owned the Logan Commercial Company, which was engaged in the milk brokerage business. About September 11, 1917, at Albany, Or., Jackson asked Daggett to make out two bills of lading for cars of milk, one to be shipped from Scio on the 18th, and one from Newberg on the 15th, saying that he might want to use the bills for a day or two at the bank until the cars came representing the shipments. Daggett made out the typewritten portion of two such bills of lading, and signed his name thereto, and mailed them to Jackson at a hotel in Portland, and returned to Newberg, where he found the bills of lading, which Jackson had returned to him. Daggett then telephoned to Jackson in Portland, and Jackson told him that he (Daggett) had used serial numbers of cars in only four figures, and that all of the cars ran in five figures, and that, instead of having one shipment come from Newberg and one from Scio, to make both come from Newberg. Daggett also testified that he then made out the bills of lading described in the indictment, but that the signature of the agent of the railroad company was not on the bills when they left his hands, and that he personally mailed them to Jackson at Seattle from Newberg on September 14th, and that they were in the same condition as when in evidence on the trial, except that the railway agent's name was not signed when he sent them. Witness said that he did not present the bills to the agent of the Southern Pacific Company; that no milk was delivered to the railway company represented by the two bills of lading.

Guild, manager of the Logan Commercial Company at Seattle, testified that to the best of his knowledge Jackson gave the bills of lading to him and told him to take them down and get them "diverted," and put them through in the usual course of business. Witness then took them to the railroad company, and had them diverted to the Oregon Railroad & Navigation Company for bills of lading, and took the bills to the bank and drew against Ward & Co. and got credit for the Logan Commercial Company. The evidence further tended to show that there was no such car in existence in September, 1917, as S P 93659, and that, although there was a car S P 91268, it was a gondola type, with a chute at the bottom, and that on September 15, 1917, the gondola car was in California, and not in Oregon, and never during the month of September, 1917, was car No. 91268 loaded or shipped from Newberg, Or.

James, the agent of the Southern Pacific Company at Newberg, Or., testified that the signature, G. W. James, and the initials, C. S., upon the bills of lading described in the indictment, were not his signatures, and were not signed by any person authorized by the Southern Pacific Company; that neither of the bills of lading referred to in the indictment was ever issued by the Southern Pacific Company; that in all cases bills of lading were made out by shipper, who put the car number and initial in, and that the railway company would then check it; that the Western Condensed Milk Company would load the car at its plant, and before the agent would sign the bill of lading he would check the car. Witness further gave a detailed statement of the only cars that went out of the Southern Pacific yards at Newberg from the plant of the Western Condensed Milk Company during September, 1917, and the list did not include the car numbers referred to.

Defendant denied that he ever had any conversation with Daggett about the preparation of the bills of lading, and denied any knowledge of them or

of their negotiations; said that he left Seattle on the 14th of September, 1917, and went to Tillamook, Or., and did not return to Seattle until the morning train of the 19th, having left Portland for Seattle on the night of the 18th. The theory of the defendant was that Daggett did not write the bills of lading at Albany, Or., but wrote them at Newberg, in the usual course of business, and that the two carloads of milk were shipped on the bills of lading, or that he wrote the bills for his own purpose, to cover up some possible shortage in his accounts.

Jay C. Allen and George H. Rummens, both of Seattle, Wash., for plaintiff in error.

Robert C. Saunders, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., both of Seattle, Wash.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). It is said that the court erred in excluding a copy of letter dated December 8, 1917, written by Logan Commercial Company, by J. R. Guild, manager, to Daggett, at Corvallis, Ore. The letter advised Daggett that the representatives of the Oregon-Washington Railway & Navigation Company had called upon the Logan Commercial Company concerning two cars shipped in September, 1917, which appeared to have the wrong car numbers. Guild, as manager, states in the letter that he is not familiar with the situation, and trusts that Daggett will be able to give the railroad company the information they desire. We do not see how the exclusion of this letter could have prejudiced the rights of the defendant. The letter refers to the lack of familiarity of the writer, Guild, with the situation. Inasmuch as Jackson testified that he disclosed everything to the railway officials, the letter could throw no light upon the situation as explained afterwards by Jackson.

The next contention is that the defendant was prejudiced by the limitations imposed by the court in the cross-examination of the witness Daggett. In the course of the cross-examination Daggett was asked this question:

"Knowing the fact he was going to use them to palm off on the bank, but you yourself helped him write them. Is that true?"

There was no error in excluding the question. It was argumentative in form, and assumed a state of facts contrary to that testified to by the witness.

Nor did the court err in sustaining objections to cross-questions put to Daggett in respect to the insurance business, with which Daggett testified he had at one time been connected. The witness said that he had been in the insurance business after he had served as mayor of Spokane; but the exact nature of the insurance business carried on by him was wholly irrelevant to the case on trial.

[1] Error is assigned to the sustaining of objections to the following cross-question put to Daggett:

"Did you not in the presence of those three (Van Osdol, Kirkup, and Phelps) say in substance and in effect that Jackson was not in town at that time (September 17, being the time witness took the books to Seattle), and you could not see him while you were in Seattle?"

Inasmuch as the witness Daggett had testified that he believed that he had seen the defendant Jackson in Seattle about the time he took certain books up to that city (September 17), the question asked was proper, as laying a foundation for the introduction of impeaching evidence. But the error could not have been prejudicial, because upon the examination of Phelps, called by the defendant, he testified that about the 18th of September, when Daggett returned to Newberg, after having been to Seattle, the witness heard Daggett, in the presence of Kirkup and Van Osdol, say in substance and effect that he had been sent to Seattle on a wild goose chase; that he went there to fix the books, but when he got there he found that Guild was sick; that Jackson was not in town, that Logan was not there, and that he had to come right back. The witness Van Osdol, also called by the defendant, testified that he heard Daggett say something to the same effect. The third person, Kirkup, was not called.

The next point urged is that the court erred in excluding an exhibit offered by defendant for identification. Daggett had testified that he never had "signed bills of lading until the carloads of milk were actually shipped out." For the purpose of discrediting this statement, and to show a contrary practice, counsel sought to introduce a letter, written by Daggett at Newberg, dated September 26, 1917, wherein he said that—

"Logan is going to Corvallis this evening. Will leave bills of lading for car now loading, so there will be no delay when loaded, whether I get back or not."

The letter was dated after the transactions under investigation were had, and had no direct bearing upon the contention that Daggett testified falsely when he said that he never had signed bills of lading until the carloads of milk were actually shipped out.

Guild testified on cross-examination that the bills of lading came to the office for shipment of carloads of milk upon which there were no car numbers. The question was then asked whether such bills of lading were signed by the agent. Witness Guild said: "I have." The answer was stricken out, and defendant excepted. The purpose of the cross-examination, as stated by defendant's counsel, was to show that the railway agent at Albany, Ore., often sent out bills of lading with no car numbers on them. Granting that there was such a loose practice pursued on the part of the agent at Albany, it had no relevancy to the matter connected with the bills of lading issued at Newberg, and involved in the particular transaction under investigation. But, however that may be, defendant was not injured, as Guild later testified directly that sometimes bills of lading had come to the office without the railway agent's signature, and that cars sometimes reached their destination where the car numbers were different from the numbers included in the bills of lading.

It is next urged that the court erred in denying the offer of testimony of certain statements made by Jackson. There was evidence tending to show that Jackson, prior to September 14th, had announced his intention of going to Tillamook, Or. Counsel for defendant sought to prove by the witness Van Osdol that Jackson had talked with him

concerning establishing a plant at Tillamook, and thus wanted to corroborate the theory of the defense that prior to the 15th of September Jackson had stated to the witness that he intended to go to Tillamook for that purpose. Inasmuch as there was the direct statement of Jackson to the effect that he was not in Seattle at the time that became a material issue, the fact that Jackson had stated to Van Osdol that he intended to go to Tillamook would not be of probative value.

On cross-examination the witness Guild was asked whether or not, about December 1st, he did not locate two cars of Western Condensed Milk, one at Boston and one at Bordeaux, for which there were no bills of lading. The witness replied that there were two cars not located, but that he could not say they both came from the Western Condensed Milk Company but he believed they did, but he could not swear where they originated; that he could not trace the bills of lading with respect to those cars, and that he had no personal knowledge of the matter at all. The bill of exceptions does not show that the court sustained objections to the testimony just referred to; but, assuming that counsel correctly states that counsel for the government objected to such testimony, and that the objection was sustained, and that exception was noted, we fail to see where there was error in the ruling. Surely the misdirection or loss of two cars, as referred to, did not tend to relieve the defendant of the crime of forging the bills of lading described in the indictment.

[2] Objection is made to an instruction to the effect that, if the jury were satisfied that the bills of lading were delivered to Jackson without the signature of the railway agent being attached, and that Jackson issued the bills by delivering them to a subordinate in his office, to be negotiated and to secure advances, then the presumption would be that he forged the name of the railway agent, and that unless such persumption was rebutted, or the evidence raised a reasonable doubt of guilt, a verdict of guilty should be rendered. In the same instruction the court expressly charged that intent to cheat and defraud must appear from the evidence, in order to warrant the conclusion that the defendant acted with unlawful intent charged, and that if, upon the entire evidence, there was a reasonable doubt of guilt, defendant must be found not guilty. Thus the instruction defined the offense charged as always including the element of intent to defraud as an essential ingredient, and laid down the proposition that, if Jackson received the bills of lading without the signature of the railway agent, and negotiated them to secure money, then the presumption would be he intended to cheat and defraud, and that unless he rebutted the presumption, or there was a reasonable doubt of his intent, he should be convicted. The presumption was in no way regarded as conclusive. This is in accord with the rule in forgery cases. Spencer v. Commonwealth, 2 Leigh (Va.) 751; State v. Britt, 14 N. C. 122; Underhill on Cr. Evi. § 423; State v. Williams, 152 Mo. 115, 53 S. W. 424, 75 Am. St. Rep. 441.

Other objections to the charge are of less importance. They have received attentive consideration and are not grounds for disturbing the judgment.

We are asked to reverse the case because the court declined to instruct the jury to find the defendant not guilty for lack of insufficient evidence. But as the verdict was predicated upon substantial evidence to support it, this court will not say that the lower court should have directed acquittal.

Judgment affirmed.

BOSTON, CAPE COD & NEW YORK CANAL CO. v. C. W. CHADWICK & CO.

(Circuit Court of Appeals, First Circuit. September 1, 1920.)

No. 1463.

1. **Canals ⟸2—Dredged approach held part of canal.**
   The dredged approach to the Cape Cod Canal through the navigable water of Buzzard's Bay, which was necessary to enable vessels to reach the canal, is for some purposes a part of the canal.

2. **Canals ⟸29—Pilot of canal company held acting within authority in piloting through dredged approach.**
   A licensed pilot of a canal company, which furnished such pilots to vessels passing through the canal under its charter authority to assist vessels in their approach to and from the canal, is acting within the scope of his employment by the canal company while piloting a vessel through the dredged approach to the canal in Buzzard's Bay, so as to render the canal company liable for his negligence.

3. **Canals ⟸29—Pilot's negligence actionable, regardless of vessel's obligation to take canal pilot.**
   Where a canal pilot furnished by the canal company assumed to pilot a vessel through the dredged approach to the canal, the canal company is liable for his negligence, regardless of whether the vessel was required to take the pilot for its passage through such approach.

4. **Canals ⟸29—Canal company liable for unlicensed canal pilot's negligence.**
   A canal company, which licensed a pilot to assist vessels through the canal, cannot avoid liability for his negligence while piloting a vessel through the dredged approach to the canal in a navigable bay, on the ground that he had no government license to pilot in such bay, so that his employment by the vessel violated Rev. St. § 4438 (Comp. St. § 8200).

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

Libel by C. W. Chadwick & Co. against the Boston, Cape Cod & New York Canal Company. Decree for libelant, and respondent appeals. Affirmed.

Samuel H. Pillsbury and Thomas H. Mahony, both of Boston, Mass. (Currier & Young, of Boston, Mass., on the brief), for appellant.

Edward E. Blodgett and Foye M. Murphy, both of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. The appellee was awarded damages in the District Court for the stranding of the steam tug Scranton in the Buzzard's Bay approach to the Cape Cod Canal. The Scranton, having a barge in tow, presented herself for passage at the eastern end of the canal on January 3, 1916. At this time the canal company, in its charge for tolls for passage of the canal, included the services of a canal pilot, furnished by it, and also that of a towboat, if needed, and under the regulations which it had issued no tug was allowed to go through the canal with a tow, unless under the charge of a pilot whose license included navigation of the canal.

Capt. Frank J. McBride, by virtue of a written appointment under date of October 1, 1915, was charged with "the duty of handling the traffic through the canal safely and expeditiously." He had a license as a canal pilot which had been issued to him by the canal company, and, while he did not act regularly as a pilot, he had upon several former occasions piloted vessels through the canal. He boarded the Scranton and told its captain that the regular pilots were all employed, but that he would take her through the canal, and she proceeded with her tow under his command. On the passage through the canal he showed Capt. Brophy of the Scranton his license as a canal pilot.

The Buzzard's Bay, or western, entrance of the canal was reached about dark on January 3d, and as it was snowing she tied up there with her tow for the night. As Capt. McBride was leaving the Scranton that night, he testified that he said to her captain:

"You are all right now; you can start off any time in the morning you are a mind to."

And the captain replied:

"I would like to have somebody go out with me in the morning. I have only been in and out of here a couple of times."

And McBride replied:

"I will come down in the morning, and I will try to have a boat to give you a hand away from the dolphins."

Capt. Brophy of the Scranton testified that Capt. McBride said to him:

"You saw the canal going east, and you can take her out."

And that he said in reply:

"No; I have not seen enough of this place yet to get through without a pilot"

—and that he told him "to come back and finish the job," and Capt. McBride said:

"All right; I will come down in the morning."

Capt. McBride did come down the next morning, and undertook to pilot the Scranton with her tow out through the channel, which had been dredged in Buzzard's Bay and formed the approach to the canal

at that end, and had proceeded about 3 miles through this dredged channel when the accident occurred.

Under the charter which had been issued to the canal company by the commonwealth of Massachusetts the canal company was authorized "to construct a ship canal beginning at some convenient point in Buzzard's Bay and running * * * to some convenient point in Cape Cod or Barnstable Bays." Acts of 1899, c. 448, § 3. Under this authorization it had dredged a channel in Buzzard's Bay to the entrance of the canal, which was shown upon the book of information and regulations issued by the canal company for the use of the public.

The District Judge has found that:

"The canal begins as a dredged channel in Buzzard's Bay near Wing's Neck, some 5 miles from where it first cuts the shore at Buzzard's Bay village. This channel is about 250 feet wide, with sloping sides. It is marked by buoys placed by the United States. Near Wenaumet Point [or "Neck"] the south side of the channel approaches the shore, which in that vicinity is strewn with boulders. That shore and the south bank of the canal adjacent are known to navigators to be dangerous because of these boulders. The other bank of the canal at that place is comparatively free from them and is much the safer one to follow."

He also found that the evidence that Capt. McBride's piloting was faulty is too clear to require discussion, and that the accident occurred solely by reason of his negligence, that the dredged channel was in effect an extension of the canal through the tidal waters of the bay, that McBride was acting as the agent of the canal company within the scope of his employment at the time of the accident, and that it is liable for the damage occasioned by his negligence.

The appellant has assigned these findings as error, and a disposition of them will dispose of all other errors assigned.

[1] We think the District Judge was right in holding that the duty which the canal company had assumed of furnishing a pilot through its canal extended to the approaches to the canal at either end, and that, while the landlocked canal began at the Buzzard's Bay entrance, about three miles from where the accident occurred, the channel which it had dredged as an approach to its westerly end was, for some purposes at any rate, as held by the District Judge, a part of the canal. The waters of Buzzard's Bay were too shoal to allow vessels of the drafts which the canal would accommodate to reach it, and it was necessary to dredge a channel, so that the canal might be reached by them. In the book of information issued by it this dredged channel is clearly shown, and instructions are given in regard to its navigation, as well as that of the landlocked canal. The canal pilots who came aboard vessels at the westerly end of the canal customarily boarded them at Wing's Neck, 5 miles from the westerly end of the canal, and piloted them through this dredged channel, and they customarily left them here after they had piloted them through the canal from the eastward.

[2] By its charter the canal company was authorized to maintain and operate steamers and other vessels—

"or use any other means or methods for assisting vessels in their approach to and passage through and from the canal."

Thus by its charter authority was given to the canal company to assist vessels "in their approach to * * * and from the canal," as well as on their "passage through," and this assistance would include the furnishing of pilots as well as tows.

We are satisfied that it was the duty of one who assumed to act as a pilot of a vessel through the canal to pilot her, not only through that part of it which was landlocked, but also through the dredged channel which constituted the approach to it at either end.

Although there was nothing in the written appointment of McBride in regard to his acting as a pilot for the canal, yet to perform "the duty of handling the traffic through the canal safely and expeditiously," a license as a pilot for the canal had been issued to him by the canal company; and it must have been intended by it that he should act as a pilot, if an occasion arose when it should be necessary for him to do so. It is significant, also, that in the report of the accident made by him to the canal company upon the very day that it occurred, he stated:

"I was piloting the tug Scranton of the D., L. & W. R. R. from Buzzard's Bay with one light Brg. in tow. Left Buzzd. Bay * * * bound for Wing's Neck"

—and that there is nothing in the record to show that the canal company ever repudiated his acting as a pilot for the dredged channel until the trial.

Capt. Robbins, who was in command of one of the towboats chartered by the canal company, testified that Capt. McBride asked him to take him aboard the Scranton and follow the Scranton down to Wing's Neck to take him off, as "he was going to pilot her down."

We are satisfied with the findings of the District Judge that Capt. McBride was acting within the scope of his employment in piloting the Scranton at the time of the accident, that the accident was occasioned by his negligence, that there is nothing in the evidence which would excuse the mistake which he made in laying out the course to be steered by the Scranton at the time of the accident, and that the accident was not occasioned by the Scranton striking against any submerged object which was temporarily within the channel and whose presence was unknown, but by getting out of the channel while under the direct control of Capt. McBride and striking upon a boulder upon or near its bank.

[3] We think it immaterial whether the Scranton was required by the canal company at this time to take a pilot furnished by the canal company or not, as we deem it sufficient for the purposes of this case that Capt. McBride assumed to act as a pilot furnished by the canal company, whose services were paid for in the tolls charged for the passage of the canal, and for his negligence it is clear that the canal company is liable.

[4] It was also contended by the appellant that, as McBride was only licensed as a canal pilot, and had no government license covering the navigable waters of Buzzard's Bay, he was employed by Capt. Brophy in violation of section 4438, Revised Statutes of the United

States (section 8200, Comp. Stat.), which makes it unlawful to employ as a pilot of a steamer of the tonnage of the Scranton one who has not been licensed by the government inspectors, and that such violation was the sole or at least a contributing cause of the accident, which would prevent a recovery by the libelant, although McBride was acting as agent of the canal company and was negligent. While the dredged channel which constituted the approach to the canal proper was in the navigable waters of Buzzard's Bay, it is evident that, at the date of the accident, one who held a pilot's license for those waters would not necessarily have knowledge of the channel which had been dredged by the canal company, for Mate Totman of the Scranton had such a license, but did not have sufficient knowledge of the dredged channel to act as pilot through it, and one who had special knowledge in regard to it was necessary. The canal company, by granting a license to McBride, held him out as one who had such special knowledge, and if it issued him such a license without his having obtained a government license as a pilot for Buzzard's Bay, it cannot take advantage of its wrong by claiming that it should be relieved from the consequence of his negligence because he did not have a government license.

We think that a license to act as a pilot for the canal included, not only that portion of the canal which is landlocked, but also the necessary approaches to it, and that McBride, when he came abroad the tug upon the morning of January 4th, was acting as a canal pilot as fully as he did upon the day before, and that the canal company is liable for his negligence.

The decree of the District Court is affirmed, with costs to the appellee in this court.

GREEN et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 7, 1920.)

No. 5547.

1. **Post office ⇐48(4)—Indictment for using mails to defraud held sufficient.**
An indictment alleging the scheme to defraud with sufficient particularity to acquaint defendants with its nature *held* sufficient under Penal Code, § 215 (Comp. St. § 10385), and not subject to the objection that under it proof might take a range not anticipated; there being no suggestion that in fact the proof did take an unanticipated range.

2. **Criminal law ⇐730(3)—Demand on defendant to produce letter held not prejudicial, in view of instructions.**
A demand by the prosecuting attorney that defendant produce a letter shown to have been written to him was not prejudicial to defendant, so as to require reversal of the conviction, where the court immediately instructed the jury that such demand was improper, and also stated that the prosecution could, if they desired, introduce a copy of the letter, which they did not do.

3. **Criminal law ⇐706—Demand in jury's presence to produce letter is inexcusable misconduct.**
A demand by prosecuting attorneys on the defendant, made in the presence of the jury, for the production of a letter in defendant's possession, is inexcusable misconduct by the attorneys.

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4. **Criminal law ⊂=1171(5)—Reference to failure of codefendant to testify held not prejudicial, after acquittal of codefendant.**
In a prosecution against several defendants charged with using the mails to defraud, a reference by the prosecuting attorney to the failure of one defendant to testify in his behalf does not require a reversal of the conviction of other defendants, where the court properly instructed the jury to disregard the reference, and the jury acquitted the defendant referred to.

5. **Criminal law ⊂=720(7)—Reference to corporation promoted by defendants in closing argument held not error.**
Charges by the government's attorney, in his closing argument in a prosecution for use of the mails to defraud, that the corporation involved was misnamed, because it was neither a "guarantee" nor an "investment" company, and was "great" only in the sense that Jesse James was great, was not error, where the charges in the indictment, if sustained by the evidence, which was not in the record, showed the scheme to be a base fraud.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Ellsworth H. Green and another were convicted of using the mails to defraud, and they bring error. Affirmed.

John B. Dudley and Ed. S. Vaught, both of Oklahoma City, Okl. (Everest, Vaught & Brewer and Shartel, Dudley & Shartel, all of Oklahoma City, Okl., on the brief), for plaintiffs in error.

Herman S. Davis, Asst. U. S. Atty., of Frederick, Okl. (Herbert M. Peck, U. S. Atty., of Oklahoma City, Okl., on the brief), for the United States.

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

JOHNSON, District Judge. Plaintiffs in error, E. H. and E. J. Green, and seven others, were tried in the court below for using the mails to defraud. Plaintiffs in error were convicted; their codefendants were acquitted by the jury or discharged by the court.

[1] Plaintiffs in error demurred to the indictment on the ground that it did not state facts sufficient to charge an offense, under section 215 of the Penal Code (Comp. St. § 10385). Their demurrer was overruled, and they have assigned this action of the court below as error. The objection of the plaintiffs in error to the indictment is stated in the most general language in their brief. They say:

"In the first place, the nature, purpose, plan, and substance of the scheme are not set out with sufficient particularity to acquaint the defendants with the nature of the charge. The scheme is simply outlined in a general way, under which the proof might take a range never anticipated nor expected by the defendants. In the second place, there is no allegation that the stock sold was not worth the price paid, or that the persons referred to as 'victims' were induced to buy and pay for anything that they did not actually get."

The sufficiency of indictments under section 215 of the Penal Code has been considered so many times by this court that we deem it unnecessary to set out or discuss the allegations of the indictment in

this case. Brooks v. United States, 146 Fed. 223, 76 C. C. A. 581; Horn v. United States, 182 Fed. 721, 105 C. C. A. 163; Gardner v. United States, 230 Fed. 575, 144 C. C. A. 629; Moffatt v. United States, 232 Fed. 522, 146 C. C. A. 480.

Tested by the rules laid down in the above-cited decisions of this court, the indictment in this case is sufficient. It alleges the nature, etc., of the scheme with sufficient particularity to acquaint the defendants with the nature, etc., of the charges made, and it is not suggested that the proof did in fact take a range never anticipated nor expected by the defendants.

The second ground that "there is no allegation that the stock sold was not worth the price paid, or that the persons referred to as 'victims' were induced to buy and pay for anything that they did not actually get," has been decided by this court in Wine v. United States (C. C. A.) 260 Fed. 911, against this contention of the plaintiffs in error.

[2] Plaintiffs in error assign as error misconduct of the district attorney in making demand, in the presence of the jury, on the attorneys for the defendants (plaintiffs in error) to produce the original of a certain letter claimed to have been written by the defendant E. J. Green to his son, the defendant E. H. Green, and of which said letter, at the time, the district attorney claimed to have in his possession a carbon copy. The record shows this matter to have come up in the trial in the following way: The assistant district attorney had called as a witness on the second day of the trial the young woman who had been a stenographer in the office of the defendant E. J. Green, and, showing her an exhibit, asked to whom the letter was addressed. The witness having answered, the assistant district attorney said:

"We now make demand on the attorneys for Mr. Green to produce, if he has it in his possession, the original of the letter written on January 30th to Mr. Ellsworth H. Green, 518 Culbertson Building, Okl."

The court immediately intervened, saying: "You are not making a demand on the defendant, are you?" To which the assistant district attorney replied: "Yes, sir." The court continued:

"That will not be permitted. The jury will not consider that demand at all. It is not justifiable or permissible in a criminal case to ask any evidence of the defendant."

The assistant district attorney then said: "I was asking it only on the ground that it is the best evidence." To which the court replied: "It is not necessary to make a request of that kind on the defendant." The defendant Franke, by his counsel, then intervened by saying:

"The defendant Franke saves an exception to the demand made by the district attorney, and asks the court at this time to instruct the jury not to consider that demand."

Thereupon the court said:

"The fundamental law in this country is that no man can be required to be a witness against himself, and it infringes that rule to ask at the trial for any document defendant possesses, even of his counsel. Therefore the ex-

ception is well taken, * * * and you will not give any consideration to it at all, but disregard it altogether, and be sure you take it out of your minds. In order that there may be no trouble about the point, the court rules that, if the instrument is traced to the possession of the defendant, then secondary evidence, or a copy, can be introduced at the trial, if otherwise admissible. The rule is not that way in civil cases. The best evidence must always be introduced, and that is the original. The rule is different in a criminal case. You will take out of your minds altogether any consideration of the request."

At the conclusion of the government's case in chief, 12 days later, counsel for the plaintiffs in error, E. H. and E. J. Green, made the following motion:

"The defendants E. H. and E. J. Green now at this time move the court to discharge the jury and these defendants for the reason that heretofore during the trial the United States attorney, with a copy of a purported letter or instrument in his hand, demanded of the defendants E. H. and Ellsworth J. Green the production of what the district attorney claimed to be the original, and thereby sought to compel said defendants to give testimony against themselves, and unduly and unwarrantedly and without authority of law referred and brought to the jury's attention the fact that they were refusing to testify against themselves, or refusing to testify in favor of themselves, and for the reason that the conduct of the district attorney in making the demand was unwarranted, unlawful, prejudicial, and that no deduction can be made from it, except that it was an unwarranted reference before the jury, and calling the jury's attention to the fact that they were refusing to testify in their own behalf or against themselves."

Passing upon the motion at the time, the court said:

"That matter has been considered before, and the ruling of the court was then and is now that the request was improper, but was taken out of the case as thoroughly as possible, and I think the effect of it has been taken out. For that reason the motion is overruled."

Counsel for defendants (plaintiffs in error) thereupon excepted to the ruling of the court.

Assuming, but not conceding, that the objection and exception of the plaintiffs in error, taken 12 days after the act of the assistant district attorney complained of, was in time, we do not think any prejudice resulted to the defendants (plaintiffs in error) by reason of this unseemly action of the assistant district attorney. As appears from the record, the court intervened immediately after the demand had been made, and the defendants were not required, even by the lapse of time, to admit or deny the possession of the letter.

The Court advised government counsel in the presence of the jury that, if he could trace possession of the letter to the defendants, then a copy could be introduced, if otherwise admissible. The fact that the government failed to introduce the copy which it claimed to have at the time the demand was made, in view of this ruling by the court, it seems to us would tend to create an impression (if it is to be assumed that any impression resulted in the minds of the jury) unfavorable to the government.

[3] The action of the assistant district attorney in making such a demand upon the defendants, or their counsel, in the presence of the jury, was inexcusable, in view of the elementary character of the rule violated and of the many decisions on the subject. However, our

opinion is that the prompt action of the trial court prevented any probable prejudice to plaintiffs in error. Chadwick v. United States, 141 Fed. 225, 72 C. C. A. 343; Dunlop v. United States, 165 U. S. 498, 17 Sup. Ct. 375, 41 L. Ed. 799.

[4] Exception is also taken by the plaintiffs in error to the remarks of counsel for the government in their arguments to the jury. They assign as error that the assistant district attorney in the opening argument—referring to the defendant C. H. Cochran—said: "He [Cochran] didn't take the stand." Counsel for the government, apparently realizing his error, immediately added: "I beg your pardon. I don't want to refer to him." Counsel for Cochran objected and excepted to the statement, when, after a short colloquy, the court said:

"Counsel has disclaimed any intention to make the remark, and that withdraws it, and you will so consider it, gentlemen. The defendant is under no obligation to take the stand, and no comment can be made upon it. You will not allow yourselves to give any attention to such matter. The government has the burden of proof in the case. That is the question here, whether it has done so by the proof beyond a reasonable doubt."

Following the statement of the court above quoted the assistant district attorney attempted to explain, qualify, and apologize for his statement, when counsel for the defendant Cochran and plaintiff in error E. J. Green continued to object and except. The court intervened by saying:

"The subject isn't open to comment, and counsel will proceed. No further explanation is necessary."

In the closing argument of the government the assistant district attorney (not the assistant who made the opening argument) also commented upon the fact that the defendant Cochran had not testified in his own behalf in the case. This comment, it appears from the record, was not called to the attention of the court until the following day, when the court, addressing counsel, said:

"In your argument something appeared in the way of comment that the defendants, particularly the defendant Cochran, did not take the stand in this case, or at least in the nature of an argument on that ground. That is wholly improper, even though it may have been inadvertent, and whether so or not, all such comment and argument must be withdrawn, and should be by counsel in express terms; and now, gentlemen of the jury, I wish to emphasize the principle, which is well settled, that it is not permissible to comment on the fact a defendant does not take the witness stand, and the court would not mention it, unless it came up as it has in the case. The burden of proof rests on the government to make out an offense, each of the offenses here charged, and unless that burden is met by sufficient evidence, of course, none of the offenses can be taken as established. That being a fixed rule, the defendant has an entire right to withhold his own testimony, and any testimony, and rely wholly on the insufficiency of the evidence for the prosecution. It is nothing that can be commented on or considered to his detriment in any way whatever. It is a special rule of law that no comment is permitted upon his failure to take the stand; so you will be careful, and the court emphasizes that, to eliminate from your minds any thought that it is of any consequence, or material in the case to any extent, that these defendants, any of them, if they have not taken the stand, have not done so. Just omit that from your minds altogether. I wish counsel for the government, and direct counsel for the government, to withdraw any such argument in this case as to this defendant Cochran, and all the defendants."

Government counsel thereupon said:

"I withdraw that, or anything that may have been so construed; but I have no recollection whatever of any such comment."

Counsel for the defendant Cochran, and also for the plaintiff in error E. J. Green, objected to the remarks made by the assistant district attorney, and excepted to the refusal of the court to declare a mistrial as to each of them.

The record shows that the defendant Cochran was acquitted by the jury, notwithstanding two public prosecutors, representing the government of the United States, violated one of the most elementary of the rules obtaining in prosecutions of criminal cases in the courts of the nation. The fact that his failure to testify was improperly referred to in the argument by counsel for the government did not prejudice his case with the jury is evidenced by their verdict of acquittal. If the defendant Cochran was not prejudiced, we are unable to see how the defendant E. J. Green could have been prejudiced.

[5] In the closing argument the assistant district attorney, referring to the Great Western Guarantee Investment Company, used the following language:

"The origin of all these troubles originated in what is known as the Great Western Guarantee Investment Company, which name itself is a misnomer. The only thing about this name is that it was 'great' in that Jesse James and Frank James were great. * * * It was not an 'investment' company or 'guarantee' company; it was a misnomer from start to finish."

To this language counsel for the plaintiffs in error E. H. and E. J. Green at the time objected and excepted.

We may assume that the foregoing excerpt was a part, at least, of the peroration of counsel's closing argument. The evidence in the case is not before us, but the charges contained in the indictment are. If the evidence sustained the charges made in the indictment, counsel may well be excused, if not wholly justified, in denouncing such a base fraud. When counsel, in their argument to the jury, do not go outside of the evidence in the statement of the facts of a case, the trial court is not required to judge with too great nicety the appropriateness of the comparisons, metaphors, and other figures of speech with which they may seek to point the argument or adorn the peroration.

"There is a degree of liberty allowable to counsel, whether for the government or the accused, in respect to the line of argument they shall pursue and the inferences to be drawn from the evidence, which a trial judge should respect until the facts of the case are overstepped or arguments used which plainly abuse the privilege." Chadwick v. United States, supra.

We do not find any prejudicial error in the record, and the judgment must be affirmed.

And it is so ordered.

C. A. WEED & CO. v. LOCKWOOD, U. S. Atty.

(Circuit Court of Appeals, Second Circuit. May 26, 1920.)

No. 245.

1. **Injunction ⟸105(2)—District attorney can be restrained from prosecuting under Lever Act, if it is unconstitutional.**
   If the Lever Food Control Act, as amended by Act Oct. 22, 1919, making unlawful unreasonable charges for necessaries, is unconstitutional, prosecutions against a dealer in wearing apparel for making numerous daily sales would deprive him of property, so that such prosecution can be restrained.

2. **War ⟸4, 33—Peace treaty not being ratified, state of war continued, so as to authorize Lever Act under war powers.**
   At the time of the national enactment of the amendment to Lever Food Control Act on October 22, 1919, the Senate having failed to ratify the peace treaty with Germany, the state of war continued, and the emergency created thereby was still in existence, so that the amendment of that act to issue an adequate supply and adequate distribution of necessaries, in view of scarcity caused by the war, was sustainable under the war powers of Congress.

3. **War ⟸4—Prohibition of unreasonable charges for wearing apparel within war powers.**
   Control of the sale and distribution of wearing apparel by the amendment to the Lever Food Control Act of October 22, 1919, was a proper subject for war legislation, so that Congress could legislate on such subjects under the authority of its war powers, without contravening Const. art. 1, § 8, cl. 18.

4. **Constitutional law ⟸258—Criminal law ⟸13—Prohibition of unreasonable charges not too indefinite to inform accused of crime or violative of due process of law.**
   The amendment of the Lever Food Control Act of October 22, 1919, so as to include wearing apparel within the act, and to make unlawful unreasonable charges for necessaries therein defined, did not violate Const. Amend. 6, giving accused the right to be informed of the accusation against him, or Amendment 5, requiring due process of law, though the determination of what is a reasonable charge is left to the jury.

5. **Constitutional law ⟸242—Exemption of farmers from Lever Act not discriminatory.**
   Provision of the Lever Food Control Act as amended October 22, 1919, exempting farmers from the act with respect to charges for products raised by them does not discriminate contrary to Constitution, since there was reason for exempting farmers in order to encourage increased production by them.

6. **Constitutional law ⟸48—Classification must be obviously arbitrary to render statute unconstitutional.**
   The power of classification enacting legislation has a very broad range, and the classification must be palpably arbitrary to authorize judicial review.

7. **War ⟸4—Failure of President to issue orders fixing prices does not prevent prosecution for unreasonable charges.**
   The failure of the President to issue order fixing prices for certain necessaries as authorized by the Lever Food Control Act, § 1, does not prevent prosecution of a dealer for charging unreasonable prices for necessaries.

Ward, Circuit Judge, dissenting in part.

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

Bill in equity filed by C. A. Weed & Co. against Stephen T. Lockwood, United States Attorney for the Western District of New York, defendant, to restrain and enjoin the defendant from taking any further proceedings upon and subsequent to the indictment against the plaintiff pending in the District Court, and from bringing the plaintiff to trial under said indictment, and to restrain the defendant from instituting any further prosecution under the act of Congress of August 10, 1917, as amended by the act approved October 22, 1919 (41 Stat. 297, c. 80). From an order (264 Fed. 453) denying an interlocutory injunction, plaintiff appeals. Affirmed.

Edward L. Jellinek and Simon Fleischmann, both of Buffalo, N. Y., for appellant.

Daniel J. Kenefick, Louis E. Desbecker, and Almon W. Lytle, all of Buffalo, N. Y., for Buffalo Retail Merchants' Ass'n; James O. Moore and Emil Rubenstein, both of Buffalo, N. Y., for Reliable Credit Clothing Co.; John W. Ryan and Merritt N. Baker, both of Buffalo, N. Y., for Buffalo Shirt Co.; Lyman M. Bass, of Buffalo, N. Y., for Hens & Kelly; Eugene Warner, of Buffalo, N. Y., for Antwerp Diamond Co.; Irving L. Fisk, of Buffalo, N. Y., for Sultzbach Clothing Co., Inc.; and Charles E. Hughes, of New York City, for National Ass'n of Clothiers and National Retail Dry Goods Dealers' Ass'n— as amici curiæ.

Stephen T. Lockwood, U. S. Atty., and Carl Sherman, Asst. U. S. Atty., both of Buffalo, N. Y., for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The grand jury for the Western district of New York returned an indictment against the appellant on the 9th day of March, 1920, charging the appellant, in 20 counts, with a violation of the act of Congress as amended on October 22, 1919, commonly referred to as the Lever Act. This bill in equity has been filed seeking to restrain the United States attorney for the Western district of New York from proceeding in the criminal action. A motion was made for an injunction restraining the United States attorney pending final hearing. The government opposed the application and contended for a dismissal of the bill. From a denial of plaintiff's motion for an interlocutory order, this appeal is taken.

[1] The right to maintain this action in equity to restrain the United States attorney in a criminal prosecution is challenged. The constitutionality of the act is involved. In addition thereto, the property rights and the reputation of the appellant are involved. The claim is that, if the act be held to be unconstitutional, the appellant will be deprived of its property without due or any process of law, will suffer repeated harassment, and may be subject to a multiplicity of prosecutions. It would suffer a great monetary loss, its reputation would be greatly impaired, and its good will and business, which it now owns possesses, and has enjoyed, will be greatly impaired, if not entirely destroyed, and thus irreparable damage will be done to it. We think that,

if the appellant is right in its contention that the act is unconstitutional, it may maintain this action in equity. This court said in Jacob Hoffman Brewing Co. v. McElligott et al., 259 Fed. 525, 170 C. C. A. 487:

"A suit in equity to enjoin the United States attorney from instituting criminal proceedings under a statute of the United States is manifestly a suit against the United States. * * * If property rights are invaded, and the statute in question is unconstitutional, it is void, is to be treated as nonexistent, and so no defense to the United States attorney. When instituting criminal proceedings under it, he is to be regarded, not as representing the United States in his official capacity, but as acting individually."

In Wilson, etc., v. New et al., 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024, an action, similar in form, was commenced against the United States attorney for the Western district of Missouri. The district court held that the so-called Eight-Hour Railroad Law (Comp. St. §§ 8680a–8680d) was unconstitutional, but the Supreme Court reversed the decree on the ground that the law was constitutional, and dismissed the bill. In the later case of Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918C, 724, in contesting the constitutionality of an act of Congress involving child labor, the same procedure was followed. The Supreme Court, in both cases, considered the merits of the claim of questioned constitutionality as to each act, and, while it did not in express words approve the procedure, it did necessarily approve it, by considering the merits of the issues raised.

The majority of the court are of the opinion that a direct injury to the property of the appellant here would follow if the law were declared unconstitutional, and that, if such were the case, it might maintain this action in equity. But we are of the opinion that the act of Congress does not contravene any of the constitutional provisions, and therefore this action cannot be successfully maintained. Act Aug. 10, 1917, c. 53, § 4, as amended by Act Oct. 22, 1919, § 2, reads as follows:

"That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries. * * * Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: Provided, that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: Provided further, that nothing in this act shall be construed to forbid or make unlawful collective bargaining by any co-operative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them."

The amendment of October 22, 1919, included in the act, among the necessaries described, wearing apparel. Section 4 of the August 10, 1917, act provided no penalty, and an infraction or violation, we held, was no criminal offense. Mossew v. United States (C. C. A.) 266 Fed. 18, decided May 19, 1920. The amendment, however, provides a penalty, and after October 22, 1919, a violation of the act constitutes a criminal offense against the United States.

[2] The first section of the Act of October 22, 1919, refers to it as the Food Control Act. An emergency for legislation of this character, which makes the statute in question a war measure, has been held by the Supreme Court to still exist. Hamilton v. Kentucky Dis. Co., 251 U. S. 160, 40 Sup. Ct. 106, 64 L. Ed. ——. The passage of this act by Congress and the failure of the Senate to ratify the peace treaty with the German government, indicates that Congress treats the war as continuing and demobilization as incomplete. It must be said that this act, passed by Congress and approved by the President, indicated an intention to support the army and navy, as well as provide a remedy for the evils resulting from the war, so that there may be an equitable distribution of such necessaries as the country has, until the natural scarcity by lack of production and the extraordinary foreign demands, and other causes which depress normal competition, shall have subsided, at least during the period while we are still at war. The purpose of the act, given in section 1, is to assure an adequate supply and equitable distribution of wearing apparel. In Stewart v. Kahn, 11 Wall. 493, 20 L. Ed. 176, the Supreme Court said:

"* * * The power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

[3] Since we are still in a state of war, and the war time emergency has not expired, we are of the opinion that Congress could legislate, as it did, under the authority of its war powers, without contravening article 1, § 8, cl. 18, of the Constitution. During the recent war, the struggle between economic resources was all important. It did much to make for the morale of the army and navy. Food control, as a subject of war legislation, has been approved. Hamilton v. Kentucky Dis. Co., supra. Wearing apparel, declared to be one of the necessaries, is well within this sphere of legislation. To so legislate does not interfere with the police powers of the state. Food and wearing apparel control, during a war emergency, are properly the subject for war legislation, and by limiting charges for such necessaries Congress does not take property without due process of law. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 79. The court, speaking through Chief Justice Waite, there said:

"In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

Thus it will be observed that the Supreme Court pointed out that the state may fix prices on all commodities where the public has an interest. We think that, while a state of war exists, Congress may declare that the public interest in the price of food and wearing apparel warrants legislation declaring an unreasonable and unjust rate or charge in handling or dealing in the necessaries.

[4] But the appellant attacks the validity of the act, saying that it is too vague and indefinite to constitute a valid definition of crime.

The enactment is said to be in contravention of Amendments 5 and 6 of the Constitution. It is said to be in violation of Amendment 6, which provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation, and of Amendment 5, in that it deprives dealers in wearing apparel of property and liberty without due process of law. The contention is advanced that the language of the statute:

"It is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, to conspire [or] combine * * * with any other person * * * to exact excessive prices for any necessaries"

—provides or establishes no particular standard of conduct; that ideas of reasonableness and excessiveness are so vague and varient that no dealer can tell whether his charges or prices are lawful, except by the subsequent opinion of the jury; and it is said that a process of law that would condemn one to lose property or liberty for an act, without having previously clearly denounced the act as a crime, would not seem to be due process, the argument being that the subsequent finding of a jury, therefore, expressing its opinion that the particular act constituting the sale as unlawful at the price charged, could not have been known to the defendant, and therefore knowing it only after conviction, would have all of the oppressiveness of an ex post facto law. The contention is that the words "unjust and unreasonable" make for the mischief. It is said that this claim is supported by the case of Tozer v. United States (C. C.) 52 Fed. 917 (opinion by Justice Brewer). Where the statute is within the legislative power of Congress, the courts are slow to say that they cannot understand and enforce its provisions. Before doing so, the courts exhaust their efforts at practical construction.

In Standard Oil Co. v. United States, 221 U. S. at page 69, 31 Sup. Ct. at page 517, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, the Supreme Court said:

"So far as the arguments proceed upon the conception that in view of the generality of the statute it is not susceptible of being enforced by the courts, because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions, therefore, but insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. But to reduce the propositions, however, to this their final meaning makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning. This is so clear as to require no elaboration. Yet let us demonstrate that which needs no demonstration, by a few obvious examples. Take, for instance, the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case, where the courts are called upon to determine whether particular acts are invalid, which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce."

In Miller v. Strahl, 239 U. S. at page 434, 36 Sup. Ct. at page 149, 60 L. Ed. 364, the court said, speaking through Justice McKenna:

"Plaintiff in error contends, further, that the statute 'is lacking in due process of law,' because 'it fails to prescribe any fixed rule of conduct.' The argument is that the requirement 'to do all in one's power' fails to inform a man of ordinary intelligence what he must or must not do under given circumstances. Rules of conduct must necessarily be expressed in general terms, and depend for their application upon circumstances, and circumstances vary. It may be true, as counsel says, that 'men are differently constituted,' some being 'abject cowards, and few only are real heroes'; that the brains of some people work 'rapidly and normally in the face of danger, while other people lose all control over their actions.' It is manifest that rules could not be prescribed to meet these varying qualities. Yet all must be brought to judgment, and what better test could be devised than the doing of 'all in one's power' as determined by the circumstances? The case falls, therefore, under the rule of Nash v. United States, 229 U. S. 373, and not under the rule of International Harvester Co. v. Missouri, 234 U. S. 199."

In Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232, Justice Holmes said:

"And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable; there must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer, sitting in the Circuit Court. Tozer v. United States, 52 Fed. 917, 919. But apart from the common law as to restraint of trade, thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. * * * 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' 1 East, P. C. 262. If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder, however little he expected the result."

The so-called "rule of reason," as announced in Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, has changed the rule as laid down in the Tozer Case. Practically all common-law crimes were originally defined by the common opinion of people, which found expression in the judgment of juries and courts. In everyday practice in the civil courts, questions of fact are determined by what a jury considers a reasonable time for performance, or substantial performance. In tort cases, involving negligent conduct, the verdict of the jury lays down a standard of reasonable and ordinary care and diligence, and the conclusion of the jury answers the question of what the defendant should have done or refrained from doing, or what act of commission or omission is branded as unreasonable and careless in the exercise of due diligence. Thus large verdicts are awarded, and consequential payments made therefor daily in commercial life. Some of the criminal statutes are dependent upon how reasonable men would conduct themselves under similar circumstances. Questions of fraud

and deceit are answered by determining what reasonable conduct would have dictated to the person charged with the fraud and deceit. Undue and unreasonable restraints in trade are determined as questions of fact. "Unfair methods of competition" have been declared objectionable by Congress, and the statute has been declared constitutional. Sears Roebuck v. Federal Trade Comm., 258 Fed. 307, 169 C. C. A. 323, 6 A. L. R. 358. There it was said:

"If the expression 'unfair methods of competition' is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon 'unsound mind,' 'undue influence,' 'unfaithfulness,' 'unfair use,' 'unfit for cultivation,' 'unreasonable rate,' 'unjust discrimination,' and the like."

In the criminal side of the court statutes are enforced daily which prohibit schemes to defraud, and there are no schedules of acts or specific definition of the forbidden conduct. There is left to the courts freedom to condemn any new or ingenious way that was unknown at the time the statutes were enacted. In determining what is an unjust and unreasonable rate, many elements may be submitted to the jury, the cost price to the merchant, his overhead charges, his rent, what is a customary and usual margin of profit as it exists in the trade, the length of time he carried the article, and his interest charges may also be of importance. The defendant can be generally guided by these elements, which should plainly lead him between the extreme of the obviously illegal and the plainly lawful.

[5, 6] It is contended that the statute in question is an arbitrary class legislation, and therefore in violation of the Constitution. Section 4 provides:

"Provided, that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him."

It is argued that farmers, gardeners, ranchmen, dairymen, or stockmen, or other agriculturists, with respect to other farm products, may make unjust and unreasonable rates and charges with impunity, but that, if the miners of coal, manufacturers and dealers in farm machinery and equipment, refiners of sugar, or dealers in food products do so, they violate the act. Therefore there is a discrimination of class. The power of classification has had a very broad range. In Atchison, Topeka & Santa Fé R. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, the court said:

"The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

Whether it would have been better policy to have included the farmer or ranchman, or not to have made such a comprehensive classification as the statute does, is not within our province to decide. Whether the existing circumstances and the times call for such a rule of conduct as to exclude farmers from the purposes of the act was a matter for the Congress to decide. Congress could make this classi-

fication, and it be held not in contravention of the Constitution. International Harvester Co. v. Missouri, 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525.

Some latitude must be allowed to legislative judgment in selecting the basis of community. It must be palpably arbitrary to authorize a judicial review of it, and it cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. Mo., Kan. & Tex. R. v. May, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 971; Williams v. Arkansas, 217 U. S. 79, 30 Sup. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865. Here Congress has limited the exemption from the operation of the statute to farmers, gardeners, and agriculturists only with respect to products of the land produced upon land owned, leased, or cultivated by them. Congress may have had in mind the encouragement of the farmers to larger production. It was essential to have full production from land in the emergency.

In German Alliance Ins. Co. v. Supt. of Ins., 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, the court said:

"A citation of cases is not necessary, nor for the general principle that a discrimination is valid, if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a Legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise."

We think Congress may well, as it did, legislate exempting the farmer exercising its war powers under the Constitution.

[7] While it is true that Congress conferred on the President by the statute the power to fix prices, as section 1 of the act provides:

"The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this act."

The appellant complains that no orders were issued with reference to wearing apparel, but this was a power which the President could have exercised, had he thought the circumstances warranted it. He likewise need not make orders in reference to fixing prices as to wearing apparel. Such orders, if issued, would not add to the terms of an act of Congress and make conduct criminal which such laws leave untouched. United States v. United Verde Copper Co., 196 U. S. 207, 25 Sup. Ct. 222, 49 L. Ed. 449. He can neither abridge nor enlarge the criminal responsibilities under the statute. Indeed, it is obvious that he could not fix a maximum rate of charge on wearing apparel as a foundation for laying indictments. The statute fixes it in the terms of unjust and unreasonable rates and charges.

We find no error in denying the injunction below. The order is affirmed.

WARD, Circuit Judge (concurring). While I agree with the majority of the court that the Lever Act is constitutional as a war measure, I think the court below, sitting in equity, had no jurisdiction of a bill

to enjoin the United States attorney from instituting the prosecution under it.

The majority of the court hold that there is such a direct injury to the plaintiff's property rights as to justify the injunction, if the act be unconstitutional. But, as we have held the act to be constitutional, any inquiry as to injury is irrelevant and obiter. Conceding, for the purpose of argument only, that there was such an injury, the court could do nothing in the suit, because the other condition of jurisdiction that the act was unconstitutional, or, if constitutional that the United States attorney was exceeding his authority, does not exist. We so held in Hoffman v. McElligott (D. C.) 259 Fed. 525. Yet the interlocutory order denying the injunction is affirmed, and the cause left to go on to final hearing, although the court can never give any relief whatever. I think the bill should have been dismissed by the court below and by this court, as was done in the case of Dryfoos v. Edwards, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. —— (opinion of the Supreme Court, December 15, 1919).

In the cases of Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024, and Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724, the bill alleged direct injury to the plaintiff's property and that the acts in question were unconstitutional. In each case the United States attorney moved to dismiss on the ground that the act was constitutional and the bill without equity. This motion admitted the allegations as to the injury to the plaintiff's property. The Supreme Court, finding the act constitutional in the Wilson Case, dismissed the bill. On the other hand, finding the act unconstitutional in the Hammer Case, and direct injury to plaintiff's property rights being admitted, it affirmed the final decree granting the injunction. In Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. ——, the bill contained allegations of direct and irreparable injury to plaintiff's property and the motion was for a preliminary injunction. The United States attorney moved to dismiss the bill for want of jurisdiction, and it was so dismissed.

If we had held the act to be unconstitutional, it would then have been necessary to determine whether there was such an injury to the plaintiff's property as justified jurisdiction in equity. On this point I think there was not. The defendant's reputation, credit, and good will, one or all, will be as much affected as if the indictment, instead of containing 20 counts, had contained but one. The United States attorney in his affidavit denies that he is making any charges against the defendant, except those contained in this particular indictment, or that he has threatened further indictments. The defendant is not prevented from selling its stock of wearing apparel at just and reasonable rates and charges, because it has been prosecuted for selling these particular garments at what is alleged to be an unjust and unreasonable rate or charge. If wrongfully convicted, it will have a perfectly adequate remedy by writ of error direct to the Supreme Court.

I think the bill should have been dismissed by the court below, and should now be dismissed in this court, for want of jurisdiction.

HOUGH, Circuit Judge (concurring). With the main argument and conclusion of Judge MANTON I agree, and what follows is but to emphasize some matters thought important. Whether "property rights are invaded" is a question of degree. Yet oftentimes the degree of invasion is a test of equitable jurisdiction. Thus there is usually no difference in material kind between a single act of nuisance and a continuing nuisance. So here; for one making a sale a month might perhaps continue to exist in a business sense under this statute; he could find out whether he was a criminal before he was ruined. But a retail storekeeper, who cannot do a day's business without running the risk of perhaps a thousand indictments, is suffering a very real invasion.

When the Lever Act was amended, this country was and still is in a state that may be described as "official war." This is substantially the finding of the Kentucky Distilleries Case, supra. It may be likened to the European "state of siege," and continues in Congress all the war powers of the United States. If we were in a state of "official" peace, this statute would in my judgment be unconstitutional, under International Harvester Co. v. Kentucky, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284. The condemnation there expressed (especially at page 223) is applicable here word for word. It would also be constitutionally obnoxious because it is a gross piece of class legislation; incapable of distinction from that condemned in Connolly v. Union, etc., Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. But the statute is begotten by war, and is constitutionally excused (i. e., justified) by the war power, which is superior to, and not to be measured by, the police powers of the several states.

Police powers generally are "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominion." The License Cases, 5 How. at page 583, 12 L. Ed. 256. A state can neither declare nor conduct a war; the United States can, and the greater the sovereign the greater the power. The United States can conduct a war in its own way, and the national sovereignty, dominion, or war power extends to every war necessity, of which the Congress is the sole judge. Congress decides that the necessity exists, and meets it in its own discretion, subject only to some procedural restrictions in favor of personal liberty, indicated, but not delimited, by Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281 and kindred decisions.

In regulating civil and commercial life in war time, the nation, through the Congress, is exercising the first law of nature, self-defense, whereof the limits are incapable of predetermination. But it is surely within those limits to fix prices by legislative fiat and punish every man varying therefrom; the present statute does not go that far, for practically it asks the usually soft-hearted jury to issue the fiat.

YOUNGBLOOD v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 7, 1920.)

No. 5532.

1. **Criminal law ⊂=901—Motion to direct verdict after government's case waived by introduction of evidence.**
   Accused waives error in the ruling of the trial court denying his motion for directed verdict at the close of the government's case by thereafter introducing testimony in his defense.
2. **Criminal law ⊂=395—Evidence that articles defendant was charged with stealing were taken without search warrant inadmissible.**
   In a prosecution for perjury in testimony by accused in his own behalf in a former prosecution for larceny from interstate commerce, evidence that the articles defendant was accused of stealing were taken from his possession by the sheriff without a search warrant was properly excluded; the means by which competent evidence is procured being a collateral issue, which should not be determined at the main trial.
3. **Searches and seizures ⊂=7—In prosecution in federal court, unlawful seizure by state officer is no defense.**
   It is no defense in a prosecution in the federal courts that evidence introduced against accused was obtained by unlawful search, where the search was made by a state officer, who made no claim to act under any federal authority.
4. **Perjury ⊂=15—Conviction for false testimony in own defense as to evidential matter permissible after acquittal of crime.**
   A defendant, who testified in his own defense, may be prosecuted for false testimony as to a subordinate evidential matter, not a mere denial of the entire charge, notwithstanding an acquittal in the case in which the testimony was given.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Ray C. Youngblood was convicted of perjury, and he brings error. Affirmed.

L. A. Simpson, of Dickinson, N. D. (E. T. Burke, of Bismarck, N. D., on the brief), for plaintiff in error.

Melvin A. Hildreth, U. S. Atty., of Fargo, N. D. (Samuel L. Nuchols, of Mandan, N. D., and Philip Elliott, Asst. U. S. Attys., of Fargo, N. D., on the brief), for the United States.

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

TRIEBER, District Judge. The plaintiff in error, hereafter referred to as the defendant, seeks by this writ of error to reverse a judgment of conviction on an indictment charging him in two counts with the crime of perjury. Although found guilty on both counts and sentenced to imprisonment on each, the confinement is concurrent.

Without setting out all the formal allegations in the indictment, the sufficiency of which is not questioned, it charges the defendant, in the first count, with having sworn falsely while a witness in his own behalf in a cause pending in the District Court of the United States for the District of North Dakota, in which he and another defendant were

charged with the crime of larceny from an interstate railroad car. The second count charges him with having sworn falsely, while testifying in the same case, in which he was charged in the second count of the indictment, with having in his possession certain articles which had been stolen from a railroad car in process of transportation in interstate commerce, knowing that they had been feloniously stolen from such a car.

Although it is alleged in the assignment of errors that the court erred in denying defendant's motion to direct a verdict of acquittal at the close of the government's evidence, and again at the close of all the testimony in the case, the record fails to show that such motions were made at any time in behalf of the defendant; but, as the defendant's personal liberty is involved, we have considered the assignment that the court erred in refusing to direct a verdict of acquittal at the close of all the testimony.

[1] As to the denial of the motion for a directed verdict at the close of the government's testimony, even if it had been made, it could not be considered by this court, as it was waived when the defendant introduced testimony in his defense. A careful reading of the testimony satisfies beyond question that, unless the court erred as a matter of law in submitting the cause to the jury, it committed no error. The errors of law, although not complained of in the assignment of errors, nor discussed in the brief of counsel for defendant, were presented in the oral argument, and will be considered by the court.

[2] It is claimed that the court erred in sustaining objections to testimony offered in behalf of defendant that the articles, alleged to have been stolen and found in the defendant's residence by the sheriff of Golden Valley county, N. D., were seized by the sheriff after a search of his home without a lawful search warrant. No request had been made to the court before the trial of the first cause or this cause for a return of the goods thus seized by the sheriff, or an order restraining the prosecuting officer of the United States from introducing evidence obtained from the alleged unlawful search.

The leading case on this subject, upon which both parties rely, is Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. But this case does not sustain defendant's contention. It was there held that while, upon an application by the defendant charged with the commission of a crime, it is the duty of the court to order the return of all papers, documents, and articles seized by officials of the United States without a legal search warrant, the court will not, at the trial of the charge permit a collateral issue to be raised as to the source of competent testimony, citing with approval Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, 1 Greenleaf, § 254a, and the case note to State v. Turner, 136 Am. St. Rep. 129, 135. The court in referring to that note said:

"After citing numerous cases the editor says: 'The underlying principle of all these decisions obviously is, that the court, when engaged in the trial of a criminal action, will not take notice of the manner in which a witness has possessed himself of papers or other chattels, subjects of evidence, which are material and properly offered in evidence. People v. Adams, 176 N. Y. 351, 98

Am. St. Rep. 675, 68 N. E. 636, 63 L. R. A. 406. Such an investigation is not involved necessarily in the litigation in chief, and to pursue it would be to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of such litigation, and which is wholly independent thereof.' "

See, also, Farmer v. United States, 223 Fed. 903, 908, 139 C. C. A. 341.

As no application for the return of the articles alleged to have been unlawfully seized was made, the court committed no error in refusing to permit evidence to be introduced to show that the search and seizure were without a lawful search warrant.

[3] Another ground upon which the court properly sustained the objection, as determined in Weeks v. United States, is:

"As to the papers and property seized by the policemen, it does not appear that they acted under any claim of federal authority, such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the federal government and its agencies."

In the instant case the record shows that the search and seizure were made by the sheriff of that county, an officer of the state of North Dakota, before the indictment in the federal court had been returned, and there is nothing to show that the sheriff acted under the authority of a federal official. Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. ——, also relied on by the defendant, does not sustain his contentions. What was determined in that case was that the court may not compel parties charged with the violation of a penal law of the United States to produce books and documents before the grand jury to be used in regard to alleged violations of the statutes of the United States by them.

[4] The next contention on behalf of the defendant is that, the defendant having been tried on the larceny charge and acquitted, he cannot be tried for the crime of perjury alleged to have been committed while testifying at the trial of that cause in his own behalf. In Allen v. United States, 194 Fed. 664, 114 C. C. A. 357, 39 L. R. A. (N. S.) 385, this same question was in issue and the court in a very able opinion, citing numerous authorities, held that one may be convicted of perjury for testifying falsely in his own behalf on his trial for a crime of which he is acquitted, and is not thereby twice put in jeopardy for the same offense, but the government should not institute a prosecution for perjury on substantially the same evidence presented on the first trial.

A full list of authorities on this question will be found in the case notes in 39 L. R. A. (N. S.) 385, and L. R. A. 1917B, 738. In Cooper v. Commonwealth, 106 Ky. 909, 51 S. W. 789, 59 S. W. 524, 45 L. R. A. 216, 90 Am. St. Rep. 275, a different conclusion was reached, but in Teague v. Commonwealth, 172 Ky. 665, 189 S. W. 908, L. R. A. 1917B, 738, that case was expressly overruled by the Court of Appeals

of Kentucky. Nor does Chitwood v. United States, 178 Fed. 442, 101 C. C. A. 342, decided by this court, apply to the facts in this case. While the court held that upon the facts in that case, he should not have been tried for perjury, it qualified it by saying:

"We do not mean that an acquittal necessarily prevents a subsequent conviction for perjury committed by the accused at the trial. But if the particular testimony alleged to be false is as general and broad as the charge of the crime—in other words a denial of guilt—a trial for perjury is virtually a second trial of the prior case. This is illustrated in Cooper v. Commonwealth, supra. In a trial of a man and woman for adultery, the man swore he never had sexual intercourse with her. They were acquitted. He was then indicted for perjury in so testifying; but it was held the charge could not be sustained. If, however, the false swearing, like in the case at bar, is as to a subordinate evidential matter, and not a mere general denial of the entire charge, an indictment for perjury may be upheld, notwithstanding the prior acquittal. But the evidence should be confined to the narrower issue, and not be given such a range as to amount to a retrial of the first case. A former acquittal, and perjury in testifying about the confession, were not necessarily inconsistent. Both may have existed. The accused was not, therefore, entitled to have the record of the former admitted as a bar to the prosecution for the latter."

There are other assignments of error as to the admission of some evidence, but a careful examination fails to convince that the court committed any error.

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

GRAFF FURNACE CO. v. SCRANTON COAL CO.

(Circuit Court of Appeals, Third Circuit. July 30, 1920.)

No. 2502.

1. **Judgment ⇐948(1)—Defense of res judicata must be pleaded.**
The defense of res judicata must be both pleaded and proved.

2. **Appeal and error ⇐916(2)—Appellate court will assume, in absence of objection, that defense of res judicata was properly raised.**
Where the District Court entered a judgment for defendants on the pleadings on the ground of res judicata, though that defense was not pleaded in the affidavit of defense, and no point was made on writ of error of the failure to specifically plead it, the appellate court will assume that the defense was properly presented below.

3. **Judgment ⇐609, 713(2)—Subsequent suit on different cause of action barred only as to matters litigated.**
Where the subsequent suit between the same parties is based on the same cause of action, the prior judgment concludes all matters which might have been litigated in the prior action; but, if the subsequent suit is on a different cause of action, the prior judgment concludes only issues actually litigated.

4. **Action ⇐1—"Cause of action" comprises acts necessary to prove.**
The "cause of action" is the ground on which the action may be sustained, and comprises every fact which plaintiff must prove to obtain judgment, or which the defendant may traverse.

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

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5. **Judgment ⊂=590(5)—Causes of action removed from former case by amendment not included.**
Where the state law recognizes separate causes of actions for damage to surface by breach of duty to support, by negligent mining, and by removal of lateral support, a former judgment is not conclusive against recovery for negligent mining, where that issue was eliminated from the bill by amendment.

6. **Judgment ⊂=590(5)—Cause of action may be withdrawn before decision without being barred.**
Where amended bill in previous action stated two causes of action, plaintiff could withdraw before hearing either of them, and not be barred from renewing the cause of action so withdrawn.

7. **Judgment ⊂=590(2)—Decision of state Supreme Court limited to cause of action decided below.**
Where the decision of the state lower court was based solely on denial of plaintiff's right to vertical support of the surface, the decision of the state Supreme Court that plaintiff was not entitled to surface support, though general enough to include lateral as well as vertical support, must be restricted to the question of the vertical support, so as not to bar a subsequent action for damages caused by withdrawal of lateral support.

8. **Mines and minerals ⊂=55(2)—Reservation of mining rights in grant of surface does not authorize removal of lateral support.**
The reservation in a grant of surface of the right to mine coal thereunder without any liability whatsoever does not authorize the removal of lateral support from the surface by mining the coal under adjacent lands.

9. **Mines and minerals ⊂=55(6)—Reservation of surface held to release damages for negligent mining.**
A reservation, in the grant of surface lands, of the right to mine the coal thereunder without incurring in any event whatever any liability for injury to the surface, prevents recovery by the holder of the surface rights of damages to the surface caused by negligent mining.

Buffington, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Action by the Graff Furnace Company against the Scranton Coal Company. Judgment for defendant, and plaintiff brings error. Affirmed in part, and reversed in part.

Thomas P. Duffy, of Scranton, Pa., for plaintiff in error.

John P. Kelly and James E. Burr, both of Scranton, Pa., for defendant in error.

Before BUFFINGTON and WOOLEY, Circuit Judges, and RELLSTAB, District Judge.

RELLSTAB, District Judge. In this case the United States District Court entered judgment for the defendant on the pleadings, on the ground that the questions sought to be litigated had been settled by a decree of the Pennsylvania state court in a suit between the same parties. The suit is by the owner of the surface estate, to recover damages from the owner of the underlying mineral estate, for injuries sustained by the subsidence of such surface. The lands are situated in the state of Pennsylvania. In the District Court, on motion of the plaintiff, its original and amended bills and the defendant's answer, filed in the state court suit, were made a part of

the record in this case. The injuries complained of are the same in both suits. As the court below disposed of the case on the pleadings, a reference to those filed in both suits is necessary.

The pleadings in the state court suit show that the plaintiff there sought to enjoin the defendant from mining its coal from underneath the surface of plaintiff's lands "in any other than a legal, careful, and workmanlike manner, and from mining * * * without leaving or erecting sufficient pillars and artificial supports to fully protect the surface of said land," and to recover the damages "already suffered, by reason of the illegal mining of the defendant under the surface of said tract of land, and under the surface of lands adjacent thereto." In that suit the plaintiff filed original and amended bills. In the original bill plaintiff alleged that it had the right of support for the surface of such lands, both vertically and laterally; that it had been injured in such right on two occasions, on both of which a serious cave-in occurred.

As to the first of these, the plaintiff alleged that it was due to the "unskillful, negligent, and careless manner in which the mining operations of the defendant had been * * * carried on," and that the second was due to the "improper mining underneath said land and underneath land adjacent thereto." It further alleged that such injuries were due to "illegal, reckless, careless, and negligent mining and removal of coal and pillars from underneath the surface of said land and of lands adjacent thereto, without leaving or providing sufficient vertical and lateral support to support the surface of said land"; that such mining was what is known as the "robbing of pillars * * * left standing since previous mining"; and that defendant had "not left sufficient pillars and supports to fully sustain and protect the surface of plaintiff's lands, * * * in violation of law and in violation of its duty to leave sufficient pillars or supports to support the surface without disturbance."

In its amended bill, a substitute for the original, the allegations that plaintiff had the right of support, both vertically and laterally, are reiterated. However, in assigning the causes of the injury, the amended complaint did not in terms charge illegal, unskillful, and reckless mining, but only that the injuries were due to "the mining operations of the defendant, * * * the withdrawal of the surface support by mining operations of the defendant underneath said land and underneath lands adjacent thereto," and the "removal of coal and pillars from underneath the surface of said land and of lands adjacent thereto, without leaving or providing sufficient vertical and lateral support to support the surface of said land." In all other respects, including the allegations of robbing or destroying the pillars necessary to insure sufficient support for the surface of plaintiff's land, in violation of law and duty, and the relief sought, the two bills were the same.

The defendant answered only the original bill, but its answer was treated as applicable to the amended bill. Besides making a general denial to the plaintiff's pertinent allegations, this answer asserted the defendant's right to mine under the land described in plaintiff's bill,

and also that it was not mining under such lands "at the time said bill was filed, so as to endanger the surface thereof."

In its declaration filed in the District Court the plaintiff alleged that, in mining and removing the coal underlying the plaintiff's and adjoining lands, the defendant fired "large quantities of dynamite and other high explosives under said land, or under adjoining land"; that the concussions and vibrations of air therefrom "were heard and felt on the surface of said land"; that the plaintiff was injured in its surface and property rights by the defendant's failure to provide lateral support for such land, and by "the careless, unskillful, and negligent manner in which defendant conducted its aforesaid mining operations"; that plaintiff's "claim to surface support was decided adversely to it" in its suit against the defendant brought in the state court of Pennsylvania; that the question of its "right to lateral support or of the negligent mining of defendant was not raised, considered, or decided" in that suit.

The plaintiff's allegation that its right to lateral support was not raised in the state court suit is erroneous. Such right was distinctly asserted in both the original and amended bills, and was put in issue by the defendant's answer.

[1, 2] In the present suit the defendant interposed no answer, but filed an affidavit of defense, intended only to raise questions of law. This affidavit is couched in the most general language, and in no way suggests the defense of res judicata. Such a defense should be both pleaded and proved. Southern Pac. Ry. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; United States v. Bliss, 172 U. S. 321, 19 Sup. Ct. 216, 43 L. Ed. 463; Delaware, L. & W. R. Co. v. Kutter (C. C. A. 2) 147 F. 51, 77 C. C. A. 315. However, as the case was disposed of by the District Court on the ground of res judicata, and as no point is made here of the defendant's failure to specifically plead that defense, this court will assume that it was properly presented (perhaps by stipulation), and will proceed to consider whether it is applicable to the present suit.

In approaching the question of estoppel by the former judgment, it is well to keep in mind that the plaintiff in the present suit asserts that the injuries sustained by it were occasioned in two ways, one through negligent mining, and the other by depriving it of lateral support. As noted, these grounds, with the additional one of being deprived of vertical support, were alleged by the plaintiff in its original bill in the suit in the state court.

[3] In Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195, the leading case expressing the modern rule of res judicata, the difference in the effect of a judgment as an estoppel in a later action between the same parties, where the suits are upon the same or a different cause of action, is stated to be:

"In the former case [on the same demand] the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * But, where the

second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

[4] As the defendant contends that the different grounds asserted by the plaintiff in its suit in the state court, as the cause of the injuries complained of, constitute but one cause of action, we shall first consider that contention. The term "cause of action" is variously used, and sometimes loosely and indefinitely applied. It is erroneous to regard it as synonymous with "remedy." The Haytian Republic, 154 U. S. 118, 128, 14 Sup. Ct. 992, 38 L. Ed. 930; Emory v. Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730. While there can be no cause of action without an injury, there may be injury without a right (cause) of action. To constitute a cause of action, there must be both a legal right and a wrongful invasion of it. It is "the ground on which an action may be sustained." Black's Law Dict. (2d Ed.) p. 178. It is "that which produces or effects the result complained of." Noonan v. Pardee, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722. It comprises every fact which the plaintiff must prove to obtain judgment, or, conversely, every fact which the defendant may traverse. Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; Bradford v. Southern Ry. Co., 195 U. S. 243, 249, 25 Sup. Ct. 55, 49 L. Ed. 178. The injury sustained, while single, may be due to the invasion of more than one legal right. But only that declared upon in the plaintiff's pleadings is the cause of action of that particular suit. Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528. "The true test of the identity of causes of action is the identity of the facts essential to their maintenance." Union Cent. Life Ins. Co. v. Drake (C. C. A. 8), 214 F. 536, 131 C. C. A. 82.

[5] In Pennsylvania land strata can be separated, and the coal owned in fee by one person and the surface by another. The courts of that state recognize a distinction between the right of the surface estate to lateral support and its right to vertical support and hold that the wrongful failure to furnish the one or the other constitute different causes of action. They also hold that one injured in his surface rights by the removal of lateral support cannot maintain an action upon the sole allegation that the injury is due to the removal of the vertical support. Noonan v. Pardee, supra. See, also, Weller v. Davis, 245 Pa. 280, 91 Atl. 664.

They also distinguish between the right to recover damages for a subsidence of the surface lands, where the defendant is under the duty of absolute support, and where, though not under such obligation, he causes the injury through negligent mining. Youghiogheny River Coal Co. v. Allegheny Nat. Bank, 211 Pa. 319, 60 Atl. 924, 69 L. R. A. 637, and cases cited. However, there is nothing to prevent a plaintiff in one suit from alleging all three causes of action. Pringle v. Vesta Coal Co., 172 Pa. 438, 33 Atl. 690; Noonan v. Pardee, supra.

Turning, now, to the subject-matter of the present litigation: The plaintiff was injured in its property by the subsidence or cave-in of the surface land, which it owned and had improved. It charges that this injury was due to the mining operations of the defendant, the owner of the subjacent estate. In its suit in the state court it first alleged that the defendant owed it the duty of both vertical and lateral support, and that it (the defendant) was mining in a negligent and illegal manner. Here it is to be observed that different grounds of liability are alleged. They involve different rights in the plaintiff and different breaches by the defendant. If the defendant was under the absolute obligation to support the plaintiff's surface rights, and the cave-in was due to the defendant's mining operations, the question whether the mining was done carefully or negligently was irrelevant and immaterial. Carlin v. Chappel, 101 Pa. 352, 47 Am. Rep. 722; Noonan v. Pardee, supra. But where no such duty of support was owing, and the injuries were alleged to be due to negligent mining, the method of carrying on the mining operations would be relevant. Weller v. Davis, supra, and cases cited.

The state trial court dismissed the plaintiff's bill, on the ground that the defendant did not owe the plaintiff any duty of vertical support. With reference to the other grounds of liability it said:

"The question of negligent mining has been taken out of the case by an amendment, and the question of lateral support is not involved."

[6] Why the question of lateral support was not involved is left to inference. As noted, it remained in the case as one of the issues tendered by the amended bill, and the right to recover on that ground, as well as on the other grounds, was denied by the defendant's answer. However, the plaintiff had a right to withdraw any of the alleged causes of action, and to give evidence to support but one of them, without being barred from renewing the causes of action not pressed for decision. See Bigelow on Estoppel (6th Ed.) pp. 185–188, 208–210; Goodrich v. Yale, 8 Allen (Mass.) 454; Haviland v. Fidelity Ins. Co., 108 Pa. 236; Stark v. Starr, 94 U. S. 477, 24 L. Ed. 276; Beltz v. Great Western Lead Mfg. Co. (D. C.) 251 Fed. 696, 700. A different rule would be applicable, if some evidence had been offered in support of the alleged right to lateral support, but insufficient to sustain the right. Bigelow on Estoppel, supra, pp. 14, 208–210.

As the trial court did not decide the alleged causes of action involving the charges of negligent mining and breach of the duty of lateral support, its decision that the defendant owed the plaintiff no duty of vertical support is not res judicata of such undecided causes of action, and bars only such matters or questions as were actually litigated and determined in the cause that was decided. Cromwell v. County of Sac, supra. What were such matters? The opinion of the judge who tried the case in the state court shows that he treated "as the real subject of controversy" the exceptions, reservations, and conditions contained in the deed conveying the surface estate in question to the plaintiff's ancestor in title, and to which the grant

to the plaintiff was made subject. These exceptions, etc., are set out in the plaintiff's declaration in the pending suit and are as follows:

"Excepting and reserving, however, to the said party of the first part, its successors and assigns, all the coal and minerals beneath the surface of and belonging to said lot, with the sole right to mine and remove the same, by any subterranean process incident to the business of mining, and also the sole right of passage through or under the said lot, to mine and remove the coal and minerals from any other lands by any subterranean process, without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of said lot or to the buildings or improvements which now are or hereafter may be put thereon; and the party of the second part, for themselves, their heirs, executors, administrators, and assigns, does hereby expressly release and discharge forever the said party of the first part, its successors and assigns, and all persons who may have derived title to said coal or other minerals from said party of the first part, of and from any liability for any injury that may result to the surface of said premises, or anything erected or placed thereon, from the mining or removal of said coal or other minerals: Provided, that no mine or air shafts shall be intentionally opened or any mining fixture established on the surface of all said premises."

[7] The Supreme Court of Pennsylvania (Graff Furnace Co. v. Scranton Coal Co., 244 Pa. 592, 91 Atl. 508) affirmed this judgment of the trial court and held that, in view of such exceptions and reservations, "the right to surface support" had never passed to the plaintiff or its predecessors in title. The term "surface support," there referred to, though general enough in itself to include lateral support, cannot be so construed. As noted, only the right to vertical support was considered and decided by the trial court, and the sole question which the Supreme Court was called upon to decide was whether the defendant owed the plaintiff the duty of vertical support. The generality of the phrase, judged in the light of both the context and the restricted question submitted to the appellate court, compels its limitation to vertical support.

[8] Furthermore, a reading of these exceptions and reservations evinces that they relate only to rights reserved to the estate immediately underneath the plaintiff's lands, and that the grantee's release and discharge of the surface estate, contained in such exceptions, relates only to injuries resulting from the mining and removal of the minerals from underneath the plaintiff's lands. These exceptions contain no limitation of the grantee's right to lateral support, and the release and discharge of the grantor's liability did not include injuries resulting from failure to afford such support. As these exceptions contained the only controversy decided in the state courts, and as they do not relate to the right to lateral support, it follows that the plaintiff is not estopped by such decision from presenting its claim for damages for a breach of such right.

[9] How do these exceptions affect the cause of action founded on the charge of negligent mining? It is to be noted that they reserve to the owner of the mineral estate the right to mine and remove coal from beneath the surface of the land "by any subterranean process incident to the business of mining, * * * without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of said lot," or improvements thereon

or to be put thereon, and the owner of the surface estate expressly releases and discharges the owner of the mineral estate "from any liability for any injury that may result to the surface of said premises or anything erected or placed thereon, from the mining or removal of said coal or other minerals."

In Madden v. Lehigh Valley Coal Co., 212 Pa. 63, 61 Atl. 559, an action founded on negligent mining, the Supreme Court, in a per curiam affirming a judgment for the defendant, based upon exceptions no more comprehensive than the one here considered, said:

"The reservation of the coal and the right to remove it was not that it should be done carefully, or in the usual course of proper mining, but the right was absolute to mine and take away 'without making any compensation * * * for any effect upon or injury to the said lot or the surface thereof, or to the buildings,' etc., in consequence of mining. Avoidance of liability for injury to the surface, however caused, by negligence or otherwise, was the very object of the reservation. As to the coal and method of its removal, the land was reserved to the grantors, and their right remained as unqualified as if the conveyance to the plaintiff had never been made at all."

No case in Pennsylvania has been cited or found, which in any way minimizes the force or modifies the scope of that decision, and we accept it as controlling the plaintiff's claim based on any negligent mining of coal directly beneath its surface estate. Therefore we are of the opinion that the judgment of the District Court, so far as it relates to the plaintiff's claim for damages founded on negligent mining directly underneath its surface estate, should be affirmed, and that so much of it as relates to the claim for damages based on its alleged right to lateral support, and upon the charge of negligent mining affecting that right, should be reversed, and a new trial be had on such issues.

Let a decree to that end be entered.

BUFFINGTON, Circuit Judge (dissenting in part). In a suit between these same parties, the Supreme Court of Pennsylvania, in Graff Furnace Co. v. Scranton Coal Co., 244 Pa. 592, 91 Atl. 508, construed the deeds under which the plaintiff claimed, and held that the plaintiff had never acquired and did not have a right to surface support from the defendant, the owner of the underlying coal. As the present decision of our court now allows the plaintiff to recover damages for the withdrawal—by the lateral mining of the defendant of its abutting subjacent coal—of a surface support which the Supreme Court has adjudged it never acquired, it seems to me the practical effect of our court's decision is to nullify the decision of the Supreme Court of Pennsylvania.

I am therefore constrained to record my dissent from the judgment of this court, in so far as it reverses the judgment of the court below and remands the case for further proceedings. I am of opinion the judgment below should have been affirmed.

THE HANS MAERSK. AKTIESELSKABET DAMPSKIBSELSKABET AF 1912 v. 20,029 BAGS OF SUGAR (ARBUCKLE BROS., Claimant) et al. SAME v. JAMISON et al.

(Circuit Court of Appeals, Second Circuit. June 25, 1920.)

Nos. 231, 232.

1. **Shipping ⟸177—Charterer's "default" in unloading covers all delays not due to vis major or act of shipowner.**
   Where a charter party provided for demurrage for each day's detention by default of the charterer, the term "default" does not mean that the charterer is liable only for delays due to his own fault, but renders him liable for all delays in the performance of his covenant to unload, not due to vis major or to the fault of the shipowner.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Default.]

2. **Shipping ⟸184—Burden is on charterer to prove delay in unloading was due to shipowner.**
   The shipowner makes out a prima facie case for demurrage by proof of delay, and the burden then lies on the charterer or consignee to prove that the delay was due to the fault of the shipowner.

3. **Shipping ⟸180—Shipowner bound to employ enough stevedores to discharge at charter rate.**
   A shipowner is bound to employ sufficient stevedores to deliver the cargo at the vessel's rail at the rate specified by the charter, though it would not be liable if it was prevented by strike or other cause beyond its control from employing the stevedores.

4. **Shipping ⟸180—Delay in unloading held due to neglect of consignee to furnish men to trim lighters.**
   Where the consignee neglected to send men to trim the lighters as sugar was loaded on them, as a result of which some of the stevedores employed by the ship had to do that work, so that the ship failed to deliver the specified number of bags of sugar per day, the delay was due in part, at least, to the fault of the consignee, rather than to shipowner's fault in failing to employ sufficient stevedores, and it is liable for the demurrage specified by the charter.

5. **Shipping ⟸174—Consignee, not charterer, held liable for delay in unloading.**
   Where the bill of lading provided for delivery of sugar to the consignee, "on payment of steamship freight and all other charges, as per charter party," the provision of the charter party for demurrage and the lien therefor were incorporated in the bill of lading, and the consignee is liable for the demurrage; the charterer having the benefit of the cesser clause of the charter party.

6. **Sales ⟸201(4)—Title passes on delivery to carrier, when the contract requires seller to ship and give credit for freight.**
   Where the contract merely required the seller to ship the sugar to the buyer and to give credit for the freight, the buyer to procure the marine insurance, the provision of Personal Property Law N. Y. § 100 (5), as added by Laws N. Y. 1911, c. 571, as to the time title passes, does not apply, but title passed to the buyer on shipment of the goods.

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

Libels by the Aktieselskabet Dampskibselskabet against 20,029 bags of sugar, claimed in part by Arbuckle Bros. and against William A.

Jamison and others, doing business under the firm name of Arbuckle Bros., by whom Jose Ignacio de Almagro and another were impleaded. Decree for respondents, and libelant appeals. Reversed, with directions to enter decree for libelant.

Haight, Sandford, Smith & Griffin, of New York City (Wharton Poor, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (D. Roger Englar and Dix W. Noel, both of New York City, of counsel), for appellees Arbuckle Bros.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (John M. Woolsey, Forsyth Wickes, P. Randolph Harris, and Harold T. Hartwell, all of New York City, of counsel), for appellees Almagro & Co.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. August 8, 1917, Arbuckle & Co., of New York, entered into a contract there with Almagro & Co. of Havana, for the purchase of 6,000 bags of sugar to be shipped to New York the second half of August under a cost and freight contract; i. e., the sellers were to give credit in the price for the freight to New York. But the contract contained the express condition that the buyers were to cover the shipment by marine insurance from shore to shore, including risk of lighterage. Payment was to be made in New York at 10 days' sight draft for 95 per cent. of the invoice amount, with shipping documents attached; any balance to be paid after final settlement of weight and tests.

Almagro & Co. chartered the steamer Hans Maersk and loaded her with the sugar in question; the balance of the cargo being consigned to the Warner Sugar Refining Company. September 4, the sellers' 10-day sight draft for 95 per cent. of the net invoice amount of the sugar, together with the bills of lading, was presented to Arbuckle & Co., accepted by them, and paid before final discharge of the cargo. September 6 the steamer arrived, and first discharged the Warner Sugar Refining Company's cargo, and then Arbuckle & Co's. There seems to be no dispute that the cargo was not wholly discharged until four days beyond the lay days had been used.

Arbuckle & Co. repudiating any liability for demurrage, the shipowners proceeded in rem against 2,500 bags of their sugar, which was the last cargo discharged, and also in personam against them, and they brought in Almagro & Co. in each case under the Fifty-Ninth rule in admiralty (29 Sup. Ct. xlvi).

The material provisions of the charter party are:

"3,000 bags per working day are to be allowed to the said merchants (if the steamer is not sooner despatched) for loading the steamer and letting her wait for orders, to be reckoned from the day the captain reports and the steamer is ready to receive cargo (time employed in shifting port, not counting) until her day of dispatch, and from the time of her arrival at said port of call until receipt of orders, and to be discharged. * * * And that for each and every day's detention by default of said party of second part, or agent, * * * $1,200 U. S. currency per day, day by day, shall be paid by said party of the second part, or agent, to said party of the first part. * * *

The cargo or cargoes to be received and delivered alongside of the steamer, where she can load and discharge, always safely afloat, within reach of her tackles, and lighterage, and also extra lighterage, if any, at the risk and expense of cargo. Lay days for discharging to begin 24 hours after the vessel arrives and the captain has made entry in the customs house and is ready to deliver cargo. Vessel to be discharged at the rate of not less than 5,000 bags average per weather working day for discharging, Sundays, holidays, and Saturday's half holiday excepted. * * * Charterers' responsibility to cease when cargo is all on board and bills of lading signed, but master or owners to have an absolute lien on cargo for freight, dead freight, and demurrage."

Both cases were tried together and one decree entered. The trial judge dismissed the libels on the ground that the ship through her own fault was not able to deliver 5,000 bags a day. He said:

"If, from the time the lighters were ready, the sugar had come to the ship's rail at the rate of 5,000 bags per day, there were lay days enough then unconsumed to have fulfilled the charter obligation—all cargo would have been overside before demurrage time began. But the sugar did not come fast enough, though the lighters were ready and able to receive at charter rate. To be sure it required some one to trim, as the sugar bags came down on lighter deck, and the consignees hired men from the same stevedores as were discharging for the shipowner, to do this trimming. Whether this interfered with the supply of stevedores, or whether the same men both discharged and trimmed, is not very clear to me; but it is immaterial, for if the ship's stevedores neglected their duties to get trimmer's pay from consignees, it was the ship's business to call them to account. Net result was that discharge was not accomplished for some time after lay days expired, and the question here is: Was such overrunning of time due to any 'default' on the part of any one other than the ship herself? Until this question is settled the relations of charterer and consignee inter sese need not be considered.

"Libelant contends that, on showing the bald fact that discharge was not accomplished within the lay days, he has made out a prima facie case, and therefore, of course, that he has prima facie shown, under this charter, a default on the part of consignee or charterer or both. Without granting the correctness of this proposition, let it be admitted; but on the evidence I find the fact to be that either there were not enough stevedores on the ship, or they were not skillful enough, or the cargo was so stowed that no number of stevedores could get 5,000 bags a day through the available hatches, or rather hatch. * * * Thus it is plain that the delay—i. e., the 'default' of the charterer—occurred on the deck of the ship, and arose either from stowage or shortage of labor or tackle, and the query in this case becomes this: Was it the ship's duty (and not the charterers') to see to it that 5,000 bags per day were tendered to the consignee?

"This is to me so fundamental that it seems to need no discussion. Unless relieved by contract, it is the duty of every carrier by water to deliver his cargo at his ship's rail; his liability and duty as carrier extends to the end of his tackle. The only modification of that immemorial customary duty produced by this very common form of charter was to fix a quantum for daily delivery and receipt. This shipowner did not tender 5,000 bags a day, and this claimant was at all times ready, able, and willing to take that amount. Therefore the only default was by libelant."

[1] A charterer or consignee, if the bill of lading incorporates the demurrage clause, is bound by his agreement that a vessel shall be loaded or discharged within a given time, notwithstanding that the shipowner does the loading and discharging. The term "default," in the covenant to pay demurrage from day to day for every day's detention thereafter, does not mean that he is only liable to pay for delay due

to his own fault, but means delay caused by his failure to perform his covenant that the vessel shall be loaded or discharged in the time agreed upon. He takes the risk of all causes of delay, except those due to the fault of the shipowner and to vis major, which covers—

"a 'superior force, acting directly upon the discharge of the cargo;' 'a direct and immediate vis major;' an 'unusual and extraordinary interruption, that could not have been anticipated when the contract was made;' 'a sudden and unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers,' and an 'interference on the part of an armed force, preventing the handling or moving of the cargo.' Upon principle, and according to the general current of authority, the detention alleged was not caused by default of the charterers, and did not render them responsible for demurrage, under this charter party." Crossman v. Burrill, 179 U. S. 113, 114, 21 Sup. Ct. 42, 43 (45 L. Ed. 106).

[2] The shipowner makes out a prima facie case when he has proved the delay, and the burden then lies upon the charterer or consignee to prove that the delay was due to the fault of the shipowner. There is no question of vis major involved here. The trial judge held that the delay was caused by the shipowner, because the stevedores employed by them were not able to deliver 5,000 bags a day at the end of the ship's tackles. This was due in part at least to the fault of the lighterman, who was the consignee's agent, in failing to equip the lighters with men to trim the cargo as it was received from the ship's tackles, which was a necessary element of receiving the cargo, and which caused the lighterman to employ stevedores who should have been working on the steamer's deck to work on the lighters in trimming cargo.

[3] It is a question open to some doubt whether for the purposes of the demurrage clause an insufficient number of stevedores or their incompetency is imputable to the shipowners. As the stevedores are performing the ship's duty of discharging the cargo, we think shipowners are as liable for their deficiency in number and skill as if the crew were discharging the cargo. Delay caused by a strike preventing the shipowners from getting stevedores at all would not be imputable to them, because it would be a matter beyond their control. Budgett & Co. v. Binnington & Co., 6 Asp. Mar. Cas. (N. S.) 592. But we think shipowners can fairly be expected to require the stevedores to employ enough competent men to discharge cargo at the required rate. We held the shipowner liable for the defaults of stevedores employed by him in Brooks v. Lumber Co., 229 Fed. 708, 144 C. C. A. 118. See, also, L. N. Dantzler Lumber Co. v. Churchill, 136 Fed. 560, 69 C. C. A. 270.

[4] On the other hand, the lighterman should have sent lighters equipped with men to trim the cargo as it was received from the ship's tackles. Without trimmers the lighters were as incapable of receiving 5,000 bags a day, as the shipowner was incapable of delivering them without a sufficient number of competent stevedores. Exactly what difference this shortage of equipment made does not appear, but on the whole case, especially in view of the fact that the consignee's lighters were not ready to receive at the rate of 5,000 bags a day, and took stevedores from the ship's deck, we think that the consignee has not

sustained the burden of proof. This requires us to consider other questions, which the opinion of the trial judge made it unnecessary for him to dispose of.

[5] The bill of lading for the particular bags proceeded against made the sugar deliverable to order of Almagro & Co., and was by them indorsed to Arbuckle & Co. It provided that the goods were deliverable upon payment "of steamship freight and charges and all other conditions as per charter party." This clause incorporated the provisions of the charter party as to demurrage, and, the shipowners having a lien for demurrage, the charterer is entitled to the benefit of the cesser clause. Russell v. Nieman, 17 C. B. (N. S.) 162; Crossman v. Burrill, supra; Carver on Carriage of Goods by Sea (6th Ed.) § 671. It follows that Almagro & Co. by virtue of the cesser clause are not liable under the charter party for demurrage incurred at the port of discharge, and that by virtue of the clause in the bill of lading Arbuckle & Co. personally and their sugar in rem are liable.

The libelant relies upon two decisions of this court. Milburn v. Federal Sugar Refining Co., 161 Fed. 717, 88 C. C. A. 577; Brooks v. Lumber Co., 229 Fed. 708, 144 C. C. A. 118. In the first case no lay days were provided for nor any agreement to pay demurrage. The obligation of the consignee was simply to receive the cargo in a reasonable time. In the second case there was doubt whether the delay of one-quarter of a day for rain ought to have been charged to the shipowners, but the charter party required that the charterer receive cargo if the vessel was ready to discharge in questionable weather, and there was nothing to show that she was so ready.

Arbuckle & Co. seek to hold Almagro & Co., brought in under the Fifty-Ninth rule, as owners of the sugar, under sections 100 (5) and 127 of the New York Personal Property Law (Consol. Laws, c. 41), as added by Laws 1911, c. 571, which read:

Sec. 127: *"Delivery to a Carrier on Behalf of the Buyers.* 1. Where in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section one hundred, rule five, or unless a contrary intent appears."

Section 100 (5): "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

[6] Apart from the question whether a contract to sell 6,000 bags of sugar, not being maritime, is within the jurisdiction of the court, and from the consideration that a state statute cannot control a federal court sitting in admiralty (U. S. Rev. Stat. § 721 [Comp. St. § 1538]), we are of opinion that the exception in section 100 (5) does not apply. Of course, the sugar had to go to and be delivered at New York. The statement of these facts in the contract does not show that title did not pass until delivery. The contract of sale merely required Almagro & Co. to ship it there by steamer in the last half of August and to give credit for the freight. It was a c. and f. contract; that is, the freight

to New York was included in the price. Had insurance also been included, the contract would have been the ordinary c. i. f., which vests title in the purchaser when the seller has shipped the goods, secured the insurance and arranged to pay the freight. See the discussion of the question in Biddell Bros. v. E. Clemens Horst Co., [1911] 1 K. B. 934, [1912] App. Cas. 18; Thames & Mersey Marine Ins. Co. v. United States, 237 U. S. 19, 26, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087.

This particular contract differs from a c. i. f. sale only in requiring the seller to pay the freight. If it stopped there, and the New York Statute were applicable, section 100 (5) might control; but it went on to require the buyer to take out marine insurance. This is the only difference between it and a c. i. f. sale, and it seems to us immaterial. The controlling provision as to intention to pass title is the same in each case, viz. that the owner takes out the insurance to protect his own goods. This particular contract requires the buyers to take out the insurance, and so shows the intention of the parties to pass the title to them.

The decree is reversed, and the court below directed to enter a decree for demurrage in favor of the libelant and to dismiss both petitions under the Fifty-Ninth rule, with costs against Arbuckle & Co.

GATES et al. (SPRATLEN et al., Interveners) v. MEGARGEL et al.*

(Circuit Court of Appeals, Second Circuit. June 2, 1920.)

No. 225.

1. **Joint adventures ⇐5(1)—Action for accounting of secret profits not based on fraud.**
   An action by the subscribers to a syndicate against the syndicate managers to compel the latter to account for a secret profit made in the sale of their stock in the syndicate is based on breach of duty by the managers, not on fraud.

2. **Joint adventures ⇐4(1)—Syndicate "promoters" have fiduciary duties.**
   The promoter of a syndicate, which is an organization formed for some temporary purpose, has duties of a fiduciary, agent, or trustee to the subscribers of the syndicate.

3. **Joint adventures ⇐4(1)—Syndicate promoter's fiduciary duties attach when he invites subscriptions.**
   The fiduciary duties of the promoter of a syndicate attach when he first invites subscriptions to the syndicate, though at that time there are technically no cestuis que trustent.

4. **Joint adventures ⇐4(1)—Syndicate promoter accountable for secret profits, regardless of representations.**
   In a suit to compel an accounting by a promoter of a syndicate of secret profits from transactions for the syndicate, which he was not entitled to make, it was immaterial whether the promoter represented to the subscribers of the syndicate that he was making no profit or not.

5. **Joint adventures ⇐4(1)—Subscribers to syndicate agreement bound by terms.**
   A subscriber to a syndicate agreement, who signed it, is bound by its terms, whether he carefully examined it, and drew inferences from it, or not.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 13, 65 L. Ed. —.

6. **Contracts ⟸170(1)—Agreement to be interpreted as makers knew it would be by those to whom it was sent.**
A syndicate subscription agreement, prepared and sent out by the managers of the proposed syndicate, is to be interpreted in the sense in which the makers knew it would be understood by the parties to whom sent, especially when it contained statements diverting attention from the thought of the managers' profit.

7. **Joint adventures ⟸4(1)—Syndicate promoter accountable for profit on stock sales in breach of good faith.**
Whether, under the circumstances, the promoters of a syndicate are entitled to profit by the sale of their corporate stock to the syndicate, depends on whether such sale would be a breach of good faith; the law having established no definite list of things the promoter can do and cannot do.

8. **Joint adventures ⟸4(1)—Syndicate promoter may sell his stock to syndicate at profit.**
Where the syndicate's subscription agreement disclosed the fact that the managers of the syndicate intended to sell to it their own stock, it was not a breach of good faith for them to sell stock already owned by them at whatever price they could obtain, though they received a profit from such sale.

9. **Joint adventures ⟸4(1)—Promoter cannot sell to syndicate at profit stock acquired as part of same scheme.**
Where the formation of a corporation and of a syndicate to handle its stock were parts of the same scheme, and the stock was acquired by the syndicate managers for the purpose of delivering it to the syndicate when formed, it was a breach of good faith for the syndicate managers to sell the stock to the syndicate at a profit, without disclosing their profit to the subscribers of the syndicate, though they did disclose the fact that they sold their own stock to the syndicate.

10. **Joint adventures ⟸4(1)—Subsequent agreement held not ratification of breach of faith.**
A subsequent agreement between the subscribers and managers of a syndicate for the sale of stock discloses no intent by the subscribers to ratify the manager's breach of faith in selling their stock at a profit to the syndicate.

11. **Estoppel ⟸53—Intent controls.**
Estoppel is mostly a question of intent.

12. **Trusts ⟸237—Ratification of wrongful acts must be on knowledge of facts and law.**
The beneficiary, who has been wronged by his trustee's breach of faith, can only be held to have ratified his trustee's acts when he not only knows the facts, but is informed of his rights under the law.

13. **Joint adventures ⟸4(4)—Syndicate members withdrawing cannot recover contribution to expenses from unfaithful managers.**
Members of a syndicate, who withdrew their stock therefrom in accordance with the terms of their agreement, after contributing a stated sum toward the expenses of the syndicate, cannot recover the sum so contributed from the managers because of their breach of trust in selling to the syndicate their own stock at a profit.

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

Suit by Herman B. Gates and others against Roy C. Megargel and another, copartners doing business under the firm name of R. C. Megargel & Co. From a decree granting relief to certain plaintiffs and interveners, but denying it to the named plaintiffs and interveners,

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

the latter appeal, and the defendants also appeal. Reversed, with directions to grant relief to the appealing plaintiffs and interveners.

The parties complainant before this court are but a portion of those who began the suit, many of the original plaintiffs and interveners not having appealed, or having abandoned their appeals after settlement out of court. Hence the case below is reported as Gregg v. Megargel, 254 Fed. 724.

Action arose out of what is called throughout the record a "syndicate agreement," contained in a letter or circular issued by defendants and distributed, not broadcast, but sent to persons who would probably be interested in the stock of a corporation producing petroleum in the state of Wyoming. The printed letter was as follows:

"Private and Confidential.

"R. C. Megargel & Co., 27 Pine Street, New York City.

"August 17, 1917.

"The Glenrock Oil Company

"(Incorporated).

"Capital Stock Syndicate.

"To.....

.....

"Dear Sirs: The Glenrock Oil Company (Incorporated) has been recently incorporated under the laws of the state of Virginia, with a total authorized capital stock of $10,000,000, divided into 1,000,000 shares, of the par value of $10 each. The corporation was organized for the purpose of acquiring by direct purchase, or through controlling interests in other corporations, producing and prospective oil properties located in the state of Wyoming and elsewhere.

"*We are negotiating for the purchase* of certain shares of the capital stock of this corporation, and are forming a syndicate *to acquire from us a portion of said stock* to the extent of not exceeding 100,000 shares, when, as and if acquired by us, at a price of $7.00 per share.

"The syndicate will terminate on October 15, 1917, subject to our right to dissolve it at an earlier date and to our right to extend it from time to time beyond said date for an aggregate period not to exceed sixty days.

"*We are to be managers* of the syndicate and may be members thereof, notwithstanding our relations as vendors thereto and managers thereof, and as such managers we *shall have full power to determine*, within the limit above stated, *the amount of stock to be purchased from us* by the syndicate, and with full power to sell, purchase, resell and repurchase for account of the syndicate, at public or private sale, any shares of stock at such prices and on such terms as we may deem fit; to pay the usual brokerages, as well as such commissions for effecting sales or purchases for account of the syndicate as we may deem proper; to charge the syndicate reasonable commissions and the usual brokerages for sales or purchases effected by us; to make advances to the syndicate, charging interest thereon; to make or procure loans and secure the same by pledge of syndicate stock or otherwise, to such amounts and in such manner as from time to time we may deem expedient; and generally to act in all respects as in our opinion may be to the interest of the syndicate. *We shall not be liable under any of the provisions of this letter or for any matter connected therewith, except for want of good faith*, and no obligation not herein expressly assumed by us shall be deemed to be implied.

"The syndicate managers may purchase, sell or otherwise dispose of, or be interested in the purchase, sale or other disposition of, any stock or other securities of said corporation or its subsidiary companies, or contract in any respect with it or them, without restriction and without responsibility therefor to the syndicate.

"All expenses incurred in the acquisition of such stock for the syndicate, in the marketing of the same, and all other expenses incurred by us as syndicate managers shall be charged against the syndicate. *We shall make no charge to the syndicate* for acting as syndicate managers, other than reasonable com-

missions and the usual brokerages for sales or purchases affected by us *being otherwise compensated in our purchases of said stock.*

"Your total obligation shall not in any event exceed the amount of your participation as herein stated, but the failure of any participant to perform any part of his obligation hereunder shall not release any other participant. Nothing herein contained shall constitute the participants partners with the syndicate managers or with one another. Syndicate participations are not transferable except with the written consent of the syndicate managers. The syndicate managers reserve the right to cancel the participation of any member violating the syndicate provisions, and to hold him liable for any losses sustained by such violation. The firm constituting the syndicate managers acts as a copartnership and all rights and powers hereunder of said firm shall vest in any copartnership which shall be the sole successor of said firm without further act or assignment.

"We, as syndicate managers, may grant to, or withhold from, any syndicate participants the privilege of withdrawing their respective allotments of stock, or any part thereof, for investment. No participant withdrawing stock shall be entitled in respect thereof to share in any profits of the syndicate. Applications to make such withdrawals, in whole or in part, must be made to us upon written acceptances of participation within the period below provided, and any such application may be refused or granted by us in such cases and to such extent as we may, in our discretion determine. In respect of your participation, or any part thereof, so withdrawn, you will be required to pay at the time and in the manner hereinafter provided an additional sum of one dollar per share on the number of shares so withdrawn to cover the proportion of the syndicate expenses attributable to such withdrawn participation. Upon the completion of all payments in respect of such withdrawn stock, you will be entitled to receive an appropriate certificate, issued by or on behalf of the syndicate managers, reciting that you are the owner of the number of shares specified therein and will be entitled to receive the same upon the termination of the syndicate. No stock so withdrawn from sale by any participant shall be delivered to him until the termination of the syndicate.

"*We have reserved for you, subject to the acquisition by us of such stock* and to the reduction of such participation in case of over-subscription as hereinafter provided, a participation in the syndicate of shares of such stock, which, at the syndicate price of $7.00 amounts to $

"Should you desire to accept such participation please confirm your assent to the conditions as herein stated by signing the enclosed acceptance and return the same to us at No. 27 Pine street, New York City, on or before August 23, 1917, after which time all offers of participation not so accepted will be deemed refused and cancelled. This letter and your acceptance will thereupon constitute the contract between us.

"All acceptances, in whole or in part, are subject to our approval, and in case of an oversubscription the syndicate managers shall have the right to allot to you such less amount of participation in the syndicate than the amount reserved as above stated, as they in their uncontrolled discretion may determine.

"You will be required to make payment in New York funds in respect of your obligation hereunder to the syndicate managers at their office, No. 27 Pine street, New York City, on three days previous notice stating the amount of participation in the syndicate allotted to you by the syndicate managers as above stated, mailed or telegraphed to you by us, against delivery to you at said office of subscription receipts representing your payment. Such call may, in our discretion, be for full payment or for payment in installments.

"Yours truly ....., Syndicate Managers."

The foregoing letter, with signature and address written in as required, came to every party complainant here or below, or to some duly authorized agent of each complainant, and each of them signed personally or by an admitted agent the form of acceptance referred to in the letter. Such acceptance merely acknowledged receipt of "your letter dated August 17, 1917, * * * offering us a participation" in the stock syndicate aforesaid, "which *we hereby accept upon the terms therein stated.*" The italicized portions of the

foregoing documents were not so printed in the original; the italics but serve to emphasize words and phrases deemed by us especially important.

The Glenrock Oil Company was "organized on the morning of the 17th of August," 1917. On its organization there was "a complete dummy board of directors, who did nothing except the formal matters of adopting the seal and by-laws and things of that kind." Subsequently they resigned, and then the "real board of directors" was chosen, which contained one Collins, from whom were in a sense derived the 100,000 shares of stock mentioned in the syndicate agreement. On August 10, 1917, Collins, as the representative of sundry existing oil companies located or operating in the state of Wyoming, agreed with Megargel that the Glenrock Oil Company should be organized, with a capital stock of $10,000,000, eight-tenths of which should be "issued or reserved for issue to acquire if possible a controlling interest in" (inter alia) the existing corporations represented by Collins.

Thus Collins would, in exchange for the shares of the existing company, acquire many shares of the Glenrock Oil Company when formed, and on August 10, 1917, he agreed in writing with the defendants that, if he should so acquire 242,500 shares, he would sell and Megargel would buy "100,000 shares thereof at the price of $3.50 per share," but Megargel should have five months from the date of the newly formed company's acceptance of the controlling interest held by Collins as aforesaid within which "to draw down stock under their purchase," provided that such stock should be deliverable to Megargel only "in lots of 1,000 shares or multiples of 1,000 shares at any one time," and that at least 20,000 shares should be "drawn down" each month. Payment at the contract rate was to be made by Megargel when and as he "drew down" each block or lot.

Contemporaneously with the execution of the Collins-Megargel agreement, defendants made a written contract with one Taylor (who likewise subsequently became a director of the Glenrock Oil Company) to purchase on a six months option 44,000 shares of Glenrock at the same price of $3.50 per share.

The Taylor-Megargel contract contained the following stipulation: "The parties of the second part [Megargel] agree to use their best efforts to form a syndicate to purchase from them not exceeding 100,000 shares of the capital stock of the company [Glenrock Company] when as and if acquired by the parties of the second part [Megargel] and to use their best efforts by means of said syndicate and otherwise to create and establish a market for shares of the capital stock of the [Glenrock] Company."

The Collins-Megargel agreement contains the following stipulation: "The parties of the second part [Megargel] agree to use their best efforts to form the syndicate above mentioned, and by means of said syndicate and otherwise to create a market for the shares of the company."

In this last-named contract there is no previous reference to the syndicate, but it is established by the testimony that Collins, Taylor, and one Pelton were, in dealing with Megargel, "really acting for the new company"—i. e., Glenrock Oil Company—when formed, and we have no doubt that the syndicate seven days later launched by the defendants was a part and parcel of the scheme of creation of the Glenrock Oil Company.

Defendants ultimately took and paid for the 100,000 shares of Glenrock, and made such payments after they had collected from the syndicate subscribers, and practically with the money furnished by said subscribers. Having as individuals obtained said 100,000 shares of stock, defendants transferred the same to the syndicate, or to themselves as syndicate managers, on their own books. No other transfer took place, nor were any taxes paid as upon a transfer from vendor to vendee. Defendants then attempted to market the syndicate stock on the "New York curb"; they bought as well as sold, "supporting" prices by such purchases. Their efforts were not wholly successful, although the quoted price was maintained above the syndicate price until December 10, 1917; thereafter it fell almost continuously, until on the 20th of December it reached less than $5 per share, and on that day the subpœna in this cause issued.

The reason for suit was the discovery by the original plaintiffs, or some of them, that defendants had paid but $3.50 a share for the stock put into the syndicate at $7. On this point the principal defendant testified: "I never told anybody what I was paying for the stock; I never told anybody who subscribed to the syndicate until long after the syndicate was formed."

The bill of complaint herein is sufficiently analyzed in the reported opinion below. The syndicate subscribers, who came in as interveners, did not so vary the history of the transaction as to require separate consideration. The voluminous record is for the most part devoted to explaining how and with what knowledge or notice, or means of acquiring knowledge, the various parties complainant joined the syndicate. To those who proved to the satisfaction of the court that they had been actually deceived, either by the language of the syndicate letter or dehors that letter by defendants' words, the court awarded decrees, excepting only to those who, with knowledge of the price paid by Megargel, agreed to enter a second syndicate, which on or about November 1, 1917, defendants sought to form to carry forward the affairs of the first syndicate, which by that time promised to fail. Nothing ever came of this second effort at syndication.

The complainant appellants in this cause represent those who did not show any deception personally wrought on them by defendants, or who were debarred from the fruits of such deception by their transactions in respect of the attempted second syndicate. Defendants' appeal (after settlements made) refers to matters of detail not requiring special statement. But one of defendants took any part in this firm transaction; hence they are spoken of usually in the singular number.

George L. Ingraham, of New York City, for appellants Gates and Eccles.

Henry Wollman, of New York City, and Clarence Alexander, of Yonkers, N. Y., for remaining complainant appellants.

Powell, Wynne, Lowrie & Ruch, of New York City (Marvin W. Wynne, of New York City, of counsel), for defendants.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The task presented by this appeal is to ascertain the relation of the parties to each other, and when the same was assumed; the law applicable to any relation compatible with the evidence is not doubtful. One kind of relation is fixed by the pleadings; and we agree with the trial court that plaintiffs, whether original or intervening, have not sued for damages caused by fraudulent representations, nor sought to rescind a contract. The "Syndicate agreement" is assumed or asserted to be valid; plaintiffs intend to keep what they got under it, but that document made Megargel their trustee, who has, however, while otherwise executing his fiduciary duties, (1) deceived them in respect of the price to him of the syndicate stock, and (2) made a secret profit out of such deception. Therefore the bill calls him to account for his stewardship.

[1] The action is not based on fraud, but on breach of duty; it is not described in the list of remedies given in Heckscher v. Edenborn, 203 N. Y. at page 220, 96 N. E. 441, and is like Yale Gas, etc., Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. Rep. 159. (For a similar, but statutory, proceeding, see Omnium, etc., Ltd., v. Baines, [1914] 1 Ch. 332.) That breach of fiduciary duty may be and often is fraud is really immaterial in this form of action;

but the form renders it imperative first to establish the fiduciary relation, and impose the duty before a breach can be relied on. Defendant admits that a time came when, as syndicate manager, he was plaintiff's fiduciary; but he dates such assumption of duty only from the day the syndicate was formed, and the business of "creating a market" for Glenrock stock began. What he did, or what happened before that time, is said to be something with which plaintiffs have no concern, nor right of inquiry.

[2] It being plain that in a wide sense this syndicate was an offshoot, if not a part, of the promotion or launching of the Glenrock Company, the accepted meaning or standing of the words "promoter" and "syndicate" may be considered. Lord Justice Bowen more than 40 years ago said that "promoter" was a term, not of law, but of business, usefully summing up a number of operations familiar to the commercial world, generally those by which a corporation is brought into existence. Whaley, etc., Co. v. Green, 5 Q. B. Div. 109. Nor has it since gained any more accurate definition (Yale Gas, etc., Co. v. Wilcox, supra; Bigelow v. Old Dominion, etc., Co., 74 N. J. Eq. at page 501, 71 Atl. 153), and has been applied in the western part of this country to mere speculators in mining claims (Snow v. Nelson [C. C.] 113 Fed. at page 355). Yet, loose as is the title, the duties of a fiduciary, agent, or trustee have been imposed upon its bearer. Dickerman v. Northern, etc., Co., 176 U. S. at page 204, 20 Sup. Ct. 311, 44 L. Ed. 423.

"Syndicate" is also a word of business and not of legal art. It signifies an organization "formed for some temporary purpose" (Palmer, Private Companies and Syndicates), and came into English use contemporaneously with "promoter." Mr. Palmer points out that such unions for speculation were frequently registered under the Companies Act of 1862, without share capital, in order to limit liability. Of the use of the word, and of registration, Erlanger v. New Sombrero, etc., Co., L. R. 3 App. Cas. 1218, is a well-known and rather early instance.

The "temporary purpose" of this syndicate was that common at present and in the United States—to pool securities, under an agreement to take them at a price, if the public could not be persuaded to relieve the joint adventurers by paying a higher price. Between a man who forms or "promotes" such a business venture, and one who gets shareholders for a new corporation by any of the means shown in a long line of reported cases, we perceive no legal difference whatever, and indeed identity of function between a syndicate former and a company promoter has been assumed in the most recent decisions. Heckscher v. Edenborn, supra; Sim v. Edenborn, 242 U. S. 131, 37 Sup. Ct. 36, 61 L. Ed. 199.

[3] Thus the question is reached: Did a fiduciary relation exist between subscriber and syndicate maker, between plaintiffs and Megargel, when (in legal contemplation) the latter on August 17, 1917, invited the former to come into his scheme? We have no doubt such relation arose instanter; of course, in one sense, it could not fully exist until there was a cestui as well as a trustee; but, if one asks another to trust him, he assumes the position of a trustee for many

purposes by the act of asking. If, therefore, defendant on August 17th assumed a position of trust quoad possible subscribers now represented by these appellants, what was he in duty bound to tell them? Undoubtedly that what his syndicate would buy he himself had for sale, and that was done; we think the wording of the agreement plain on this point.

[4, 5] But was defendant bound to state either what he had agreed to pay for what he wished to sell, or the bald fact that he would profit by the sale? This is the crux of the case, and here we differ with the learned trial court. If it was defendant's duty to disclose, or if he was by law under a disability to take a secret profit, it was immaterial under this bill whether he also represented orally or otherwise that he was putting the stock to the syndicate at what it cost him. It was also immaterial whether a subscriber carefully examined and drew inferences from the syndicate agreement or not; he signed it, and is bound by its terms, and by this action recognizes it as his agreement. What he complains of, and all he complains of, is Megargel's lack of good faith, or breach of duty (in effect the same thing), in carrying out the agreement.

[6] That defendant did not disclose is admitted, but we may go further and hold, without analyzing the agreement phrase by phrase, that the document contains an apparatus of words which diverts attention from the thought of vendor's profit, and creates by suggestion the belief, so far as this particular lot of 100,000 shares is concerned, that defendant was coming into the syndicate on an equality with all others, but hoped to make money by other purchases of stock. Such a document especially invites application of the rule that a writing is to be interpreted in the sense in which the maker knew or had reason to know it would be understood by the party to whom he tendered it. Ryan v. Ohmer, 244 Fed. 34, 156 C. C. A. 459; Moran v. Standard Oil Co., 211 N. Y. 196, 105 N. E. 217. Therefore we hold that defendant ex industria concealed his expected profit at a time—i. e., August 17, 1917—when he asked to be the trustee for every party plaintiff in this action.

[7] Thus defendant's position is seen to be that one who says to his invitees, "I ask you to trust me to buy from myself with your money, and for your ultimate account, but presently for an entity of a syndicate which I shall manage, in the hope of profit for all of us," is under no duty to say more. This is a question of law, yet the law does not offer, and never has made, a list of the things promoters can do and cannot do. Every act complained of is to be tested by asking whether the relations between the promoter, and the birth, formation, and floating of the venture he promotes, are such as to render it contrary to good faith that the promoter should derive a secret profit from the promotion. This is Lord Justice Bowen's formulation of the rule in Whaley, etc., Co. v. Green, supra, and it has not been improved on. It has been often said (e. g., per Pitney, J., then Chancellor, in Bigelow v. Old Dominion, etc., Co., supra, 74 N. J. Eq. at page 502, 71 Atl. 153) that fraud need not be shown "to disentitle the promoter to his secret profit," and the reason for it is that good faith often fails, where fraud is

neither contemplated nor attempted; lack of good faith is often no more than something judicially deemed against public policy.

[8] But defendant, if he had no shares of Glenrock on August 17th, had agreed to take and pay for them; wherefore it is urged that, even, admitting his agency or trusteeship, and a status equivalent to that of a promoter, he still had good right to sell his own property to his syndicate at any price he could get, if the identity of the vendor was stated. The right contended for exists, and, though often stated, never better than by James, L. J., in Gover's Case, L. R. 1 Ch. Div. at page 187, and by Sharswood, J., in Densmore Oil Co. v. Densmore, 64 Pa. 43, who agree that "in point of law" a man may sell his own property to an entity he himself forms, just as he may sell to another the right to become his partner; it being assumed that in the "original purchase there was no confidential relation" affecting the seller with a trust. In such a transaction the parties, it is said, "deal at arm's length," and the vendees "must exercise their own judgment"; in other words, "caveat emptor" applies.

This is all true, not because the thing sold belonged to the promoter, but because such ownership stood the test of good faith. The time of acquisition has been considered; and in Highway, etc., Co. v. Ellis, 7 Ont. L. R. 504 (a case much pressed on us by defendant), the court declined to hold a promoter because it had not been shown that "at or before" the date of purchase the promoter had invited the public to come in.

[9] Whether the inquiry be, were these parties dealing at arm's length? or was there a confidential relation imposed on this defendant at his date of purchase? the answer is unfavorable to defendant. They were certainly not dealing at arm's length, for that phrase implies no lodging of discretion by one party in the other, and here Megargel had absolute discretion whether to buy from himself or not. As for the existence of a confidential relation at the time of purchase, it is to be remembered that the Collins-Megargel contract was made in contemplation of this syndicate, both were parts of the launching of the Glenrock Company, and the creation of the company (and therefore of stock) was simultaneous with the syndicate agreement, whereof one object was to get the money wherewith to pay for the stock.

Time here, merely as time, is not of the essence, and we think it clearly shown that the object of the contract was to give a coating of legality to a preconceived intent (1) immediately to sell to the syndicate at a profit of 100 per cent., and (2) to conceal the profit from the syndicators. The profit plainly depended on successful concealment; the trusteeship was sought to get the profit. Under such facts, the whole transaction must be regarded as unitary, and defendant held as a fiduciary ab initio, because he agreed to take stock only to pass it along to himself as trustee. Since liability grows out of duties equitably imposed by a voluntarily assumed relation, it may be said generally that one who seeks or creates an agency or trusteeship or any fiduciary position, for the purpose and with the intent of secretly profiting therefrom, is not acting in good faith, and from the time he forms the intent occupies such a position "that any profits resulting

from his dealings with" the concern whose agency he seeks must be accounted for. McKay's Case, L. R. 2 Ch. Div. 1; and compare statement of general rule in United States v. Carter, 217 U. S. at page 306 (30 Sup. Ct. 515, 54 L. Ed. 769, 19 Ann. Cas. 594). If defendant's fiduciary position be taken to date from the launching of the syndicate on August 17th, or even from date of subscriptions, we do not overlook the strong arguments for appellants based on the language of the agreement, but have preferred the broader ground above stated.

[10-12] There remains the question of estoppel urged against such of the present appellants as consented to go into the inchoate and futile second syndicate, after learning of defendant's secret profit. Estoppel is mostly a question of intent (Dorrance v. Barber [C. C. A.] 262 Fed. at page 492), and certainly no intent to ratify their trustee's breach has been shown in respect of these appellants. But on the holding now made, that these appellants were cestuis que trustent and were dealing with their trustee, it is plain law that a cestui who has been wronged by his trustee can only be held to have ratified when he not only knows the facts, but is informed of his rights under the law. In re Long Island, etc., Co., 92 App. Div. 1, 87 N. Y. Supp. 65. The present case falls far short of meeting this requirement.

So far as it affects the present appellants, the decree appealed from is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Appellants are entitled to an accounting, upon which the defendant must be surcharged with $3.50 in respect of each share accounted for.

[13] But, since the contract has not been rescinded, we see no reason why those appellants who withdrew their stock from the syndicate on paying a dollar a share over the syndicate price should not be held to their bargain. They agreed to contribute that dollar to the funds of the joint adventure, it was the price of escaping further loss or foregoing gain, as the case might be, and the sum so paid they cannot complain of. The reasons for granting an accounting in addition to those heretofore indicated are that the general adventure of the syndicate ended by lapse of time and the account proffered by the defendants and in evidence before us is insufficient, even without any reference to the matter of secret profits. Marvin v. Brooks, 94 N. Y. 71.

The appealing plaintiffs and appealing interveners will each recover one bill of costs in this court. No direction is given as to the costs of the District Court.

EIKLAND et al. v. CASEY et al.*

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920.)

No. 3365.

1. **Waters and water courses ⇐171(2)—One changing course of stream must anticipate floods.**
   The flooding of a stream, although the water rose to an unusual height, even beyond what had been known for many years, cannot be considered an act of God, in a legal sense, where floods of greater or less volume were usual and to be expected, and one changing the course of the stream was bound to anticipate and provide against it.

2. **Waters and water courses ⇐171(2)—Persons diverting stream liable for flood damage.**
   Defendants, who changed the channel of a stream, making a new channel, of smaller capacity than the natural channel, which passed around plaintiffs' lot, *held* liable for the washing away of the lot by a flood caused by heavy rains, which were not unprecedented nor unusual, except in the volume of water falling.

   Wolverton, District 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.

Action at law by A. Eikland and another against W. W. Casey and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Action to recover damages for causing destruction of plaintiffs' property by flood waters. The defendants Casey and others, owners of land bordering upon Gastineau Channel at the mouth of Gold creek, in 1913 sold to the plaintiffs a lot. Gold creek flows from the mountain range east of Juneau, in part through a canyon, out of which it flows near the boundary of the Casey-Shattuck land, and thence across such land into Gastineau Channel. Plaintiffs' lot was on the south side of the stream, and from the point where the stream emerges from the canyon to a point some distance below plaintiffs' lot the creek was confined by high banks, but a short distance below plaintiffs' lot the creek at times overflowed the banks, and spread over parts of the Casey-Shattuck lands, and allowed a free outlet of the waters to the channel.

After the plaintiffs had built a house and improved their property, defendants built a dam or bulkhead across the creek at a point approximately opposite the plaintiffs' lot, and from the dam, and from a point opposite and across the stream, constructed bulkheads of logs and stone to Gastineau Channel at a point to the southeast, thus changing the course of the stream, and deflecting it to the southeast in a curve around the west and south sides of plaintiffs' lots. It was alleged that the new channel thus constructed was sufficient to carry the water away at ordinary stages of the stream, but was wholly insufficient at times of flood, such as ordinarily occurred at times of heavy rains, so that the stream as dammed and changed in its course became a danger to plaintiffs' property of which defendants were fully advised. It was also averred that on September 26, 1918, there occurred one of the usual periodical heavy rains to which the vicinity was subject, and which caused the water of Gold creek to rise and pour out of the canyon onto the Casey-Shattuck lands, and that the waters, unable to flow across the flat in their usual and natural course, because of the dam, and being deflected thereby, and the new channel being insufficient to confine and carry off the water, the flood water was deflected, and impinged against plaintiffs' prop-

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

*Rehearing denied October 18, 1920.

erty, and washed it away, and washed the earth and soil upon the lot itself, so that a new and deep channel thereafter occupied the space formerly occupied by the lot and house; that the damage and destruction was caused solely by the construction of the dam and bulkheads.

The answer affirmatively pleaded that the flood and rains of September 26th were unprecedented and extraordinary, and such as could not have been foreseen by the defendants or any one else, and that the damage was due solely to an act of God. Issue was taken with these affirmative allegations. The case was tried to a jury, and verdict rendered for defendants.

The evidence showed that the defendants constructed bulkheads across Gold creek, and thus dammed the same and diverted it from its natural bed, and forced it into an artificial channel, that the original natural channel before diversion had a relative capacity larger than that of the artificial channel, and that the original channel on a cross-section measurement had an area of 230 square feet, while the new channel on a cross-section measurement had but 150 square feet.

J. H. Cobb and John Rustgard, both of Juneau, Alaska, for plaintiffs in error.

H. L. Faulkner, of Juneau, Alaska, and Myrick & Deering and James Walter Scott, all of San Francisco, Cal., for defendants in error.

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

GILBERT, Circuit Judge (after stating the facts as above). The plaintiffs were in possession of property which was protected against freshets by the natural channel of a stream sufficient to carry all flood waters. The defendants, for their own benefit, closed the channel and made a new one, against the plaintiffs' protest that the change would endanger their property. The plaintiffs requested an instruction to the jury that if they found that, if the artificial channel had been built of a capacity equal to the natural channel, the plaintiffs' property would not have been damaged by the flood, then the defendants were liable. Such an instruction would have been justified under the doctrine of the leading case of Rylands v. Fletcher, L. R. 3 H. L. 330, and other English cases cited by the plaintiffs, such as Greenock Corporation v. Caledonian R. Co., [1917] A. C. 556, in which the Lord Chancellor said:

"It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by an extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel, he will be liable."

In 2 Farnham on Waters and Water Rights, 1634, 1635, it is said:

"The channel in which a stream flows is a component part of the stream itself, and one owner cannot change the flow of the water to another channel to the injury of a lower proprietor without being liable for the injury. * * * One who undertakes to change the channel of a stream must see that the capacity of the new channel is in all respects equal to the old one, and he will be liable for injuries caused by the overflow of the stream in case it is not so; and the fact that the size is greater than that of the old channel will not relieve him from liability if it is constructed in such a manner as to be more likely to overflow"—citing Fletcher v. Smith, L. R. 2 App. Cas. 781.

To the same text may be cited McLean v. Crosson, 33 U. C. Q. B. 448. This inherently just and equitable doctrine of the English courts has been accepted in a few of the courts of the United States, as in Shipley v. Associates, 106 Mass. 194, 8 Am. Rep. 318, Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Cohill v. Esatman, 18 Minn. 324 (Gil. 292), 10 Am. Rep. 184, and Knapheide v. Eastman, 20 Minn. 478 (Gil. 432), and no reason is suggested why it should not be applied to the present case except the reason—if it be a reason—that it is opposed to the decided weight of American authority.

[1, 2] But if that reason is controlling, and we are required to follow the rule generally accepted in the United States, that one who in changing the natural channel of a stream exercises reasonable precaution against floods which may be expected is not responsible for damages thereby occasioned, there still remains the fact that there is no evidence in the present case that the flood of September 26, 1918, was of such a character that it should not have been anticipated in the exercise of reasonable care and prudence. The defendant Casey admitted that before the cribbing was put in on the banks of the creek he knew that at times of very high water the water would flow over the banks at any place. The defendants called three witnesses, who testified as to their observation of floods in the stream during the last 10, 11, and 15 years, and their testimony covering as it does so short a period of time may be held negligible. The defendants also called witnesses who had observed the stream for longer periods. Coggins, who had lived in Juneau 23 years when asked whether he had ever seen freshets as high as that of 1918 answered, "I could not say whether I did or not." He testified, further, that he had seen other freshets and could not say whether they were as high as that of 1918. "They might have been higher for all that I know." Layton was asked whether within his memory of 30 years he had seen as great a rainfall, or as high water as on September 26, 1918. He answered, "No, I don't think so." Behrens, who had been 32 years at Juneau, said that he thought the flood was the highest he had ever seen, but he would not undertake to say positively that it was. The defendants are bound by this testimony, which they themselves introduced. It is wholly insufficient to show that the flood was of an extent and character which the defendants were not bound to anticipate. The plaintiffs excepted to the instructions of the court upon the question of an ordinary flood as not being sufficient under the testimony in the case. We think that the exception was well taken.

"An ordinary flood is one, the repetition of which, though at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream in which it occurs, reasonably have been anticipated. An extraordinary flood is one of those unexplainable visitations whose comings are not foreshadowed by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight." 13 Am. & Eng. Ency. of Law (2d Ed.) 687.

The flood in the present case was not an "unexplainable visitation." It was caused by no cloudburst or other catastrophic phenomenon,

so as to be classed as an act of God. It was caused solely by a heavy downfall of rain at a time when heavy rains were to be expected. In Ohio, etc., R. Co. v. Ramey, 139 Ill. 9, 28 N. E. 1087, 32 Am. St. Rep. 176, it was said:

"The principle, clearly, is that, although a rainfall may be more than ordinary, yet if it be such as has occasionally occurred, and it may be at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. It is within the knowledge of all who have long resided in this state that our streams are occasionally subject, after intervals which are sometimes of shorter and at other times of longer duration, to great floods, occasioned by very heavy rainfalls, and their heights are known by those who have felt interested in them. Such rainfalls were not usual and ordinary, but they were unusual and beyond ordinary; i. e., they were extraordinary, and yet it is just as certain that like rainfalls will occur in the future as it is that the same laws of nature by which they are produced, and the same conditions to be affected by those laws, will continue to exist in the future as they have in the past."

It was there held that a cloudburst which had at irregular and infrequent intervals occurred within the memory of man in a particular locality was not to be classed as a vis major. So in Gulf, etc., R. Co. v. Pomeroy, 67 Tex. 498, 3 S. W. 722, the court held that, if extraordinary inundations had occurred within the memory of men then living, their recurrence should be anticipated and provision made against the danger likely to result therefrom should a recurrence of the flood take place. In Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 South. 374, the court said:

"The term 'act of God,' in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them."

In Realty Co. v. Railroad, 154 Mo. App. 364, 134 S. W. 1034, it was said:

That "the history of the country as to" floods should "be taken into consideration," and where similar "extraordinary inundations have occurred within the memory of men then living, their recurrence should be anticipated and provided against."

In Hartshorn v. Chaddock, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426, the court said:

"Irrespective of any question of negligence or malice, a riparian owner who by his willful act diverts the waters of a natural stream from its accustomed channel, and causes them to flow upon the lands of his neighbor, is liable for the resulting damages."

Answering the contention that the flood in question "was so extraordinary and unusual as to be deemed an act of God," the court said:

"It is found that, though the freshet was unusual, with respect to the volume of water, yet that similar ones, but of less power, have occurred in the past, and are liable to occur in the future from heavy rains or melting of snow."

In Mundy v. New York, etc., R. Co., 75 Hun, 479, 27 N. Y. Supp. 469, it appeared that a flood which occurred in 1889 was unusual in respect to the volume of water, yet that similar floods, but of less

power, had occurred in 1833 and 1865, and that the river had for many years been subject to sudden variations and heavy rises. It was held that the flood of 1889 was not so extraordinary as to relieve the defendant from liability.

The judgment is reversed, and the cause is remanded for a new trial.

WOLVERTON, District Judge (dissenting). After a very careful study of the present controversy, I am not persuaded that the rule which requires a person owning land, and having occasion to change the channel of a stream running through it for the purpose of reclamation or improvement for his benefit, under all circumstances, in order to protect his neighbor against injury, to construct a channel of equal capacity with the old or natural channel, is the better one. The rule in this country would seem to be to the contrary by an overwhelming weight of judicial utterance.

I conceive the law to be that one desiring to change the channel of a stream, which he deems necessary in order to reap the greatest benefit to himself from his own holdings, must, for the protection of his neighbor, take care that the new channel is constructed in such a way, and of such ample capacity, that it will not impede the usual flow of the water in the stream, nor the ordinary flood waters, such as might be reasonably expected or anticipated by the exercise of common prudence and foresight, taking into consideration the known climatic conditions, the topography of the country, and the experience of persons long resident within the locality. He is not required to anticipate unusual and extraordinary or unprecedented floods, such as are produced by the overwhelming cataclysms of nature, although they may not, in a strict sense, be classified as vis major or the acts of God. The trial court's definition of an extraordinary flood is apt, namely, that it "is one of those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight."

Generally speaking, no person is bound to foresee and provide against casualties never before known and not reasonably to be expected, or which would not have arisen save under circumstances which are exceptional. 29 Cyc. 433. But, coming more nearly to the question in hand, and speaking under the subject "act of God," this expression is found in the same work:

> "Thus it has been decided that winds of unusual and extraordinary violence, extraordinary rainstorms, floods, fires, and frosts are classed as acts of God within the rule exempting defendant from liability." 29 Cyc. 441.

The rule is thus epitomized as applied in L. & N. R. Co. v. Conn, 166 Ky. 327, 332, 179 S. W. 195, 198:

> "He is not liable for damages growing out of overflows which were caused by extraordinary rains or floods; i. e., such floods or rains as are of such unusual occurrence in the vicinity that they could not have been anticipated by persons of ordinary experience and prudence."

So, in Lyon v. Chicago, M. & St. P. Ry. Co., 45 Mont. 33, 42, 121 Pac. 886, 888:

"The rule of law in such cases is that the defendant is only required to take precautions against ordinary storms which occur in the vicinity; and if the damage would have occurred by the act of God, notwithstanding the obstruction, even if there were negligence on the part of the defendant, damages cannot be recovered. * * * In this case, unlike most cases in which the act of God is invoked as a defense, the act of negligence did not occur during the storm, or after it was over. Therefore the act is only made a negligent act by comparison with the duty which defendant owed before the storm. It was not defendant's duty to foresee and prepare against an unprecedented storm; in other words, it was not defendant's duty to prepare against 'the act of God.' Its duty was only to prepare against ordinary storms."

See, also, Farnham on Waters and Water Rights, vol. 3, sec. 990, where the author says:

"But in making improvements upon his own property a landowner is under no obligation to anticipate or provide against extraordinary floods. * * * But a flood is an act of God when caused, without the negligence of man, by an extraordinary rainstorm so great that it could not reasonably have been anticipated, although if it had been anticipated the effect might have been prevented. A storm is not shown to have been extraordinary, so as to constitute an act of God, by the fact that a similar one had not occurred during a period of six years. If the flood is extraordinary, one whose structures, which were carefully constructed with due regard to the rights of his neighbors, aided in the injury, is not liable for the result."

"Floods unprecedented and so extraordinary as to have been beyond reasonable anticipation are not to be provided against." Atchison, T. & S. F. Ry. Co. v. Herman, 74 Kan. 77, 79, 85 Pac. 817, 818.

So of a large number of cases, comprising many states in the Union, of which I cite only a few: B. & O. R. Co. v. Sulphur Spring School District, 96 Pa. 65, 42 Am. Rep. 529; Karchner v. Penn. R. Co., 218 Pa. 309, 67 Atl. 644; Goddard v. C., B. & Q. R. Co., 143 Wis. 169, 126 N. W. 666; White River Log, etc., Co. v. Nelson, 45 Mich. 578, 8 N. W. 587, 909; Inhabitants of Palmyra v. Waverly Woolen Co., 99 Me. 134, 58 Atl. 674; Dahlgren v. Chicago, M. & P. S. Ry. Co., 85 Wash. 395, 148 Pac. 567; Smith v. C., B. & Q. R. Co., 81 Neb. 186, 115 N. W. 755; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; O. & M. Ry. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529, 36 Am. St. Rep. 359; Price v. Oregon Railroad Co., 47 Or. 350, 83 Pac. 843.

The necessity of the utilization of water courses in this country is so diverse, for the promotion of so vast a number of enterprises, that I am impressed that an application of the English doctrine, virtually making the party seeking to change or utilize a public stream, for his own benefit, an insurer of his neighbor against injury, is not so well calculated to meet the ends of justice to all as the American doctrine.

As to the usual or unusual features of the flood, it must be conceded that, if the conditions pertaining to whether the flood was an ordinary one, or an extraordinary or unprecedented one, were such that reasonable minds might conscientiously differ, the question was for the jury, and not for the court. Supplementing what is set forth in the prevailing opinion touching the flood waters having a tendency to show their proportions, the witness Summers, who was in charge of the local office of the Weather Bureau at Juneau, testified that the precipitation in 24 hours, on September 25–26, was 5.54 inches, and that at another

period, in October, 1913, when the water was accounted high, the precipitation was 3.50 inches, and that he had no records showing that the rainfall exceeded that in the meantime. Witness further testified that the precipitation at the Perseverance mine, in the Gold creek basin above, spoken of as the Jualpa basin, for the 24 hours ending at 4 p. m. on September 26th, was 7.40 inches, practically 2 inches more precipitation than at Juneau.

Mr. Sharick, who had been a resident of Juneau since 1898, and kept a record of the rainfall from 1898 to 1912, testified that the highest precipitation was on September 7, 1902, 4.01 inches, the next highest on October 17, 1905, 3.50 inches, and the next highest to that on August 26, 1905, 2.17 inches. Mr. Gastonguay relates that the highest precipitation at Perseverance mine since October, 1916, was on September 26, 1918, 7.04 inches. The next highest, according to his record, was on May 28 preceding, 3.4 inches.

Mr. Canfield, an engineer of the United States Geological Survey, who kept a gaging station in Gold creek, near Juneau, from July 20, 1916, testified that the highest point of the water was the stage indicated by 6.81 feet, with a corresponding flow of 2,600 cubic feet per second, on September 26, 1918, and that the highest number of cubic feet prior to that date was 1,000, on August 19, 1917.

W. W. Casey testified that he had been a resident in Juneau since 1898, and that he had seen no such water as fell on September 26, 1918. He further testified that at that time a flume in the basin was carried down, and that the bridge across Gold creek was carried away. The bridge was built in 1914, and took the place of an old one, which was there when witness came to Juneau in 1898, and remained intact from floods during the entire time. The new bridge was constructed some 4 or 5 feet higher than the old one, which was torn down to make place for it.

The very action of the flood in question has a tendency to show it to have been extraordinary and unprecedented. It completely washed away upland, lying 21 feet above the level of the channel of Gold creek, which was covered in part with stumps, and had never, so far as known, been so affected with floods before.

Considering all these things, I am impressed that the question whether the flood was an ordinary one, or was unusual and extraordinary or unprecedented, was one for the jury, and was properly submitted to them for their judgment.

Further than this, a careful examination of the record does not, to my mind, disclose any reversible error of the court.

These considerations would lead to an affirmance of the judgment.

ADLER v. SEAMAN et al.

(Circuit Court of Appeals, Eighth Circuit. May 11, 1920. Rehearing Denied September 18, 1920.)

No. 5449.

1. **Action ⇐57(1)—Consolidation of causes limited by statute.**
Under Rev. St. § 921 (Comp. St. § 1547), authorizing consolidation of causes "of a like nature or relative to the same question, * * * for avoiding unnecessary costs or delay, * * * when it appears reasonable to do so," the consolidation of causes is a matter of judicial discretion, but within the limits imposed by the statute, and litigants are deprived of legal rights if their causes are consolidated, outside of the terms of the statute, to their injury.

2. **Action ⇐57(2)—Consolidation of essentially different suits by different parties against same defendant not warranted.**
Where two suits against a street railroad company were pending at the same time, the first by a stockholder against the corporation and others to recover, in right of the corporation, assets wrongfully wasted by officers and directors, to secure removal of such officers and directors, and avoidance of alleged fraudulent contracts, and incidentally, if necessary, appointment of a receiver, and the second by a mortgage creditor for foreclosure and appointment of a receiver for alleged insolvency, the only question in common in the two suits being the receivership, and a receiver was appointed in the second suit, who took possession of the property, an order, made thereafter and before any action had been taken in the first suit, consolidating the two suits and treating the second as an intervention in the first, over objection of the complainant therein, *held* erroneous.

3. **Action ⇐57(1)—Consolidation dependent on status of cases.**
The propriety of any consolidation order must be determined by the situation of the two cases at the time the order is made.

4. **Action ⇐57(1)—Court without power to force intervention.**
Interventions are in their nature voluntary, and a court is without power to consolidate two suits and force the complainant in one into the position of an intervener in the other over his objection.

5. **Corporations ⇐320(4, 13)—Receivers ⇐52—Receiver for corporation necessary party to stockholder's suit, and appointment of receiver or extension of receivership unnecessary.**
Where a general receiver for a corporation was appointed in a suit by a creditor, and took possession and control of its property, the extension of his receivership to suit by stockholder to recover in right of the corporation assets alleged to have been wrongfully wasted by its directors *held* not only unnecessary, but improper, since the receiver, as representing the corporation, is a necessary party to such suit, and should be brought in that he may, if deemed advisable by the court, prosecute the same, or may as a defendant be bound by the adjudication.

6. **Appeal and error ⇐71(4), 78(1)—Order of consolidation and extending receivership appealable.**
An order consolidating two suits and making one subordinate to the other as an intervention, over the objection of complainant in the subordinated suit, and also extending the receivership in his suit to the other, *held* final and appealable.

7. **Abatement and revival ⇐8(5)—Stockholder's suit cannot exclude suits by creditors.**
A stockholder, by commencing a suit against the corporation and others to enforce rights inhering in the corporation, and incidentally praying for a receiver, if it should become necessary to protect the property from creditors, cannot confer on the court jurisdiction of the res, which will

exclude creditors from enforcing their rights, including the right to a receiver, if entitled to one, except by intervening in such suit, which, under equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), would subordinate them to complainant's litigation.

8. Equity ⇐114—Order allowing invention cannot be made to relate back to operate as abatement.

An order in a suit against a street railroad company, permitting the filing of petitions of intervention challenging the jurisdiction of the court, made after appointment of a receiver in the suit, who was then in possession of and operating a large property, cannot be made to relate back, so as to abate all prior proceedings, including appointment of the receiver, pending determination of the question of jurisdiction.

9. Receivers ⇐96—Appointment of counsel for receiver within discretion of court.

Appointment as counsel for a receiver of one who had acted as one of the counsel for a complainant in bringing another suit *held* within the discretion of the court.

10. Parties ⇐38—Nature of "intervention."

"Intervention" is a method of practice by which one having an interest or right which will be affected by existing litigation, to which he has not been made a party, may by leave of court, come into the litigation to protect such interest or right, and is not an independent action, but is ancillary and supplemental to the existing litigation.

[Ed. Note.—For other definitions, see Words and Phrases, Intervention.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer and John C. Pollock, Judges.

Suits by John W. Seaman against Richard McCulloch and others and by Samuel W. Adler against United Railways Company of St. Louis and others. From an order consolidating the two causes and extending the receivership in the Adler suit to the consolidated cause, Adler appeals. Reversed.

Edward W. Foristel, of St. Louis, Mo., for appellant.

Ephrim Caplan, of St. Louis, Mo., for appellee Seaman.

Irvin V. Barth, of St. Louis, Mo. (George H. Williams, William R. Gentry, M. F. Watts, and Edwin W. Lee, all of St. Louis, Mo., on the brief), for appellee Leed Mining Co.

Randolph Laughlin, of St. Louis, Mo. (Ephrim Caplan, of St. Louis, Mo., on the brief), for appellees Laughlin.

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

STONE, Circuit Judge. January 7, 1918, John W. Seaman, a preferred stockholder of the United Railways Company of St. Louis, filed his bill, charging waste and maladministration by certain present and past directors of that company, wherein he sought the recovery of the sums so wasted and the removal of the directors. An amended bill and a supplemental bill were later filed, and the cause brought to issue thereon by answer filed February 7, 1919. February 15, 1919, complainant filed his motion for the appointment of a receiver, which resulted in an order, February 17, 1919, appointing a master to take testimony and report upon the advisability of such receivership.

March 27, 1919, the Leed Mining Company, a bondholder of the United Railways, sought and was permitted to intervene. April 1, 1919, E. A. Laughlin and Robert T. Laughlin, who were similar bondholders, intervened. Both intervening petitions prayed receivership, though with some differences.

April 11, 1919, Samuel W. Adler, a bondholder under a mortgage junior to that of the above interveners, filed his bill in equity against the United Railways, and its predecessor, St. Louis Transit Company, wherein he sought a receivership. Upon the same day the defendants filed separate answers in the Adler suit, admitting all of the allegations of that bill, and the United Railways joining in the prayer of the petition for a receiver. The following day, April 12th, Rolla Wells was appointed receiver in the Adler suit, and took immediate possession. April 22, 1919, Seaman and the two interveners filed separate motions in both the Seaman and Adler cases, praying that the two causes be consolidated, and that the Adler suit be treated as an intervention in the Seaman case. The above pleadings will be developed, and other pleadings which were filed will be noticed, further in this opinion. April 24, 1919, the court heard such motions, and ordered that—

"Cause No. 5608 [Adler suit] is considered an intervention in cause No. 4820 [Seaman suit], and is consolidated with the latter, and said causes shall hereafter proceed under the title 'John W. Seaman, Complainant, v. Richard McCulloch et al., Defendants, Consolidated Cause No. 4820, in Equity.'"

As a further part of said order Rolla Wells was appointed as receiver in the consolidated cause. The same day two other orders were made, by one of which the special master theretofore appointed in the Seaman case was appointed in the consolidated case under the receivership, and by the other Charles W. Bates was appointed general counsel for the receiver in the consolidated cause.

May 6, 1919, two interventions were permitted in the Adler suit; one by the above Laughlins, and the other by Henry F. Mueller et al., who were preferred stockholders in the United Railways and holders of bonds issued by that company, or by one of the companies making up the consolidation of the United Railways. May 22, 1919, Charles B. Cole and William B. Thompson, preferred stockholders of the United Railways, applied for leave to intervene in the consolidated cause. This application was reported adversely by the master November 26, 1919, and upon December 4, 1919, the court denied such application.

From various of the above proceedings three appeals have been taken. The present one, by Adler; another, by Henry S. Priest, a defendant in the Seaman Case, 266 Fed. 844, decided at this time; and the third, by Charles B. Cole and Thompson, 266 Fed. 846, also decided at this time. This appeal by Adler is from the above order of April 24, 1919, to the effect that "cause No. 5068 is considered an intervention in cause No. 4820 and is consolidated with the latter," and from the appointment of a receiver in that order.

The motions to which this order responded were expressly based upon equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii, 33 Sup. Ct. xxviii). The words of each motion are, in this respect, identical and

are "to treat said cause No. 5068 [Adler suit] as an intervention in said cause No. 4820 [Seaman suit], and to consolidate the same under equity rule 37 with said cause No. 4820 and to appoint Rolla Wells, receiver in said consolidated cause." Rule 37 has nothing to do with consolidation of causes, which is governed by section 921 of the Revised Statutes (Comp. St. § 1547). The rule controls interventions in equity suits. The purpose of the motions was therefore to secure intervention. No desire was evidenced for the mere trial of two independent cases at the same time for purposes of saving time and expense, such as contemplated by section 921. But it was sought to employ consolidation as a medium of getting the two independent suits united, so that the movants might, as an intervention, bind up with and in subordination to their existing litigation the independent suit of Adler, who vigorously opposed such union in any form or for any purpose. To determine whether this could properly be done involves an examination of the purposes and some of the characteristics of consolidations and of interventions, and an application of those principles to the matters in hand.

[1] Consolidation of separate and distinct causes pending in the same court is, in federal courts, authorized by section 921 of the Revised Statutes. In its conception that statute was designed for the sole purposes of saving the time of the court and the costs to the litigants. As originally enacted in 1813 (3 Stat. 21) it was one of three sections in an act dealing with costs. Under its beneficent provisions, not only may cases affecting the same property, title, res, or fund be thus brought together and tried at one time, but cases unrelated in right or liability, but connected by some common controlling issues or facts, which can conveniently be heard and determined by a jury or a chancellor at one hearing. Instances of the former character are Gila Bend Res. Co. v. Gila Water Co., 202 U. S. 270, 26 Sup. Ct. 615, 50 L. Ed. 1023; The North Star, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91; The Dove, 91 U. S. 381, 23 L. Ed. 354; Bankers' Trust Co. v. Ry. Co., 251 Fed. 789, 164 C. C. A. 23 (C. C. A. 8th Cir.); The Rochester (D. C.) 227 Fed. 203; Gay v. Power Co. (C. C.) 190 Fed. 773; City of Boston (D. C.) 182 Fed. 171; Bird v. People's Gas and Elec. Light Co. (C. C.) 158 Fed. 903; Cole v. Ry. Co. (C. C.) 140 Fed. 944, 947; Toledo, etc., R. R. Co. v. Trust Co., 95 Fed. 497, 36 C. C. A. 155 (C. C. A. 6th Cir.); The Job T. Wilson (D. C.) 84 Fed. 204; Sioux City Terminal, etc., Co. v. Trust Co., 82 Fed. 124, 27 C. C. A. 73 (C. C. A. 8th Cir.); Park v. R. R. Co. (C. C.) 70 Fed. 641; Compton v. Jesup, 68 Fed. 263, 15 C. C. A. 397 (C. C. A. 6th Cir.). Instances of the latter are Ætna Life Ins. Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356; B. & O. Southwestern R. R. v. U. S., 220 U. S. 94, 31 Sup. Ct. 368, 55 L. Ed. 384; Conn. Mut. L. I. Co. v. Hillmon, 188 U. S. 208, 23 Sup. Ct. 294, 47 L. Ed. 446; Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; Hanover Fire Ins. Co. v. Kinneard, 129 U. S. 176, 9 Sup. Ct. 269, 32 L. Ed. 653; Teal v. Bilby, 123 U. S. 572, 8 Sup. Ct. 239, 31 L. Ed. 263; U. S. v. U. P. R. R. Co., 98 U. S. 569, 604, 25 L. Ed. 143; Am. Trust & Sav. Bank v. Coal Co., 165

Fed. 34, 91 C. C. A. 72 (C. C. A. 7th Cir.); Am. Window Glass Co. v. Noe, 158 Fed. 777, 86 C. C. A. 133 (C. C. A. 7th Cir.); Diggs v. R. R. Co., 156 Fed. 564, 84 C. C. A. 330 (C. C. A. 6th Cir.); Butler v. Pub. Co., 148 Fed. 821, 78 C. C. A. 511 (C. C. A. 4th Cir.); Holmes & Co. v. Ins. Co. (C. C.) 142 Fed. 863; Denver City Tramway Co. v. Norton, 141 Fed. 599, 73 C. C. A. 1 (C. C. A. 8th Cir.); Betts v. U. S., 132 Fed. 228, 65 C. C. A. 452 (C. C. A. 1st Cir.); Frank v. Geiger (C. C.) 121 Fed. 126; Times Pub. Co. v. Carlisle, 94 Fed. 762, 36 C. C. A. 475 (C. C. A. 8th Cir.); Berry v. Seawall, 65 Fed. 742, 13 C. C. A. 101 (C. C. A. 6th Cir.); Stone v. U. S., 64 Fed. 667, 12 C. C. A. 451 (C. C. A. 9th Cir.).

Consolidation is in no wise mandatory, but the advisability of such an order is based upon the practical administration of justice and the economical and convenient disposition of the cases in the trial court. It is therefore a matter of judicial discretion. But the statute has in terms limited the exercise of this discretion to cases "of a like nature or relative to the same question"; also this discretion, even within the above limits, is judicial, not arbitrary, and there must be some indication of "avoiding unnecessary costs or delay in the administration of justice," and some basis that such action is "reasonable" as required by the statute. Since consolidation of independent cases is lawful only under this statute, litigants are deprived of legal rights if their causes are consolidated outside the terms of the statute, to their injury, and the appellate courts of the United States have often examined orders of consolidation.

[10] Intervention is an entirely different character of proceeding. It is a method of practice by which one having an interest or right, which will be affected by existing litigation to which he has not been made a party, may, if he desire, by leave of court come into that litigation to protect such interest or right. Rocca v. Thompson, 223 U. S. 317, 330, 32 Sup. Ct. 207, 56 L. Ed. 453. It is not an independent action, but is ancillary and supplemental to the existing litigation (Rouse v. Letcher, 156 U. S. 47, 50, 15 Sup. Ct. 266, 39 L. Ed. 341), and must, under the limitations expressed in rule 37, "be in subordination to, and in recognition of, the propriety of the main proceeding." The purpose of intervention is to afford an opportunity for proper parties who are not necessary to the litigation to come in, if they so desire. In federal equity courts this procedure is determined by equity rule 37, which is, as to interventions:

"Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." (226 U. S. appendix, p. 11, 33 Sup. Ct. xxviii.)

Having in mind the above purposes and characteristics of consolidation and intervention, we come to consideration of their application to the order here involved. Although this order had as its main purpose and object the intervention feature, we will separately examine it as to consolidation, and then as to intervention.

If the two suits are "of a like nature, or relative to the same question," the court might simply consolidate them, unless it is clearly

and conclusively evident that such action would not avoid unnecessary costs or delay and would be unreasonable as affecting rights of some of the parties. To determine these matters requires, first, examination and comparison of the two actions; and, second, an examination of the status of each at the time the order of consolidation was made.

[2] Proceeding to the first inquiry, we are not now concerned with the sufficiency of either bill, but with the purposes of the bills and with the issues presented by those bills and the answers thereto. The Seaman amended bill is, of necessity, lengthy and involved, but its essential purposes are clear. Seaman, a holder of preferred stock in the United Railways Company, brings his bill as such for himself, and all like stockholders desiring to join, for the benefit of the company. The defendants are the company, certain directors and officers of that company, and the representatives or trustees of such as are deceased. The company is but a nominal defendant. The preferred stock held by complainant was 5 per cent. cumulative, upon which no dividends had been paid since 1910. The bill alleges continued domination of the board of directors of the company, since 1908, by certain interests engaged in manufacturing, distributing, and selling electric power; that a contract for such power was made by the company in 1908, which was followed by two later contracts for the same purpose; that all of said contracts were wrongfully and fraudulently made by the directors, for the benefit of the dominating influences and at the expense of the company, thus obligating it to pay excessive prices for its power. It also alleges actions by the directors resulting in arousing public enmity, and in extravagant, unnecessary, or unlawful expenditures of the corporate assets. These actions are particularized as the unreasonable resistance to the so-called city "mill tax"; the unreasonable and offensive resistance to valid and just claims against the company; the expenditure of a secret "slush fund" to corrupt state and city legislative action, and to obtain the commission of felonies—an instance of the last being the theft of certain referendum petitions affecting a reduced rate of taxation against the company.

The bill alleges that, but for all of these unlawful and fraudulent acts of the defendants, the company would be solvent and able to procure extensions of its franchises from the public, and to successfully finance its business and pay dividends to complainant and other preferred stockholders; that because of such acts the company is insolvent and in danger of dismemberment; that the recovery of the assets so illegally diverted by defendants would save the solvency of the company and enable it to conduct its affairs successfully; that the removal of the present board and officers, if replaced by others not similarly dominated, would restore good feeling and relations between the company and the public. It also alleges that the inimical control of the directors and officers prevents action of this character against these defendants, and that application by complainant to such officers and directors to bring such an action would be unavailing, and that therefore the company is made a defendant.

The reliefs prayed are injunction to prevent the company, its officers, directors, or agents, from disposing of any of the property or removing any of the records, books, etc., of the company; to prevent the defendants from acting as directors, officers, or committeemen of the company, and from interfering with any of its property or removing any of its property, funds, or affairs; a decree that, but for the wrongful and unlawful disposition of the corporate assets by defendants, the company could have paid the annual dividends on the preferred stock; ouster of the defendant directors and officers from all control or power as to company affairs or property, except that defendant McCulloch, as an employé in the operating department, might continue to exercise such duties under the direction of "this honorable court and its agents"; accounting by defendant directors and by the defendant trustees or representatives of the deceased directors of their stewardship since election in 1908, with particular reference to personal profits or advantages to themselves, and to losses or injuries to the company permitted or caused by them, with a decree for payment of such profits and losses; appointment of a special master to report to stockholders the facts of the above accounting, and to cause to be held a stockholders' meeting, at which the power contracts would be submitted for ratification or rejection, and at which all shareholders found to have unlawfully participated in profits from such contracts be enjoined from voting, and that the decision at such meeting be given full force and effect as to the railway, its officers, directors, and shareholders; that following the decision of such meeting a receiver be appointed for the purpose (a) of obtaining from the Electric Company of Missouri, the Union Electric Light & Power Company, and any other parties, an accounting and satisfaction in reference to moneys, etc., improperly received from the company, and (b) to institute proceedings to carry into effect the above decision of the stockholders' meeting; appointment of a receiver at "any time it appears necessary to this honorable court, in order to preserve the equities of the shareholders, to preserve the assets, to prevent dismemberment, and to preserve intact the property of the railway from threatening creditors," such receiver to carry out "the orders herein prayed for"; and for general relief.

By a later supplemental bill (filed July 18, 1918) other existing directors were made defendants under allegations, that they were dominated by the same interests, had knowledge of, but had taken and would take no steps to recover, such wasted assets, or to discharge an indicted official of the company, and prayed that they also be enjoined from acting as directors, and that a special master be appointed to hold a stockholders' meeting to elect a new board of directors, and at such election defendants and all other persons found to have unlawfully participated in or permitted profits from the power contracts, or participated in the other unlawful acts referred to, be enjoined from voting.

Thus the Seaman bills are seen to be a proceeding by a dissatisfied stockholder against the corporate officers and directors, seeking accounting and satisfaction for past wrongdoing as such, the prevention

of future wrongdoing or action prejudicing the corporate welfare by the removal of such officers and directors and election of a new board, and escape from onerous contracts fraudulently consummated by such persons. If necessary to protect the corporation from harm during this proceeding, a receiver is sought. The other prayers for receiver are purely as an aid in executing a decree found in complainant's favor.

The Adler bill was by a bondholder under a junior mortgage. It alleges default in payment of a senior mortgage on part of the railway system, insolvency of defendants, threatened foreclosure or improper increase of indebtedness prior to complainant's lien, default under another prior mortgage and danger of foreclosure, danger of dismemberment of a harmonious street railway system, resulting in large loss in value in the security behind complainant's bonds and injury to the public. The prayer is for a receiver, a marshaling of assets, and a declaration of rights of respective lien holders and creditors.

A comparison of the purposes of the two bills reveals a common question, to wit, appointment of a receiver for an insolvent street railway corporation, to prevent dismemberment of its system by various creditors and lien claimants. The consolidation, however, was not for the purpose of having both cases heard upon this point at the same time. The consolidation order was not made until 12 days after the appointment, in the Adler case, of a receiver who took immediate possession.

[3] The propriety of any consolidation order must be determined by the situation of the two cases at the time that order was made. Nor can the attempted reservation in the receivership order in the Adler case of the "determination of the consolidation of this and the original suit of John W. Seaman" avail to alter the proposition that the validity of the order of consolidation must be determined by the situation at the time the order was made. That situation was as follows: Under the Adler bill a receiver was in possession, with the broad general powers of a receiver, who was to preserve, collect, and marshal the entire assets of the company, conduct its active buisness as a street railway system, and make such provision for the care of its creditors of all classes as the court might direct.

The appointment of a receiver for this company materially affected the status of the Seaman litigation as to consolidation. The Seaman bill had sought three main and one contingent results, which were, recovery of assets wrongfully wasted by certain of the defendant officers and directors; submission of the power contracts and replacement of existing directors and officers; and, if dismemberment threatened during the litigation, a receiver to preserve the property in its integrity. The broadly empowered receiver appointed in the Adler case abundantly met the need for a receiver in the Seaman suit. This appointment also vitally affected the sought replacement of the company directors and officers, because it suspended the possibility of such relief during the receivership and made the granting of such relief even after the termination of the receivership entirely dependent

upon the result of the receivership. The same statement applies to the executory portion of the power contracts, since the receiver may adopt them or not as seems best for the estate (Dushane v. Beall, 161 U. S. 513, 515, 16 Sup. Ct. 637, 40 L. Ed. 791; U. S. Trust Co. v. Ry. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085) during the receivership, and in fact is given, in the order appointing him, a specified time within which to adopt or reject all contracts. How did the Adler receivership affect the remaining object of the Seaman bill, to wit, the recovery of wasted assets of the company?

Officers and directors of a corporation are civilly liable for its assets, which they have illegally and fraudulently dissipated. This liability is to the corporation, the assets of which have been thus unlawfully dissipated, and to it alone. It is only when the duly constituted corporate authorities will not enforce that liability for the corporation that its stockholders can seek to do so. Such a stockholders' suit is based upon the refusal of the corporation (through its proper officials) to act, and it is for the sole benefit of the corporation. All sums recovered therein go to the corporation, diminished only by the legitimate expenses of such litigation. Such was the character of the Seaman bill as to this portion of the relief sought therein. When the receiver was appointed, he acquired, under the broad terms of his appointment, the rights of the corporation to prosecute such character of suit for waste. In Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815, while a state court receiver was in control of corporate property and business, certain stockholders brought their bill in the federal court against the corporate officers for dissipation of corporate assets. The bill made the corporation a defendant, and recited the refusal of the state court to permit the receiver to bring such action or to be made a defendant therein. The Supreme Court affirmed the ruling of the trial court, sustaining a demurrer to the bill, because the receiver was not made a party. The court said:

"The right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation, and it is only when the corporation will not bring the suit that it can be brought by one or more stockholders in behalf of all. Hawes v. Oakland, 104 U. S. 450. The suit, when brought by stockholders, is still a suit to enforce a right of the corporation, and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound by the judgment. Davenport v. Dows, 18 Wall. 626. If the corporation becomes insolvent, and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce this and all other rights of property of the corporation vests in the receiver, and he is the proper party to bring suit, and, if he does not himself sue, should properly be made a defendant to any suit by stockholders in the right of the corporation."

It is thus clear that the receiver in the Adler bill would have been a necessary party to any action such as Seaman brought, had Seaman commenced his action after appointment of the receiver in the Adler suit. The circumstance that such suit was pending when the Adler receiver was appointed cannot alter or affect this rule. The receiver is not a party to that suit. He can become such only by an order of the court (Wilder v. City, 87 Fed. 843, 31 C. C. A. 249 [C. C. A.

5th Circuit]; 22 Standard Enc. of Prac. 434; High on Receivers [4th Ed.] § 258), although he might be made so by such an order (National Electric Signaling Co. v. Telefunken Wireless Teleg. Co., 208 Fed. 679, 698, 125 C. C. A. 647). No application by the receiver or by any one else to have him made party to the Seaman suit has been ruled upon or even filed in the Adler suit. Therefore, as to this proceeding for unlawful waste brought by Seaman, the status of the two cases at the time of the order of consolidation was that a stockholder had a suit against certain corporate directors for unlawful waste of corporate funds, and in another proceeding a creditor had obtained a general receivership of that corporation. The only place where the two cases in any wise touch is that, if Seaman can legally continue the prosecution of his suit after the qualification of the Adler receiver, any sum recovered by him would be for the benefit of the corporation, and would pass as assets thereof to the receiver. This is no basis for any consolidation of the two cases. No economy of expense or of time, and no convenience in the conduct of the suits, can arise from such combination. If the receiver is not made a party to the Seaman suit, that suit is outside the scope of the Adler receivership, which is in no wise affected thereby, unless and until Seaman successfully terminates his action and has a fund to turn over to the receiver. The receiver has not been made a party, and as yet Seaman has no such fund; therefore there was no ground to connect the suits, and no proper purpose is served thereby.

There is a clear way in which the two suits may become related, and it is the only way. That is by making the Adler receiver a party to the Seaman suit. The court can order him to intervene as party plaintiff and promote the prosecution of the suit (National Electric Signaling Co. v. Telefunken Wireless Teleg. Co., supra), or it can permit him to be made a party defendant, so that he will be bound by the result of the suit (Porter v. Sabin, supra). The preceding statement reveals that the only true relation of the Seaman suit is as subordinate to and in aid of the receivership, when once the receiver becomes a party thereto, but not before. It would then be like any other independent suit brought by the receiver to recover and collect some of the assets of the corporation. But even then the action would be ancillary in its nature, presenting no reason for consolidation with the main suit, and not properly susceptible of being so consolidated. So much the more was the consolidation improper, and without the power of the court under the statute, when the actual status of the two cases at the time of consolidation, as above outlined, is considered.

[4] This order, however, was not one purely of consolidation. It was more substantially one of intervention. It required, not that the cases should be heard together, but that the Adler suit should be regarded as an intervention in the Seaman suit, and that the causes should proceed under the title of the latter action. Interventions are, in their nature, voluntary. They are the avenues by which proper parties may enter litigation and present therein their rights to some title, property, res, or fund involved therein. None of the parties to

the Adler suit desired to be made parties to the Seaman litigation, and at the date of consolidation no title, property, res, or fund was therein involved, wherein an intervention by any of them could find place. On the contrary, they bitterly opposed any union of the two actions. Over vigorous protest they saw their action made an intervention in the Seaman suit. We know of no instance of an order forcing a pure intervention by unwilling parties, and we think that such order cannot be made.

Nor does the circumstance that this intervention was coupled with consolidation avail. Although the result of consolidation is merely to try cases together, necessitating separate verdicts and judgments or separate decrees (Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; Toledo, etc., R. R. Co. v. Trust Co., 95 Fed. 497, 36 C. C. A. 155 [C. C. A. 6th Circuit, opinion by Judge Lurton]), yet it is true that sometimes independent suits bear a relation to each other, such that, when they are properly consolidated, the several controversies assume certain natural attitudes toward each other, such as "in the nature of" a cross-bill or intervention, and it is then convenient to so regard them in the subsequent conduct of the litigation (Sioux City Terminal R. R. and Warehouse Co. v. Trust Co., 82 Fed. 124, 27 C. C. A. 73 [C. C. A. 8th Circuit]; Lant v. Kinne, 75 Fed. 636, 637, 21 C. C. A. 466 [C. C. A. 6th Circuit]; Central Trust Co. v. Bridges, 57 Fed. 753, 6 C. C. A. 539 [C. C. A. 6th Circuit]; McBee v. Ry. Co. [C. C.] 48 Fed. 243, 245); but this is purely a rule of convenience, and does not result in actually making such parties defendants or interveners in the other suit. No such situation of convenience appears here. Adler's suit to collect, preserve, and marshal the entire assets of the company, to determine the rights of all creditors, and, in the meanwhile, to conduct the entire business of the company, cannot in any sense be considered an intervention in Seaman's suit to recover certain wasted assets and to escape certain alleged burdensome operating contracts. The order of intervention-consolidation was improvident, and cannot withstand the attack here made.

[5] Another point raised on this appeal is as to the propriety of the appointment of a receiver in the Seaman suit. In view of the status of this entire litigation at the time that order was made, we think that it was erroneous. At that time a general receiver, with very extensive and complete powers, was possessing, protecting, and collecting the property, assets, and rights of the company, and operating its business. Therefore there was no necessity of another receivership, or an extension of that receivership to the Seaman suit. Bird v. People's Gas & Electric Light Co. (C. C.) 158 Fed. 903; Fernald v. Tel. Co., 31 Wash. 219, 71 Pac. 731. Nothing could properly be obtained through a subsequent appointment in or extension to the Seaman suit which could not be through the receiver already acting in the Adler suit. Upon qualification, the Adler receiver became a necessary party to the Seaman litigation, because he succeeded to the rights of the corporation to pursue its officers and directors for maladministration. Such a suit by the receiver would be in course of

collecting the corporation assets, and would be ancillary to the main action. Pope v. Railway Co., 173 U. S. 573, 19 Sup. Ct. 500, 43 L. Ed. 814; White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; In re Tyler, 149 U. S. 164, 181, 13 Sup. Ct. 785, 37 L. Ed. 689; 34 Cyc. 381. Such character of suit assumes no higher standing because brought by a stockholder and pending at the time the receiver was appointed. No good result, but only confusion, could follow by extension of the receivership to the Seaman suit.

Where no good purpose can be served by appointment of a receiver, it will be refused, and the same principle is enforced where a receiver has already been appointed in another suit. Bird v. Light Co. (C. C.) 158 Fed. 903. Also courts of equity are not inclined to grant, much less extend, a receivership, where the main purpose is or result would be to take up litigation against corporate officials (Clark v. Oil Co., 105 Fed. 787, 45 C. C. A. 53 [C. C. A. 7th Circuit]; Hallenborg v. Copper Co., 8 Ariz. 329, 74 Pac. 1052; Empire Hotel Co. v. Main, 98 Ga. 176, 25 S. E. 413; Marcuse v. Gin Co., 52 La. Ann. 1383, 27 South. 846; Richardson v. Trunk Co., 181 Mass. 580, 64 N. E. 400; Miller v. Kitchen, 73 Neb. 711, 103 N. W. 297; People's Investment Co. v. Crawford [Tex. Civ. App.] 45 S. W. 738), although this has been done (Du Puy v. Terminal Co., 82 Md. 408, 33 Atl. 889, 34 Atl. 910; Hazzard v. Credit Mobilier, Fed. Cas. No. 6,289). To repeat, the proper procedure was, by leave of court, to bring the receiver into the Seaman suit as a party, so that the receiver may prosecute the suit, if deemed advisable by the court, or may, as party defendant, be bound by the adjudication. While it has been questioned whether a stockholder could prosecute such a suit pending a receivership (Kelly v. Dolan, 233 Fed. 635, 147 C. C. A. 443), we see no reason why such should not be permitted, if leave be secured from the court appointing the receiver to join him as defendant, and this seems to be the effect of the decision in Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815, and to accord with justice (Marcuse v. Gin Co., 52 La. Ann. 1383, 1394, 27 South. 846; Brinckerhoff v. Bostwick, 88 N. Y. 52; Id., 23 Hun, 237; Id., 99 N. Y. 185, 1 N. E. 663). Unless such suit by a stockholder would unreasonably prolong or otherwise injuriously affect the receivership, we see no reason why the stockholder should not be permitted, at his own risk and expense, so to sue and join the receiver as a party. The practical objections which might be urged against such a course, such as expensive delay in terminating the receivership, can be amply dealt with in connection with the consideration of the application to make the receiver a party.

[6] Appellees earnestly urge a motion to dismiss this appeal, on the ground that the order appealed from was purely interlocutory and of no such finality as to furnish any basis for an appeal. Consideration of this contention has been postponed until after a discussion of the merits of the appeal, since that discussion would reveal the true character of the order in question. It is said that the gist of the appeal is the order of consolidation-intervention, and not that part of the order appointing a receiver in the Seaman case. A consideration

of the contention, even from that point of view, is of no avail to appellees. As a rule an order purely of consolidation is not appealable, although we do not care to say it might never be. The reason, as stated in Toledo, etc., R. R. Co. v. Trust Co., 95 Fed. 497, 506, 36 C. C. A. 155, 164, by Judge Lurton, is that in an order purely of consolidation—

"each record is that of an independent suit, except in so far as the evidence in one is, by order of the court, treated as evidence in both. The consolidation does not change the rules of equity pleading, nor the rights of the parties, as those rights must still turn on the pleadings, proofs, and proceedings in their respective suits."

Such is not the character of this order, nor is such its innocuous effect. It does not leave the Adler suit a separate, independent action, but subordinates it as an intervention in the Seaman action. It does affect the rights of Adler in his litigation. It takes from him the control of his own litigation. It makes his suit dependent upon the success of other litigation, which he may deem ill-advised and ill-founded. It deprives him of all opportunity to question the litigation into which he is unwillingly injected. He cannot object to the receivership being burdened with the costs and delay of this litigation, in the success of which he has no faith, but must helplessly and silently see settlement of his claim delayed and, as he may think, imperiled by dissipation of the funds, to which he is looking for payment, in litigation which he may believe cannot succeed. Except as to emergency orders, every party to a general receivership suit has a right, which is important, to be seasonably heard by the court in favor of or opposition to any action of the receiver materially affecting the general assets or policy of the receivership. The value of his interests depends upon the proper conduct of the receivership, and he may present his views to the court controlling the receiver. But here no application to have the receiver made a party to the Seaman suit has been made, and no opportunity has or will ever be afforded Adler to protest such action, although Seaman is attempting to gain indirectly, through this order, the entire benefit, if not, indeed, more than he could secure by an order on the receiver in the Adler suit to become a party to the Seaman suit. Certainly Adler cannot be unwillingly deprived of these rights of the ordinary litigant without an opportunity to have such action reviewed, and what practical good would such review accomplish after final decree in the Seaman suit? The situation has in it much which is, in effect, analogous to that in Bankers Trust Co. v. Railway Co., 251 Fed. 789, 164 C. C. A. 23, decided in this court. We think the right of appeal clear.

An additional controlling consideration is that this appeal was also from that portion of the order appointing a receiver in the Seaman case. This appointment of a receiver was under the statute (Judicial Code, § 129; Compiled Stat. § 1121) an appealable order. The contention of appellees that Adler cannot complain of this appointment, because he himself sought a receivership, cannot prevail. There was no order of vacation of the receivership in the Adler case, but that receivership was virtually extended to the Seaman suit. This ex-

tension was, however, made with conditions that made it much more. It had the practical effect of throwing upon the receiver the conduct of the Seaman suit, without affording the parties to the Adler suit an opportunity to object to such a burden, or it created an anomalous situation of a general receiver with broad powers, in a stockholder's suit for official malfeasance in which the receiver was not a party. Such an order was improper, was harmful to Adler's rights as a litigant, was no such result as he sought or desired, and was therefore subject to attack by him and to review here.

[7] It is also contended that through the prayer for a receiver in the Seaman case the court in that case acquired exclusive jurisdiction of the res of the litigation, even though not actually in the possession of the court, and therefore that, if Adler desired a receivership of the same res, he must come into that suit as an intervener. We cannot accept this definition. Under the Seaman bill a receivership was contingent and incidental. That litigation might easily have proceeded to finality, and have failed, or have accomplished its entire purpose without any such receiver being appointed. The contingency upon which that prayer in the Seaman suit was predicated was one not resting on conditions existing at the time that bill or the amended and supplemental bills were filed, but upon what some creditor *might* attempt to do for the protection of his own rights during the period of that litigation. If such creditors, to enforce their rights, must come into the Seaman litigation, they must do so by intervention. If they intervene, they cannot challenge the propriety of the main litigation, but must accept it. Equity rule 37; Jennings v. Smith (D. C.) 242 Fed. 561, 564; Seaboard Air Line v. Trust Co., 125 Ga. 463, 465, 54 S. E. 138; Charleston, etc., Ry. v. Pope, 122 Ga. 577, 50 S. E. 374. Take, in connection with these rules of law, the further rule that a receiver, if appointed, would be a necessary party to a suit by a stockholder against corporate directors and officers (Porter v. Sabin, supra), and the result of the contention urged is as follows:

No receiver may ever be appointed under the allegations of the Seaman bill, but if any creditor, during the period of the long drawn out Seaman litigation, deems it essential to his interests to have a general receiver appointed, he can secure such only by accepting the Seaman litigation, subordinating his own interests and litigation thereto, and waiving all objection thereto, although he may be convinced that such suit will be fruitless, and although he may be convinced that some of its objects (such as renunciation of the power contracts) would be to the detriment of his interests. Certainly no such result can receive approval in a court of equity. Again, as has been said above, if a general receiver of a corporation is appointed, he succeeds the corporation as to causes of action against its directors and officers for official malfeasance. But that does not mean that he is compelled to suffer delay in winding up the receivership, or to risk the assets of the estate in his charge in litigating such claims. The receiver, under the control of the court, may deem it wise to ignore such claims as too doubtful or as unfounded, in which case the receivership would proceed without such litigation. Also, where the stockholder's suit, as

here, involves existing contracts with the corporation, the receiver, under the court, may wish to avail himself of them as in full force. Yet if no receiver can be appointed, except in and subject to the stockholder's suit, he is effectually deprived of all such freedom of action. In short, the effect of appellee's contention, when thus developed, is that a dissatisfied stockholder, after refusal of the officers and directors, and perhaps a majority in amount of the stockholders, of an insolvent corporation to sue its directors and officers for claimed malfeasance in office, can himself institute such suit, and by praying contingently for a receiver prevent all creditors from protecting their rights against the corporation through a receivership, except at the penalty of having the receiver take up the burden and expense of the stockholder's suit. Yet the same stockholder could not have compelled the corporation, out of the assets from which the subsequent receiver must conduct the litigation, to undertake such a burden. We cannot believe that a stockholder has any such control over the rights and remedies of the creditors or the receiver of a corporation. The necessary conclusion is that the creditor could, as here, bring his bill for a receiver independently of the stockholder's suit.

[8] It is also contended that all proceedings in the Adler suit must abate, pending determination of the issue that it was filed through fraud and collusion. The Adler bill was filed April 11, 1919, answered the same day, followed by appointment of a receiver therein April 12, 1919, who took immediate possession. April 16, 1919, Henry F. Mueller et al. filed petition for leave to file an intervening petition. May 6, 1919, leave was granted as of April 16th, the day of submission as shown in the order granting leave. May 6, 1919, similar leave was granted E. A. Laughlin et al., as of April 12, 1919, the day of submission as shown by the order granting leave, and petition in intervention was filed May 7th as of April 12th; no petition for such leave appearing in the record here. The petitions of intervention are similar in effect. They charge that the bill was collusive; that there is no "matter in controversy" between the parties to the bill; that there is lack of jurisdiction, because of absence of diverse citizenship; that there was pending in the Seaman suit a proceeding before the special master involving the same controversy and praying the same relief as the bill; that the proper procedure would be for Adler to intervene in the Seaman suit; that the Adler proceeding could form no foundation for any valid appointment of a receiver therein, but would only serve to thwart, defeat, or cripple the Seaman litigation, result in delay pending an appeal, with the ultimate result of overturning the Adler receivership and requiring appointment of a new receiver in the Seaman suit; that the answer of the Railways Company in the Adler suit is a confession of insolvency and emergency which requires appointment of a receiver in the Seaman suit.

In view of what is said elsewhere in this opinion, and of the present status of this entire litigation, the only point deserving special notice it that relating to the jurisdiction. The lack of jurisdiction is not apparent on the face of the bill, but is based upon allegations that

Adler is not the real owner of the bonds claimed, but that they belong to one Tilles, a resident of the same state as defendants in that suit. The verity of these allegations is not a point included in this appeal, and so far as we are advised has not been determined in the trial court—possibly this has not been done because of the possible effect of the consolidation-intervention order of April 24, 1919. The point relating to jurisdiction here presented is that a challenge of the jurisdiction of the court by interveners should suspend or abate any action in the case until that question is determined. Although the orders permitting these interventions state that such petitions were submitted to the court April 12th and 16th, respectively, yet the order and actual filing were not until May 6th and 7th, while the receiver had been appointed April 12th and had entered into immediate possession. While filings of pleadings and papers and orders permitting such may often be related back, yet such, in the nature of things, cannot be done for purposes of abatement. What has happened up to the time of the actual making of the order cannot be abated by a relation back of the order to an earlier date. Up to the making of the order herein the receivership had been in force for almost a month, during which time the assets, property, and active operation of the corporation business had been in the receiver—part of the time solely in the Adler suit, and the remainder in the consolidated cause. The receivership has since continued for many months, and is now in force. In the face of what the court did in permitting continuation of the receivership, and bearing in mind the effect of an order now suspending or abating the receivership in the Adler suit after the receiver has been in control of a large property and actively operating it, we think no force should be given this contention.

[9] Another point of attack is upon the appointment of Charles W. Bates as attorney for the receiver, on the ground that he was of counsel for Seaman at the time of such appointment. The attorney for a receiver is an officer of the court, chosen by the court, and must exercise the duties of his position impartially, with an eye single for the proper and successful conduct of the receivership. The court can at any time replace counsel whose impartiality or usefulness becomes doubtful, and abuse of this discretion of appointment may be remedied by appellate courts. Counsel for all parties, in argument, conceded the high personal character and professional ability of Mr. Bates. The trial court, which must conduct this receivership, is presumed to have been familiar with his qualifications and impressed with the conviction that his services would be impartial and efficient. The Seaman litigation was hardly past the preliminary stage when Mr. Bates withdrew as counsel, upon his appointment as counsel for the receiver. We deem the objection to his appointment ill-founded. Cases analogous in principle are Shainwald v. Lewis (D. C.) 8 Fed. 878, affirmed (C. C.) 48 Fed. 492, and United States v. Church of Jesus Christ, 6 Utah, 9, 43, 21 Pac. 503, 524, cited in a note to 34 Cyc. 292, 293.

As there has never been any vacation of the Adler receivership the vacation of the consolidation order will not affect the acts of the

receiver done in the due administration of the property. Nor will it affect the appointment or acts of the master and attorney for the receiver done in such administration.

The order is that the order of April 24, 1919, as to consolidation of the Seaman and Adler suits, declaring the Adler action an intervention in the Seaman suit, and appointing or extending the receivership to the Seaman suit, be set aside and vacated, with costs of this appeal taxed against the appellees.

PRIEST v. SEAMAN et al.

(Circuit Court of Appeals, Eighth Circuit. May 11, 1920.)

No. 5448.

Appeal and error ⟸324—All parties affected must join in appeal, in absence of notice and severance.

To sustain an appeal from an order equally affecting several defendants, all must join in the appeal, or there must be a notice and severance.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by John W. Seaman against Richard McCulloch and others. From an order of the District Court, defendant Henry S. Priest appeals. Appeal dismissed.

Henry S. Priest and Thomas T. Fauntleroy, both of St. Louis, Mo. (Boyle & Priest and Fauntleroy, Cullen & Hay, all of St. Louis, Mo., on the brief), for appellant.

Ephrim Caplan, of St. Louis, Mo., for appellee Seaman.

George H. Williams, of St. Louis, Mo. (Irvin V. Barth, William R. Gentry, M. F. Watts, and Edwin W. Lee, all of St. Louis, Mo., on the brief), for appellee Leed Mining Co.

Randolph Laughlin, of St. Louis, Mo. (Ephrim Caplan, of St. Louis, Mo., on the brief), for appellees Laughlin.

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

STONE, Circuit Judge. John W. Seaman filed his bill, as a stockholder, against the United Railways Company, this appellant, as an officer of such company, and various other officers and directors of the company. The purposes of the bill were to recover assets alleged to have been wrongfully diverted by such officers and directors, to escape certain burdensome power contracts fraudulently made by such officers and directors on the part of the company, to displace such officers and directors, and, incidentally, if necessary to preserve the assets and the street railway system from dismemberment, to have a receiver appointed. Later Samuel W. Adler, a junior bondholder, filed his bill against the company and its predecessor, alleging insolvency and threatened dismemberment of the railway system by holders of

defaulted bonds senior to those held by him, and asked a receivership. There were answers and interventions filed, and finally, upon motion of Seaman and certain interveners, the Adler Case was consolidated as an intervention with the Seaman suit. Prior to this last order a receiver had been appointed in the Adler suit. As a part of the above order of intervention and consolidation a receiver was appointed, and the usual injunction issued against interference therewith by officers and directors of the company. From this order appointing a receiver, enjoining corporate action by the officers and directors, and declaring the Adler bill an intervention in the Seaman suit, Priest appeals. The above outline is sufficient for the purposes of this case, but a more detailed statement may be found in the case of Adler v. Seaman (C. C. A.) 266 Fed. 828, decided at this time.

A motion to dismiss this appeal has been filed. The grounds therefor are:

> That "the appellant, Henry S. Priest, is only one of a number of defendants in this cause, and all the parties [defendant] interested in the cause and affected by the decree are not joined in this appeal, nor have such other parties [defendant] been notified and requested to join in the appeal, nor has a severance been obtained on their refusal to join in the appeal," and that "the real party [defendant] in interest in this cause and affected by the order appealed from is the United Railways Company of St. Louis, and this defendant does not join in the appeal, nor has it been served with notice of the appeal and requested to join in the appeal, nor has a severance been taken as to this defendant."

The petition for appeal was taken by "Henry S. Priest, one of the defendants in the above-entitled cause, for himself and such other of the defendants as may join herein," and was signed, "Henry S. Priest, by Boyle & Priest, Solicitors." There is no claim that any notice to other defendants or any severance for appeal was attempted. It is thus plain that the appeal was by Priest alone. Just before the oral argument of this appeal, appellant presented a written request upon the part of all the other defendants, except D. R. Francis, Jr., and Annie E. Huttig, heir and trustee under will of Charles H. Huttig, deceased, asking to be permitted to join in this appeal. This was ineffective, for one reason, inter alia, because out of time (2 R. C. L. 66, § 48), and, for another, that it still leaves two defendants, at least one of whom is equally interested and affected by the order with appellant Priest. This leaves the questions raised by the motion where they were.

This appellant has no interest severable from that of other of the defendants. We think the law is clearly as contended by appellees, and that this appeal should be dismissed, because neither the other defendants appealed, nor was a severance for appeal granted to this appellant. Garcia v. Vela, 216 U. S. 598, 601, 30 Sup. Ct. 439, 54 L. Ed. 632; Beardsley v. A. & L. Ry. Co., 158 U. S. 123, 15 Sup. Ct. 786, 39 L. Ed. 919; Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39, 36 L. Ed. 933; Hampton v. Rouse, 13 Wall. 187, 20 L. Ed. 593; Clifton v. Sheldon, 23 How. 481, 16 L. Ed. 429; Todd v. Daniel, 16 Pet. 521, 523, 524, 10 L. Ed. 1054; Owings v. Kincannon, 7 Pet. 399, 8

L. Ed. 727; Williams v. Bank of U. S., 11 Wheat. 415, 6 L. Ed. 508; 2 R. C. L. 66, Sec. 49; 3 C. J. 1005, 1011, 1012.

The motion to dismiss the appeal is sustained, and the appeal dismissed.

COLE et al. v. SEAMAN et al.

(Circuit Court of Appeals, Eighth Circuit. May 11, 1920.)

No. 5525.

Corporations ⇐558—Receivership by consent of corporation may not be vacated by stockholders.

Where a corporation, in its answer in a suit against it, by authority of its directors, whose good faith is not questioned, admitted its insolvency and consented to appointment of a receiver, stockholders are not entitled as of right to intervene for the purpose of overthrowing such action and securing a vacation of the receivership.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by John W. Seaman against Richard McCulloch and others. Charles B. Cole and another appeal from an order denying leave to intervene. Affirmed.

Ford W. Thompson, of St. Louis, Mo. (W. B. Thompson, of St. Louis, Mo., on the brief), for appellants.

William R. Gentry and Ephrim Caplan, both of St. Louis, Mo., for appellee Seaman.

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

STONE, Circuit Judge. This is an appeal from a denial of an application to intervene in the consolidated case of John W. Seaman v. Richard McCulloch et al. For a full statement of the pleadings and facts in the consolidated case, reference is made to the opinion on the appeal of Samuel W. Adler v. Seaman (also decided at this time) 266 Fed. 828. For the purposes of the present appeal, it is necessary to consider only a portion thereof, together with certain additional circumstances peculiar to this case.

Seaman filed his bill as a stockholder against certain officers and directors of the United Railways Company, alleging fraudulent diversion of corporate assets, and also wrongful acts and course of conduct of the directors and officers, resulting in arousing public encity, to the detriment of the company's business. He sought recovery of such wasted assets, the election of a new board of directors, and the submission to the stockholders, for adoption or rejection, of certain power contracts, alleged to have been fraudulently entered into by the directors. The bill also prayed a receiver, in the event that during the litigation the street railway system of the company should be threatened with dismemberment by creditors. This bill was filed

January 7, 1918, and followed by an amended and a supplemental bill and answers. February 15, 1919, complainant moved the appointment of a receiver, and two days later a master was appointed to take testimony and report upon the advisability of appointing such receiver. March 27, 1919, and April 1, 1919, certain bondholders of the company were permitted to intervene, and, inter alia, prayed a receiver in their intervening petitions. April 11, 1919, Samuel W. Adler, as a bondholder, filed a bill against the company and its predecessor, the St. Louis Transit Company, praying a receivership. The same day these two defendants answered, admitting the allegations of the Adler bill, and the Railways Company joined in the prayer for a receiver. The day following a receiver was appointed, who qualified and has since been in active possession and control of the assets and business of the company. April 24, 1919, in pursuance of motions filed by Seaman and the interveners, the Seaman and Adler cases were consolidated, on the basis of the Adler case being treated as an intervention in the Seaman suit. The same day a special master and general counsel for the receiver were appointed. May 22, 1919, these appellants, as preferred stockholders, applied for leave to intervene in the consolidated cause. This application was submitted to the master, upon whose adverse report (filed November 26, 1919) the court denied the application, on December 4, 1919. From that order this appeal is brought.

The view we hold concerning the merits of this appeal makes unnecessary any consideration of a motion filed by Seaman to dismiss the appeal. The purpose of the intervention, as shown by the application and proposed answer and cross-bill filed therewith, was to vacate the receivership, on the ground that the company was in fact solvent at the time of the appointment of the receiver. In the answer of the company to the Adler bill it admitted its insolvency. This answer was authorized by the board of directors. There is no claim by appellants that the directors, in authorizing such answer, acted fraudulently or wrongfully, but merely that they did so without authority of the stockholders. No such authority is necessary. The directors were the duly authorized and acting governing body of the company for all of the stockholders, and their acts, honestly done, within the scope of their office, are binding upon the corporation and all of its stockholders. It is within the scope of their authority to judicially admit insolvency, and where, as here, no question of the good faith of that action is raised, stockholders cannot interfere and seek to overthrow that action. The evidence before the master is not preserved in the record brought here, and we have no hesitation in adopting the finding of the master that the interests of all stockholders are being adequately represented by parties already in court. In addition to the absence of right to intervene, it appears that the court acted wisely in exercising its discretion in refusing the intervention.

The order denying the application to intervene is affirmed.

EDWARDS v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 8, 1920.)

No. 1737.

1. **Criminal law ⊜1063(1)—Motion in arrest not necessary, where error appears on record.**
The defendant in a criminal case may take advantage of a material defect appearing on the record, though such point was not raised by motion in arrest of judgment.

2. **Larceny ⊜30(1)—Failure to describe property stolen fatal defect.**
A count in an indictment charging that defendant did willfully, unlawfully, and feloniously knowingly apply to his own use "certain property of the United States" furnished for the military service, without describing the property, *held* insufficient to state an offense, under Criminal Code, § 36 (Comp. St. § 10200).

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

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

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

C. F. Haynsworth and Oscar K. Mauldin, both of Greenville, S. C. (H. J. Haynsworth, of Greenville, S. C., on the brief), for plaintiff in error.

C. G. Wyche, Asst. U. S. Atty., of Greenville, S. C. (J. William Thurmond, U. S. Atty., of Edgefield, S. C., on the brief), for the United States.

PRITCHARD, Circuit Judge. This was a criminal action tried in the District Court of the United States for the Western District of South Carolina. The facts may be epitomized as follows:

Early in the year 1919, it was publicly announced that Camp Sevier, located five miles from the city of Greenville, would be abandoned. Following this there was a general movement of troops from the camp. The last remaining regiment, the 89th, was removed the latter part of March, leaving only a few guards at the camp site for the protection of government property.

It is insisted by counsel: That plaintiff in error (defendant below), who was a prosperous farmer, lived on lands adjoining the camp site, and about a half mile distant therefrom. A part of the land occupied by the 89th belonged to the defendant, having been leased by him to the government. On this part of the land there was an open shed, in which a few bales of hay were left on the withdrawal of the troops. That he was accustomed to pass several times each week along a road running by this shed. He had seen the hay, and claimed that he thought it had been abandoned. That on or about sundown on the evening of April 22, 1919, the defendant, in driving by this open shed, loaded into his wagon six bales of hay. At this point a guard came

up from behind the shed and asked the defendant about taking the hay. The defendant stated that he thought the hay had been abandoned and offered to return it. The arrest and indictment of the defendant followed.

The following is a copy of the three counts contained in the indictment:

First Count.

"That heretofore one Perry Edwards, to wit, on the 22d day of April, A. D. 1919, at Camp Sevier, in the county of Greenville, state of South Carolina, Western district of South Carolina, and within the jurisdiction of this court, did willfully, unlawfully, and feloniously steal certain property of the United States, to wit, six bales of hay, of the value of fifteen dollars, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America."

Second Count.

"That heretofore one Perry Edwards, to wit, on the 22d day of April, A. D. 1919, at Camp Sevier, in the county of Greenville, state of South Carolina, Western district of South Carolina, and within the jurisdiction of this court, did willfully, unlawfully, and feloniously steal certain property of the United States, to wit, six bales of hay, of the value of fifteen dollars, which said property had theretofore been furnished for the military service of the United States, and was to be used for said military service, 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."

Third Count.

"That heretofore one Perry Edwards, to wit, on the 22d day of April, A. D. 1919, at Camp Sevier, in the county of Greenville, state of South Carolina, Western District of South Carolina, and within the jurisdiction of this court, willfully, unlawfully, and feloniously did knowingly apply to his own use certain property of the United States, which said property had theretofore been furnished for the military service of the United States, and was to be used for said military service, 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."

The indictment was drawn under section 9714, Barnes' Fed. Code (Comp. St. § 10200), which reads as follows:

"Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of any ordinance, arms, ammunition, clothing, sustenance, stores, money, or other property of the United States furnished or to be used for the military or naval service, shall be punished as in the preceding section."

In the first and second counts it is alleged that the defendant "did willfully, unlawfully, and feloniously steal certain properties of the United States, to wit, six bales of hay, of the value of fifteen dollars." In the third count it is alleged that the defendant "willfully, unlawfully, and feloniously did knowingly apply to his own use certain property of the United States, which said property had theretofore been furnished to the military service of the United States, and was to be used for such service."

There was a verdict of not guilty as to the first and second counts, but the jury found the defendant guilty on the third count. This verdict, to say the least, was contradictory and inconsistent. The jury

having disposed of the first and second counts, the only remaining point is as to whether the court erred in the trial as respects the third count.

It is insisted by counsel that the third count charges no offense, and in reply to this proposition counsel for the government insists that this point should have been raised on a motion in arrest of judgment, and therefore it is too late for the court to consider this. However, it is urged we should consider the same under rule 11 (233 Fed. vii, 146 C. C. A. vii), as well as the general practice.

[1] Writs of error lie to correct errors apparent on the record, even though no motion in arrest was filed in the court below. In the case of State v. Rosenblatt, 185 Mo. 114, 83 S. W. 975, it was said:

"Numerous decisions of this court attest that a defendant in a criminal case may take advantage of a material defect apparent of record, though such point be raised for the first time in this court. McGee v. State, 8 Mo. 495; State v. Meyers, 99 Mo. 107, 12 S. W. 516. And if no crime is charged in the indictment, then none is confessed by pleading guilty thereto, and the effect of such a plea only amounts to an admission by record of the truth of whatever is sufficiently alleged in the indictment, and will not prevent the defendant from taking advantage of the defects apparent of record on writ or error. 1 Bish. New Crim. Proc. 795; State v. Levy, 119 Mo. 434, 24 S. W. 1026; Fletcher v. State, 12 Ark. 169; Wharton's Crim. Pl. and Prac. (9th Ed.) § 413; Henderson v. State, 60 Ind. 296; * * * Com. v. Kennedy, 131 Mass. 584."

In Bishop's New Criminal Procedure (2d Edition) vol. 2, p. 1180, under section 1368, it is said:

"*What Errors.*—Except as disclosed in the next section, this writ reaches only errors in the record, not extending to preliminary steps, to what pertains to a plea in abatement, to papers merely on the files, or the like. It is good for an error in the indictment in the verdict, in the sentence, in any other part of the record, or where the statute authorizing the punishment is repealed; in short, after sentence, for whatever would have sustained the motion in arrest before." State v. Van Matre, 49 Mo. 268; Jesse v. State, 28 Miss. 100; Stewart v. State, 13 Ark. 720, 750.

"*Sufficiency of Indictment.*—As a general rule, if an indictment states no offense within the jurisdiction of the court, such defect is fatal at any stage of the proceedings, and is not waived by the failure to take advantage thereof in the trial court, but may be raised for the first time on writ of error or appeal. This would seem eminently proper, because, if it appears that no crime was charged in the indictment, it must follow that the verdict of guilty is no broader than the charge, and does not import any crime whatever, and consequently there is nothing to support the judgment." 2 R. C. L. 88.

The case of Clyatt v. U. S., 197 U. S. 221, 25 Sup. Ct. 432, 49 L. Ed. 726, among other things, contains the following statement, which is very much in point:

"While no motion or request was made that the jury be instructed to find for defendant, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet Wiborg v. United States, 163 U. S. 632, 658, justifies us in examining the question in case a plain error has been committed in a matter so vital to the defendant."

In Teal v. Walker, 111 U. S. 246, 4 Sup. Ct. 422, 28 L. Ed. 415, Mr. Justice Woods, in delivering the opinion of the court, said:

"The writ of error is not taken to reverse the judgment of the court upon the demurrer to the complaint, for that was not a final judgment, but to re-

verse the judgment rendered upon the verdict of the jury. The error, if it be an error, of overruling the demurrer, could have been reviewed on motion in arrest of judgment, and is open to review upon this writ of error. When the declaration fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer, nor is it cured by verdict. The question, therefore, whether the complaint in this case states facts sufficient to constitute a cause of action, is open for consideration."

In view of the above-stated rule, we think it is clearly established that the defendant in a criminal case may take advantage of a material defect appearing on the record, though such point be raised for the first time in this court.

[2] This count simply alleges that the defendant applied to his own use certain property of the United States government which had theretofore been furnished for military service. There is not a single word to indicate the nature, character, or value of the property thus furnished. In other words, it might have been clothing, horses, hay, or any other kind of property. This charge is too vague and indefinite upon which to deprive one of his liberty.

In the case of United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, Mr. Justice Field, who wrote the opinion of the court, said:

"The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances. * * * The general, and, with few exceptions, of which the present is not one, the universal, rule on this subject is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially, or by way of recital."

Upon a second indictment there would be no possible way by which defendant on the face of the record could show the nature of the charge upon which he had already been tried. However, it is urged by the government that the failure to accurately and definitely allege the particular kind of property is a clerical error, which must have been made by the stenographer. We fail to find any evidence that it is the result of a clerical error, and, even if it could be shown that the stenographer had left out the proper words of description, that would afford no reason whatever for sustaining the indictment.

It is insisted by counsel that, inasmuch as there is a specific description of the property alleged to have been taken in the first two counts, such description is sufficient to cure any defect contained in the third count. In certain cases this would be true, but here we simply have an allegation, as we have said, which alleges that defendant

used certain property belonging to the United States; but there is nothing contained in the other counts to indicate that this is the property referred to therein, nor is there any word of description in the last count which could be held to refer to the property contained in the other two counts.

While there are other assignments of error, in view of the conclusion we have reached as to the validity of the indictment, we do not deem it necessary to discuss the same. However, we will say in passing that, even if the indictment had been valid, we would have been impelled to reverse the court below on the merits of the case.

For the reasons stated, the judgment of the lower court is reversed.

KNAPP, Circuit Judge (concurring). When Edwards went to take the hay, he either believed it had been abandoned or he did not so believe. If he believed the hay had been abandoned, the taking was innocent, and he was not guilty of stealing it, or of "knowingly" applying it to his own use. If he did not believe the hay had been abandoned, the taking was felonious, and he was guilty of stealing it. The finding of the jury that he was not guilty of stealing was therefore in effect a finding that he believed the hay had been abandoned, and this left no basis for the charge of applying to his own use. To "knowingly apply to his own use" implies that the property was either stolen by or intrusted to the defendant. Manifestly the hay was not intrusted to him, nor did it come rightfully into his possession, except upon the theory that he believed it had been abandoned. The jury found that he did not steal it, and it follows that he did not commit the offense of which he was convicted.

REILLY v. SHIPMAN et al.

(Circuit Court of Appeals, Eighth Circuit. May 11, 1920.)

No. 5416.

1. **Public lands ⇐205—Mexican grant to community and not to individuals.**
   A Mexican grant of land in 1822 on what is now New Mexico, known as the Anton Chico grant, as confirmed by Act June 21, 1860, *held* not a grant to individuals, but a community grant to the inhabitants of the town of Anton Chico.
2. **Public lands ⇐211—Act confirming Mexican grant conclusive as to nature of title.**
   Where a Mexican grant of lands in territory now belonging to the United States has been directly confirmed by act of Congress, such action is conclusive, and any controversy as to the nature of the title must be determined from the confirmatory act, back of which the courts cannot go.

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Ejectment by Hugh Reilly against Robert Shipman and others, doing business as Shipman & Thompson. Trial to court, and judgment for defendants, from which plaintiff brings error. Affirmed.

F. Faircloth, of Santa Rosa, N. M., for plaintiff in error.

S. B. Davis, Jr., of East Las Vegas, N. M., and E. R. Wright, of Santa Fé, N. M., for defendants in error.

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

STONE, Circuit Judge. Error by plaintiff below from adverse judgment in a suit for ejectment and damages for a tract of land containing over 378,000 acres, situated in the counties of Guadalupe and San Miguel, state of New Mexico, and known as the Anton Chico grant.

The contentions of the plaintiff are that the original grant from the Mexican government in 1822 was to the grantees as individuals; that the patent issued in 1883 in conformity with the confirming act of Congress of June 21, 1860 (12 Stat. 71), was to the original grantees as individuals, and inured to their successors in title; that his title deraigns directly from such grantees; that he or his predecessors in title have been in adverse possession claiming title for more than 10 years. The contentions of the defendants are that the original grant was not to individuals as such, but to a community or town; that the confirming act of 1860 was to the inhabitants of Anton Chico as a community; that the patent is to the patentees as a community, but, if not, it is a nullity, as the act must control; that plaintiff's title is not deraigned from the original grantees; that there has been no sufficient adverse possession; that plaintiff is estopped and barred from claiming title by an adjudication of this title in the state courts.

A jury being waived, the court, besides refusing various findings of fact (including adverse possession) requested by plaintiff, found that the grant was not to individuals as such, but to a community, and that the suit in the state court operated as an estoppel or bar to plaintiff in this action.

[1] The first matter to be considered is the character of title, whether individual or community, of the original grant, as well as the effect thereon of the subsequent confirmatory act of 1860, and the patent issued thereon in 1883. The history of the title up to and including the act, with an outline of the patent, are as follows:

January 24, 1822, Salvador Tapia, for himself and 17 others named therein, petitioned the "president and respective tribunal" of independence for a "tract of land on this river called Anton Chico." For want of jurisdiction, this petition was referred to the governor. May 2, 1822, Fecundo Melgares, the governor, ordered Manuel Baca, constitutional justice of the jurisdiction of San Miguel del Bado, which adjoined this land, to place the parties in possession. This order recites that it is made after "having seen the present document and the petition of Citizen Manuel Rivera, for himself and in the name of 36 men." No such petition by Rivera is preserved, and Rivera was not one of those joining in the Tapia petition. The direction of the order was:

"To place the parties in possession of the grant they ask for, in order that they, their children, heirs, and successors, may hold and possess them in the name of his majesty, observing in so doing all the circumstances and requirements which should be practiced in similar cases, and particularly the one citing injury."

The action of Baca is shown by his report filed May 2, 1822, as follows:

"I, Manuel Baca, constitutional justice and commander in arms, in compliance with the directions of Governor Don Fecundo Melgares, gentleman of the order of San Ermerigildo, political and military governor of this kingdom, before proceeding to the Sangre de Cristo vulgarly called Anton Chico, in the presence of two aldermen, who were Don Ventura Trujillo, 2d alderman, and Don Miguel Sisneros, 3d alderman, the 36 petitioners being present, I read the petition to them and gave them to understand that they were to comply with and perform according to law the following conditions:

"First. That the place selected should be common, not only for themselves, but also for all those citizens who in the future should remove to and settle there.

"Second. That concerning the arrangements of the place they shall be equipped with firearms and arrows, and they shall pass muster upon entering upon the land and whenever the justice sent to them shall deem proper.

"Third. That the labor of the town, such as the digging of ditches, and many other works as may be necessary to be performed for the common good, shall be performed by all and other [torn] charge each one for himself.

"In regard to their compliance with the foregoing conditions they unanimously answered that they understood them and were acquainted with the conditions I had imposed upon them, in consequence of which I took them by the hand and stated in a clear, intelligible voice that in the name of our independence, which may God preserve, without injury to its royal credit nor the ———

"Fourth. I walked with them over the lands, they pulled up grass, throwing stones, and crying aloud saying, 'Long life to the independence,' taking possession of said lands quietly and peaceably, without any opposition, assigning them their boundaries which are: On the north, the boundary of Don Antonio Ortiz; on the south the ridge of the Piedra Pintada and the little table land of Guadalupe; on the east, the Sabino spring, with the Alto de Los Esteros, where the river forms a cañon below where the men were killed; and on the west, the Cuesta and the Little Bernal hill, which is the boundary of El Bado, with the understanding that the pastures and watering places are common, without injury to third parties."

March 8, 1834, Juan Martin, under verbal orders of the constitutional justice, delivered certain portions of the land as follows:

"At the town of Anton Chico, newly called by the name of 'the Avocation of Our Lord and Sangre de Christo,' on the 8th day of the month of March, 1834, by verbal orders from Citizen Juan Jose Cebeza de Baca, constitutional justice, in regard to the fact that there was scarcity of land for to cultivate, and the lands on Anton Chico being entirely vacant, without being cultivated by the legitimate individuals to whom it had been given seven or eight years previously, and that they are now entirely abandoned, because the Indians had attacked them so often that they had depopulated the place, and that now in order to administer to the necessities above mentioned of the unoccupied citizens having no lands and for the encouragement of agriculture, a matter of so much interest for the support of its inhabitants, I was directed to deliver the land to those who should claim it, and distribute what had been before granted to available and laborious hands, which I did on the abovementioned day, delivering and donating to those newly applying for lands, reinstating those to whom land had formerly been granted, and donating the surplus in the name of the laws governing us, to whomsoever wished for lands who are as follows:

"To Biteroo Sandoval, former grantee, the point of the valley, without measurement. Vincente Seguro, donated 100 varas. Miguel Jaramillo, by purchase, 100 varas. Pablo Ortiz, donated 100 varas. Ignacio Aragon, donated 125 varas. Santiago Aragon, donated 75 varas. Julian Garcia, donated 100 varas and a strip. Bartolo Ocona, donated 100 varas. Miguelito Duran, former grantee, 200 varas. Jose de Jesus Duran, 100 varas and the remainder of the arroyo. Jose Antonio, the dumb, 100 varas. Francisco Sandoval, 100 varas. Gertrudis Mestas, 50 varas.

"Which in fulfillment of my trust, and as actual alderman and acting constitutional justice, grant and donate to them in the name of the Lord we obey, in order that they may hold the same and not dispose of them until they are authorized to do so within the period required by law, and complying with the conditions, rights, and requirements exacted from all settlers, enjoin upon them particularly that they be always provided with arms, laboring together peaceably and friendly, so as not to be surprised by the savages, and in testimony whereof I signed at the aforementioned place, on the said day, month, and year, with two witnesses with whom I act in the ordinary way, to which I certify."

Thereafter this land became part of the United States, and in 1859 a petition for confirmation was presented by David Stewart, "for himself and in behalf of the heirs and legal representatives of the original grantees and present inhabitants of the town of Anton Chico." The petition recited that the land had been granted February 13, 1822, by Melgares to Salvador Tapia and others, who had possessed and cultivated the same and built dwellings, which "now compose the town of Anton Chico"; that the grant had never been surveyed; that said town existed in August, 1846, when the United States took possession of New Mexico; that the town was unincorporated, "but the heirs of the original grantees and the present lot holders know of no adverse claim to them"; and that the grantors had full power and authority to make said grant. The prayer was for confirmation. The petition was signed "J. Houghton, attorney for the Inhabitants of Anton Chico." Upon this petition the Surveyor General reported as follows:

"This case was set for trial on the 27th day of June, 1859. On the 24th day of January, 1822, Salvador Tapia, for himself and 16 others, petitioned the tribunal of independence supposed to be the corporation of the town of San Miguel for a tract of land known as Anton Chico on the Pecos river. The president of that corporation for want of power, the land asked for being beyond the jurisdiction of that body, referred the petition to the governor for his action in the premises. Melgares, the governor, on the 13th day of February of the same year, remanded the paper back to the corporation, with instructions to make application to the provincial deputation for its approval.

"The corporation of San Miguel repeating its want of jurisdiction in the matter, on the 9th of November, referred the matter to the provincial deputation. No further action appears to have been taken in the matter until the 2d of May, 1822, when Governor Melgares is purported to have granted the land to Manuel Rivera and 36 men and directed Manuel Baca, the constitutional justice of El Bado, to place the parties in possession, which was done on the 2d day of May of the same year. The claimants file a third document, dated March 8, 1834, purporting to be a distribution of the Anton Chico lands by Juan Martin under verbal authority from Juan Jose Cabesa de Baca, constitutional Justice of El Bado. It is stated in this document that the original grantees were compelled to leave the land on account of having been driven off by the Indians. Under this distribution 14 persons are placed in possession of a certain amount of arable land, varying from 50 to 100 varas, and among

them there are two of the former grantees. This document is considered as entirely superfluous and has no bearing whatever on the case.

"The documents marked A and C are original. Document B contains a copy of the grant made by Governor Melgares and certified to by Manuel Baca, the justice aforesaid. The documents filed are all disconnected and appear to bear no relation to each other. Evidence has been introduced by the claimants proving the town to have been in existence since 1839. This claim is contested by the heirs of Preston Baca, deceased, so far as it conflicts with the grant made to Juan E. Pino, of which they are the assigns. The grant made by Melgares on the 2d of May, 1822, severed the land from the public domain and placed it beyond the further search and control of the government.

"The instructions to this office provide that, the existence of a town when the United States took possession of the country being proven, is to be taken as prima facie evidence of a grant to said town, and as it is proven to have been in existence in 1839 and up to 1846, with the knowledge and tacit consent of the Mexican government, and was recognized as a town by that government, it is believed to be a good and valid grant, and the land claimed severed from the public domain. It is therefore approved and ordered to be transmitted to Congress for its action in the premises."

This report was confirmed by Congress June 21, 1860 (12 Stat. 71, § 3), being claim No. 29, as follows:

"That the private land claims in the territory of New Mexico, as recommended for confirmation by said surveyor general in his reports and abstract marked Exhibit A, as communicated to Congress by the Secretary of the Interior * * * numbered from 20 to 38, both inclusive, be, and the same are hereby, confirmed. * * *"

In pursuance of this confirmation, a patent dated March 27, 1883, was issued, which, after setting out in extenso the report of the surveyor general (above quoted) and a report of the boundaries as surveyed, proceeded as follows:

"'Now know ye that the United States of America in consideration of the premises and pursuant to the second [third] section of the act of Congress of third of March, Anno Domini one thousand eight hundred and sixty-nine, entitled 'An act to confirm certain private land claims in the territory of New Mexico,' *have given and granted* and by these presents *do give and grant* unto the said *Manuel Rivera and others, being the thirty-six men* to whom the grant was made by Fecundo Melgares, governor, May second, one thousand eight hundred and twenty-two, their children, heirs, successors and assigns, as in said grant provided, and which was confirmed as private land claim number twenty-nine by act of Congress, entitled 'An act to confirm certain private land claims in the territory of New Mexico,' approved June twenty-first, one thousand eight hundred and sixty, subject to all the provisions and conditions mentioned and set forth in the decree granting said tract of land as aforesaid and the record of juridical possession, and other documents accompanying the same, and made part of the report of Wm. Pelham, surveyor general of New Mexico, on the fifteenth of July, one thousand eight hundred and fifty-nine, and to the rights of all persons claiming under said provisions and conditions, the tract of land embraced and described in the foregoing survey, but with the further stipulation that in virtue of the provisions of the aforesaid act of Congress of twenty-first of June, A. D. one thousand eight hundred and sixty, that the foregoing confirmation shall only be construed as quitclaims or relinquishments on the part of the United States and shall not affect the adverse rights of any other person or persons whomsoever. *To have and to hold* the said tract of land with the appurtenances unto the said *Manuel Rivera and others, being the thirty-six men* to whom the grant was made, their children, heirs, successors and assigns, forever, with the conditions, provisions and stipulation hereinbefore referred to."

In considering the character of the grant and the effect thereon of the subsequent confirmatory act and patent, it is best to first examine the effect of the act and patent. The contention in that regard is whether the patent or the act controls, if there is any difference between them; and, next, as to the meaning of whichever dominates. The government has employed several methods of determining private title claims to land at the time of cession of territory to the United States. As said in Morrow v. Whitney, 95 U. S. 551, 554 (24 L. Ed. 456):

"Sometimes such claims have been submitted to boards of commissioners for approval or rejection, sometimes they have been referred to the judicial tribunals for determination, and sometimes they have been directly acted upon by Congress."

In the instance of such claims to land located in New Mexico the method employed was direct action by Congress through a statute confirming or rejecting the claims.

In referring to the effect of the above act of 1860 the Supreme Court said:

"This act was a final disposition by Congress of certain claims under Mexican grants for lands situate in the territory of New Mexico." Shaw v. Kellogg, 170 U. S. 312, 331, 18 Sup. Ct. 632, 640 (42 L. Ed. 1050).

No provision was made in the act for issuance of a patent, and apparently no patent was necessary to effectuate the act. Shaw v. Kellogg, 170 U. S. 312, 343, 18 Sup. Ct. 632, 42 L. Ed. 1050. The only office of a patent under such an act was thus defined by the Supreme Court:

"If, by a legislative declaration, a specific tract is confirmed to any one, his title is not strengthened by a subsequent patent from the government. That instrument may be of great service to him in proving his title, if contested, and the extent of his land, especially when proof of its boundaries would otherwise rest in the uncertain recollection of witnesses. It would thus be an instrument of quiet and security to him, but it could not add to the validity and completeness of the title confirmed by the act of Congress." Whitney v. Morrow, 112 U. S. 693, 695, 5 Sup. Ct. 333, 334 (28 L. Ed. 871).

Obviously the act of Congress must prevail here over the patent, if there be any difference between them. What, then, was the nature of the confirmation by the act of Congress? Was it of a title to individuals as such, or to them as representative of a community? The act itself is brief, and was of the claims "as recommended for confirmation by said surveyor general in his reports and abstract marked Exhibit A, as communicated to Congress by the Secretary of the Interior." We must therefore look to the report of the surveyor general to ascertain the character of title which he commended for confirmation. A perusal of that instrument leaves no doubt that such was a community title. The petition to the surveyor general was by the inhabitants of Anton Chico, and not by the heirs of the original grantees as such. It is true that the opening sentence of the petition, when taken alone, is ambiguous, in that it states:

"Your petitioners, David Stewart, for himself and in behalf of the heirs and legal representatives of the original grantees and present inhabitants of the town of Anton Chico," claim the land.

But this ambiguity is removed by other statements which are entirely inconsistent with any claim as individuals. Such are:

"That said town and settlement existed and was about the same as at present in August, A. D. 1846, when possession was taken of New Mexico by the authorities of the United States," and "the town of Anton Chico is not an incorporated town."

Such averments would have no place in a claim by individuals as such. Both would bear directly upon a community claim. The first, because one of the instructions from the Secretary of the Interior, authorized by the above act of 1854 (10 Stat. p. 308), and given in this instance to the surveyor general, was as follows (italics ours):

"In the case of any town, lot, farm, or pasture lots, held under a grant from any corporation or town, to which lands may be granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities, thereof, or in the case of any city, town, or village lot, which city, town, or village existed at the time possession was taken of New Mexico by the authorities of the United States, the claim to the same may be presented by the corporate authorities of the said town, or where the land on the said city, town, or village, was originally granted to an individual, the claim may be presented by or in the name of such individual, *and the fact being proved to you of the existence of such city, town, or village, at the period when the United States took possession, may be considered by you as prima facie evidence of a grant to such corporation,* or to the individuals under whom the lot holders claim."

The other statement that the town was unincorporated is to explain why individual inhabitants, and not the municipal corporate authorities, file the petition. The petition is signed by "J. Houghton, Attorney for the Inhabitants of Anton Chico."

The surveyor general regarded the petition and proceedings as by the inhabitants of Anton Chico, for he entitled the proceedings "Town of Anton Chico v. The United States." Again, the evidence before him dealt with the existence of the town prior to and at the time of annexation to the United States, and did not refer to the identity, possession, or occupation of the grant by any of the original grantees or their heirs. The basis of the finding was the "existence of a town, when the United States took possession of the country," and the recommendation is to confirm the grant to the town. Such statement and recommendation are:

"The instructions to this office provide that the existence of a town when the United States took possession of the country, being proven, is to be taken as prima facie evidence of a grant to said town, and as it is proven to have been in existence in 1839 and up to 1846, with the knowledge and tacit consent of the Mexican government, and was recognized as a town by that government, it is believed to be a good and valid grant, and the land claimed severed from the public domain. It is therefore approved and ordered to be transmitted to Congress for its action in the premises."

We think it conclusive that the recommendation of the surveyor general, and therefore the confirmation, was to the individuals as inhabitants of the town of Anton Chico.

[2] What effect has such confirmation upon any contrary claim which appellant might base upon a construction of the original granting instruments or facts in connection therewith? In a case involving a New Mexican grant confirmed by this same act and section, the Supreme Court said:

"The final action on each claim reserved to Congress is, of course, conclusive, and therefore not subject to review in this or any other forum. It is obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the surveyor general or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action." Tameling v. U. S. Freehold & Emig. Co., 93 U. S. 644, 662, 23 L. Ed. 998.

We are clearly concluded from going back of the confirmation of Congress. If we were not so concluded by the above-quoted authority, we would feel bound to conclude the facts in favor of a community grant by the decision in U. S. v. Sandoval, 167 U. S. 278, 17 Sup. Ct. 868, 42 L. Ed. 168. A decision of the questions there raised necessitated a determination of the character of the grant; that is, whether it was a grant to individuals as such or to the community. The statement of facts therein contains the instruments of the original grant, and referred to land adjoining that here involved. They are so strikingly similar, not only in essentials, but expression, to these here involved, as to suggest that those in this action were, as to form, copied therefrom. The court there held the grant to be to the community. Further, if we had no such guide as the Sandoval opinion and decision, we would decide upon the facts here presented that such was the nature of the grant.

Another point pressed here is the exclusion of certain deeds, with their recitals, which were introduced as ancient documents and designed to show deraignment of title from the original grantees to the entire tract. Since we hold that this grant was not to individuals as such, but to the community, such recitals become immaterial.

As to the contention based upon adverse possession, is suffices to say that the court found against such adverse possession. Such finding in a law case is equivalent to a verdict by a jury. As the evidence was conflicting, we should not disturb the finding of the court.

Our determination of the character of this title makes unnecessary any discussion or decision of the effect of the decision of the state court as an estoppel against appellant.

The judgment is affirmed.

HARDY v. MISSOURI PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. May 17, 1920.)

No. 5385.

1. **Negligence ⊜39—Owner of underground conduit not liable for death of child.**
Defendant, which with an adjoining owner constructed a concrete conduit 700 feet long covering a shallow stream, filling in above and leaving the ends open and into which, at a considerable distance from either end, it at times discharged waste steam and hot water from the boilers of its power plant, *held* not chargeable with negligence which rendered it liable for the death of a boy who, with others, undertook to walk through the conduit and was killed by a discharge of steam; it being shown that other boys had walked through three times during the preceding four years, but not that defendant had knowledge of it.

2. **Negligence ⊜23(1)—Attractive nuisance doctrine stated; "anticipation."**
"Anticipation," in the meaning of the doctrine which holds property owners liable for injury to children by dangerous instrumentalities on their premises, where such injury should be anticipated, means probability, and not possibility, and there must be a reasonable expectation of the presence of children at the time and place of danger before there arises a duty to guard them from that danger.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Anticipation.]

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

Action by Cora Hardy, administratrix, against the Missouri Pacific Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

E. L. McHaney and G. W. Murphy, both of Little Rock, Ark., for plaintiff in error.

E. B. Kinsworthy and W. R. Donham, both of Little Rock, Ark., for defendant in error.

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

STONE, Circuit Judge. Error from directed verdict at the close of plaintiff's evidence in an action to recover for death through negligence. The point here pressed is the sufficiency of the evidence upon the issue of negligence. The deceased was a boy 12 years old. The facts pertinent to a determination of the issue here are as follows:

Defendant is a railway corporation owning and operating a station, power house, and railway yards at Little Rock, Ark. Prior to 1910 a perennial stream ran through a ravine, cutting the grounds of defendant near its depot, as well as adjoining property. About 1910 the predecessor of defendant and an adjoining property owner built a quadrangular concrete structure over the stream, filling in the spaces on each side and above, and leveling the new surface. The conduit thus formed was about 6 feet high and wide and about 700 feet long. The upper or south end of the conduit and something more than a city

block and the width of a street of its length therefrom were upon the land of the adjoining property owner, or under a street, while the remainder was on defendant's land, with the lower or northern opening near the depot. No obstruction, guards, or warnings were placed at either entrance or in the conduit, though bars could have been placed across the openings at slight expense. Through this conduit normally ran a stream of clear water several inches deep. At a point about where the conduit passed the power house were pipes connected with defendant's power house boilers, and through which waste steam and hot water were discharged at intervals into the conduit. Children played at and in the ends of the conduit at times, and several boys had gone partially through from the south opening to a manhole south of defendant's property, where they came out. In three instances boys had gone through the conduit. These instances being, one in 1913 or 1914, one in 1914 or 1915, and the other in 1916.

No actual knowledge of the playing of the children or passage through the conduit by any of them was brought home to defendant. On June 27, 1917, deceased, with two other boys, started at the south end to go through the conduit. When they reached a point at or near the pipe ends, hot water and steam issued, causing the death of this boy.

[1] The decisive issue here presented requires the application to the above facts of the so-called "attractive nuisance" doctrine as to liability for injury to children by dangerous agencies on private grounds to which they have been attracted. We are not here concerned with that class of cases dealing with dangerous agencies or conditions adjoining or near public ways or other private grounds, but with such as are well within private property. Nor are we interested in that other class wherein there is an intention to inflict injury, as in the trap or spring gun cases. No legal proposition has more thoroughly divided the courts of different jurisdictions than has the recognition or application of the doctrine here involved.

Among many fruitful discussions and collections of cases dealing generally with the doctrine are Wheeling & L. E. Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N. E. 66, 19 L. R. A. (N. S.) 1136, 122 Am. St. Rep. 503, 11 Ann. Cas. 981; Thompson v. Railroad Co., 218 Pa. 444, 67 Atl. 768, 19 L. R. A. (N. S.) 1162, 120 Am. St. Rep. 897, 11 Ann. Cas. 894; 11 Harvard Law Rev. 349; notes in 4 L. R. A. (N. S.) 80, and 19 L. R. A. (N. S.) 1094. The following are cases involving injury from open water: United Zinc & Chemical Co. v. Britt, 264 Fed. 785, — C. C. A. — (recently decided by this court); McCabe v. Am. Woolen Co., 132 Fed. 1006, 65 C. C. A. 59; Cœur d'Alene L. Co. v. Thompson, 215 Fed. 8, 131 C. C. A. 316, L. R. A. 1915A, 731; Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; Hanna v. R. Co., 129 Ill. App. 134; Donk, etc., Co. v. Leavitt, 109 Ill. App. 385; Price v. Water Co., 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625; Kansas City v. Siese, 71 Kan. 283, 80 Pac. 626; Franks v. Oil Co., 78 S. C. 10, 58 S. E. 960, 12 L. R. A. (N. S.) 468; Omaha v. Bowman, 52 Neb. 293, 72 N. W. 316, 40 L. R. A. 531, 66 Am. St. Rep. 506; Id., 59 Neb. 84, 80 N. W. 259; Tucker v. Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; Richards v. Con-

nell, 45 Neb. 468, 63 N. W. 915; Moran v. Car Co., 134 Mo. 651, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 543; Arnold v. St. Louis, 152 Mo. 173, 53 S. W. 900, 48 L. R. A. 291, 75 Am. St. Rep. 447; Carey v. Kansas City, 187 Mo. 715, 86 S. W. 438, 70 L. R. A. 69; Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557; Smith v. Packing Co., 82 Mo. App. 9; Peters v. Bowman, 115 Cal. 349, 47 Pac. 113, 598, 56 Am. St. Rep. 106; Cooper v. Overton, 102 Tenn. 222, 52 S. W. 183, 45 L. R. A. 591, 73 Am. St. Rep. 864; Sullivan v. Huidekoper, 27 App. D. C. 154, 5 L. R. A. (N. S.) 263, 7 Ann. Cas. 196; Schauf v. Paducah, 106 Ky. 228, 50 S. W. 42, 90 Am. St. Rep. 220; Stendal v. Boyd, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597; Greene v. Linton, 7 Misc. Rep. 272, 27 N. Y. Supp. 891; Klix v. Nieman, 68 Wis. 276, 32 N. W. 223, 60 Am. Rep. 854; Peninsular Trust Co. v. Grand Rapids, 131 Mich. 571, 92 N. W. 38; Clark v. Manchester, 62 N. H. 577; Ritz v. Wheeling, 45 W. Va. 267, 31 S. E. 993, 43 L. R. A. 148; Hargreaves v. Deacon, 25 Mich. 1; Selve v. Pilosi, 253 Pa. 571, 98 Atl. 723; Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; Breckenridge v. Bennett, 7 Kulp (Pa.) 95; Dobbins v. R. Co., 91 Tex. 63, 41 S. W. 63, 38 L. R. A. 573, 66 Am. St. Rep. 856; Cook v. H. D. Navigation Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52; Marnock v. Simpson, 10 Del. Co. Rep. 119; Blum v. Weatherford & C. Bros., 121 La. 298, 46 South. 317; Indianapolis Water Co. v. Harold (Ind. App.) 79 N. E. 542; Id., 170 Ind. 170, 83 N. E. 993; Salladay v. Old Dominion, etc., Co., 12 Ariz. 124, 100 Pac. 441. Cases involving injury from hot water are: Briscoe v. Henderson L. & P. Co., 148 N. C. 396, 62 S. E. 600, 19 L. R. A. (N. S.) 1116; Etheredge v. Railroad Co., 122 Ga. 853, 50 S. E. 1003; Schmidt v. Distilling Co., 90 Mo. 284, 1 S. W. 865, 2 S. W. 417, 59 Am. Rep. 16; Putney v. Kieth, 98 Ill. App. 285; Brinkley Car Works & Mfg. Co. v. Cooper, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216; Id., 70 Ark. 331, 67 S. W. 752, 57 L. R. A. 724. Cases of injury by discharge of hot water or steam are Mergenthaler v. Kirby, 79 Md. 182, 28 Atl. 1065, 47 Am. St. Rep. 371, and Conway v. Kinston, 169 N. C. 577, 86 S. E. 524, L. R. A. 1916B, 945. A case of injury in an underground water conduit is Brown v. Salt Lake City, 33 Utah, 222, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004.

The recognition of this doctrine in the federal courts was settled by Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, and Railroad v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434. This doctrine has been applied by the various federal Circuit Courts of Appeals in the cases following: McCabe v. American Woolen Co., 132 Fed. 1006, 65 C. C. A. 59 (affirming [C. C.] 124 Fed. 283); Shellaberger v. Fisher, 143 Fed. 937, 75 C. C. A. 9, 5 L. R. A. (N. S.) 250 (8th Cir.); Peirce v. Lyden, 157 Fed. 552, 85 C. C. A. 312; Snare & Triest Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367; Saint Louis & San Francisco Railroad Co. v. Underwood, 194 Fed. 363, 114 C. C. A. 323; Northern Pacific Railroad Co. v. Curtz, 196 Fed. 367, 116 C. C. A. 403; Erie R. R. Co. v. Swiderski, 197 Fed. 521, 117 C. C. A. 17; Cœur d'Alene L. Co. v. Thompson, 215

Fed. 8, 131 C. C. A. 316, L. R. A. 1915A, 731; Chesko v. Del. & H. Co., 218 Fed. 804, 134 C. C A. 492; Great Northern Ry. Co. v. Willard, 238 Fed. 714, 151 C. C. A. 564; United Zinc & Chemical Co. v. Britt, 264 Fed. 785, recently decided by this court. We are therefore concerned solely with the application of that doctrine to the facts in hand. Such application necessitates an understanding of that doctrine and a definition of its essentials. We take the principle of the doctrine to be that children of tender years and immature discretion are not to be deemed as trespassers, if they merely follow childish instincts of curiosity or adventure in a manner and to an extent which should have been anticipated by a reasonably careful person; and a property owner must use reasonable care to protect such children at places upon his property where he should reasonably have anticipated their presence. Such anticipation may be based upon knowledge, actual or legally implied, that children do resort to such places, or upon knowledge, actual or legally implied, that such places are attractive to children and within their observation.

The essentials of the doctrine we deem to be, first, that the owner negligently maintains an agency which he knows or should know would be dangerous to children; second, that such agency is maintained at a place where the owner knows or should know children are likely to resort or to which they are likely to be attracted. Our decision hinges upon the second requirement. The entire evidence has been carefully read and considered and every reasonable meaning and inference favorable to plaintiff in error (given) full weight. We think the trial court correctly determined that there was not sufficient evidence to sustain a verdict of negligence on the part of defendant. The danger here consisted of the hot water and steam. This danger was of occasional occurrence only, being every day or two, as pleaded in the petition, with no definite showing as to its frequency in evidence, except such as may be inferred from the circumstance that it seems to have been the waste steam and hot water from the power house. The radius of the danger was obviously limited in area and its duration temporary. It was limited to a place in the conduit several hundred feet from either opening and far from the opening through which this boy entered.

[2] Nothing approaching knowledge by defendant of any passage through the conduit of boys at any time was shown, and such knowledge cannot be inferred nor imputed from the three trips in the course of four years shown in the evidence. Such knowledge cannot be founded upon the circumstance that children played about the openings of the conduit. There is no limit, except physical ability, to what a child may do. The law does not require the property owner to guard against any such wide possibility of action. "Anticipation," in the meaning of this doctrine, means probability, not possibility. There must be a reasonable expectation of the presence of children at the time and place of danger before there arises a duty to guard them from that danger. In our judgment, the proof here falls short of this standard.

The judgment must be and is affirmed.

FITTS v. CUSTER SLIDE MINING & DEVELOPMENT CO.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1920.)

No. 203.

1. **Bankruptcy ⟸49—Disposition of petition of intervention within discretion of court.**
   Denial of a motion for further continuance on a petition for leave to intervene in bankruptcy proceedings, and treating the answer thereto and replication as addressed to the petition in intervention tendered therewith, and which set forth the same facts and proceeding to a hearing thereon, *held* not an abuse of discretion, where prior continuances had been granted for hearing "on the merits," with leave to take evidence, which evidently related to the petition of intervention itself.
2. **Bankruptcy ⟸43—Whether directors of corporation have authority to file petition is matter of state law.**
   Whether the directors of a corporation, without authority from the stockholders, have power to file a petition in voluntary bankruptcy, must be determined by the law of the state in which the corporation is organized.
3. **Bankruptcy ⟸43—In absence of statute on the subject, directors of corporation may file petition.**
   Under the general law, in the absence of any provision on the subject in the statutes of the state, or in its articles of incorporation or by-laws, the directors of a corporation are authorized to execute a general assignment of its property for the benefit of creditors, and such power extends to the filing of a petition in voluntary bankruptcy.
4. **Bankruptcy ⟸43—Corporations; filing of petition not an "incumbrance" of property.**
   The filing of a petition in bankruptcy by a corporation *held* not an "incumbrance" of its property, within the meaning of Rev. St. Colo. 1908, § 865, as amended by Laws Colo. 1915, p. 175, providing that the directors of a mining corporation shall not have power to incumber its mines or plant without a vote of the stockholders authorizing it.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incumbrance.]

Elliott, District Judge, dissenting.

Petition to Revise Order of the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

In the matter of the Custer Slide Mining & Development Company, bankrupt. On petition of William H. Fitts to revise order of District Court. Petition denied.

Daniel B. Ellis, of Denver, Colo. (Henry T. Rogers, Lewis B. Johnson, and Pierpont Fuller, all of Denver, Colo., on the brief), for petitioner.

William L. Dayton, of Denver, Colo. (Wilbur F. Denious, of Denver, Colo., on the brief), for respondent.

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

CARLAND, Circuit Judge. [1] The Custer Slide Mining & Development Company, a Colorado corporation, was adjudged a bankrupt by the United States District Court for the District of Colorado

on October 2, 1918, upon its voluntary petition, pursuant to a resolution of its board of directors, adopted September 30, 1918. On November 16, 1918, the petitioner filed his petition for leave to intervene in the bankruptcy proceeding, to which was attached a proposed petition in intervention. The hearing upon the application to intervene was fixed for November 22, at 10 o'clock a. m. At the time fixed for said hearing the bankrupt appeared and filed an answer to the petition for leave to intervene. On November 27 the petitioner filed a motion for leave to file an amendment to his petition of intervention, and on the same day filed a replication to the answer of the bankrupt.

The record further shows that on the morning of November 22, 1918, counsel for petitioner appeared and reported to the court that the petitioner was ill and could not appear in court, although he was then in Denver, Colo., where the hearing was to be had. About 10 days thereafter, the petitioner went to Colorado Springs, Colo., where he remained until about the middle of January following. On January 8, 1919, petitioner and the bankrupt appeared by counsel before the District Judge in chambers, and by agreement the matter was again set for hearing on the merits for January 30; the judge announcing at the time that the matter involved must be tried at that time, and that, if counsel for petitioner should ascertain that he could not then present his testimony, the same would have to be taken by deposition, and as a further accommodation, if petitioner's physical condition was such that he could come to Denver and testify before January 30, the matter would be taken up, tried, and determined on short notice. The court was unable to hold the hearing on January 30, and again continued the matter to February 4; counsel being notified of the postponement. On February 4, counsel appeared, but, the court being engaged, they were excused until the next morning at 10 o'clock, at which time the matter was called for hearing.

Thereupon counsel for petitioner announced that his client was then in California and a further continuance was asked for. The court asked counsel why the petitioner had not remained in Colorado and come to Denver for the hearing, if he was able to go to California, or why his deposition had not been taken, when petitioner found for any reason that he could not be present. Counsel for petitioner said to the court that petitioner had important business interests in Salt Lake that needed his immediate attention, and that he had gone to Salt Lake, and thence to San Francisco, where he expected to submit himself to a surgical operation. A telegram from petitioner, dated January 28, at San Francisco, and also what purported to be a letter from a surgeon at the same place, were read by counsel, to the effect that petitioner could not, on account of his physical condition at that time, come to Denver. The court thereupon announced that, in view of the prior setting and understanding in regard to the case, the same would not be further continued, whereupon counsel for petitioner read a written unverified statement as to what he proposed to prove. After argument, the court granted the prayer of petitioner for leave

to intervene, but at the same time made the order sought to be revised in this proceeding. It is as follows:

"And thereupon this matter comes on now to be heard upon the said petition of intervention, the answer thereto, and the replication to said answer, the answer of the bankrupt company to said petition for leave to intervene and the replication to said answer being considered and treated as answer and replication, respectively, to said petition of intervention, and is argued by counsel. And thereupon, on consideration thereof, it is ordered by the court that the said petition of intervention be and the same is hereby denied, and that the same be and it is hereby dismissed out of this court, at the cost of petitioner."

The record shows that the petition in intervention set forth the same facts as the petition for leave to intervene, and this accounts for the recital in the order complained of to the effect that the answer of the bankrupt to the petition for leave to intervene and the replication thereto of petitioner should be considered and tried as an answer and replication, respectively, to the petition of intervention. We are satisfied that considering the language used by the court at the times the hearing was continued, namely, that the hearing should be upon the merits, and also that the matter should be tried, that the court understood the hearing where testimony should be offered should be upon the petition in intervention itself, as the question as to whether the petitioner should be allowed to intervene was a matter determinable upon the face of the petition for leave to intervene, and was not the subject of trial upon the merits, and therefore the error, if any, committed by the court in denying a hearing on February 5, must be determined by considering whether or not the court abused its discretion in refusing a continuance.

Counsel for petitioner claims that this question is not only involved, but that the court by its action refused to give petitioner his day in court on his petition in intervention, because the court no sooner granted petitioner the right to file his petition in intervention than the court dismissed the same. It is our opinion that the hearing which the court spoke of during the continuance of the proceeding was a hearing on the petition of intervention, and that the mere fact that a formal order allowing petitioner to intervene, which was not made until February 5, 1919, cannot control the character of the proceeding, in view of the fact that the only petition in intervention that was ever filed in court was filed November 16, 1918. About six weeks elapsed after the adjudication in bankruptcy before the petitioner moved to intervene, and in our judgment he was given ample opportunity to sustain his petition in intervention prior to February 5, 1919, and there was no abuse of discretion in refusing to continue the case further for the taking of evidence.

[2] Counsel for petitioner next claims that, if there was no error in refusing a continuance, there was error in the action of the court in dismissing the petition in intervention, as the pleadings and record showed that the voluntary petition in bankruptcy was filed by the bankrupt in pursuance of authority granted by the directors of the corporation alone, without the consent or authorization of the stock-

holders. Whether the directors of a corporation, without the authority from the stockholders, have power to file a petition in voluntary bankruptcy, must be determined by the law of the state in which the corporation is organized. Home Powder Co. v. Geis, 204 Fed. 568, 570, 123 C. C. A. 94 (Eighth Circuit); Dodge v. Kenwood Ice Co., 204 Fed. 577, 123 C. C. A. 103.

[3] In Home Powder Co. v. Geis, supra, this court said:

"It is not to be presumed that there will be found in the general laws of the state, or in the articles of incorporation or by-laws, any express provision authorizing such admission; but under the general law the board of directors or trustees of a corporation have the power to authorize execution of an assignment of all property of the corporation for the benefit of its creditors, when such a step is advisable, unless such an assignment is prohibited by law, the articles, or by-laws."

This is, we understand, the general rule. See Dodge v. Kenwood Ice Co., supra; Rudebeck v. Sanderson, Trustee, 227 Fed. 575, 142 C. C. A. 207; In re Foster Paint Co. (D. C.) 210 Fed. 652; In re Russell Wheel Co. (D. C.) 222 Fed. 569.

[4] Counsel for petitioner claims that the laws of Colorado expressly provide that the directors of a corporation have no power without the consent of the stockholders to file a voluntary petition in bankruptcy. Section 865, Rev. Stat. of Colo., as amended by Session Laws of 1915, page 175, is cited in support of this contention. This statute reads as follows:

"The board of directors or trustees of a mining or manufacturing corporation shall not have power to incumber the mines or plant of such corporation, or the principal machinery incident to the production from such mine or plant until the question shall have been submitted at a proper and legal meeting of the stockholders and a majority of all the shares of stock shall have been voted in favor of such proposition; and any mortgaging or incumbering of such property, without such consent shall be absolutely void."

In order to make this statute applicable the filing of a voluntary petition in bankruptcy must be an "incumbering" of the property of the bankrupt. This court in Westerlund v. Black Bear Mining Co., 203 Fed. 599, 121 C. C. A. 627, construed this statute and expressly defined what the words "incumber" and "incumbering" used in the statute mean. In the case cited it was said:

"The words 'incumber' and 'incumbering,' when used in reference to property and its title, are words of this character, and the known legal meaning of these words in their popular sense, in the sense that would be attributed to them by conveyancers, lawyers, and judges, the persons most conversant with them, included when this statute was enacted, and still includes, not only mortgages, deeds of trust, and pledges for the payment of money, but every right or interest in the land which may subsist in third persons to the diminution of the value of the land or its title, but consistent with the passing of the fee by the conveyance of the owner."

And again on page 610 of 203 Fed. on page 638 of 121 C. C. A., in the same opinion, it is said:

"When this statute was enacted, the popular sense, the ordinary significance, and the known legal meaning of the words 'incumber' and 'incumbering,' when used with reference to property or its title, included every right or interest in land which may subsist in third persons to the diminution of the

value of the land, or its title, but consistent with the passing of the fee by the conveyance of the owner."

This language is fully supported by a number of cases cited in the opinion. The statute in question was passed in 1895, and the amendment of 1915 simply added the proviso that a lease for a period of not exceeding five years should not be deemed an incumbering of property. At the time the statute was passed there was no bankruptcy law, so that it cannot be claimed that the Legislature of Colorado had the provisions of that bankruptcy law in mind. We do not believe that the filing of a voluntary petition in bankruptcy can reasonably be held to be an incumbering of property. The voluntary petition of a person or corporation to be adjudged a bankrupt results, of course, in an adjudication in bankruptcy; but this adjudication in and of itself, without any assignment, transfer, or other act of the bankrupt, operates to divest him of all title and to vest it in the trustee of his creditors. Remington on Bankruptcy, § 1112; Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174.

The words "incumber" and "incumbering" in the statute, as this court said, must be construed in accordance with their popular sense, a sense that would be attributed to them by conveyancers, lawyers, and judges, the persons most conversant with them. Given their popular meaning, these words do not apply to an instrument or proceeding which has the effect to convey the whole estate absolutely. Such a conveyance is not an incumbrance. This is a bankruptcy proceeding conducted on equitable principles, and this makes it proper to mention a proceeding in the case with which the petitioner was connected. The petitioner on May 16, 1919, applied to this court for an order staying the sale of the bankrupt property advertised for May 9, 1919. After the hearing on said application an order was entered by this court postponing the sale of the property until July 9, 1919. This order recited that the petitioner consented to the sale on said day, and on July 9, 1919, the property was sold, and the sale has been confirmed by the referee; the petitioner having filed his claim with said referee in the sum of $7,858.17.

This proceeding of the petitioner may not estop him from litigating the question which he has now before the court, but with the case in its present condition this court will not go out of its way to sustain objections that are more or less technical.

The petition to review is denied.

ELLIOTT, District Judge (dissenting). I concur in the foregoing if the case is to be considered upon the merits.

I am of the opinion, however, that the undisputed record discloses that petitioner never appeared in the bankruptcy proceedings for any purpose other than to present his petition for leave to intervene; that he never was treated as a party to such proceedings prior to the oral order of February 5th, at which time the petition for leave to intervene was pending, and as part of the order granting leave to file the petition in intervention the Court dismissed the same.

I am of the opinion that the preservation and enforcement of the rights of petitioner, brought into this proceeding by the order of February 5th, permitting him to file his petition in intervention, entitle him to a reasonable time after the granting of his petition to intervene within which to serve petition in intervention, have the issues made up thereon and prepare for trial, and therefore that the Court erred denying his application for a continuance for a reasonable time for such purpose.

The effect of the order was to permit petitioner to intervene and by the same order withhold from him the benefit thereof by denying his motion for continuance in order to produce his witnesses in support of the allegations of the petition, within a reasonable time to be fixed by the Court.

In my view the petition to revise should be granted and the cause remanded.

CHAN GAI JAN et al. v. WHITE, Immigration Com'r.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920.)

No. 3408.

1. **Aliens ⟸32(13)—Finding of status of Chinaman, supported by evidence, not reviewable.**
   A finding by the immigration authorities that the status of a Chinese alien was that of a laborer, and not of a merchant, under Act Nov. 3, 1893, § 2 (Comp. St. § 4324), *held* not reviewable, where based on evidence showing that, while he was a member of a mercantile firm and helped conduct its business, he also devoted a considerable part of his time to superintending and working in a fruit orchard, which he leased.
2. **Aliens ⟸25—Chinese laborer not entitled to admission of wife and children.**
   A Chinese alien, domiciled in this country as a laborer, is not entitled to admission of his wife and minor children.

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

Habeas corpus by Chan Gai Jan and Ng Shee against Edward White, Commissioner of Immigration for the Port of San Francisco. From a judgment dismissing the petition, petitioners appeal. Affirmed.

Geo. A. McGowan, of San Francisco, Cal., for appellants.

Annette Abbott Adams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

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

WOLVERTON, District Judge. This case is here on appeal from a judgment of the District Court, sustaining a demurrer to a petition for writ of habeas corpus and dismissing the petition.

Ng Shee is the wife of Chan Moy, and Chan Gai Jan is his minor son. Chan Moy has been in this country 32 years, and has a laborer's certificate, issued March 3, 1894, showing him to be domiciled here. At the time his wife and son applied to enter this country, he claimed to be, and now claims to be, a Chinese merchant, and a member of the firm of Kum Chong Company, of Isleton, Cal. He acquired an interest in the firm in January, 1914, by purchase from one Wong Kwun, paying him $1,000 therefor. As the wife and son of Chan Moy, Ng Shee and Chan Gai Jan applied to enter the United States on April 28, 1917, having arrived at the port of San Francisco from China on the steamship Shinyo Maru.

After hearing had before the Commissioner of Immigration, they were denied a landing. In due course the cause was appealed to the Secretary of Labor, with the same result, and they were ordered to be returned to China. The question in the case turned upon whether Chan Moy, the husband and father, was, at the time of the attempted entrance of the wife and son into this country, a merchant or a laborer within the meaning of the Chinese Exclusion Acts.

It appears that Kum Chong Company is a bona fide firm, engaged in mercantile business. Chan Moy has under lease about 30 acres of orchard, situated 3 to 5 miles from Isleton, where the firm is located, and the evidence tends to show that he superintends the work in taking care of the orchard, pruning and the like. As expressed by one witness, he is a "kind of manager." Mr. Mathena, who has known Moy for a number of years and is well acquainted with the situation, in a letter which is in evidence states:

"It is a fact that Chan Moy, as is true of nearly all the Chinese merchants of the river sections, was and is, in conjunction with his partners in the mercantile business, and as an adjunct to said business, engaged in fruit and vegetable raising."

Mathena in his testimony, however, was of the view that Chan Moy performed no labor, other than to superintend the work, except on occasions to show the men how to do certain work that they might be engaged in. When asked as to what proportion of the time Moy spent "looking after the orchard," he replied that "it would be hours at a time, maybe," and he estimated that Moy would be there about a day in a week, but that when witness visited the store he usually found Moy there. Others testified to seeing Moy at the store frequently, at times selling goods, but that generally he was in and out, peddling goods and taking orders on the ranches. There were five members of the firm of Kum Chong Company. Three of them were silent members, and of the other two Wong Gwun is listed as "manager," and Chan Moy as "gen. help."

In the course of the investigation, Lauritz Lorenzen, immigrant inspector, was directed to visit the locus in quo where Moy was supposed to be engaged taking care of the orchard. He reported that on his arrival he found Moy working in the orchard, cutting grass. During this visit he obtained the affidavit of one S. E. Talpelman, who deposed that he had known Moy for the previous 2 years; that for the first 6 months of that time Moy devoted his entire time to the

work connected with the fruit orchard; that Moy told him about a year and a half previously that he had purchased an interest in the Kum Chong Company; that affiant had seen Moy in the store on two different occasions, but could not say how much time Moy devoted to the business in the store; that Moy had maintained rooms and sleeping quarters in a house on the 30 acres of fruit orchard during the entire 2 years, and had devoted about half of his time in various kinds of work, such as pruning and spraying the orchard, picking and packing fruit, cultivating vegetables for the market, and generally supervising the work of from 2 to 10 other Chinese.

[1] Based upon the testimony, of which the foregoing recounts the salient features, the question was presented to the Department of Labor to determine whether Chan Moy was a merchant or a laborer, within the intendment of the Chinese exclusion legislation. We can only determine whether the Department of Labor has exceeded its authority, or has misinterpreted the law, in arriving at the conclusion reached by its decision. If there is competent evidence of persuasive character to sustain its findings, its judgment is final and conclusive, and is not susceptible of review or revision by the courts. This latter proposition is now so well established as to need no citation of authorities.

The Act of Congress of November 3, 1893 (28 Stat. 7, c. 14 [Comp. St. §§ 4320, 4324]), by section 2 (section 4324) defines the terms "merchant" and "laborer" or "laborers." A merchant is a person engaged in buying and selling merchandise, who during the time does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant. The words "laborer or laborers" include both skilled and unskilled manual laborers; the statute instancing certain lines of work which may be considered as illustrative. A merchant may therefore do certain labor without losing his status as a merchant, but that labor must be done in and about the conduct of his business, and be necessary thereto. If he goes beyond this, and engages in manual labor not connected with his business as a merchant, he is to be classed as a laborer; his status being manifested by the kind of work he does. Ow Yang Dean v. United States, 145 Fed. 801, 804, 76 C. C. A. 365.

Thus it is held that a Chinese person, who is engaged half of his time in cutting and sewing garments for sale by a firm of which he is a member, is not a merchant within the meaning of section 2 of the act above cited. Lai Moy v. United States, 66 Fed. 955, 14 C. C. A. 283. So it was held by Maxey, District Judge, that a Chinese person who owns an interest in a mercantile firm, but who works as head cook in a restaurant of which he is in part proprietor, is a laborer, and not a merchant. Mar Bing Guey v. United States (D. C.) 97 Fed. 576. A case of marked analogy to the one at bar is Lew Quen Wo v. United States, 184 Fed. 685, 687, 106 C. C. A. 639, 641, where this court said:

"The farmer or fruit grower, who leases land and tills the same, and labors in the production of a crop, which he sells to others, is engaged in an occupation similar to that of those who are engaged in mining, fishing, or drying

fish for home consumption or exportation. Lew Fong, as the owner of an interest of $500 in a general merchandise store, would have been a merchant within the meaning of the acts, and his status as a merchant would not have been affected, had he performed only manual labor such as might have been necessary in the conduct of his business as a merchant; but here the labor which he performed was aside and entirely distinct from his business as a merchant, and therefore, at the time when the appellant was landed in the United States, Lew Fong was not one of the privileged class of persons who are entitled to enter the United States, and therefore the appellant was not entitled to admission."

This answers the appellants' first contention, that Chan Moy was a merchant, seeing that there was competent testimony, pertinent for consideration, submitted to the Secretary of Labor, upon the question as to whether Moy's status was that of a merchant, and the honorable Secretary found against the contention.

The second contention is that Moy was a person other than a laborer. But this is necessarily included in the first, for the Secretary of Labor, in finding that Moy was not a merchant, based the finding upon the ascertained fact that he was a laborer.

[2] The next and last proposition insisted upon by counsel is that, even if Chan Moy is a laborer, he is entitled to have his wife and minor son admitted, to remain with him in his household. This identical question was involved in a case recently decided by this court, namely, Yee Won v. White, 258 Fed. 792, 170 C. C. A. 86, and was decided against the contention.

It follows that the judgment of the District Court should be affirmed, and such will be the order of the court.

ANDREWS INSTITUTE FOR GIRLS v. NEW YORK STEAM CO. et al. (INDEPENDENT ORDER OF FORESTERS, Intervener).

(Circuit Court of Appeals, Second Circuit. June 2, 1920.)

No. 244.

1. **Pleading ⇐34(5)—Allegation that breach of trust was "procured" not equivalent to allegation it was knowingly induced.**

An allegation in a complaint in intervention that the officers of the mortgagee, suing to foreclose the mortgage, procured a breach of trust by intervener's officers, is not an allegation that the breach of trust was knowingly induced, which is a fraud, since "procured," though having well-known meaning in criminal law, has only a vague and indefinite meaning in civil law.

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

2. **Insurance ⇐695—Investment of funds by president of fraternal society in insufficiently secured bonds not breach of trust.**

Though the statutes require the investment of the funds of a fraternal benefit society in bonds reasonably worth the price paid therefor and secured by mortgage, the mere fact that such funds were invested by the president in bonds of an embarrassed corporation, which were insufficiently secured, does not establish a breach of trust.

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3. Corporations ⇐480—Lender to embarrassed corporation not entitled to priority over existing mortgages.

One who loans money to a financially embarrassed corporation, to enable it to continue in business, and takes security therefor, is not thereby entitled to priority over mortgages existing when the loans were made.

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

Suit by the Andrews Institute for Girls against the New York Steam Company and others, in which the Independent Order of Foresters intervened, claiming a lien prior to the mortgages which complainant sought to foreclose. From a decree granting complainant's motion to dismiss the intervention, after answer, the intervener appeals. Affirmed.

Plaintiff, hereinafter called the Institute, brought suit to foreclose several mortgages upon as many parcels of real estate situate within that district. Jurisdiction depended upon diversity of citizenship; the Institute being a corporation of Ohio and the defendant mortgagor (the Steam Company) a corporation of New York. The Central Union Trust Company of New York was made defendant as the trustee of two corporate mortgages created to secure issues of bonds. These mortgages, created in 1911 and 1916, respectively (and hereinafter called senior and junior), were both inferior in order of lien to the mortgages sought to be foreclosed by the Institute.

Several months after action begun the appellant herein (hereinafter called the Foresters) obtained leave to intervene as a party defendant. This order was obtained upon representations by affidavit that the Foresters owned $2,062,000, par value, of the bonds issued under the junior mortgage; wherefore it was asserted that the Foresters had "an interest in this litigation, and its presence" therein was proper "to a complete determination of the cause and for the protection of its said interest." The affidavit for intervention states no reason why the bondholder intervened in an action wherein its trustee was already a party.

The amended answer of the Foresters, after certain denials now confessedly immaterial, sets up a counterclaim to the following effect, viz: The intervener is a Canadian corporation carrying on an insurance business of the kind commonly known as "fraternal" or mutual, and it had in 1914 in its corporate treasury considerable funds and property held for the benefit of its policyholders.

The answer averred that the "true intent, meaning, and effect" of the Canadian statutes on the subject are that the Foresters' fund should be invested "in such bonds only as are reasonably worth the price paid therefor, and are secured by a mortgage or hypothec upon real or other property * * * of a value substantially in excess of the total amount of bonds issued against and secured" thereby. In the year 1914 one Stevenson was president of the Foresters and had control of the investment of its funds.

At the same time the Institute was a large holder of the existing securities of the Steam Company, and as such deeply interested in its prosperity and advancement, and one of its trustees, Mr. St. John, was and continued to be the Institute's agent for (as the answer avers) "procuring of necessary funds for the" Steam Company and the "sale of the property and securities of the Steam Company owned by the Institute." St. John, together with one Hanford (who is not alleged to have had any connection with the Institute), "procured" Stevenson, as president of the Foresters, to advance to the Steam Company large sums of money, which were expended largely at any rate in the improvement and extension of its plant or apparatus, in return for which the Foresters received through Stevenson the Junior mortgage bonds hereinabove referred to.

It was also alleged that Stevenson bought from St. John personally, and paid for out of the Foresters' money, a considerable amount of Steam Company stock. It does not appear what Stevenson did with the stock, or whether the Foresters now own it. It is then averred that when Stevenson made this investment, or advanced the moneys now represented by it, i. e., in and after December, 1914, the business of the Steam Company was "unprofitable, and was resulting and had for many years resulted in substantial annual losses, and the property and resources of Steam Company available for and applicable to the payment of the advances made by Stevenson were not equivalent in value by a large sum to the aggregate of such advances," with the result that the Foresters' junior mortgage bonds were a very poor security, obtained at a time when the "unsound financial condition" of the Steam Company was well known to the Institute and to St. John.

It is finally alleged that Stevenson's application of the Foresters' funds in the manner above set forth was "in violation of the laws governing investment and expenditure of the funds of the Foresters and constituted a breach of trust of which (the Institute and St. John) had knowledge or notice and in which they participated."

For these reasons the Foresters prayed that they should be "decreed to have a lien upon the property and assets purchased with the trust funds * * * aforesaid paramount and superior to the lien" of the real estate mortgages which the Institute was seeking to foreclose in this action, and to the senior corporate mortgage of 1911.

In two other separate counterclaims the Foresters' amended answer substantially alleged fraud on the part of the Institute, in that St. John made false representations to Stevenson in regard to the earnings and profits of the Steam Company. These counterclaims, however, were formally withdrawn before hearing in the court below.

Interveners' answer being thus reduced to the allegations above summarized, the Institute moved to dismiss on the ground that the facts stated were not "sufficient to constitute a cause of action in equity."

This motion—equivalent to a demurrer under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi)—was granted, and the Foresters then appealed.

Greene & Hurd and Bert C. Fuller, all of New York City, for appellant.

White & Case, of New York City (Joseph M. Hartfield and James A. Murphy, both of New York City, of counsel), for appellee Institute.

Larkin & Perry, of New York City (Lewis H. Freedman, of New York City, of counsel), for appellee Central Union Trust Co.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). By considering the point decided on the motion in the court below and presented by this appeal, we are not to be understood as expressing approval of the order permitting intervention. As to the propriety of granting permission to intervene we express no opinion; the point not having been argued.

Assuming as true the allegation that Stevenson bought Steam Company stock from St. John individually, it is immaterial. Indeed, the Foresters do not pray for a lien or other relief in respect of that sum. The demand of the Foresters is contained in what is called an answer to the bill of complaint in foreclosure, and is set up by way of counterclaim, apparently under equity rule 30 (201 Fed. v, 118 C. C. A. v). Whether this is a proper, or even permissible, method of presenting

such a claim as this, is another matter, not argued, and as to which no opinion is expressed.

What the Foresters want, however, is plain enough, viz. to have their junior mortgage bonds, representing Stevenson's very ill-judged investments, promoted in lien so as to outrank all the Steam Company securities held by the Institute. To reach this result by any kind of proceeding in this suit in equity, the Foresters must show a cause of action against the Institute.

[1] Such cause of action is asserted to exist because, when Stevenson bought the junior mortgage bonds, he committed a breach of the trust imposed upon him by law as president of the Foresters, and that the Institute "procured" Stevenson to do what he did through St. John, and of such breach of trust by Stevenson St. John had knowledge. The use of the word "procured" in this connection is singular. Its meaning in criminal law is well known and can be accurately stated; but in a bill in equity it cannot be stretched to mean "knowingly induced." Indeed, its use on the civil side may be called a solecism and its meaning vague. To knowingly induce a trustee to violate his trust for the pecuniary advantage of the inducer is an obvious fraud, and would be within the decision in Fyler v. Fyler, 3 Beav. 550. But no such cause of action is here well pleaded.

[2] Perhaps a more fundamental objection to the claim attempted to be set forth is that there are no allegations of fact showing that Stevenson was in any legal or accurate sense of the word a trustee, or that in buying the junior bonds of the Steam Company he committed a breach of any trust. No such trust relation can be spelled out of the statutes to which we are referred, and while in a certain sense any corporate officer who improvidently invests the corporate funds is violating his trust, that popular locution is much too vague to warrant any such relief as was approved in theory, but denied in fact, in the Fyler Case, and is here attempted.

[3] In short, this intervener is at the best in the position of one loaning money to an embarrassed corporation and taking security therefor, who deems himself in equity entitled to a lien for his loan superior to that of mortgages existing when he loaned. That no such equity exists was adjudged in Farmers' Loan, etc., Co. v. Bankers' etc., Co., 148 N. Y. 315, 42 N. E. 707, 31 L. R. A. 403, 51 Am. St. Rep. 690, and cases cited.

No cause of action being shown entitling the Foresters to a lien other than the lien of the bonds which they have, the order below was right; and it is affirmed, with costs.

LOOMIS, Collector of Internal Revenue, v. WATTLES.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1920.)

No. 5545.

1. **Internal revenue ⊂=38—Second appeal to Commissioner after payment of tax unnecessary, before bringing action for recovery.**
Where an appeal had been taken to the Commissioner of Internal Revenue from the assessment of an income tax against a stock dividend, before the tax was paid, it was not necessary, under Rev. St. § 3226 (Comp. St. § 5949), to make a second appeal, after paying the tax under protest, before bringing action for its recovery, since such appeal would have been an idle proceeding.

2. **Internal revenue ⊂=7—Stock dividend not taxable as "income."**
A stock dividend declared by a corporation from its accumulated surplus is not taxable as "Income," under Act Oct. 3, 1913.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

3. **Appeal and error ⊂=171(1)—Assessment on stock dividend cannot be sustained on appeal as assessment of cash dividend.**
Where an assessment of income tax was treated by both parties in the court below as an assessment on a stock dividend, and so treated in the assessment of the tax by the Commissioner of Internal Revenue, it cannot be upheld in the Circuit Court of Appeals as an assessment on a cash dividend, though the corporation's surplus was distributed by check, which was indorsed by the stockholder in exchange for the stock, the assessment having been made on the value of the stock, which was more than double the face of the check, since the assessment must be made by the Commissioner, and cannot be made by the court.

4. **Appeal and error ⊂=1078(5)—Assignment of error as to allowance of interest, not argued, abandoned.**
An assignment of error relating to the allowance of interest in an action for internal revenue tax paid under protest, which was not argued, will be deemed abandoned.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action by Gurdon W. Wattles against George L. Loomis, as Collector of Internal Revenue for the District of Nebraska. Judgment for plaintiff, and defendant brings error. Affirmed.

T. S. Allen, U. S. Atty., of Lincoln, Neb. (F. A. Peterson, Asst. U. S. Atty., of Omaha, Neb., on the brief), for plaintiff in error.

John Lee Webster, of Omaha, Neb., for defendant in error.

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

CARLAND, Circuit Judge. This is an action by defendant in error, hereafter plaintiff, to recover from plaintiff in error, hereafter defendant, an income tax levied under Act Oct. 3, 1913, c. 16, 38 Stat. 166, and paid under protest. Plaintiff had judgment in the trial court and defendant brings error.

The facts are as follows: On January 13, 1914, the stockholders of the United States National Bank of Omaha, Neb., voted an increase of the capital stock of the association in the sum of $300,000. On the same day the board of directors declared a special dividend of 42⁶/₇ per cent., payable January 14, 1914. This per cent. equaled $300,000 of the then surplus of the association. The dividend was declared out of earnings accumulated prior to March 1, 1913. Plaintiff on January 14, 1914, as a stockholder, received a check for his proportion of the declared dividend amounting to $24,985.74. On January 15, 1914, he indorsed this check back to the association and received therefor his proportion of the newly issued capital stock at par, and entered the same on his private books at a valuation of $225 per share, or $56,219. The plaintiff made no return of the above stock as income, claiming that it was a stock dividend and not taxable. The defendant did not agree with the plaintiff as to the character of the transaction, and made an additional assessment upon the shares of stock, accepting the value placed thereon by the plaintiff. The tax levied on the shares on the above valuation amounted to the sum of $2,021.67. Plaintiff made an application to defendant to have the tax remitted, which was rejected. An appeal was taken to the Commissioner of Internal Revenue, and the ruling of the defendant was affirmed. The tax was then paid under protest, and this suit instituted for its recovery.

[1] The right of the plaintiff to maintain this suit is challenged in this court for the reason that the plaintiff did not appeal to the Commissioner of Internal Revenue after the tax was paid. This contention is based upon section 3226, Rev. St. U. S. (Comp. St. § 5949). The object of the statute requiring a party to exhaust his remedies in the Internal Revenue Department before he shall bring suit is to give the department an opportunity to decide whether in its judgment the tax is legal or illegal, and thus save the delay and expense of litigation. The point under consideration was not made in the court below, nor is it mentioned in the assignment of errors; but, as it may be claimed to be jurisdictional, it will be considered. We had a similar question before us in Weaver v. Ewers, 195 Fed. 247, 115 C. C. A. 219, and we then held that, notwithstanding section 3226, an appeal to the Commissioner, before the tax was paid, answered the purpose for which the statute was enacted. In the case cited we said:

"What the Commissioner of Internal Revenue thought about the assessment had been obtained upon full statement of the facts, and it would have been a useless form again, after the tax was paid, to appeal to the Commissioner and obtain the same judgment. The reason for the appeal did not exist, and hence the appeal after tax was paid was not necessary."

The following cases sustain our ruling: Schwarzchild, etc., Co. v. Rucker (C. C.) 143 Fed. 656; San Francisco Sav. & Loan Society v. Carey, 2 Sawy. 333, Fed. Cas. No. 12,317; Grier v. Tucker (C. C.) 150 Fed. 658; Tucker v. Grier, 160 Fed. 611, 614, 615, 87 C. C. A. 513; De Bary et al. v. Dunne (C. C.) 162 Fed. 961.

Counsel for defendant cites Savings Bank v. Blair, 116 U. S. 200, 6 Sup. Ct. 353, 29 L. Ed. 657; Stewart v. Barnes, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. Ed. 781, and Hastings v. Herold (C. C.) 184 Fed.

759. These cases have been examined, and when the facts of each case are considered they sustain the ruling of this court in Weaver v. Ewers, supra. We therefore see no reason for departing from the ruling heretofore made, and hence decide that the contention is without merit.

[2] On the merits we have this to say: The defendant levied the tax which it is sought to recover in this action upon what he determined to be a stock dividend, and accepted the valuation placed on the stock by the plaintiff. The plaintiff also claimed that it was a stock dividend, but not taxable as income. All through the proceedings in the Internal Revenue Department, before the Collector and the Commissioner, both parties agreed that it was a stock dividend; the Internal Revenue Department claiming that it was taxable, and the plaintiff that it was not. The plaintiff in his pleading in this action claimed that it was a stock dividend, and not taxable. The defendant in his answer did not dispute the claim that it was a stock dividend, but claimed that it was taxable as income.

It was decided in the case of Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. ——, that Congress had no power to tax, without apportionment, a true stock dividend, made lawfully and in good faith, or the accumulated profits behind it, as income of the stockholder. See, also, Lynch v. Turrish, 247 U. S. 221, 38 Sup. Ct. 537, 62 L. Ed. 1087, and Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254. As both parties agreed that the transaction was a stock dividend, the judgment must be affirmed, unless another contention first made in this court by the defendant shall be sustained.

[3] In this court the defendant claims that the transaction in question amounted to a cash dividend, and was therefore taxable as income. We are of the opinion, however, that the defendant cannot mend his hold in this court in this manner for the following reasons: (1) Assuming it to have been a cash dividend, the tax levied was double what it ought to have been. (2) This court has no power or authority, in an action at law, at least, to assess property and levy a tax thereon; such power or authority in the present case having been vested by law in the Internal Revenue Department. That department decided that the transaction amounted to a stock dividend, which was taxable as income, and the tax collected must, as a tax on a stock dividend, stand or fall. Having levied the tax as a stock dividend tax, defendant may not now say that it ought to have levied a tax upon the theory of a cash dividend, and then ask this court to do what the defendant failed to do.

[4] The assignment of error relating to the allowance of interest is not argued, and will be deemed abandoned.

Judgment below affirmed.

PAYNE, Director General of Railroads, v. BEARDEN.

(Circuit Court of Appeals, Eighth Circuit. July 15, 1920.)

No. 5499.

Commerce ⟸27(7)—Employment in interstate commerce held conclusively shown.

Under the facts appearing in evidence in this case, the train movement was one in interstate commerce, and the plaintiff was entitled to a directed verdict in her favor, except as to the amount of damages.

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

Action by Agnes Bearden, as administratrix, against John Barton Payne, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

W. M. Hezel, of St. Louis, Mo. (J. L. Howell, of St. Louis, Mo., on the brief), for plaintiff in error.

Sidney Thorne Able, of St. Louis, Mo. (Charles P. Noell, of St. Louis, Mo., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. The defendant in error, hereafter plaintiff, brought this action against the Director General of Railroads, hereafter defendant, to recover damages for the death of her husband, Frank D. Bearden, alleged to have been caused by the negligence of said defendant in operating the East St. Louis Connecting Railroad Company. At the trial the only defense made was that the movement of the string of cars between two of which Bearden was killed by reason of a defective coupling was not an interstate movement. There was a verdict for the plaintiff. Defendant contends that the trial court committed error in refusing to direct a verdict in his behalf.

The car movement was as follows:

On April 5, 1918, at the city of East St. Louis, Ill., a string of cars, six in number, were standing on a track in the yards of the railway company, known in the evidence as track No. 7. Commencing with the car standing next to the engine, which was coupled on to said string of cars, the cars stood in the following order: Grand Trunk, 100413; C. & N. W. 101510; N. O. P. M. 2392; I. C. 35996; Southern, 186246; I. C. 123497.

Witness Snell, an employé of the railroad company, who had charge of the records of cars handled through its yards, testified in substance as follows: The Grand Trunk car was loaded with linoleum in transit from Philadelphia, Pa., to Wm. Walker Company, Kansas City, Mo., in care of Kansas City, Mo., River Navigation Company, at East St. Louis Warehouse. The evidence further showed that the I. C. car No. 123497, was loaded with coal, as was Southern car No. 186246. This string of cars was moved from track No. 7 for the purpose of placing

I. C. car No. 123497 on track No. 4, known as the coal chute track, and then to return the five remaining cars to track No. 7, from whence they came, and otherwise distribute said cars to the places where they belonged.

We think the evidence clearly showed that the Grand Trunk car loaded with linoleum belonged at the River Warehouse, in care of which it was billed, and that the linoleum was to be unloaded and transported by boat to Kansas City. Bearden was killed by a movement of the cars while he was attempting to uncouple the I. C. car No. 123497 from the remaining cars, so as to leave it on track No. 4; a defective coupler having made it necessary for him to go between the cars for the purpose of uncoupling them.

Witness Lipe, the switch foreman, testified that he did not know whether the four box cars were loaded or not. This left the testimony of the witness Snell undisputed. On cross-examination of the witness Lipe, a report of the accident made by him to the railroad company on the day it occurred was introduced in evidence. These questions and answers appeared in the report:

Q. How many cars in train? A. Six.
Q. How many loads? A. Two.

Lipe explained the answer which he had given in the report as to the number of cars loaded by testifying that the I. C. car No. 123497 and Southern car No. 186246 were coal cars loaded with coal, that the other four cars in the string were box cars, and that he was not required to ascertain whether the box cars were loaded or not. The report and the explanation is the only testimony which could be claimed to contradict that of the witness Snell. The statement of Lipe in his report that two cars were loaded, without specifying which cars, and his testimony at the trial that, outside of the two cars loaded with coal, he did not know whether the cars were loaded or empty, in our opinion created no substantial conflict with that of Snell.

On this state of the evidence, a verdict that there was no car in the string of cars loaded with interstate freight would not have been allowed to stand. It therefore becomes immaterial to determine whether the court erred in its charge to the jury, or in what was said about the report. On the uncontradicted evidence we are of the opinion that the car movement was an interstate movement, within the meaning of the statute and the decisions of the Supreme Court. The plaintiff was entitled to a directed verdict, except on the question of damages. Philadelphia & Reading Ry. Co. v. Hancock, 250 U. S. 658, 40 Sup. Ct. 54, 63 L. Ed. 1193; Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. §§ 8657–8665); St. L., S. F. & Tex. Ry. v. Seale, 229 U. S. 156, 161, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; New York Central & Hudson River R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; New York Central R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; New York Central R. Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536; Southern Pacific Co. v. Industrial Accident Commission (January 5, 1920) 251 U. S. 259,

40 Sup. Ct. 130, 64 L. Ed. —; Erie Railroad Co. v. Downs, 250 Fed. 415, 162 C. C. A. 485; Bolch v. Chicago, Milwaukee & St. Paul R. Co., 90 Wash. 47, 155 Pac. 422; Delk v. St. Louis & San Francisco Railroad Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590; Chicago, Milwaukee & St. Paul R. Co. v. Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264; Erie R. Co. v. Winfield, 244 U. S. 175, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662; Vandalia R. Co. v. Holland, 183 Ind. 438, 108 N. E. 580; Snyder v. Great Northern R. Co., 88 Wash. 49, 152 Pac. 703; Hester v. Railroad, 254 Fed. 787, 166 C. C. A. 233; Wagner v. C., R. I. & P. Ry. Co., 277 Ill. 114, 115 N. E. 201; Texas & Pacific Ry. Co. v. Sherer (Tex. Civ. App.) 183 S. W. 404; Daley v. Boston & M. R. R. Co. (Sup.) 166 N. Y. Supp. 840; Trowbridge v. Railway, 192 Mo. App. 52, 179 S. W. 777; Southern Railway Co. v. Puchett, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69; Texas & Pacific R. Co. v. Lester (Tex. Civ. App.) 207 S. W. 555; Roberts, Federal Liability of Carriers, vol. 1, pp. 743 to 746, page 886, § 510, page 762, page 885, § 509, page 770, § 447, page 873, § 503, and page 800, § 462.

The case was tried on the theory that, in order to recover, the plaintiff must show a movement in interstate commerce. We therefore do not discuss the question of whether there was a liability on the part of the defendant by reason of a violation of the Safety Appliance Act.

Judgment affirmed.

FOSS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920.)

No. 3424.

Conspiracy ⊜34—Conspiracy to prevent witness from testifying in land contest is crime; "right secured by Constitution or laws."

The right of a citizen to appear and testify as a witness before a land office in a contest involving lands entered under the land laws is one secured to him by the Constitution or laws of the United States, within Criminal Code, § 19 (Comp. St. § 10183), and a conspiracy to intimidate him or prevent the free exercise of such right constitutes a crime.

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

Criminal prosecution by the United States against Carl E. Foss and Jacob Bjornstad. Judgment of conviction, and defendants bring error. Affirmed.

Norris & Hurd, of Great Falls, Mont., for plaintiffs in error.

Edward C. Day, U. S. Atty., and Walter W. Patterson, Asst. U. S. Atty., both of Helena, Mont.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error were indicted under section 19 of the Criminal Code (Comp. St. § 10183) for conspir-

ing to intimidate citizens of the United States in the free exercise and enjoyment of rights secured to them by the Constitution and laws of the United States, to wit, the right and privilege to appear and testify on behalf of contestants in contest cases involving lands entered under the laws of the United States. They were found guilty under the first count.

The plaintiffs in error demurred to certain paragraphs of the first count of the indictment as insufficient to constitute overt acts, for the reason that they failed to state that the alleged acts were done because of the exercise by any person of a right secured by the Constitution or laws of the United States. The first count sets forth several overt acts. Section 19 does not require that an overt act be pleaded; but, if an overt act was necessary, it is sufficiently pleaded in that paragraph in which it is alleged that Jacob Krause had been subpœnaed and intended to appear before the United States commissioner as a witness on behalf of the United States in a contest between Carl E. Foss and the United States in the United States Land Office at a date and place named, and that for the purpose of preventing him from so appearing and testifying the plaintiffs in error murdered him.

It is contended that section 19 is not sufficiently broad in its scope to include the offense with which the plaintiffs in error were charged. The origin of section 19 was in the Act of May 31, 1870 (16 Stat. 141), which was re-enacted as section 5508 of the Revised Statutes. Section 5508 came on for construction in United States v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673, where it was held that the exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied public lands was the exercise of a right secured by the Constitution and laws of the United States, within the meaning of the statute. In Re Quarles and Butler, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. Ed. 1080, it was held that a conspiracy to oppress, threaten, or intimidate a private citizen in his right to notify a marshal of the United States of the violation of the internal revenue laws of the United States (38 Stat. 745) was punishable under the statute. Said the court:

"It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the posse comitatus in upholding the laws of his country. It is likewise his right and duty to communicate to the executive officers any information which he has of the commission of an offense against those laws. * * * The right of a citizen, informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action."

In Motes v. United States, 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150, the statute was held applicable to a conspiracy to injure, oppress, threaten, and intimidate one who had informed the collector of internal revenue of the carrying on of the distillery business in violation of the law. Said the court:

"It was the right and privilege of Thompson, in return for the protection he enjoyed under the Constitution and laws of the United States, to aid in the execution of the laws of his country by giving information to the proper authorities of violations of those laws. That right and privilege may properly be said to be secured by the Constitution and laws of the United States."

And in United States v. Mosley, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. Ed. 1355, it was held that section 19 of the Criminal Code applies to the acts of election officers, who conspire to injure and oppress qualified voters of the district in the exercise of their right to vote for members of Congress by omitting the votes cast from the count.

The plaintiffs in error rely upon United States v. Sanges (C. C.) 48 Fed. 78, in which Mr. Justice Lamar held that the right to testify before a federal grand jury without interference from private individuals was not one conferred by the Constitution of the United States within the meaning of section 5508, that the Constitution has no provision in relation to witnesses and their testimony in court, except that which is found in article 5 of the Constitution, and that the giving and receiving of evidence did not originate in the Constitution, and is not in any manner dependent for its existence upon that instrument. The doctrine of that case, that the rights and privileges secured by the Constitution and laws of the United States, within the meaning of the statute, must rest directly upon some express provision of the Constitution or the laws, has not received the sanction of the Supreme Court, but, on the other hand, has been denied in the decisions to which we have referred, and in others, as in Logan v. United States, 144 U. S. 263, 294, 12 Sup. Ct. 617, 626 (36 L. Ed. 429), where the right involved was the right of a citizen to protection while in the custody of the United States marshal, the court said:

"In the case at bar, the right in question does not depend upon any of the amendments to the Constitution, but arises out of the creation * * * of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try, and punish for crime, and arrest the accused and hold them in safe-keeping until trial, must have the power and the duty to protect from unlawful interference its prisoners so held."

If one is protected under the statute while in the lawful custody of a United States marshal, or in giving information to a United States marshal for violation of the laws of the United States, or in giving information to a collector of internal revenue, for violation of the revenue laws of the United States, it follows, we think, without question that one is protected in giving testimony before the land office in a contest which involves the rights of entrymen under the land laws of the United States. The power which is delegated to the federal government to dispose of the public lands includes the power to hear and determine contests in the land office, and the power to compel witnesses to testify in such contests, and the power to protect them while so doing, and in all such contests the United States is a party.

The judgment is affirmed.

BRADLEY et al. v. ROBIE.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1920.)

No. 5511.

1. **Chattel mortgages ⇐197(1)—Delay in recording invalidates only against creditors acquiring lien in meantime.**
Under Rev. Laws Minn. 1905, § 3461, as construed by the Supreme Court of that state, delay in recording a chattel mortgage invalidates the mortgage only as against creditors who have, prior to the filing thereof, acquired a lien by attachment or execution on the mortgaged property.

2. **Bankruptcy ⇐184(2)—Trustee can attack chattel mortgage as preference, when recorded, only if creditors had acquired superior lien; "required."**
Under Bankruptcy Act, § 60b, as amended by Act June 25, 1910, § 11 (Comp. St. § 9644), recording is deemed required when, through delay, a position superior to the challenged transfer has been gained by some creditor whom the trustee represents, or whose place he is entitled to take. The trustee is not such a person by virtue of section 47a (section 9631), as this lien arises subsequently to the recordation of the challenged transfer.

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

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by Richards M. Bradley and others against E. G. Robie, trustee in bankruptcy. Decree for defendant, and plaintiffs appeal. Reversed, with directions.

E. F. Alford, J. W. Hunt, and Alan J. McBean, all of Duluth, Minn., for appellants.

C. W. Stilson, of Duluth, Minn., for appellee.

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

CARLAND, Circuit Judge. Appellants, who executed a lease to the Roman Meal Company, containing a chattel mortgage clause, filed a petition in the court below, praying for an order requiring the trustee of the estate of said Roman Meal Company, a bankrupt, to turn over to them certain personal property covered by the mortgage, so that they might proceed to sell the same in satisfaction thereof. The trustee answered, and after a hearing on the merits the referee denied the petition of appellants, and his action was affirmed by the District Court. The material facts are as follows: The lease was dated December 10, 1913, expiring April 30, 1915. The rental was $250 per month. The leased premises were lots 7 and 8, block 9, Central division of Duluth, Minn., and the building thereon. The lease contained the following provision:

"That the lessee, in consideration of the giving of this lease and to secure the payments of rent hereunder, shall pledge and give a lien, and the lessee does hereby pledge and give a lien, to the lessors upon all fixtures and furniture of every kind and nature at any time placed in said leased premises which said fixtures and furniture may, upon the termination of this lease and upon the

payment in full of all sums of money then due, and not otherwise, be removed from said premises by the lessee."

The lessee went into possession and paid the stipulated rent to and including January, 1915. On April 6, 1915, the lease was filed by the lessors in the office of the city clerk of Duluth. On April 21, 1915, the Roman Meal Company filed a voluntary petition in bankruptcy, and was adjudged a bankrupt April 22, 1915. At the time of the adjudication in bankruptcy the bankrupt owed appellants as rent for the leased premises $750, being the stipulated rent for February, March, and April, 1915. Certain furniture and fixtures belonging to the bankrupt were on the leased premises at the time of the adjudication, and passed to the possession of the trustee, who sold a portion thereof for the sum of $413.50, leaving the remainder unsold, of the appraised value of $629.50.

[1] The contention of the trustee was and is that the mortgage constituted a voidable preference under section 60b of the Bankruptcy Law, for the reason that Prindle & Co., the agents of appellants, had reasonable cause to believe, at the time the lease was filed, that the mortgage clause would effect a preference. This contention was sustained by the District Court. In so deciding we think court and counsel overlooked the present state of the law ruling the question at issue. Under the statutes and decisions of the Supreme Court of Minnesota, unrecorded chattel mortgages are only void as against creditors who have, prior to the filing thereof, acquired a lien by attachment or execution on the mortgaged property. Section 3461, p. 683, Rev. Laws Minn. 1905, and notes; St. Paul Title Ins., etc., Co. v. Berkey, 52 Minn. 497, 55 N. W. 60; Howe v. Cochran, 47 Minn. 403, 50 N. W. 368; Ellingboe v. Brakken, 36 Minn. 156, 30 N. W. 659; Coykendall v. Ladd, 32 Minn. 529, 21 N. W. 733; Brayley v. Byrnes, 20 Minn. 435 (Gil. 389).

[2] It does not appear that any creditor whom the trustee represents had prior to the filing of the lease acquired a lien upon the mortgaged property by attachment or execution. It was decided by the Supreme Court in Martin, Trustee in Bankruptcy of Virgin, v. Commercial National Bank of Macon, Georgia, 245 U. S. 513, 38 Sup. Ct. 176, 62 L. Ed. 441, that in such a case as that before us the trustee cannot assail an unrecorded mortgage as a preference as of the date of its recordation under section 60b of the Bankruptcy Act, as amended June 25, 1910 (36 Stat. 838, 842, c. 412, § 11 [Comp. St. § 9644]), if he represents no lien on the property other than the lien mentioned in section 47a (section 9631) arising subsequently to the recordation. It was also decided that recordation is to be deemed "required," in the sense of the amendment, when, through delay of it, a position superior to the challenged transfer has been gained during the period that the mortgage was unrecorded by some creditor whom the trustee represents, or whose place he is entitled to take. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, Carey v. Donohue, 240 U. S. 430, 36 Sup. Ct. 386, 60 L. Ed. 726, L. R. A. 1917A, 295, and Hoshaw v. Cosgriff, 247 Fed. 22, 159 C. C. A. 240 (Eighth Circuit), are to the same effect.

Nothing appears in the record to impeach the validity and good faith of the mortgage clause in the lease at the time the lease was executed. It therefore results that the judgment below should be reversed, and appellants allowed to take possession of the mortgaged property still remaining unsold, and of so much of the proceeds of that which has been sold, as will satisfy the claim for rent, with interest and costs; and it is so ordered.

TRELEASE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1920.)

No. 5517.

1. **Criminal law ⟸753(2)—Sufficiency of evidence not presented, where motion for verdict not renewed at close of evidence.**
   The question of the sufficiency of the evidence to authorize a conviction was not raised at the trial, where the only motion for a directed verdict was made at the close of the evidence for the United States, and was not renewed at the close of all the evidence.

2. **Army and navy ⟸40—Evidence held to show intent to cause insubordination and obstruct recruiting.**
   In a prosecution for violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), evidence *held* to sustain charge that the language used by defendant was intended to cause insubordination in the military and naval forces of the United States, and to obstruct recruiting and enlistment in such forces.

3. **Criminal law ⟸451(4)—Evidence of impression of speech on witness admissible.**
   In a prosecution for violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), it was not error to allow a witness to testify as to the impression made upon him by defendant's speech, though the witness could give only the substance of the speech.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

H. J. Trelease was convicted of violating the Espionage Act, and he brings error. Affirmed.

E. T. Burke, of Bismarck, N. D., and Nuchols & Kelsch, of Mandan, N. D., for plaintiff in error.

Melvin A. Hildreth, U. S. Atty., of Fargo, N. D. (Philip Elliott, Asst. U. S. Atty., of Fargo, N. D., on the brief), for the United States.

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

CARLAND, Circuit Judge. Plaintiff in error, hereafter defendant, was convicted and sentenced on counts 2 and 3 of an indictment which charged a violation of section 3, title 1, of the Espionage Act of June 15, 1917. 40 Stat. 219 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c). Counts 2 and 3 of the indictment under which defendant was convicted charged that the language set forth was uttered with

intent to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, and with intent to obstruct the recruiting and enlistment service of the United States to the injury of such service. Certain errors are assigned as having intervened in the trial of the cause, which it is alleged require a reversal of the judgment.

[1] It is assigned as error that the evidence was insufficient to sustain the verdict of the jury. This question was not raised at the trial, as the only motion for a directed verdict was made at the close of the evidence for the United States and was not renewed at the close of all the evidence.

[2] The defendant's liberty, however, being involved, we have carefully read the evidence with the view of ascertaining whether the error assigned has any merit. There was evidence tending to show that the defendant in a public address delivered in the presence of 150 to 200 people at Strawberry Lake, N. D., on July 3, 1917, declared that the war with Germany was a rich man's war; that they were sending your boy and mine to fight to protect the moneyed interests and Wall Street; that the Draft Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k) was an injustice, unconstitutional, and wrong, and they were going to knock it out; that the draft law ought to be put to a vote; that the Constitution was drawn by a bunch of cocked hats, in the interest of conservatives, who were looking out for their own interests; that we had no business in the war; that we were sending our boys over to be slaughtered; that the war was wrong; that any young man that would enlist in the army was a fool; that this was a war to protect the moneyed interests; that, if the United States had loaned money to Germany, we would be fighting on their side, instead of on the side of England; that the real enemies of the people were the munition makers and moneyed interests; that if all the young men of draft age would resist there would be no war; that a man was a damn fool to fight for the money interests—to protect other men's dollars; that, if our boys who were drafted would refuse to sign up, there would not be any war, they could not get anybody to fight; that defendant was opposed to all forms of government and all officers, all government officers; that defendant had a conversation with one Earnest Soderstrom, a young man who had just enlisted in the navy. Soderstrom told the defendant that he could not get by with the stuff like the talk he had given there, because he had just enlisted in the navy. Defendant replied: "You are a damn fool to enlist in the navy to fight in the interest of the rich." There was other language in the speech abusing and slandering the President of the United States.

There was evidence of other statements made at different times and places for the purpose of showing intent. The evidence was properly admissible for that purpose. A mere recitation of the language used clearly shows that there was sufficient evidence to take the case to the jury, and that their verdict of guilty was fully warranted by the evidence. The defendant testified that he had never taken out or declared his intention to become a citizen of the United States; that

he was technically a subject of Great Britain; that he commenced to talk for the Nonpartisan League in February, 1917, on a salary of $125 a month, and he continued in their service until July; that he spoke in many places, and spoke to as many as 1,500 or 2,000 people at one time; that he was 22 years of age when he came to America in 1899 or 1900.

[3] It is further assigned as error that the court erred in allowing the witness Whipple to testify as to the impression made upon him by the speech of defendant, for the reason that Whipple could not give the exact language of the speech, but only its substance. We see no merit in this assignment. The evidence as shown in the record brings this case clearly within the decision of this court in the O'Hare Case, 253 Fed. 539, 165 C. C. A. 208, Debs v. U. S., 249 U. S. 215, 39 Sup. Ct. 252, 63 L. Ed. 566, Abrams v. U. S., 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173, and many other cases in the Supreme Court and this court.

Judgment affirmed.

CLEVELAND CLIFFS IRON CO. v. VILLAGE OF KINNEY et al.

(Circuit Court of Appeals, Eighth Circuit. August 7, 1920.)

No. 5559.

1. **Appeal and error ⊂⊃23—Court must consider jurisdictional question, not presented.**
   The Circuit Court of Appeals must consider the question of its jurisdiction to hear the appeal, though nothing was said concerning it in the briefs or oral arguments.

2. **Courts ⊂⊃405(5)—Circuit Court of Appeals has no jurisdiction to review decree, dismissed for want of jurisdiction.**
   Under Judicial Code, § 238 (Comp. St. § 1215), the question of the jurisdiction of the District Court must be certified to Supreme Court, and the Circuit Court of Appeals has no jurisdiction thereof by section 128 (section 1120); so that the Circuit Court of Appeals cannot hear an appeal from decree of District Court, dismissing a bill for want of jurisdiction.

Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Suit by the Cleveland Cliffs Iron Company against the Village of Kinney and others. From a decree dismissing the suit for want of jurisdiction, plaintiff appeals. Appeal dismissed.

See, also, 262 Fed. 980.

W. D. Bailey, of Duluth, Minn. (Washburn, Bailey & Mitchell, of Duluth, Minn., on the brief), for appellant.

Warner E. Whipple, of Duluth, Minn. (Frank E. Randall, of Duluth, Minn., and Luke F. Burns, of Virginia, Minn., on the brief), for appellees.

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

CARLAND, Circuit Judge. [1] This is an appeal from a decree entered in the above-entitled action, reading as follows:

"Ordered, adjudged, and decreed as follows: That the original bill and amended and supplemental bill are hereby dismissed for want of jurisdiction of this court."

The case was argued and submitted to this court at the present term thereof. Nothing was said in the briefs or oral arguments of counsel concerning the jurisdiction of the court to hear the appeal. We must, however, have jurisdiction to hear the appeal, or we can do nothing except to dismiss the same; therefore it becomes our duty to consider the question of jurisdiction on our own motion.

[2] The record shows that the trial court in its opinion discussed two questions: (1) Whether or not the suit was one where the matter in controversy exceeded, exclusive of interest and costs, the sum or value of $3,000. This question was decided in favor of the defendant. (2) Whether or not the subject-matter of the suit was of equitable cognizance. This question was also decided in favor of the defendant. When the trial court came to enter its judgment, it did not dismiss the complaint for want of equity, or on the merits, but entered a decree as above set forth.

A decree dismissing the complaint for want of equity would be reviewable here, as the question of jurisdiction in such a case would not be a question of jurisdiction within the meaning of section 238, Judicial Code (Comp. St. § 1215); but such a decree was not entered. We must accept the decree as entered, namely, that the original bill and amended and supplemental bill were dismissed for want of jurisdiction of the trial court. In such a case, under section 238, supra, the question of jurisdiction alone should be certified to the Supreme Court from the court below for decision. Under section 128 of the Judicial Code (section 1120), this court has no jurisdiction in such a case. Great Northern Ry. Co. v. Blaine County, Nebraska, et al., 252 Fed. 548, 164 C. C. A. 464, wherein this court decided that, where a suit was dismissed by the District Court solely for want of jurisdiction over the subject-matter, this court was without jurisdiction to review such decree. Many cases are cited by this court in support of the position here taken.

Appeal dismissed.

DIEZ v. GREEN et al.

(Circuit Court of Appeals, First Circuit. August 30, 1920.)

No. 1370.

1. **Appeal and error ⟸23—Appellate court must determine jurisdictional question.**
   The Circuit Court of Appeals must of its own motion inquire as to the jurisdiction of the court below.

2. **Courts ⟸438—Alien domiciled in Porto Rico cannot sue in the United States District Court.**
   The United States District Court does not have jurisdiction of a suit by a citizen of Spain domiciled in Porto Rico against a defendant, also a resident in Porto Rico.

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

Suit by Antonio Diez y Gonzalez against Enrique O. Green y Morales and others. Decree for defendants, and plaintiff appeals. Decree set aside, and case remanded, with directions to dismiss the bill for want of jurisdiction.

Hugh R. Francis, of San Juan, P. R. (Francis & De la Haba, of San Juan, P. R., on the brief), for appellant.

Philip N. Jones, of Boston, Mass. (Boyd B. Jones, of Boston, Mass., on the brief), for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

PER CURIAM. [1] This is a suit in equity in the District Court of the United States for the District of Porto Rico by a citizen of Spain domiciled in Porto Rico against a defendant, also resident in Porto Rico. We must of our own motion inquire as to the jurisdiction. Railway Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; Grand Trunk Railway Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237.

[2] Plainly this case is governed by the decision of the Supreme Court in Porto Rico Railway, Light & Power Co. v. Diàz Mor, 253 U. S. —, 40 Sup. Ct. 516, 64 L. Ed. —, decided June 1, 1920. The case must be dismissed for want of jurisdiction.

The decree of the District Court is set aside, and the case is remanded to that court, with directions to dismiss the bill for want of jurisdiction, without costs, and without prejudice to either party.

OHIO RAKE CO. v. BUCHER & GIBBS PLOW CO.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1920.)

No. 3349.

1. **Patents ⇐25—Connecting disk harrows in one machine held combination, and not aggregation.**
   The connection of an in-throw set of disk harrows with an out-throw set in one machine, so that they operate together to give the desired results, is a combination, not a mere aggregation.
2. **Patents ⇐26(2)—Combination of old elements accomplishing better result invention.**
   A combination of elements, all of which were old, but which produce a new and better result, or the same result in a new and materially better way, is an invention.
3. **Patents ⇐328—Reissue 13,163, for a four-gang disk harrow, held to disclose invention and to be infringed.**
   The Niesz reissue patent, No. 13,163, for a four-gang disk harrow, consisting of a set of in-throw disks connected by a flexible reach bar behind a set of out-throw disks, so that the disks are aligned in the space between the disk and the end, so that the whole harrow can be turned without tearing up the earth, *held* to disclose invention and to be infringed.

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

Suit by the Bucher & Gibbs Plow Company against the Ohio Rake Company. Decree for plaintiff, and defendant appeals. Affirmed.

Alfred M. Allen, of Cincinnati, Ohio (Allen & Allen, of Cincinnati, Ohio, on the brief), for appellant.

Harry Frease, of Cleveland, Ohio, for appellee.

Thomas A. Banning, of Chicago, Ill., amicus curiæ.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Suit for infringement of reissued patent No. 13,163, November 1, 1910, to Niesz. The device of this patent is a four-gang disk harrow; that is, one consisting of two sets, a front and a rear, each carrying two gangs of oppositely facing concavo-convex disks, the gangs of each set being adjusted angularly to each other. In the front set the disks face outwardly, the angle of the gangs extending rearwardly, thus making what is called an "out-throw" harrow. In the rear set the disks face inwardly, the angle of the two gangs extends forwardly, thus making an "in-throw" harrow. The front set, when connected with the tongue, forms a completely operable out-throw harrow; the rear set, if its frame were similarly connected, would form a completely operable in-throw harrow. In each case the concave face of the disks is presented to the earth.

It is necessary to the most effective cultivation that the disks carried by the rear frame track between those carried by the front frame, so that the soil turned by the forward disks is by the rearward disks turned back into the trench caused by the forward disks, thus leaving the soil smooth and uniform. It is also essential to the

best results that the harrow be able to make short turns in the field without cutting into or scraping off the surface of the soil. To maintain proper tracking between the front and rear gangs, and at the same time sufficient flexibility to enable the harrow to turn without digging into the ground, the inventor connects the rear disk-carrying frame to the front disk frame by a reach pivotally connected to the rear end of the tongue, thus making a central, flexible draft connection. Supports for the ends of the gang frame between plates secured to the main rear frame are provided, to prevent tilting of the gangs in making a turn.

The first three claims embrace the front and rear disk-carrying frames as described, together with the central, flexible draft connection between them. The fourth, fifth, and sixth claims include also the anti-tilting device. We print in the margin the first claim in full, together with a description of the anti-tilting device contained in the fourth claim.[1] Both invention and infringement are denied. The District Judge found each of the six claims valid and infringed. This appeal is from the interlocutory decree awarding injunction and accounting.

1. *Invention.* Both separate out-throw and separate in-throw harrows, carrying respectively two gangs of disks diagonally disposed to each other, were old. The same is true of mere tandem arrangement of cultivating devices (as distinguished from front and rear double-disk gangs), as shown by Lyon's revolving harrow, Thompson's land roller, and Bramer's "wheel harrow."

The tilting device of the patent in suit was disclosed by Gault & Tracy (1886), and substantially by Clark (1902). Dow (1888) and Clark (1894 and 1902) had disclosed four-gang disk harrows, but neither had a central, flexible draft connection, but, on the contrary, each had a rigid connection between the two harrow frames. While Thompson's land roller and Lyon's revolving harrow, as well as some other cultivating implements, had shown central, flexible draft connections between front and rear members, Niesz was the first to clearly disclose in a four-gang disk harrow belonging to the art immediately in question a central, flexible draft connection between the two disk-carrying frames.

In so saying we do not overlook the fact that Wildman (No. 686,174, November 5, 1901) disclosed a four-gang disk harrow; its rear portion being divided into two separate parts, whose shafts were mounted in frames pivotally connected together, the forward central

[1] "1. In a disk harrow, the combination with a front draft frame having two separate disk-carrying shafts adjustable to assume a rearwardly converging angle, and harrow disks carried by said shafts, of a separate rear disk frame having two separate disk-carrying shafts adjustable to assume a rearwardly diverging angle, harrow disks carried by the shafts, a reach bar having its rear end connected to the rear frame and extending forward to the front disk frame, and a horizontally swinging pivotal connection between the reach bar and the front frame and located in a longitudinal line with the apex of the converging angle of the forward disk-carrying shafts."

"And horizontal slidable engaging members between the disk frames and the rear frames to prevent a tilting movement of the disk frames."

part being "swivelly mounted in the frame * * * at the butt end of the tongue." But Wildman's invention involved no problem of preserving tracking alignment between front and rear gangs, for his front portion was merely "adapted to cultivate the central strip of ground not touched by the other two parts," which were widely separated. Moreover, it does not clearly appear that Wildman's rear frame was pivotally or flexibly connected with the front frame. Such connection is not disclosed in his specification, nor is it clearly contained as an element of either of his claims, nor clearly disclosed by either of the drawings. The words "pivotally mounted," found in the first claim, seem quite as likely to refer to the pivoting of the two portions of the central part to prevent tilting. The Wildman reference falls, in our opinion, within the rule referred to in Munising Paper Co. v. American Sulphite Pulp Co. (C. C. A. 6) 228 Fed. 700, 703, 143 C. C. A. 222, and cases there cited.

Nor do we overlook the Tschantz disk harrow patent, No. 344,293, June 22, 1886. But while in the Tschantz harrow the frame carrying the rear set of disks is pivotally attached to the tongue, Tschantz does not properly belong to the art we are considering. Not only are both his front and rear shafts integral, and thus without angular adjustability of oppositely facing disks (as expressly called for in the first three claims of the patent in suit, and impliedly in the remaining three), but the disks are not concavo-convex, as are those of the patent in suit. All three expert witnesses so treat the disks of the Niesz patent, as do counsel for both plaintiff and defendant. The angular arrangement of the two gangs of disks in a given set seems to be provided on account of the concavity of the disks. Certain it is that in the modern disk cultivator the disks are concave, and nowadays such concavity is usually implied in the term "disk cultivator," although, strictly speaking, a disk need not be of that form. Moreover, the specification of the Tschantz patent states that "the clod-cutting disks are fixed rigidly on a shaft at an obliquity or inclination from a right angle, and both shaft and disks revolve. In revolving, therefore, the disks have a wobbling motion." [2]

[1] If Niesz's central, flexible draft connection, as applied to disk harrows of the type in question, involved invention, the claims are all, in our opinion, valid. Each contains that element, in some form of expression, and we are not impressed with the contention that the claims are subject to the defense of aggregation. It is not correct to say, as defendant's counsel says, that whatever invention there is in the Niesz patent must rest in "coupling an old single in-throw harrow in trailing or tandem relation to an old out-throw harrow." We think each of the claims in suit covers a true combination.

[2] It is a matter of at least curious interest that in defendant's Lathrop patent on disk harrows, applied for July 6, 1910 (4 days before the application for the Niesz reissue, 24 years after Tschantz and 9 years after Wildman), it is said: "Heretofore in such constructions the frames carrying the two gangs of disks have either been rigidly connected together to form a single rigid frame, or the frames for the two gangs have been separate and merely coupled in tandem, by a central coupling bar."

"The action of one part of the entire structure modifies and affects the action of the other part, and there is during the active period more than that mere aggregation which defeats a patent." Houser v. Starr (C. C. A. 6) 203 Fed. 264, 273, 121 C. C. A. 462; Mausoleum Co. v. Sievert (C. C. A. 6) 213 Fed. 225, 129 C. C. A. 569.

[2] The defense of aggregation apart, the claims may of course involve invention, despite the fact that every element is old, provided the combination accomplishes a materially better result or reaches that result in a new and materially better way. Loom Co. v. Higgins, 105 U. S. 591, 26 L. Ed. 1177; Loose-leaf Co. v. Leaf-Binder Co. (C. C. A. 6) 230 Fed. 120, 144 C. C. A. 418; Ferro Concrete Constr. Co. v. Concrete Steel Co. (C. C. A. 6) 206 Fed. 666, 668, 124 C. C. A. 466.

[3] But, in the view we take of the case, the question, so far as concerns this branch, is whether there was invention in applying to the four-gang disk harrow art the central, flexible draft connection previously used in cultivator arts not employing concavo-convex disks. In our opinion there was such invention. When Niesz entered the field, disk harrows had been in use 30 or more years. Every one knew that proper cultivation of the soil required that the disks be in angular relation to the line of draft; also that, if all the disks carried by a given frame faced in one direction, the lateral pressure of the soil and the diagonal inclination of the disks would tend to cause the entire series to move laterally on a diagonal line, causing what is called "side thrust"; but that the opposite facing of the disks of the gangs in a given series tends to counterbalance the side thrust of one gang with that developed by the opposing gang; hence the opposite facing of the two gangs of disks in a given set. But while, as appears without dispute, and indeed by concession, the disk harrow art had for years presented the live problem of how to combine sufficient rigidity for ordinary forward operation with flexibility enough to permit turning of the machine, without tearing up the earth and materially increasing the draft, yet until Niesz it had occurred to no one to employ the central, flexible draft connection used in other cultivating machines. Whether this was because the prior art recognized that the combination of in-throw and out-throw sets of disks had a tendency to lateral displacement, and so to interfere with the proper trailing of front and rear sets of disks (plaintiff's expert testifying, without dispute, to such prior art recognition), is not of controlling importance.

The fact of real significance is that, for some reason, prior to Niesz it seems to have been the accepted view among those interested in developing the disk harrow art that a rigid connection between front and rear gangs was necessary to the preserving of proper alignment in the forward operation. It is not important to determine the basis of that belief, nor is it necessary to invention on the part of Niesz that he should have known just why it was that through a central, flexible draft connection (notwithstanding, as stated, a supposed contrary tendency) the rear gang of disks would turn fully as effectively as in the case of an ordinary wagon wheel, or, as plaintiff's counsel contends, even more effectively. While, in the light alone of what Niesz

did, it would now seem that his conception ought to have been always obvious, the question of invention must be determined in the light of the further facts that until Niesz manufacturers were seeking a satisfactory solution of the problem before referred to, without finding it, and notwithstanding central, flexible draft connections as applied to other cultivating instruments were well known, and that Niesz's invention was received with great public favor; a large number of manufacturers, including defendant itself, obtaining licenses for manufacturing thereunder and operating under such licenses. The Niesz reissue was sustained, and infringement found, by District Judge Day in 1913; the decision not being appealed from. Bucher & Gibbs Plow Co. v. International Harvester Co. (D. C.) 211 Fed. 473.

2. *Infringement.* The important question on this branch of the case is whether Niesz's invention is broad enough to cover defendant's draft connection as a substantial equivalent for the device of the patent. We think this question must be answered in the affirmative. It is true that defendant's draft connection is not in the form of a single reach on the median line of the machine, but consists of two draft bars a short distance apart, one on each side of the median line and equidistant therefrom; each bar being pivotally and flexibly connected with the tongue, and at its rear end rigidly connected to a coupling bar, which in turn is pivotally connected at its front end to the respective gangs of the rear set. In our opinion the word "central," found in the fifth and sixth claims, does not necessarily mean "on the median line," but may properly refer to the central location generally. Equally, we think, the words "reach" and "reach bar" of the first three claims are not necessarily limited to a "one-piece" reach. We think that defendant has the substantial equivalent of plaintiff's central, flexible draft connection, notwithstanding the presence in defendant's machine of two draft bars which never change their relative position, and in spite of the fact that at one point in the turning the pull seems to be entirely on one bar, thus making a "lopsided pull, while the other [Niesz's] has a straight pull."

Defendant's circular advertises its draft connection as "flexible to a sufficient degree to allow turns to be made without straining the frame," and it accomplishes this result in substantially the same manner as does plaintiff's draft connection, and within the meaning of all the claims of the patent, unless plaintiff is to be limited to a unitary reach on an absolute median line. It is true that defendant's expert states that in his judgment defendant's device operates in better alignment in straight forward work than does plaintiff's, but not so effectively in the turning movement; but plaintiff's expert testifies to careful observation of both machines in practical field work, and that so far as he can see both are equally effective and work in exactly the same way in both straight forward operation and in the turning movement. It is also not without significance that during the 5 years between the issue of plaintiff's patent and the issue of the patent owned by defendant, and under which it manufactures, defendant acquired three separate patents, each apparently with the hope of accomplishing the result effected by plaintiff's patent, but without suc-

cess, and that the still later Imus patent, under which defendant operates, was obviously designed to accomplish the result found in plaintiff's patent and in the same manner, so far as possible without infringing. While no criticism is intended upon this action, yet the history stated, in connection with the previous history of the art, helps to throw light upon the question of infringement.

In our opinion plaintiff is not limited by the prior art, or by the terms of his claims, or both, to the specific construction shown in his patent. We think defendant should be held to infringe each of the six claims in suit.

The judgment of the District Court is accordingly affirmed.

PERNA v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, E. D. Pennsylvania. July 12, 1920.)

No. 6534.

Shipping ⇐3½, New vol. 8A Key-No. Series.—Shipping Board not immune from suit.

The United States Shipping Board Emergency Fleet Corporation, a corporation of the District of Columbia, *held* not immune from suit because of the ownership of its entire capital stock by the United States.

At Law. Action by Joseph Perna against the United States Shipping Board Emergency Fleet Corporation. On motion to set aside verdict and for new trial. Denied.

Henry K. Fries, of Philadelphia, Pa., for plaintiff.

Chas. D. McAvoy, U. S. Atty., of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The question of immunity from suit of the Fleet Corporation, raised upon the present motion, will inevitably be settled by an appellate court. This case, along with other cases in which the same questions are raised, will not be expedited in reaching an appellate court through the granting of a new trial.

The decision of this court in United States v. Carlin, 259 Fed. 904, merely involves the question whether a fraud, the effect of which was to fictitiously increase the contract actual cost of the shipyard at Hog Island, or the vessels being constructed there, the funds for payment of which were supplied out of the treasury of the United States, and by so much to diminish the funds of the United States, was therefore a fraud against the United States, under section 37 of the Criminal Code (Comp. St. § 10201), defining conspiracies to defraud the United States. To like effect is United States v. Union Timber Products Co. (D. C.) 259 Fed. 907. Those cases, therefore, did not decide the question whether the Fleet Corporation, chartered under the laws of the District of Columbia by authority of section 11 of the Shipping Act of September 7, 1916 (Comp. St. § 8146f), is subject to suit.

I agree entirely with the reasoning of Judge Learned Hand, of the

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

Southern District of New York, in the cases of Gould Coupler Co. v. U. S. Shipping Board Emergency Fleet Corporation and Employers' Liability Assur. Corporation, Limited, of London, v. U. S. Shipping Board Emergency Fleet Corporation, 261 Fed. 716, and upon the grounds stated in Judge Hand's opinion the motion is denied.

BANQUE-RUSSO ASIATIQUE-LONDON v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION et al.

THE KITTEGAUN.

(District Court, E. D. Pennsylvania. July 13, 1920.)

No. 24.

Shipping ⇐3½, New, vol. 8A Key-No. Series—Suit in personam against Emergency Fleet Corporation not affected by statute.

Act March 9, 1920, §§ 1, 2, prohibiting the arrest or seizure of vessels or cargoes owned or possessed by the United States, or by any corporation in which the United States owns the entire stock, and providing that, where suits in rem against such vessels or cargoes would be maintainable as against private owners, suits in personam may be brought against the United States or the corporation, as the case may be, has for its sole purpose preventing interference with the operation of government owned or controlled vessels employed in commerce, by substituting for suits in rem authorized by Shipping Board Act Sept. 7, 1916, § 9 (Comp. St. § 8146e), suits in personam, and it has no application to a suit in personam against the United States Shipping Board Emergency Fleet Corporation, arising out of breach of contract.

In Admiralty. Suit by the Banque-Russo Asiatique-London against the United States Shipping Board Emergency Fleet Corporation, owner of the Steamship Kittegaun, with Charles Kurz & Co., Incorporated as garnishee. On petition to set aside service of citation and to dissolve foreign attachment. Petition dismissed.

Lewis, Adler & Laws, of Philadelphia, Pa., for libelant.

Charles D. McAvoy, U. S. Atty., of Philadelphia, Pa., for respondent.

THOMPSON, District Judge. The present suit is upon a libel in personam in a cause of breach of contract, civil and maritime. The libelant's claim is based upon a charge for demurrage alleged to be in violation of the bill of lading under which the steamship Kittegaun had carried from Batoun to Philadelphia a cargo of manganese ore.

It is alleged in the libel that the Kittegaun was operated by the Export Steamship Corporation, of New York, for and on behalf of the United States Shipping Board Emergency Fleet Corporation, and employed solely as a merchant vessel, as used and contemplated in the Shipping Board Act of September 7, 1916, and its supplements. Upon a citation issued with a clause of foreign attachment, the marshal attached the credits and effects of the respondent in the hands of Charles Kurz & Co., Incorporated, as garnishee.

A petition was thereupon filed by the United States attorney, "for

and on behalf of the United States of America and/or the United States Shipping Board Emergency Fleet Corporation," praying that the service of the citation shall be set aside and the writ of attachment dissolved, and that proceedings under the libel shall be had in accordance with the provisions of the act of Congress approved March 9, 1920. It is alleged that by the terms of that act an exclusive remedy is provided for the bringing of suits and the recovery of claims arising out of admiralty proceedings against the United States, or any corporation in which the United States or its representatives shall own the entire outstanding capital stock. The petition avers that the Kittegaun is an American vessel, and is listed in the name of the United States of America, and is owned by the United States, that the steamship is operated as averred in the libel, and that the moneys attached, in the hands of the garnishee, are the moneys of the United States, derived from the operation of the steamship.

The practice adopted by the United States attorney is novel, and it is asked, upon the mere averments of the petition, that the facts therein set forth be accepted as true, and that upon those facts the service of the citation be set aside and the writ of attachment dissolved. The usual course of procedure in admiralty would be through intervention as a claimant and proof of the facts put in issue by an answer to the libel. Aside from the irregularity in practice, however, I think the government has placed too broad a construction upon the act of March 9, 1920. The Shipping Act of September 7, 1916, provides (section 9 [Comp. St. § 8146e]) that vessels purchased, chartered, or leased from the United States Shipping Board—

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

The act of March 9, 1920, in section 1, prohibits arrest or seizure of vessels or cargoes owned or possessed by the United States, or by any corporation in which the United States or its representatives shall own the entire outstanding stock, or vessels operated by or for the United States or for such corporation. Section 2 provides that in cases where, if such vessel were privately owned or operated, or such cargo were privately owned or possessed, a proceeding in admiralty could be maintained, a libel in personam may be brought against the United States, or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The section then provides for service on the United States and such corporation by serving a copy of the libel on the United States attorney for the district and the mailing of a "copy thereof by registered mail to the Attorney General."

As will be seen upon examination of the statute, section 1 merely

prohibits the arrest or seizure of vessels and cargoes in which the United States or a corporation described has the required interest. There is nothing in section 1 or elsewhere in the act which prohibits a libel in personam against a corporation in which the United States has the entire stock interest, for a cause of action in which a libel in personam would lie against it under admiralty and maritime law. The apparent intent of sections 1 and 2 of the act is to prevent interference through arrest and seizure with vessels and cargoes while the vessels are being operated or the cargoes are in course of transportation, and to substitute for an action in rem against the vessel or cargo an action in personam.

Section 13 repeals the provisions of all other acts inconsistent therewith. As the provisions of section 9 of the Shipping Act of September 7, 1916, are broad in their terms, making such vessels while employed solely as merchant vessels subject to all laws, regulations, and liabilities governing merchant vessels, and the act of March 9, 1920, by sections 1 and 2, provides for the substitution of an action in personam where an action in rem would lie, it is evident that Congress did not intend to repeal the pertinent part of section 9 of the act of 1916, so that all suits in admiralty were to be included within the terms of the act of 1920, but that it was solely intended to substitute an action in personam for an action in rem against the vessel or the cargo, and the effect was to take such cases out of the provisions of the earlier act. There would seem to be no sound reason for construing the act of 1920 as doing more than regulating such suits in admiralty as would interfere with the operation of vessels and the possession of cargoes, if brought in rem, leaving the vessel subject in other cases to the broader provisions of section 9 of the Shipping Act of 1916.

In my opinion sections 1 and 2 of the act of 1920 must be read together. Section 1 does not prohibit suits against corporations in which the United States has ownership of the entire outstanding stock, but prohibition of arrest and seizure of vessels and cargoes is the sole purpose of the section. It is further apparent, from the provision of section 2 that suits shall be brought in the district in which the parties reside or in which the vessel or cargo charged with liability is found, that the procedure was intended to apply only to proceedings in rem against the vessel or cargo. The present suit is not based upon any liability of the vessel or cargo. It is a suit based upon a contract created by the terms of a bill of lading issued on account of the Emergency Fleet Corporation, owner of the vessel, a foreign corporation organized under the laws of the District of Columbia, with service of a foreign attachment upon the garnishee, as provided for in rule 2 of the Supreme Court Equity Rules.

That the Emergency Fleet Corporation is subject to suit as other corporations of the District of Columbia has been held by this court in the case of Commonwealth Finance Corporation v. Landis, 261 Fed. 440, and Perna v. United States Shipping Board Emergency Fleet Corporation, 266 Fed. 896, in a recent opinion, and by Judge Learned Hand, of the Southern district of New York, in the case of Gould

Coupler Co. v. U. S. Shipping Board Emergency Fleet Corporation, 261 Fed. 716.

The petition to set aside service and dissolve the attachment is dismissed.

In re GROCERS' BAKING CO.

(District Court, M. and N. D. Alabama. Sept. 9, 1920.)

No. 17327.

1. **Corporations ⊜415—Statute authorizing mortgages of personal property by directors does not forbid execution by managing officers.**
   Code Ala. 1907, § 3481, authorizing corporate directors to execute mortgages on personal property, is simply declaratory of the common law, and does not prohibit the execution of mortgages by officers to whom the management of the corporation's affairs have been intrusted.

2. **Corporations ⊜426(4)—Directors ratify mortgages by formal resolution or by retaining proceeds.**
   A mortgage executed by corporate officers was ratified by the directors, where they subsequently passed a formal resolution authorizing the execution of a subsequent mortgage to confirm the first and retained the proceeds of the first mortgage.

3. **Corporations ⊜426(10)—Acceptance of beneficial acts of agent found from slight acts.**
   Where the unauthorized acts of a corporate agent are for the benefit of the corporation, its acquiescence and acceptance of such acts will be found from slight acts on the part of the corporation, reasonably accounted for only on the supposition of acceptance.

4. **Corporations ⊜426(1)—Ratified mortgage as binding as one originally authorized, except as to intervening rights.**
   Except as to intervening rights of strangers, ratification by corporation of unauthorized mortgage by its officers relates back to the time of the execution, and is equivalent to original authority.

5. **Mortgages ⊜16—Security for future advances is valid.**
   A mortgage to secure future advances, though not so expressed on its face, is valid between the parties, and as against subsequent purchasers and incumbrancers, at least so far as to secure advances made before the equities of others attach, in the absence of fraud or bad faith.

6. **Mortgages ⊜258—Bona fide purchaser of negotiable paper entitled to security of mortgage against equities.**
   A bona fide purchaser of commercial paper secured by a mortgage is entitled to the benefit of the mortgage as against equities to the same extent as to the negotiable paper itself.

7. **Bankruptcy ⊜303(1)—Creditors must prove assignment practically exhausts assets, within statute making such for benefit of creditors.**
   A trustee in bankruptcy, claiming the benefit of Code Ala. 1907, § 4295, making a general assignment of substantially all of assignor's property an assignment for the benefit of creditors, has the burden of showing that the mortgage attacked embraced substantially all the estate of the bankrupt.

8. **Bankruptcy ⊜178(3)—State statute giving creditors benefit of assignment of assets not applicable.**
   Code Ala. 1907, § 4295, making a mortgage of substantially all the assets of a corporation a general assignment for the benefit of creditors, does not apply to a proceeding instituted by a trustee in bankruptcy.

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9. **Fraudulent conveyances ⊂=3—State statute held enactment of common-law rule.**
Code Ala. 1907, § 4293, making all instruments intended to defraud creditors void as to the creditors, simply enacts the well-settled common-law rule.

10. **Courts ⊂=372(1)—State decisions not controlling on question of commercial law.**
Though decisions of state tribunals on questions of commercial jurisprudence are entitled to respect, they are not conclusive authority by which judgment of the federal courts is to be bound.

11. **Bills and notes ⊂=356—Bank discounting notes is bona fide purchaser, though deposit not exhausted.**
A bank, which discounts a note secured by mortgage and places the amount on deposit for its customer, is a bona fide purchaser of the note, if some of the deposit has been withdrawn before conflicting equities attach, though the deposit has not been entirely exhausted.

12. **Bankruptcy ⊂=303(3)—Evidence held to show bank advanced money on mortgages, so as to be bona fide purchaser.**
On a claim by a bank against a trustee in bankruptcy for preference note and mortgage, evidence that, when the bank discounted the note secured by the mortgage, its customer was indebted to it in excess of the amount, and contemporaneously paid more than half the amount on account of the indebtedness then matured, and thereafter exhausted the whole amount of the proceeds prior to the adjudication in bankruptcy, *held* to show that the bank was a bona fide purchaser of the note and mortgage.

13. **Bankruptcy ⊂=178(1)—Mortgage to secure supplies for continuing operations not "fraudulent conveyance."**
The giving by a corporation of a mortgage to secure payment of a note for supplies already furnished and those which were to be furnished for the purpose of enabling the corporation to continue its operations is not a fraudulent conveyance within Bankruptcy Act, § 67e (Comp. St. § 9651).
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraudulent Conveyance.]

14. **Bankruptcy ⊂=165(1)—Payments on running accounts, followed by new sales, not preferences.**
Payment by a bankrupt on a running account for supplies furnished, where new sales succeeded the payments and the net result was to increase the value of the estate, are not preferential transfers, under Bankruptcy Act, § 60a (Comp. St. § 9644).

15. **Bills and notes ⊂=497(1)—Purchasers before maturity presumed to be bona fide.**
The holder of negotiable paper acquired for value before its maturity is presumed to be a bona fide holder, in the absence of proof to the contrary.

In Bankruptcy. Involuntary proceedings against the Grocers' Baking Company. From an order of the referee, sustaining the claim of the Birmingham Trust & Savings Company, the trustee in bankruptcy appeals and brings a petition to review the same. Order confirmed.

Wood & Pritchard, of Birmingham, Ala., for trustee.

Cabaniss & Cabaniss, of Birmingham, Ala., for Birmingham Trust & Savings Co.

CLAYTON, District Judge. The involuntary petition was filed January 8, 1920, against the Grocers' Baking Company, a corporation, and it was adjudicated a bankrupt on the 16th day of the same month.

The Birmingham Trust & Savings Company, a banking corporation, claimed a superior lien under a certain two mortgages hereinafter described. The trustee brings this petition for review of the order of the referee, sustaining the claim of the bank and directing that the trustee pay, out of the proceeds derived from the sale of the property of the bankrupt's estate, $7,500, with interest thereon from December 6, 1919, to the bank.

The bankrupt was engaged in the bakery business on a large scale. Its prior names had been Martin Bread Bakery and Magnolia Baking Company. Under the latter name it came under the control of the Alien Property Custodian in July, 1918. On the 8th day of that month such custodian sold its machinery and equipment to the Grocers' Baking Company, the bankrupt here, for $30,000. The purchase money was furnished by Geo. A. Shaw and the corporation issued to him stock for the same. Thereafter, until he was put in jail, about December 10, 1919, Shaw had the management and conduct of the business, and was all the while president of the corporation.

On September 11, 1919, the bankrupt owed Connell & Baldwin, dealers in flour, etc., $2,106.21. At this time they refused to extend further credit to the bankrupt unless secured by mortgage. On that day the bankrupt gave them an acceptance for $900, due November 10, 1919; an acceptance for $1,200, due December 10, 1919; a note for $5,400, payable one day after date; and a mortgage to secure the three papers, which mortgage was filed for public record the next day. These papers are Exhibits 1, 2, 3, and 7 CL.McC. The acceptances were given as substantially covering the existing account, and the $5,400 note for future advances in flour, etc., to be made by Connell & Baldwin. It was explained that the reason why the note was drawn as due one day after date was because the real time of payment would be fixed later by agreement. The mortgage did not cover all of the equipment, as it was intended. The directors did not, in the first instance, authorize the execution of the mortgage. Shaw, as president and manager of the bankrupt business, executed the mortgage in its name, in order to continue the operation of the bakery. Shortly after these papers were made, Connell & Baldwin submitted them to their attorneys, Cabaniss & Cabaniss, for advice on the question of safety in making additional advances.

Then an examination of the affairs of the bankrupt was made by J. H. Cabaniss, a member of that firm, a member of Connell & Baldwin, and a bookkeeper. The result of the examination showed that the machinery and equipment, carried on the books of the bankrupt at $45,219, were apparently worth $35,000 as a going concern. The books of the bankrupt had not been very well kept, but no evidence was found on this examination of any indebtedness exceeding $12,000 or $13,000, including that of Connell & Baldwin. The bankrupt explained that its trouble was temporary, and was caused in part by shortage of operating capital and by stealing on the part of its subordinate employés while baking and delivering bread, and that since the discovery of such stealing it had been stopped, and it was also made to appear that the business was then earning a fair profit. The attorney ex-

amined the county records, and found there no judgment or liens against the bankrupt, except conditional sale contracts recorded against automobiles used in the business and the mortgage of September 11 to Connell & Baldwin. This investigation led Attorney Cabaniss and a member of the firm of Connell & Baldwin to believe that the assets of the baking company, as a going concern, were fairly worth about three times its liabilities.

On November 8, 1919, under formal resolutions of the board of directors adopted November 4, 1919, the bankrupt executed to Connell & Baldwin the two notes, Exhibits 5 and 6 CLMcC, for $4,300 and $3,200, respectively, due in 75 and 90 days, respectively, after date, and the mortgage securing their payment, a copy of which is Exhibit 4 CLMcC. The mortgage was filed for public record November 13, 1919. On November 8, 1919, the amount owing to Connell & Baldwin was $3,379.61. This second mortgage was given to extend the security over the entire machinery and equipment, as well as to ratify and confirm the action previously taken by Shaw, and was intended by the parties to cover the accrued indebtedness of $3,379.61 and future advances to a total of $7,500.

On November 13, 1919, the Birmingham Trust & Savings Company, in due course of its banking business, discounted or purchased the two last-named notes, deducting unearned interest, paying therefor $7,507.91, and still holds and owns them. At the time the notes were acquired by the bank, Connell & Baldwin explained to the bank that they were secured by a mortgage on the machinery and equipment of the Grocers' Baking Company, on file for record in the probate office of the county. The bank (claimant) knew nothing more of the transaction or of the affairs of the bankrupt. On November 13, 1919, when the papers were discounted with the bank, the bankrupt owed Connell & Baldwin $4,091.52, and on January 9, 1920, the bankrupt owed them $8,402.70. The ledger record of this account is Exhibit 8 CLMcC, but involved, in that there is record of other items entered on each side of the ledger according to the methods of bookkeeping, such as credit for checks given and debit when the checks were dishonored, and charges for checks for pay roll of the bankrupt advanced by Connell & Baldwin, and credit for repayment made in whole or in part. An analysis of the account shows that the additional advances in flour and other merchandise, made after November 13, 1919, to keep the bakery in operation, and excluding cash advance, amounted to $4,834.14, and that the aggregate payments thereon were $1,300.73.

On September 17, 1919, Connell-Baldwin Company was incorporated, and took over the assets and assumed the liabilities of Connell & Baldwin, the partnership. Subsequent to that time the transactions with the bank were continued in the name of Connell & Baldwin, but by and for the successor corporation. The bank account with the Birmingham Trust & Savings Company continued in the name of Connell & Baldwin until the middle of January, 1920, when the new name was given to the concern.

Directors of the bankrupt were called as witnesses by the trustee for the purpose of showing that the bankrupt, from May, 1919, was insolvent, and that Connell & Baldwin had notice of the same, or of sufficient facts to charge them with notice, and that the first mortgage was executed without authority of the bankrupt corporation. Their testimony and the other evidence tended to show that a partial audit made in 1919 disclosed little or no operating capital, embarrassment for lack of money to meet the weekly pay roll and other current expenses, and a loss in operating of about $4,000 per month—all of which the directors thought was caused by the stealing of subordinate employés and Shaw's lack of watchful care. The belief of the directors of the bankrupt's solvency and ability to continue business successfully was manifested by their individual advances in money and credit from time to time to carry it over what they considered only temporary trouble. The accommodations continued until and after the time Shaw was incarcerated, about the middle of December, 1919. If the bankrupt was insolvent during the period of time covered by the transactions involved, the directors testified that they did not know it, and did not believe it was insolvent.

The property covered by the mortgage was sold, free of liens, by the trustee, under regular order of the bankrupt court, and brought $10,250. The referee held, in effect, that inasmuch as the property sold in July, 1918, for about $30,000, and afterwards, under judicial sale in bankruptcy, for $10,250, it was reasonable to conclude that Connell & Baldwin were justified in their belief that the property, as that of a going concern, was worth the original price paid to the Alien Property Custodian, and that, with proper management, the business would be profitable and successful. The investigation made by Attorney Cabaniss, with competent assistants, indicated to a reasonable extent that, at the time of the execution of the papers now owned by the Birmingham Trust & Savings Company, the bankrupt owed not over $5,000 or $6,000 above what it owed Connell & Baldwin.

[1] The trustee invokes section 3481 of the Code of Alabama as against the validity of the mortgages. This statute, in so far as it provides that mortgages on personal property may be executed by the directors, is simply declaratory of the common law. The affairs of a corporation, as a general proposition, are under the management and control of its board of directors. At common law a mortgage on the property of a corporation may be valid under certain circumstances, although it may not have been expressly authorized by the directors; and there is no contrary inhibition in the Alabama statutes. It is a settled law that—

"If the stockholders and directors turn over the management of the business to one or more officers or persons, and virtually abandon their functions and duties as directors and stockholders, such person or persons have apparent power to do any act in the ordinary course of the business, including the giving of a mortgage, execution of notes," etc. Fletcher, Cyc. Corp. §§ 2097, 2098.

"If it was within the power of the corporation, as we hold it was, to create the debt through the agency of the managing officers vested with the ordinary functions of the board of directors, a mortgage of its property, executed in its behalf by such officers while exercising such authority, must be held valid also,

notwithstanding there was no authority from the board of directors; for it is an ordinary incident to the creation of a debt (Thomp. Corp. § 6133), and the power to give it came from the ultimate constituency." Cunningham v. German Ins. Bank, 101 Fed. 977, 41 C. C. A. 609.

[2] And the evidence in this case is convincing that the directors of the Grocers' Baking Company had committed the entire management and conduct of the affairs of the corporation to Shaw, and he had apparent authority to execute the first mortgage. However, if the mortgage was not authorized, it was subsequently ratified (1) by the formal resolutions adopted by the board of directors; (2) by the giving of the second mortgage, expressly approving the first; (3) by the acquiescence of the corporation in receiving and retaining the proceeds acquired under the first mortgage; and (4) by the failure to disaffirm and to return such proceeds. It was held in Taylor v. A. & M. Ass'n, 68 Ala. 229, that—

"A loan having been negotiated for a corporation, and to secure it a mortgage made, but defectively executed, on its property by an agent, an acceptance by the corporation of the benefits of the transaction, by receiving and appropriating to its own uses the money obtained on the loan constitutes a ratification of the agent's act; and, although resting in parol, the ratification, in equity, operates as an estoppel on the corporation from denying the authority of the agent, or the execution of the mortgage."

[3] Acquiescence may rest on the principle of ratification or upon the principle of estoppel. 4 Fletcher, Cyc. Corp. 2195; Pollitz v. Wabash R. Co., 207 N. Y. 113, 100 N. E. 721. And it was said in Bank of U. S. v. Dandridge, 25 U. S. (12 Wheat.) loc. cit. 70, 6 L. Ed. 552, that—

"Grants and proceedings, beneficial to the corporation, are presumed to be accepted, and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact."

[4] The principle is laid down in 4 Fletcher, Cyc. Corp. § 2207, and sustained by numerous authorities cited, that—

"Except as to intervening rights of strangers, ratification by a corporation of an unauthorized act or contract by its officers or others relates back to the time of the act or contract ratified, and is equivalent to original authority. The corporation and the other party to the transaction are in precisely the same position as if the act or contract had been authorized at the time." Fleckner v. U. S. Bank, 21 U. S. (8 Wheat.) 338, 5 L. Ed. 631.

It was held in Foerstner v. Citizens' Sav. & T. Co., 186 Fed. 1, 108 C. C. A. 267, that where a defectively executed mortgage under the local law amounts to no more than an agreement to give a lien, and the property covered thereby passes into the hands of a trustee in bankruptcy before any proceedings are taken to reform the instrument, the trustee takes it in the plight in which it then stood, and in such case the title remains in the bankrupt, but there is an outstanding equity in the mortgage.

[5] If not attended with fraud or bad faith, a mortgage to secure future advances, though not so expressed on its face, is valid, as between the parties and as against subsequent purchasers and incum-

brancers as well, so far at least in regard to advances made before the equities of subsequent purchasers or incumbrancers attached. Jones on Chat. Mortgages, § 9495; Kirby v. Raynes, 138 Ala. 194, 35 South. 118, 100 Am. St. Rep. 39.

[6] The second mortgage was properly executed, and was given to secure the commercial papers, and if they were acquired by the Birmingham Trust & Savings Company in due course, for value, before maturity, therefore as a bona fide holder, such bank is entitled to enforce the mortgage without regard to any defenses that might have been interposed by the mortgagor. We quote from 2 Jones on Mortgages, §§ 834, 835:

"When, therefore, the debt secured is in the form of a negotiable note, a legal transfer of this carries with it the mortgage security; and inasmuch as a negotiable promissory note by the commercial law, when assigned for value before maturity, passes to the assignee free of all equitable defenses to which it was subject in the hands of the payee, it does not lose this character which it has under the commercial law when it is secured by a mortgage. The mortgage rather is regarded as following the note, and as taking the same character; and it is the generally received doctrine that the assignee of a mortgage securing a negotiable note, taking it in good faith before maturity, takes it free from any equities existing between the original parties.

"Where the mortgage assigned secures a negotiable note, it does not matter that the consideration of the mortgage was wholly void, as where the consideration was the price of intoxicating liquors sold in violation of law, or that the mortgage was originally given without consideration. The negotiable note secured by the mortgage is valid in the hands of a bona fide indorsee for value without notice of the illegal consideration for which it was given. When the mortgage is assigned at the time when the note is indorsed, there is no principle or authority which makes the mortgage less valid than the note."

The assignee for value before maturity of negotiable paper and the mortgage to secure it cannot be affected by equities of which the assignee had no notice to which it would be subject in the hands of the mortgagee. Nat. Live S. Bank v. First Nat. Bank, 203 U. S. 296, 27 Sup. Ct. 79, 51 L. Ed. 192. And this is the rule in Alabama. In Thompson v. Maddux, 117 Ala. 468, 23 South. 157, it was held that, where a note secured by a mortgage is transferred, such mortgage follows the note, and is of the same character and governed by the same rules in respect to the right of the maker of the note and mortgage to set up equities and defenses against it in the hands of the transferee as purchaser.

[7] The trustee further insists that the mortgages constitute under section 4295 of the Code of Alabama a general assignment, because he says that they convey substantially all of the property subject to execution of the now bankrupt debtor, in payment of a prior debt, and that by such preference the payment was given to Connell & Baldwin, creditors, over the remaining creditors of the grantor, and that the mortgages were not given to secure a debt contracted contemporaneously with their execution. The Supreme Court of Alabama, in construing this section of the Code, has said:

"The statute is not intended to declare conveyances fraudulent or void, but simply to blot out intended preferences or priorities; effect is to be given to the instrument or to the transaction that would be given to it if the statute was

incorporated in the instrument or transaction as a part of it." Dadeville O. M. v. Hicks, 184 Ala. 371, 63 South. 971.

And undoubtedly, if uncontrolled by any statutory inhibition, a debtor, though insolvent, may make preferences among his creditors, paying one in full to the exclusion of the others; but this section of the Code converts such preference into a general assignment, if the conveyance embraces all or substantially all of the debtor's property. Goetter v. Smith, 104 Ala. 481, 16 South. 534; Bell v. Goetter, 106 Ala. 462, 17 South. 709.

[8] Whether or not the mortgages embrace substantially all of the debtor's property is subject to great doubt. Certainly they did not convey the leasehold estate in the place of business occupied by the bankrupt, which had several years to run, as well as the debts due to the bankrupt and its stock of goods on hand at the time the mortgages were executed; moreover, the trustee, who assumed the burden of showing that the mortgages embrace substantially all of the estate of the bankrupt, has not reasonably demonstrated that such was the case. However, this Alabama statute in my opinion is inapplicable, because the trustee is only empowered by the Bankruptcy Law to avoid transfers as for fraud or as preferences; and a proceeding under this statute does not contemplate an avoidance of the transfer, but an affirmance of it, so as to make it inure to all creditors alike.

[9] The trustee further contends that the mortgages are void under section 4293 of the Code of Alabama, which says that all instruments made to hinder, delay, or defraud creditors are void as to the creditors. Of course, this statute embraces nothing more than a well-settled common-law rule, established long before the Alabama enactment. In construing this statute the Supreme Court of Alabama, in Hall & Farley v. Ala. T. & I. Co., 143 Ala. 471, 39 South. 287, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363, said that—

"It is of no importance to us whether the statute of 13 Elizabeth was the ordination of original law, or merely declaratory of existing common law in England. Whatever may be the solution of that somewhat mooted question, that enactment, antedating as it did the first English settlement in the territory now constituting the United States, and 'being applicable to our situation and not inconsistent with our institutions and government,' became a part of the common law of this country, * * *" and that, "being a re-enactment of an English statute which was a part of the common law of this country, it has justly been held to be but declaratory of existing common law. Anderson v. Hooks, 9 Ala. 704, 709."

The trustee insists further that the mortgages are void under section 67e of the Bankruptcy Act (Comp. St. § 9651), because, as he alleges, they were made with intent to hinder, delay, or defraud creditors, in violation of the above-mentioned common-law rule, recognized in and made a constituent part of the Bankruptcy Act. Are the mortgages such a transfer of the bankrupt property which the creditor of the bankrupt might have avoided, or did the bank become a bona fide holder for value of the commercial papers, and the mortgages to secure their payment, on November 8, 1919, or prior to the date of the adjudication in January, 1920? If the bank is such holder, the referee in bankruptcy ruled correctly that it has against the trustee a superior

lien on the property covered by the mortgages for the sum of $7,500, with interest thereon. But it is urged by the trustee that the bank was not a bona fide purchaser for value of the commercial papers and mortgages, because the proceeds of the notes were discounted and placed to the credit of Connell & Baldwin, and that the evidence failed to show that all of such proceeds were drawn out of the bank by Connell & Baldwin, and cites Citizens' Nat. Bank v. Buckeit, 14 Ala. App. 511, 71 South, 82, 89, and Tatum v. Com. Bank & T. Co., 185 Ala. 249, 64 South. 561, where in the latrer case it is said that—

"A bank does not become a purchaser in due course for value by crediting a note upon payee's account, if the credit is not absorbed by antecedent indebtedness or exhausted by subsequent withdrawals."

[10, 11] As was said in Swift v. Tyson, 41 U. S. (16 Pet.) 1, 18 (10 L. Ed. 865) the decisions of the local tribune upon the doctrine of commercial jurisprudence are entitled to the most deliberate attention and respect, but they cannot furnish positive rules or conclusive authority by which the judgments of the federal courts are to be bound and governed, and the ruling of the United States Supreme Court was to the same effect in Presidio County v. Noel-Young B. Co., 212 U. S. 59, 73, 29 Sup. Ct. 237, 53 L. Ed. 402. I think that the rulings made in these Alabama cases, which are embraced in the quotation from one of them, is not applicable to the case at bar. In 8 Corpus Juris, 483, it is stated to be—

"* * * well settled that a bank or a person, by discounting negotiable paper, placing the same to the credit of the depositor, honoring his checks or drafts, surrendering to him securities, or in some other manner making advances and extending its credit on the faith of such deposit, thereby becomes a holder for value."

This proposition is supported by many authorities cited in the footnote, including Amalgamated Sugar Co. v. U. S. Nat. Bank, 187 Fed. 746, 109 C. C. A. 494, Boardman v. Hanna (C. C.) 164 Fed. 527, Hatch v. N. Y. City, etc., 147 N. Y. 184, 41 N. E. 403, and Elmore County Bank v. Avant, 189 Ala. 418, 66 South. 509; and in the same work, at page 484, it is said:

"There is some authority, including dicta, to the effect that the credit given or the funds of the depositor on deposit in the bank, sufficient to pay the note on its dishonor, must have been exhausted; but these cases and dicta are against the weight of authority, which supports the rule that all of the credited deposit need not have been paid out, in order to make the transfer one for value, and also that it is immaterial whether or not the depositor has, or may have, funds in the bank exceeding the amount of the discounted note, provided, of course, the bank has, on the faith of the fact of the proceeds of such discount, made some advance, extended some credit, or done something else whereby it assumed a relation other than that of mere debtor and creditor."

The text is supported by many cited authorities, and Tatum v. Com. Bank, supra; is referred to as one of the cases that fall under the author's criticism.

[12] Connell, of the firm of Connell & Baldwin, testified that, at the time the notes were discounted with the bank, the indebtedness of his firm to the bank was something like $20,000, and that contempo-

raneously with the transaction, Connell & Baldwin paid to the bank, out of the proceeds of the discounted paper, $3,965.33 on account of its indebtedness to the bank which had then matured. From the evidence there can be no doubt that the whole amount of the proceeds of the discounted notes were absorbed by the bank on account of the indebtedness of Connell & Baldwin prior to the adjudication and were paid out by the bank in the many daily transactions had between it and Connell & Baldwin prior to the bankruptcy. In Sherrill v. Mer. & Mech. Trust & S. Co., 195 Ala. 175, 70 South. 723, the Supreme Court of Alabama said:

"A bank does not become a bona fide purchaser for value and without notice of a negotiable paper by simply discounting it for one not its debtor at the time and placing the amount to the credit of the holder by way of deposit. In such circumstances the act of discounting and of crediting only effects to establish the relation of debtor and creditor between the depositor and the bank; but, if the amount deposited to the checking account of the customer is exhausted before maturity, or before notice of any defect, then the bank is a purchaser for value."

[13] So that, even under the rule recognized by the Alabama decisions, the bank was a purchaser for value, since the whole amount of the deposit was exhausted before the bankruptcy, and before notice to the bank of any infirmity in the paper. It seems clear that the bankrupt and Connell & Baldwin did not intend to create a preference discountenanced by the law, but that the real purpose in giving the notes and mortgages was to pay the running account for flour and other supplies furnished to the baking company, and to obtain additional supplies to keep the bakery business in operation. The directors of the bankrupt and Connell & Baldwin believed, and had apparent good reason to believe, that the concern would be tided over a temporary embarrassment, and would, by the advancement made by Connell & Baldwin, be able to continue business and preserve the estate. Connell & Baldwin subtracted nothing from the assets of the estate when they took the papers from the baking company. On the contrary, they added to the estate, by furnishing flour, lard, etc., for its operation, in harmony with the major purpose of making the notes and mortgages. To constitute a preferential transfer within the meaning of the Bankruptcy Act, there must be a parting with the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt's estate. Continental & Commercial Trust & Savings Bank v. Chicago Title Co., 229 U. S. 435, 445, 33 Sup. Ct. 829, 57 L. Ed. 1268.

[14] It may be true that there was included in these conveyances a large amount of the property of the bankrupt, but the transaction was in good faith, with a view of preserving the estate and enabling it to continue as a going concern and to meet its indebtedness. Such conveyances were valid at common law, from which this feature of the act (section 67e) was taken, and, while Congress in the Bankruptcy Act strikes down preferential conveyances, where the party has good reason to believe that a preference is intended, Congress has not declared voidable merely preferential conveyances made in good faith,

if the grantee, as in the present case, was ignorant of the insolvency of the grantor and had no reason to believe that a preference was intended. Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 108. The notes and mortgages were given in part as payment on a running account for supplies furnished and to be furnished to the bakery to keep it in operation. Payments on a running account, where new sales succeed payments, and the net result is to increase the value of the estate, do not constitute preferential transfers under section 60a (Comp. St. § 9644). Jaquith v. Alden, 189 U. S. 78, 83, 23 Sup. Ct. 649, 47 L. Ed. 717.

I find that, in giving the commercial papers and the mortgages to secure them, there was no intent on the part of the bankrupt or Connell & Baldwin to defraud the creditors of the bankrupt; also that the bank in purchasing the notes had no intent to defraud, and had no knowledge of any intent on the part of Connell & Baldwin to defraud, the creditors. Under the facts in this case, the mortgages ought not to be set aside, since the amount derived from the discount of the papers by the bank was used in part to pay an existing indebtedness due at the time to the bank, particularly as the residue of the proceeds were eventually checked out in the usual course of business, as above stated. Van Iderstine v. Nat. Discount Co., 227 U. S. 577, 583, 33 Sup. Ct. 343, 57 L. Ed. 652. There were no infirmities on the face of the papers. The bank had no knowledge of any defense thereto. There were no circumstances which required the bank to make inquiry, Connell & Baldwin had the right to sell and transfer the papers to the bank, and the bank became the holder and transferee of the notes and mortgages in the usual regular course of its banking business. It is said in Goodman v. Simonds, 61 U. S. (20 How.) 343, 364, 365 (15 L. Ed. 934), that—

"A well-defined and correct exposition of the rights of a bona fide holder of a negotiable instrument was given by this court in Swift v. Tyson, 16 Pet. 1, as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion, as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration. This court then said, and we now repeat, that a bona fide holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. That question was not one of new impression at the date of that decision, nor was it so regarded either by the court or the learned judge who gave the opinion; on the contrary, it was declared to be a doctrine so long and so well established, and so essential to the security of negotiable paper, that it was laid up among the fundamentals of the law, and required no authority or reasoning to be brought out in its support; and the opinion on that point was fully approved by every member of the court, and we see no reason to qualify or change it in any respect."

[15] This court will follow what I think is the weight of authority, and declare that the Birmingham Trust & Savings Company was a bona fide purchaser for value in discounting the negotiable papers and the mortgages to secure them, as the bank gave full credit by depositing

to the account of such firm the face value of the papers less the small discount charge; the bank paid out on checks of Connell & Baldwin $3,965.33 contemporaneously with the discounting of the notes and prior to the institution of the bankruptcy proceedings from time to time to Connell & Baldwin, on their daily running account, a sum greater than that derived from the discounted notes. And it is familiar law that the holder of negotiable paper acquired for value before its maturity is not bound to prove that he is a bona fide holder without notice, for the law will presume that in the absence of proof to the contrary, and therefore the onus is upon the defendant (here the trustee has assumed such place) to establish by way of satisfactory proof the contrary and thus overcome the prima facie title of the holder. Swift v. Tyson, supra; Security Bank of Minn. v. Petruschke, 101 Minn. 478, 112 N. W. 1000, 118 Am. St. Rep. 644; Dreilling v. First Nat. Bank, 43 Kan. 197, 23 Pac. 94, 19 Am. St. Rep. 126; Amalgamated Sugar Co. v. U. S. Nat. Bank, 187 Fed. 746, 109 C. C. A. 494.

After careful consideration of the pleadings, the testimony, and the argument of the attorneys, I am of the opinion that the ascertainment of facts by the referee and his conclusions of law are correct, and that the Birmingham Trust & Savings Company has a superior lien upon the property covered by the mortgages for the sum of $7,500, with interest thereon from November 6, 1919; and inasmuch as the property has heretofore been sold under the order of the court free of the mortgage lien, and produced a sum greater than the amount of the principal and interest, that the lien was transferred from the mortgaged property to the proceeds derived from the sale thereof; and therefore the trustee in bankruptcy must, out of the proceeds of such sale, pay the Birmingham Trust & Savings Company such principal sum of $7,500, with interest thereon from November 6, 1919.

Appropriate order will be entered.

FILBIN CORPORATION et al. v. UNITED STATES.

(District Court, E. D. South Carolina. August 26, 1920.)

No. 788.

1. **Eminent domain ⇐69—Taking either by "requisition" or by "condemnation" requires compensation.**

Any attempted distinction between requisition or condemnation of property by the United States is largely technical in ordinary parlance, the word "requisition" being more often used with reference to the taking of personal property, and the word "condemnation" to the taking of real estate; but, whether the taking is by requisition or condemnation, Const. Amend. 5, requires just compensation to be made.

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

2. **Eminent domain ⇐69—United States has same powers as government of England; "sovereignty."**

The "sovereignty" of the United States consists of the powers existing in the people as a whole and the persons to whom they have delegated

it, and not as a separate personal entity, and as such it does not possess the personal privileges of the sovereign of England; and the government, being restrained by a written Constitution, cannot take property without compensation, as can the English government by act of king, lords, and Parliament.

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

3. **Eminent domain ⟸166—Exemption from suit does not permit government to take property without legal procedure.**
The exemption of the United States from suit by an individual does not affect the rule that the United States cannot take private property from a citizen, except in accordance with the formal rules governing procedure in such cases.

4. **Jury ⟸19 (11)—Condemnation proceeding is "proceeding at common law," in which jury trial is guaranteed.**
A proceeding to ascertain just compensation for property taken for public purposes is a "proceeding at common law," in which the right to a trial by jury is guaranteed by Const. Amend. 7.

5. **Jury ⟸19 (11)—Omission from statute of provisions for jury trial does not deprive owner of right.**
The omission, from a statute authorizing the taking of property by the United States, of any provision for trial by jury, does not deprive the owner of such right, though similar statutes for the taking of property expressly provided for jury trial.

6. **Jury ⟸19 (11)—Existence does not authorize taking of property without jury trial as to compensation out of hostile zone.**
The existence of a state of war does not authorize the United States to take from a private citizen property situated outside the zone of hostilities, without a jury trial to determine compensation, where the civil laws and courts are in operation, though it might take such property without a jury trial, where martial law was in force.

7. **Statutes ⟸237—Rule against construction in derogation of sovereignty not applicable here.**
The ancient rule, applicable in the courts of Great Britain, that a statute in derogation of sovereignty must be construed in favor of the sovereign and against the subject, is not applicable in the United States, where there is no sovereign, in a feudal or monarchical sense, and no subject.

8. **Jury ⟸10—Statute construed, so as not to defeat common-law right to jury trial.**
The construction of a statute, so as to deny the common-law right to trial by jury to determine compensation for property taken by the government, is in derogation of common law, and should be avoided, if it can be.

9. **Eminent domain ⟸209—If compensation for requisitioned property is determinable in equity, damages can be submitted to jury.**
If the right to recover compensation for property requisitioned by the government during war is an equity proceeding, which may be tried by the court without a jury, it may also be submitted to the jury by the court for its information and guidance.

At Law. Petition by the Filbin Corporation and another against the United States to recover compensation for property taken from petitioners. On motion by the United States for rehearing, modification, and revocation of an order directing the submission of the cause to a jury. Motion refused.

Buist & Buist and Miller, Huger, Wilbur & Miller, all of Charleston, S. C., for petitioners.

Francis H. Weston, U. S. Atty., of Columbia, S. C.

SMITH, District Judge. In this cause an order was made on the 28th May, 1920, by this court (265 Fed. 354), directing that it should be submitted to a jury at the next term of this court, or at any term thereafter, as soon as it could conveniently be tried, to determine in this cause the question as to what was a fair and reasonable value which would constitute the just compensation to be paid for the taking for public purposes of the lands mentioned and described in the petition herein.

On the 18th of June, 1920, due notice of motion was given on behalf of the United States that on the 25th of June, 1920, a motion would be made for a rehearing, modification and revocation of the order just before referred to, and this motion came on to be heard, and was fully heard on argument of counsel on both sides, including counsel from the Attorney General's office at Washington. These arguments have been most carefully considered by this court.

[1] On behalf of the government an argument has been submitted at length upon what is argued to be the difference between "requisition" and "condemnation." By this argument it is sought to establish that a difference exists between "requisition" and "condemnation," and whatever rule of law existed as to proceedings in condemnation being an action at common law, it would not apply to a requisition, which is not an action at common law, and, not being an action at common law, there was no right on the part of the owner of the property requisitioned to a trial before a jury upon the question of the compensation.

This argument, however, is very largely (it seems to the court) technical. Whether you call it a "requisition" or a "condemnation," if the result be the taking from the individual of property and subjecting it to the public use, the result is the same, and the proceeding is in substance the very same. In ordinary parlance—perhaps in legal parlance—the word "requisition" is the more often used in reference to the taking of personal property, and the word "condemnation" to the taking of real estate. This is not noted in the argument on behalf of the government, but it would follow therefrom, if any argument could be made from it, that, as the present proceeding is one to take real estate, it would be a proceeding in condemnation, and not in requisition.

The language of the Fifth Amendment to the Constitution of the United States is:

"Nor shall private property be taken for public use without just compensation."

Nothing is said about "requisition" or "condemnation"; the word used is "taken." The result of either condemnation or requisition is *a taking,* and therefore, in the opinion of the court, this amendment applies to the taking of private property, whether it be by requisition

or by condemnation; and both requisition and condemnation being exercised by virtue of the same provision of constitutional law, commonly called "eminent domain," which allows the interest of the individual to be subordinated to that of the public, and private property to be taken compulsorily for public use, in the opinion of the court, under the Constitution of the United States, there is no difference between a "requisition" and a "condemnation," so far as the obligation of the United States is concerned, to award to the owner just compensation.

[2] It is argued, however, that, though this may be the case, yet where the word used may be "requisition," and not "condemnation," it does not follow that the same rights to a trial by jury which would exist in a condemnation would exist under a requisition, because the sovereign in England and the sovereign states of the United States have at various times exercised the right both to requisition and to condemn, and to award compensation, without a trial before a jury.

It is to be noted that statutes of Great Britain and of the several colonies, as well as judicial decisions on the subject anterior to the American Revolution, and the adoption of written Constitutions, have little application and are of small assistance in the discussion of the question. In approaching this question, it is as well also to disabuse the mind at once that it was to be approached from the standpoint of what was the rule in England, from which the great body of the laws of this country are drawn. This has been too much lost sight of in the past.

The government of Great Britain, although ordinarily termed *free,* was in one sense (from the standpoint of this country) autocratic and despotic. Anything could be done by Parliament in its threefold combination of king, lords and commons. They were bound by no restrictions whatsoever. Any statute passed or law created by the consent of these three different powers, so to say, in the government, was absolute and binding upon any and all people. Life and property could be taken, and laws entirely abrogated, by the consent of these three powers.

There was no such thing as a written Constitution in Great Britain. It was a government whose governing power, as represented by Parliament, was autocratic. There were no protective provisions of a written Constitution to guard the people. Anything was lawful and constitutional that was done by Parliament. It is true there came to be certain unwritten rules of procedure and of protection, that Parliament had seen fit to follow for long periods, so as that they had come to look upon them as established rules or principles of the government; but they were in no way binding as such in the sense of the American Constitution.

Parallel in the American Constitution to the English Parliament are the President, the Senate, and the House of Representatives; but not even the unanimous consent of all three co-ordinate powers of the legislative and executive departments can make it lawful for them to do anything not permitted by the express powers conferred upon them by the written provisions of the Constitution of the United States.

This has been too much overlooked in analogies in the past, as also it has been too frequently the habit to ascribe to what was called *the sovereignty of the United States* those peculiar personal privileges and immunities which were in Great Britain attached to the sacred person of the king.

Drawing our law, as we did, from the body of English law, it was but natural that the vocabulary of that law, as well as its substantial terms, should be followed in this country; and the "sovereign," therefore, has been spoken of and declared in the law (in too many cases now to be subject to change) as a sacred entity, immune from all possibility of suit or prosecution; whereas in truth no such entity exists. The "sovereignty" consists of a power existing in the people as a whole and the persons to whom they have delegated it, and not as a separate semi-sacred personal entity.

Under the written provisions of the United States Constitution it is declared that private property shall not be taken for public purposes without just compensation. That is law which can be violated by no act of Congress, although concurred in by President, Senate, and House of Representatives.

[3] In the discussion of the principle as affected by the difference between the unwritten practice of the kingdom of Great Britain and the written constitutional provisions of the Constitution of the United States, great profit can be obtained from the learned decision of Mr. Justice Miller in the case of United States v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171.

As illustrating that principle may be the rule of law now adjudged, that the United States is exempt from suit or action, except where it consents to allow it. This exemption has been applied, not only to the United States, but to the several states. In many of the decisions holding it as law, it has been held so in analogy to the privilege or immunity which attached to the person of the sovereign in Great Britain. In the decisions to reject any such reasoning as existing in this republic it has been stated that the proper reason is that to allow any such action to be brought would be inconsistent with the very idea of a supreme executive power, and would injure the performance of the public duties of the government, to subject it to repeated suits as a matter of right, at the will of any citizen. But it appears upon consideration of all the authorities, while the doctrine has been enforced, it has never been satisfactorily placed upon any adjudicative reasoning. As is said by Mr. Justice Miller, in 106 U. S. at page 207, 1 Sup. Ct. 250:

> "While the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."

It is therefore established law that the United States, as representing the government of the people of the United States, cannot be sued directly by original process as defendant. At the same time it is equally adjudicated law that no citizen of the United States can

have his property taken away from him, except in accordance with the formal rules governing procedure in such cases.

[4] It is also provided by the Seventh Amendment to the United States Constitution that in suits at common law the right of trial by jury shall be preserved, and the Supreme Court of the United States has decided that a proceeding to ascertain just compensation to be made for property taken for public purposes is a proceeding at common law. It follows, therefore, that the right of trial by jury must necessarily adhere to it. It is quite true that at common law there was no such thing as a suit to recover compensation for property taken by act of Parliament, because there was no obligation to award compensation for so doing. Parliament could take it without making any compensation; but it became entirely otherwise under the Constitution of the United States, when the Congress of the United States was not endowed with the power that Parliament possessed.

But it has been frequently decided that rights of the kind enforceable by actions at common law were in effect to be enforceable in such actions, and were actions at common law, and that would appear to be without doubt the meaning of the Supreme Court of the United States, when it decided that such a suit for the compensation to be paid for the taking in condemnation was in all respects akin to a suit at common law.

It would seem absurd to say that, if the United States sued a man on a contract or for a tort, in which it sought to make him pay more than the sum of $20, it could not deprive him of the right to have the issue tried by a jury, and then to say that, if the United States by virtue of any act of Congress desires to wrest from a man, under either requisition or condemnation, property claimed to be worth $1,000,000, that on that question, as to the quantum to be paid him, he is not entitled to a trial by jury!

[5] Furthermore, great stress is laid in the argument upon the circumstance that in many other cases in which the acts of Congress provided for allowing suits against the United States to recover claims for just compensation, such suits are expressly required to be tried by the court without a jury. Assuming this to be so, the argument would apparently be irresistible that, inasmuch as it required some such provision to deprive the party concerned of his right to a jury trial, where any such provision is omitted, such right of trial exists; and in the case of the statute under which these present proceedings are brought, there is no provision that it should be tried by the court without a jury, or anything expressly indicating any such intention.

Much is said on this point as to the necessity of urgent and speedy action in cases of requisition, as rendering it necessary to avoid the delay of jury trials, which, under the argument, is more or less sought to be made applicable to acts done for the purposes of war; and the argument is that, requisitions being made for the purposes of war, the same procedure is not required in this present case as is required in cases of condemnation in times of peace.

[6] Does the fact of the mere existence of a state of war between two countries abrogate all civil laws existing in either? It has never

been so held. The mere statement that there is a condition of war loses entire sight of the circumstances under which the urgency of war may exist. Many matters are permissible on the field of battle, or in the face of the enemy, or in the territory directly subject to the incursions of warfare, which are not permissible in the country entirely removed from it, where the population is orderly and is pursuing its usual avocations. In the course of an armed conflict, it may be entirely proper that the troops of the country, defending the country, take refuge from the fire of the enemy in the private house of a citizen of the country, which may lead to its destruction; and in such cases the government would not be liable to condemnation, as that is an incident to the struggle itself.

That would not mean, however, that 1,000 miles from the scene of conflict, in the midst of civil order and the enforcement of civil laws, the government could summarily take and destroy the house of a citizen without awarding him just compensation for the taking. Where martial law is proclaimed and enforced, the observation of the civil rules is for the time in abeyance. In the face of the enemy, it is permitted to try an alleged spy summarily before a drumhead court-martial, and execute him if found guilty; but that does not mean that 1,000 miles away from the scene of conflict, where the community is still in obedience to the orderly and civil rules of law, that an alleged spy can be tried and summarily executed under a court-martial, when the civil courts are open for his trial and punishment.

A state of war does not sanction summary requisitions for all purposes everywhere, but only in those places in which, by the necessities of the conflict, martial law is in force and civil law is suspended. It does not appear to the court, therefore, that there is anything in the argument that a state of war was existing between this country and Germany at the time, when the seat of conflict was 3,000 miles from the shores of this country; that such extraordinary powers could be given to an officer of the executive department of the United States, that he should be enabled to take property and deprive the citizen whose property is taken of the ascertainment of his compensation by due legal process and a trial by a jury.

[7] The argument in behalf of the government also insists that, inasmuch as the construction of the statute as one refusing trial by jury is one in derogation of sovereignty, it must be construed in favor of the sovereign and against the subject, which is nothing but a repetition of the use of the words "sovereign" and "subject" in the ancient rule applicable in the courts of Great Britain. Who is the sovereign in the United States? and who is the subject? The United States has sovereignty in the sense of a paramount government, but is not a sovereign in any feudal or monarchical sense; and it has citizens and inhabitants who are not subjects in any feudal or monarchical sense. The use of the words "sovereign" and "subject" have been adopted and applied from the vocabulary of English law, but not with the meaning they have in British statutes and decisions.

[8] The general rule is that all statutes in derogation of common law—that is, of common right—are to be strictly construed, and, if such be the proper rule, any statute which is in derogation of the common right of trial by jury should not be given such construction if it can be avoided.

It does not seem necessary here to repeat the analogies and consideration of all the adjudicated precedents. It is not to be denied that they are conflicting, and (it is not too strong to say) almost irreconcilable. The general rule to be gathered from them is that there is no such thing as personal sovereignty in the United States, and that all laws and rules of England or the kingdom of Great Britain, which were sustainable upon the ground that they affected the personal privileges, rights, and immunities of a personal sovereignty, are not of force.

The rights and privileges, as against the government of the United States, which are of force, are those which are based upon the reasons that they are necessary for the performance of the public duties of the administration for the time being, and anything that would tend to endanger or destroy that, by preventing the carrying on of the government in war and peace, according to the injunctions of the constitutional contract forming the basis of government and order; and such are enforced, not because of any personal attribute, but as necessary for the continuation of the government and effectuation of its ends and purposes.

The statute under which this action is brought, if it does not by the language used expressly permit trial by jury, in no wise prohibits it; and it would seem that, if ordinarily the party would be entitled to a trial by jury, the inference would be that there should be a special prohibition to deprive him of it.

[9] If, however, the case were one in which the court might have the option or the power to try the case without the intervention of a jury, because the declaration of the statute is that the United States District Courts shall have jurisdiction to hear and determine the controversy—if under that it be held that the proceeding is similar to an equity proceeding, and the matter may be tried by the court without the intervention of a jury, then likewise the equitable rule would come in that the chancellor has a right to submit the question to a jury for the assistance and information of his conscience in coming to his conclusions; and in the opinion of the court the issue in this case is among those issues, like that of assessing damages in an equity suit, or ascertaining title in an equity suit—one which should be submitted to a jury.

For all these reasons, the court is of the opinion that its order in this case, filed May 28, 1920, referring the matter to a jury, was correct and proper; and the motion to modify, change, or revoke the same is accordingly refused.

In re ST. LOUIS & TENNESSEE RIVER PACKET CO.

(District Court, E. D. Missouri, E. D. September 9, 1920.)

No. 4953.

1. **Shipping ⟸209(3)—Evidence held to show sinking of steamboat was due to negligence of crew.**
   Evidence that a steamboat struck an obstruction and sank 50 yards outside of the channel, near a point where there had been a snag visible above the water for several months, *held* to warrant the inference that the vessel struck the snag, and that the cause of the accident was the negligence of the crew.
2. **Admiralty ⟸23—State statute, penal only in part and allowing damages for death, can be enforced.**
   If it be doubtful whether admiralty courts will enforce a claim on a penal statute, they will enforce a claim founded on Rev. St. Mo. 1909, § 5425, allowing penalty and damages for death caused by negligence of a steamboat crew, which has been held by the state court penal to the extent of the minimum allowance, and compensatory as to any allowance above the minimum sum.
3. **Shipping ⟸209(2)—Insurance money need not be paid into court to secure limitation of liability.**
   The owners of a foundered steamboat need not, in order to secure limitation of liability, pay into court the insurance money on the steamboat collected by them, as part of their interest in the vessel and pending freight.
4. **Shipping ⟸208—Liability may be limited, where loss was due to negligence of crew.**
   The mere fact that the loss of a vessel, shown by the evidence to have been seaworthy and manned by a competent crew, was occasioned by negligence of the crew in the navigation thereof, does not establish privity or knowledge of the owners, so as to preclude limitation of their liability.

In Admiralty. Application by the St. Louis & Tennessee River Packet Company for limitation of its liability as owner of the steamboat St. Louis. Decree entered limiting liability.

Thomas K. Skinker, of St. Louis, Mo., and Charles K. Wheeler, of Paducah, Ky., for libelant.

Douglas H. Jones and James J. Connell, both of St. Louis, Mo., for claimants.

FARIS, District Judge. This is a proceeding in admiralty, by which petitioner, a corporation, and former owner of the foundered steamboat St. Louis, seeks to have decreed a limitation of its liability, under sections 4283–4287, R. S. U. S. (Comp. St. §§ 8021–8025), for all damages accruing through the sinking of said steamboat, and to enjoin all claimants from prosecuting actions for loss or damage, except in this court under the applicatory statutes and proceedings. The St. Louis, on its return voyage to the city of St. Louis from certain Tennessee river points, about 1 o'clock in the morning of September 2, 1918, struck some unknown obstruction in the Mississippi river at a point 22 miles south of the city of St. Louis and sank. At the time she sank she was in the channel of the river. On this point the proof

discloses that the place at which she came in contact with the obstruction, which caused her to sink, was some 150 feet east of the east limit of the channel. Limitation of liability is contested here by one E. B. Samuels, as the guardian and curator of certain infant children of one Nora R. Robertson, deceased, who has come in, pursuant to process, to answer the libelant's petition, as also by others, touching whose claims, however, no separate discussion need be set out. Decedent, a passenger upon the St. Louis, lost her life by drowning when the boat sank, as a result, it is averred, of libelant's negligence. This causal negligence is averred, among numerous other charges thereof, which it is not necessary to mention, as consisting (a) in permitting the boat to get out of its course in the darkness, and (b) in striking a snag which had for a long time prior to the casualty been in the river, where it either was seen, or could easily have been seen, by the crew in charge of the boat. There are 14 other charges of negligence. Some of these may, upon both the law and the facts, be well taken; some of them, obviously, are not well taken, either upon the law or the facts. Regardless of this, however, I deem it unnecessary to consider for the purposes of this case any except the 2 above referred to, and these I find it necessary to consider together.

When the boat struck, she was in deep water. The evidence shows that the channel is at this point some 500 yards wide. She struck within 50 yards of the east side of the channel. At or near this point there had lain for a long time a snag, which at the stage of water prevailing was visible above the water. Numerous witnesses say that this snag had been so visible for many weeks; some say for many months. It is true that there is no direct evidence that the boat struck this particular snag. But she sank right near it, almost right by it. Her sinking is conceded to have been due to striking an obstruction, which ripped her hull open, and no other obstruction of any sort is shown to have been in the vicinity. No particular effort as disclosed by the evidence seems to have been made in order to accurately determine the precise cause of her loss, or indeed the precise facts of the casualty. Some excuse is found for this, in the fact that in a day or two after she sank the river rose rapidly and removed the snag, or covered it up, and also tore away and destroyed the wreck.

[1] I. I find from the evidence that the fair inference of fact to be deduced from the circumstances is that the boat struck a snag which had long lain in the edge of the channel at this point, and which either was known to be there, and to be a menace to navigation, or ought to have been so known to the crew in charge of this boat. I conclude from this that the sinking of the boat was due to the negligence of the crew in charge thereof, and that cæteris paribus libelant is liable for the ensuing damages.

[2] The statutes of the state of Missouri provide that—

"Whenever any person * * * shall die from any injury resulting [from] or occasioned by the negligence of any master, pilot, engineer, agent, or employé whilst running, conducting or managing any steamboat, or any of the machinery thereof, * * * the corporation * * * in whose employ

any such * * * master, pilot, engineer or driver shall be at the time such * * * injury is received, resulting from or occasioned by any defect or insufficiency, * * * negligence or criminal intent above declared, shall forfeit and pay as a penalty, for every such person * * * or passenger so dying, the sum of not less than two thousand dollars and not exceeding ten thousand dollars, in the discretion of the jury, which may be sued for and recovered * * * by the minor child, or children of the deceased." Section 5425, R. S. of Mo. of 1909.

This so-called penal sum of the Missouri statute has been held by the Supreme Court of Missouri to be both penal and compensatory. Boyd v. Missouri Pacific Ry. Co., 249 Mo. 110, 155 S. W. 13, Ann. Cas. 1914D, 37; Johnson v. Railroad, 270 Mo. 418, 193 S. W. 827. If it be doubtful whether courts of admiralty will enforce a claim bottomed upon a mere penal statute, I take it that such doubt should be resolved in favor of the claimant, where the statute invoked is held to be penal, up to the sum of $2,000, the minimum amount of recovery permitted, and compensatory thereafter, up to $10,000, the maximum amount of recovery permitted.

So much is said upon the merits, on the theory that no claimant herein sought to be enjoined, and against whom libelant seeks to have its liability limited, will have any standing to contest such limitation of liability, unless such claimant has a valid, or at least a colorable, cause of action. I conclude there is a valid claim in favor of the claimant Samuels, as guardian and curator of the minor children of the decedent, which claim he is entitled to present before the commissioner for allowance.

II. Coming to the question of the right of libelant to have limitation of its liability decreed under the statutes invoked (sections 4283–4287, R. S. of U. S.), I am constrained to conclude that the limitation prayed for ought to be decreed. The evidence shows a full complement or crew of competent officers, as well as the seaworthiness of the boat, for she was staunch, practically new, and well found. It also shows statutory clearances and the fact that all statutory requirements as to a full crew had been complied with, and that all requisite life-saving appliances were on board. I need not go further into that.

It is contended, however, that limitation of liability ought to be denied here, because (a) the casualty was caused by the negligence of the crew in charge of this boat, and (b) because the insurance on the boat, amounting to $22,500, was collected by libelant, but not turned over to the trustee as constituting any part of the owner's interest in the vessel and pending freight.

[3] There is no sufficient evidence that, aside from the insurance money collected, the owner's interest in the vessel and all pending freight have not been properly turned over to the trustee. I find that as to this libelant has in all things complied with the requirements of the statute. In passing, it may be said that the contention of this claimant touching the alleged statutory duty of libelant to turn over the insurance money collected, as a condition precedent to a decree for limitation of liability, has already been struck out under the authority of The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134, which case I have felt it my duty to follow, while taking

leave to doubt both its logic and conclusion. This contention is therefore disallowed, solely on authority of the Case of City of Norwich, supra.

[4] The question whether the fact that the crew were guilty of negligence (which finding is at least necessary to establish the right of claimant to participate in the assets if a limitation shall be decreed), will, at the same time, preclude the granting of a limitation of liability, seems to be equally as well settled by the authorities against the contentions of claimant. Deslions v. La Compagnie Générale Transatlantique, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; La Bourgogne, 139 Fed. 433, 71 C. C. A. 489. In the case of Deslions v. La Compagnie Générale Transatlantique, supra, 210 U. S. at page 122, 28 Sup. Ct. at page 673, 52 L. Ed. 973, this was said by the Supreme Court of the United States:

"Without seeking presently to define the exact scope of the words 'privity' and 'knowledge,' it is apparent from what has been said that it has been long since settled by this court that mere negligence, pure and simple, in and of itself does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute. And nothing to the contrary is properly to be deduced from the case of The Main, 152 U. S. 122, so much relied upon in argument, for that case did not purport in the slightest degree to overrule or qualify the previous decisions, and was concerned, not with the meaning of the words privity and knowledge, but with the rule to be applied in determining what constituted pending freight within the meaning of the law for the limitation of liability. And this is also true of the English cases which were cited in the opinion in that case. It may be that there are general expressions found in some cases in the lower federal courts, decided both before and after the Hill Case, which lend color to the assumption that privity and knowledge as defined in the statute is but the equivalent of mere negligence. Such of the cases relied upon, however, as were decided before the authoritative interpretation of the statute in the Hill Case, were necessarily overruled by that decision, and so far as those decided since may be inconsistent with the previous rulings of this court, they are clearly not entitled to weight."

The points discussed dispose of all the decisive questions in the case. I conclude (a) that the prayer for limitation of liability should be granted; (b) that the casualty—that is, the loss of the vessel—was proximately caused by the negligence of the crew in charge of her; (c) but that such negligence and the result thereby occasioned were not done or had with the privity or knowledge of the owner of the vessel; (d) that the petitioner has duly surrendered all its interest in the St. Louis and her pending freight, by the transfer heretofore made by it to the trustee; (e) that the claims filed in the cause, including that for negligently causing the death of Nora Ramer Robertson, be referred to the commissioner herein, to take testimony as to the amount of such claims, and report upon the same to this court, together with his opinion, with all convenient speed; and (f) that all claimants who are defendants in this cause be enjoined from prosecuting claims in any court, or jurisdiction other than this court, and before the commissioner in this cause and in this behalf appointed and designated.

Let a decree be drawn and entered accordingly.

THE APALACHEE. THE WABAN. THE CECELIA.

(District Court, E. D. South Carolina. May 28, 1920.)

No. 787.

1. **Salvage ⇐19—Success of one of two vessels under common management in common undertaking credited to both.**
   Where two steam tugs under common management were engaged in a common undertaking of salvage, the success of one of them after the other was disabled by accident is to be credited to some extent, at least, to the other.

2. **Salvage ⇐30—$10,000 and damages sustained awarded for relieving vessel stranded on sand in no great danger.**
   Where steam tugs aided in pulling off a vessel worth $450,000 from sand, where she was stranded, but it was doubtful whether the final result was not attained by the vessel alone, and the operation involved no great danger, $10,000 may be awarded as salvage, in addition to the damages sustained by the tugs.

3. **Salvage ⇐38—Apportioned between owners and crew in ratios of four-fifths and one-fifth.**
   A salvage award of $10,000 will be distributed, 80 per cent. to the owners of the salvaging tugs, and 20 per cent. to the crews, in the proportion of the monthly wage of each member.

In Admiralty. Libel by Robert H. Lockwood, manager of the steam tugs Waban and Cecelia, against the British tanker Apalachee, her engines, etc., for salvage. Salvage awarded libelant.

Miller, Huger, Wilbur & Miller, of Charleston, S. C. (Alfred Huger, of Charleston, S. C., of counsel), for libelant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, and Buist & Buist, of Charleston, S. C. (Robert S. Erskine, of New York City, of counsel), for respondent.

SMITH, District Judge. This is a proceeding in rem, brought by the libelant against the British tank steamer Apalachee. Libel was filed December 28, 1918; the vessel was duly arrested, and has been released on stipulation. The Anglo-American Oil Company, as the owner of the steamship Apalachee, has appeared as claimant, and the steamship has been released on bond.

The cause, being at issue, came on to be heard. Testimony has been taken, and the cause has been duly heard on the merits. From the testimony it appears that on the 24th of December, 1918, the British steamship Apalachee was on its way to the port of Charleston to receive bunker coal. The Apalachee is an iron tank steamship of about 4,200 tons, about 340 feet long, and with a depth of a few inches over 30 feet, and beam of about 44 feet. The value of the Apalachee was $450,000.

Off the coast of South Carolina, on the morning of December 24th, while in a fog, the vessel lost her bearings and grounded near the entrance of North Edisto Inlet at 11 a. m., on the coast near Charleston, about 2 miles from the shore. After she grounded, the captain attempted to extricate her, but found that she was unable to work, so he wirelessed to Lloyd's agent, in the city of Charleston, S. C., of his

condition, and requested that a tug or tugs be sent to his assistance. Upon receipt of this wireless, Mr. James H. Small, Lloyd's agent in Charleston, went to Capt. Robert H. Lockwood, who was the managing owner or agent of two steam tugs, called the Cecelia and the Waban, of the port of Charleston, and occupied in doing the usual business of tugs at that port. The value of each of these tugs was $65,000, and they were kept equipped, as far as tugs of that character can be, with the necessary apparatus for assisting vessels in distress off the coast and the performing of salvage services. The time of the notice was Christmas Eve, about 6 or 7 p. m., and with some hesitation, and after some discussion as to being able to go at that time and at that period of the year, the manager, Capt. Lockwood, finding that he could get no assistance from tugs at the nearest port, Savannah, started with both his tugs to where the steamship was said to be stranded, to assist her.

At the time that the steamship stranded, she was in water ballast and drew as her mean draft about 18 feet. When the captain found that his vessel was hard aground, and she could not extricate herself, he directed that the water ballast be pumped out of the ship, and succeeded, before the tugs came, in pumping out so much at least of the water ballast as would lessen his draft from 18 feet to 13½ feet, or about 14 feet. At the time the vessel stranded, the water was calm; but the wind thereafter rose, and when the Waban and Cecelia started to her assistance, it was blowing quite a stiff breeze, with an average velocity, according to the weather reports, of 14 miles an hour, with a maximum velocity of 23 miles for 5-minute periods. The direction of the wind was from the southwest. The sky was cloudy.

The vessel stranded at near high water on the 24th of December, and the tugs arrived in her vicinity in the neighborhood of 11 p. m., about 12 hours after the vessel had taken the ground. When the tugs arrived in the vicinity, after a little difficulty (as the night was dark), they located the ship, and found her lying stranded, with a considerable sea running. The ground, at that place where the vessel lay, is a sandy shore, shelving gradually towards high land; and when the Cecelia came up to the boat, according to the testimony of the captain of the Cecelia, she was lying with a depth at her stern of not exceeding 12 or 13 feet. This would appear to be borne out by the circumstance that the Cecelia touched ground several times in the sea, whilst endeavoring to put a rope to the vessel and tow her off, which she would not likely have done, had the depth at that point been as great as 18 feet. It would appear that after the captain had pumped out his water ballast, so as to lessen his draft by some 5 feet or over, the vessel had gradually drifted in nearer the shore, so that at high water she was lying aground with a depth at her stern of say about 13 to 14 feet.

The Cecelia, with some difficulty, got a hawser to the ship, and started to tow the ship towards deep water at about 11 p. m., or a little later. After towing a short time, say half an hour or three-quarters of an hour, the hawser broke. With some difficulty, the Cecelia again got a rope to the ship and started to tow and the hawser again broke. In the meantime the tug Waban had come up and approached the ship

as near as she safely could do in the sea, so as to get a rope to the ship to help assist in the towing. Whilst endeavoring to do so, the sea was such that the Waban struck heavily on the bottom, bent and drove her shoe up so high that it involved her propeller, so that the propeller would not work, and she thereupon drifted up to the steamer, where she was in a position where she would in the sea be beaten against the side of the steamship, and as the steamship was an iron ship and the Waban an iron tugboat, there was some possibility, if the thumping of the sea continued for any time, that either the ship's plates would be injured or that the Waban would have a break in her side and possibly sink.

The captain of the Waban, therefore, called to the captain of the Cecelia, on which tug the manager, Capt. Robert H. Lockwood, was, to come and assist him. The Cecelia, whose hawser had just broken a second time, went to the assistance of the Waban, got a rope aboard, and then towed the helpless Waban about a mile or so out in deep water, where she could anchor, if necessary, and wait until she could be further towed by the Cecelia. The Cecelia then went back to the steamship and put on another rope, which was secured to the steamship, and attempted to tow her, and the rope broke again, but was again made fast to the steamship.

The position of the vessel, when the Cecelia first came up to her and when she grounded, was that she was lying in a position about parallel to the line of the shore, northeast and southwest. The Cecelia at first attempted to tow the steamship from her stern, attempting, as it were, to work the stern from side to side, ease it off from the place where it seemed to be aground, and pull the steamship off; but the last time, when she towed, she put her hawser onto the head of the ship, and attempted to pull her head around. This she was successful in doing, to the extent that she pulled it around, so as to bear nearly east, instead of northeast, and to head directly for deeper water, instead of heading to the shore, or alongshore.

The tide having fallen at this time so low that to make any further pulling at that time useless, the Cecelia left the boat and went to Charleston for supplies, so as to return to the stranded vessel upon the next high water; high water being the only period at which she could with any success attempt to extricate the steamship. On the way, she looked for the Waban, but, not seeing her, went on to Charleston alone, and, after staying there for a short time, she came back to the steamship.

In the meantime the Waban, after some work, had forced the shoe down sufficiently to allow the propeller to move slowly, and started to go back to Charleston slowly under her own steam. The Cecelia arrived at the place where the steamship was stranded next morning, just about high water; that is, about between 12 m. and 1 p. m.

When she arrived, the vessel was headed straight out to sea, towards deeper water, and her engines were moving under her own steam. Whether or not she was at that time extricated and floating is a matter of the most direct conflict of testimony between the manager of the Cecelia, Capt. Robert H. Lockwood, and the master of the steamship.

The master of the steamship says that, after her bow had been shifted so as to point to deep water, at high tide next morning, the morning of the 25th, Christmas Day, he got his engines to work and came off the strand; that after he was off the Cecelia came up, and they took a hawser from her, and the Cecelia assisted her by helping her out into deep water, but assisted her only in the sense of towage, as at that time she was floating and wholly free of the strand. The manager of the Cecelia testifies that the vessel was not yet extricated; that he heaved his hawser to the steamship, where it was made fast, and then pulled her directly in line as she was going, and with the assistance of the Cecelia she was finally extricated from the bottom.

The Cecelia pulled for a very short time on that occasion; the vessel came off of the strand, and then proceeded wholly under her own steam to Charleston Harbor, entered the harbor, and there made fast. It will be seen, therefore, that the whole question whether or not it was a successful salvage operation in any respect, so as that the salvors are entitled to remuneration, depends upon two questions:

First. Whether the Cecelia, in pulling the head or bow of the ship, so as to face eastward, or nearly so, in the early morning of the 25th of December, in any way rendered an assistance which contributed to her extrication from her position.

Second. Whether the Cecelia, shortly after noon on the 25th, by her towing, assisted the vessel, then still being aground, in being extricated from her position and being able to move out to sea under her own steam.

If these services, one or either of them, contributed to the rescue of the vessel, then to the extent of that contribution the salvage service was successful. The position of the vessel was that of a vessel stranded in the face of the Atlantic Ocean. She was stranded upon a shelving, sandy shore. The conditions of the weather were such as not to expose her at that time to any possibility of breaking up, nor was there much danger of a vessel of her size and strength being broken up by the action of the waves on a shore of the character upon which she lay. Her great danger was to be so driven up towards the beach and buried in the surrounding sand as to be either inextricably involved, or so involved as not to be capable of extrication without great labor and expense. There was no immediate danger, either to life or property, so far as the stranded vessel was concerned, except the danger that necessarily surrounds a stranded vessel, stranded in the face of the ocean.

So far as the salvors are concerned, the weather does not appear to have been very tempestuous, and there was no danger to life or property, except as involved in the chance of the tugs being injured by being thumped against the bottom by the seas. It was necessary for the tugs to approach the ship in the sea that existed, in order to obtain a line from her, or heave a line to her, to which a hawser could be attached, and then drawn in and made fast to the ship, or to the tug, as the case might be. To approach the ship near enough for this purpose, it was necessary for them to venture in such shallow water

that, with the sea running, there was danger of injury to property from the striking of the tugs upon the bottom.

The testimony of the manager on board the tug Cecelia is that that tug several times struck, although apparently not hard enough to do damage; but in the case of the Waban she certainly struck hard enough to injure her shoe and put an end to all possibility of her propeller moving, and of her having any control of herself; and then the danger she ran was that, if there was a collision between herself and the ship, she might be injured to the extent of possibly sinking. The night was dark. The operation was at night, and that is always an added danger under such circumstances. Still the danger does not seem to have been great, either to life or to property, of the salvors; but, if not great, it did result in injury to the Waban, amounting to some $1,200, and the loss from the breaking of the hawsers of the Cecelia was estimated at $1,000, or $2,200 altogether.

The case, in many respects, is not unlike the case of The Peruviana, a salvage case in which a decree of this court was filed on the 2d day of August, 1912. In that case the Peruviana, a British vessel of 4,000 tons tonnage, laden with a full cargo, went ashore on the coast of South Carolina, off the entrance of Stono Inlet, in about 16 feet of water, on or near the shoal constituting the sea breakers at the mouth of the channel entrance. She was on her way to Charleston, but at the time of the stranding was out of her proper course. The point at which she stranded was about 3 miles from the shore in a direct line. The then weather conditions were cold to an unusual severity. She signaled for assistance, and after some delay three tugs, the Protector, the Waban, and the Cecelia, went to her assistance. They pulled for about 4 hours on the first tide, and on the next tide towards high water again took hold of the ship, whose engines were started, and after some endeavor the ship was pulled off, was able to float, and moved under her own steam, but was also assisted by one of the tugs, which assisted her by towing until she arrived in the port of Charleston. The value of the Peruviana and her cargo was much less than the value of the Apalachee, as it was then agreed to be only $240,000; and the then value of the three tugs was only about $90,000, as against the present value of $130,000 for the two tugs.

The time engaged in the extrication of the vessel was in a rough way the same, and the circumstances very similar, except that admittedly the vessel in that case could not have extricated herself without the aid and assistance of the tugs; and in the present case it is a question of strong dispute whether or not the vessel did not actually extricate herself, without the aid and assistance of the Cecelia. If, however, the vessel had already extricated herself when the Cecelia arrived, about noon on the 25th, it does not seem probable that the master of the steamship would have allowed the tug to put her hawser aboard and assist in pulling her. If he was already afloat, moving out to sea under his own steam, there was no necessity for himself incurring the obligation of a further salvage service when he was already in safety. The likelihood, therefore, is that he was not entirely free when the

Cecelia came, and he took her hawser aboard and allowed her to assist in towing him, as he was endeavoring with the steamship's own engines to extricate her; but the point is not free from doubt.

There is a difference in the cases, however, as stated before, that in one case the efforts of the salvors were admittedly successful, and the safety of the ship was entirely due to their success, while in the present case that result is involved in doubt. The work done by the Cecelia on the last occasion was quite limited. That does not take away from any meritorious service performed on the first occasion in swinging the head of the steamship off shore and towards deep water, thereby enabling the steamship to work her engines and propeller to most advantage to extricate herself. The ship was stranded and in danger; she herself called for help; the salvors at once responded, and spared no efforts they could make to extricate the ship from danger. If these efforts in any wise contributed to the successful saving of the ship, the case is one for the allowing of salvage remuneration.

[1] Inasmuch as both tugs were under the same management, the same control, and went for a joint operation to effect the same result, they must be looked upon as conducting one salvage operation; and the success of the Cecelia must be to a certain extent at least credited to the Waban. The amount allowed for the total salvage in the case of the Peruviana was $9,000 among the three tugs, with an additional amount of $400, allowed to the person who procured the assistance for the vessel, making $9,400 in all. At the same time, the prices of all supplies and the cost of labor and the expenses of operation are much enhanced between the date of the salvage of the Peruviana and the date of the performance of the salvage in this case.

[2] The great difference between this case and that of the Peruviana is that the Peruviana was more hopelessly aground, took more effort to extricate her, and admittedly owed her extrication to the labors of the salvors; while here the final extrication by the assistance of the tug is disputed, and at any rate involved very little effort on the part of the tug, as assistant only to the work done by the ship herself. After a careful consideration of the whole case, the court is of the opinion that it is a case which calls for the allowance of salvage services, and that an allowance to the two tugs of $2,400, to cover the damages inflicted, and of $10,000, to cover the compensation to be paid for the strictly salvage services, or $12,400 in all, would be a fair and sufficient allowance for salvage; and it is so decreed.

As the two tugs appear to have been acting under a common management and for a common purpose, and ask only for a joint allowance, the apportionment of this salvage among them and their separate crews will not now be decreed, unless the two tugs are unable to apportion it among themselves, in which case the court will apportion it.

[3] With regard to the proportion of the salvage of $10,000 allowed to be paid to the crews, under the principle adjudicated in Conekin v. Lockwood (D. C.) 231 Fed. 541, and Rivers v. Lockwood (D. C.) 239 Fed. 380, it will be distributed 80 per cent., or four-fifths of the

salvage, to the owners of the tugs, and 20 per cent., or one-fifth to the crews of the two tugs, in the proportion of the monthly wage of each member of the crew.

The costs are to be paid by the defendant.

UNITED STATES ex rel. WEINSTEIN et al. v. UHL, Assistant and Acting Immigration Com'r.

(District Court, S. D. New York. January 14, 1920.)

No. M5-203.

1. Habeas corpus ⊂=33—Alien, arrested for deportation and refused release on bail duly fixed by proper authority, entitled to release.

Where a warrant issued by the Department of Labor for the arrest of an alien for deportation provides, in accordance with Immigration Act Feb. 5, 1917, § 20 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼k), that pending further proceedings the alien may be released from custody on furnishing satisfactory bond in the sum of $10,000, the refusal of the immigration officers to accept such bond when tendered renders the detention of the alien thereafter without authority and unlawful, and he is entitled to release on habeas corpus.

2. Aliens ⊂=54—"Hearing" and "hearings" in proceedings for release on bond in deportation proceedings include preliminary hearings.

The word "hearing," or "hearings," as used in Immigration Act Feb. 5, 1917, § 20 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼k), providing for the release of aliens taken in custody on bond conditioned on their production when required for hearing, or hearings, in regard to the charges on which they were taken into custody, and for deportation if unlawfully within the United States, include any hearing, whether preliminary or otherwise.

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

Habeas corpus, on petition of Sarah Weinstein, mother of Gregory Weinstein, and on petitions of Max Gendlin and others, against Byron H. Uhl, Acting Commissioner of Immigration at Ellis Island. Writs granted on condition.

Charles Recht, of New York City, for relators Weinstein and others.

Harry Weinberger, of New York City, for relators Gendlin and others.

Francis G. Caffey, U. S. Atty., and John E. Joyce, Asst. U. S. Atty., both of New York City, for respondent.

KNOX, District Judge. Upon December 30, 1919, the Acting Secretary of Labor issued a warrant of arrest for an alien named Gregory Weinstein, upon the alleged ground that said alien had been found in the United States in violation of the Immigration Act of October 16, 1918 (Comp. St. Ann. Supp. 1919, §§ 4289¼b[1]–4289¼b[3]), for the following among other reasons: That he is a member of or affiliated with an organization that entertains a belief in the overthrow by force or violence of the government of the United States; that he

is a member of or affiliated with an organization that advocates the overthrow by force or violence of all forms of law; that he is a member of or affiliated with an organization that advocates the overthrow by force or violence of the government of the United States; that he is a member of or affiliated with an organization that teaches the overthrow by force or violence of the government of the United States; that he is a member of or affiliated with an organization that teaches opposition to all organized government; that he is a member of or affiliated with an organization that entertains opposition to all organized government. Thereupon the warrant authorized the Acting Commissioner of Immigration at Ellis Island, N. Y., to take the said alien into custody and to grant him a hearing to enable him to show cause why he should not be deported in conformity with law. After the recital of some further matter, not now material, the warrant contains this provision:

"Pending further proceedings, the alien may be released from custody upon furnishing satisfactory bond in the sum of $10,000."

Upon January 5, 1920, the said Weinstein was taken into custody. Upon January 10, Sarah Weinstein, upon behalf of her son, Gregory, presented to this court a petition for a writ of habeas corpus, in which it was alleged upon information and belief that the relator was given a hearing before the inspectors of immigration upon January 8, 1920, and that at the conclusion of said hearing bail in the sum of $10,000 was tendered to one of the officials upon Ellis Island, whereupon counsel was informed that the said hearing had not been satisfactory to the government officials, for the reason that the relator had refused to answer the questions of the inspectors of immigration, upon the ground that he might be incriminated thereby.

Attached to the petition is an affidavit made by one Rose Weiss, an attorney at law, wherein the foregoing allegations are substantiated with considerable detail. In this affidavit the further averment is made that one of the officials at Ellis Island said that he did not consider the hearing a "proper hearing," and that until the said Weinstein answered the questions (put to him by the inspectors) his release on bail would not be permitted. Upon this petition, and its supporting affidavits, a writ issued, and a return was made upon January 13, 1920.

The return does not controvert the matter hereinbefore recited as being contained in the moving papers. It does, however, ask that the writ be quashed upon the ground (among a number of others) that the petition does not allege facts sufficient to show that the proceedings by the Department of Labor upon its warrant of December 30, 1919, have been terminated; the theory being that until said proceedings, or at least a preliminary hearing, have been completed, or have been protracted over an unreasonable length of time, the writ of habeas corpus will not lie.

The return then proceeds to recite the facts of the relator's arrest, and alleges that upon January 8, 1920, a hearing was commenced and the warrant of arrest read to the relator. The hearing continued upon January 9, but has not, it is averred, been completed. It is also stated

that the hearing will be speedily resumed and continued until all the evidence in support of the charges contained in the warrant have been presented, and until Gregory Weinstein shall have had a full and fair opportunity to present such evidence as he may be advised.

A transcript of the hearing so far had is made a part of the return, and from this it appears that the relator, aside from giving his name, age, and country of birth, refused to answer all material questions put to him, for the alleged reason that his attorney was not present at the hearing. Upon January 10 the alien was asked if he was ready to answer the questions, and he replied:

"As I stated yesterday, I want previously to consult with my lawyer."

The inspector then addressed the relator as follows:

"I will adjourn your case until 10:30 Saturday morning, January 10, 1920. I have informed you fully as to the charges upon which you are held at Ellis Island, and also regarding the rule promulgated by the Acting Secretary regarding the appearances of counsel in your behalf. Your hearing upon the 10th may be the last opportunity that will be afforded you to show cause, as directed by the Acting Secretary, why you should not be deported in conformity with law."

[1] The writ of the court having intervened upon January 10, the case was adjourned subject to the call of the government. The rule promulgated by the Acting Secretary, and referred to by the inspector, is as follows:

"Preferably at the beginning of the hearing under the warrant of arrest, or at any rate as soon as such hearing has proceeded sufficiently in the development of the facts to protect the government's interests, the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that thereafter he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented or adduced by the government."

In passing I may say that I do not consider the validity, reasonableness, or propriety of this rule to be here involved. The question for determination is whether upon the foregoing facts the relator is now entitled to be released upon bail.

In order to reach a conclusion, I do not consider it necessary to enter upon a discussion as to what are the constitutional rights of an alien arrested for deportation, which, of course, were it not for the Immigration Law itself, would involve the alien's right to bail. I think the present litigation may be decided solely upon the Immigration Law; that is to say, upon the warrant issued, its provision for bail, and the refusal of the Ellis Island officials to abide thereby.

[2] Section 20 of the Immigration Law (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼k) now in force provides:

"Pending the final disposal of the case of any alien so taken into custody, he may be released under a bond in the penalty of not less than $500 with security approved by the Secretary of Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the

charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States."

I do not question in any degree the warrant upon which this alien has been taken into custody, nor do I intimate that it was incumbent upon the authority issuing the warrant to fix bail, nor do I pass upon the alien's right to the presence of counsel. My inquiry is solely as to whether, bail having been fixed, it must, in the absence of suggestion as to its insufficiency, be taken. The urgency of the present case and a number of others dependent upon it precludes a lengthy discussion of what appear to me to be the principles of law here applicable.

I appreciate fully the power and authority of the executive departments of the government in matters of deportation, and I should not consciously impair the lawful exercise thereof; indeed, its maintenance is of the highest importance. Nevertheless, when the Department of Labor exercises its authority, and in so doing accords to an alien rights and privileges which the law says may be accorded to him, I fail to see why the alien is not entitled to their enjoyment.

It is contended by the government that I have no jurisdiction in the instant case for the reason that, if the officials of the Department of Labor, in whose custody the relator finds himself, act improperly, the relator's remedy is by appeal to a higher authority within that department. I think the sufficient answer to this argument is that the warrant of December 30, 1919, is the only authority for the arrest of Weinstein; that this warrant, within itself, contained a limitation of the power to be exercised under it; and that to the extent that Weinstein is deprived of his liberty in excess of such limitation he is unlawfully detained, and is entitled to assert his rights by way of habeas corpus.

Suppose, for instance, the proper authority at Ellis Island had, after hearing, found that an alien in a given case was unlawfully within the country and should be deported, and that the alien had exercised his right of appeal to the Secretary of Labor, who, upon examination of the record, reversed the finding of the local officials and ordered the alien released. Continuing the illustration, suppose that, upon receiving the order of the Secretary, the Commissioner of Immigration, either arbitrarily or otherwise, continued the alien in custody; could it then properly be argued that the alien should appeal for relief, not to the courts, but to the Secretary of Labor? I think that in such case habeas corpus would undoubtedly lie; and, if so, it will lie here. In the case before me the Acting Secretary of Labor has directed to be done a certain thing which the Commissioner has failed to do, and his failure so to do gives this court jurisdiction.

It is suggested that the provision for bail contained in the warrant becomes operative only when the government has completed its preliminary examination. The section of the Immigration Law above quoted says that the bond shall be conditioned that the alien shall be produced when required for a hearing or hearings. These words, beyond doubt, include any hearing, be it preliminary or otherwise, and I am forced to the conclusion that the extent of the jurisdiction of the respondent over the relator was to take the latter into custody, and,

pending his hearing, upon the presentation of a good and sufficient bond in the sum of $10,000, properly conditioned, to admit him to bail. This has not been done, and the present restraint of the relator is therefore unlawful. If I am correct in this conclusion my right to now act in the premises would seem to be supported by Gegiow v. Uhl, 239 U. S. 3, where at page 9 (36 Sup. Ct. 2, 3 [60 L. Ed. 114]) the court said:

"* * * And when the record shows that a commissioner of immigration is exceeding his power, the alien may be released on habeas corpus."

The relator here, as was the case in Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, was imprisoned for deportation without the process of law to which he is given a right. (True, Weinstein has the right as a matter of grace from the Department of Labor; it is, notwithstanding, a right.) In Re Greathouse, 10 Fed. Cas. 1059, No. 5,741, the relator was imprisoned under the judgment and sentence of the court before which he sued out his writ, and he claimed to be entitled to his discharge by virtue of the presidential proclamation of December 8, 1863. The application was resisted upon the ground that the court had no jurisdiction. The question was resolved to the contrary and the relator discharged. A right accorded by the executive himself was in controversy, and the court held that it had the right to vindicate the President's act of grace. Why, may it be asked, have I not the right here to validate and make real a lesser act of grace upon the part of an executive department?

I shall therefore sustain the writ, unless, as directed by the warrant of deportation, the Commissioner of Immigration forthwith admit the relator to bail pending the completion of the hearings to be accorded the relator.

The writs sued out by the relators Gendlin et al. are hereby similarly disposed of.

THE PENN.

THE LORD BALTIMORE.

(District Court, E. D. Pennsylvania. July 16, 1920.)

Nos. 7, 8.

1. **Maritime liens ⇐30—Furnisher charged with notice of terms of charter.**
A dry dock company, which furnished labor, material, and equipment for making stability tests of two steamers, ordered by government authority, but by no one authorized to represent the owner, and which had knowledge that the steamers were under charter, *held* bound by the terms of the charter, which required the charterer to pay all expenses, and not entitled to a lien, either under Act June 23, 1910, §§ 2, 3 (Comp. St. §§ 7784, 7785), or under the general maritime law.

2. **Maritime liens ⇐25—"Other necessaries," in statute, construed.**
The words "other necessaries," used in Act June 23, 1910, §§ 2, 3 (Comp. St. §§ 7784, 7785), relating to maritime liens for repairs, supplies, and other necessaries furnished to vessels, under the rule of ejusdem generis,

must be limited in their meaning to such things of the general nature of repairs and supplies as are fit and proper for the use of the ship.

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

In Admiralty. Suits by the Norfolk Shipbuilding & Dry Dock Corporation against the Steamers Penn and Lord Baltimore. Decrees for respondents.

Howard M. Long, of Philadelphia, Pa., for libelant.

Thomas F. Cadwalader, of Baltimore, Md., and John Cadwalader, Jr., of Philadelphia, Pa., for respondents.

THOMPSON, District Judge. The steamers Penn and Lord Baltimore were, at the time of the matters averred in the libel, owned by the Baltimore & Philadelphia Steamboat Company, and were under charter to Charles W. Harrison and his assigns, and were being operated by the Washington-Southern Navigation Company, under assignment of the charter party, as passenger boats on the Chesapeake Bay. In July, 1919, the Supervising Inspector General of the Steamboat Inspection Service of the Department of Commerce ordered a local steamboat inspector, George L. Taylor, to make stability tests of both vessels. The vessels were taken to the shipyards of the Norfolk Shipbuilding & Dry Dock Corporation, libelant, at Norfolk, Va., and the stability tests were made under the supervision of Inspector Taylor. The purpose of the tests was to ascertain the stability of the steamers by determining the GM, or the height of the metacenter above the center of gravity, and thereby determine the seaworthiness of the vessels for the carriage of an ascertained number of passengers.

In making the tests, small narrow-gauge level tracks were installed on the decks of the vessels athwartships. Small trucks loaded with weights of given amount were placed on the tracks, which were moved from side to side across the vessel, in order that, when moved to given distances from a center, the deviation from the perpendicular caused by the listing of the vessel through the weight of the loaded trucks might be noted through the use of plumb lines extending into the hold. The trucks were loaded with junk, scrap iron, and any weighty material which happened to be about the shipyard. The tests were made at night. For the labor employed, consisting of carpenters, joiners, helpers, laborers, machinists, and blacksmiths, and for the material and equipment used, amounting in the case of the Penn to $1,229.35, and in the case of the Lord Baltimore to $1,562.82, the libelant has caused the vessels to be attached under libels for the furnishing of materials and repairs, claiming liens against the vessels by the general maritime law and under the Act of June 23, 1910.

The Baltimore & Philadelphia Steamboat Company, as claimant, filed answers, denying that the materials, supplies, and repairs were furnished at the request of the owners of the steamers, denying that they were necessary and proper, denying that they were furnished

on the credit of the vessels or of their owners, and averring that they were furnished at the sole instance and request of C. W. Harrison, or his assign, the Washington-Southern Navigation Company, the charterer of the vessels, denying that they constituted a lien on the vessels, whether by general maritime law or by statute.

The answers further set up:

(1) The materials, supplies, and repairs were not furnished upon the order of the owner or owners of the vessels, or of a person by him or them authorized;

(2) The libelant knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party the person ordering the supplies was without authority to bind the vessels.

(3) That under the terms of the charter party, as the libelant, knew, or by the exercise of reasonable diligence could have ascertained, the charterer had agreed for himself or his assigns to provide and pay all expense.

(4) That the alleged materials, supplies, and repairs were not necessary, but were unusual and of such a character as to put the libelant upon inquiry as to the terms upon which the steamers were being operated.

[1] The answers put the burden upon the libelant of proving the authority of the person ordering the labor and material for the stability tests. This burden has not been met, as there has been no evidence to show upon whose order the work was done and the materials supplied. The Act of June 23, 1910 (Comp. St. §§ 7784, 7785), provides as follows:

Section 2: "The following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel."

Section 3: "The officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

It does appear, however, that Mr. Guy, the superintendent of the libelant company, knew that the vessel was chartered by a company that was running a new line between Norfolk and Washington from the Chesapeake & Ohio piers. It is apparent that the work done upon the stability tests was not strictly included within the term "supplies, repairs, or necessaries." The knowledge on the part of Mr. Guy was sufficient to put the libelant on inquiry as to the existence and the terms of the charter party, but the libelant failed to make any inquiry and furnished the work and supplied the material to make the tests without any inquiry whatever. Having, therefore, been put upon inquiry, and failing to make the necessary inquiries, the libel-

ant did not acquire a lien against the vessels, even assuming that the labor and material furnished came within the general head of "necessaries." The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710.

The services rendered in this case were not shown to have been necessary for the operation of the vessels, nor to have been a charge for which the owners would be liable under its charter party. While there may be a maritime lien for services rendered to a vessel, and there may be a presumption that such services were rendered on the credit of the vessel, such as in the case of salvage or pilotage services, whether such presumption arises, or whether the lien exists, depends on the nature of the services and the circumstances under which they are rendered. The Alligator et al., 161 Fed. 37, 88 C. C. A. 201. In that case Judge Grey said:

"There are maritime services which are usually rendered under circumstances which make them so essential to the movement of a vessel, and to the performance of her primary function, as an instrument of commerce, that the admiralty law presumes they are rendered on the credit of the vessel, in the absence of proof to the contrary, and creates a maritime lien in their favor, independently of the question whether it be a domestic vessel or not. Notable examples are the lien for pilotage services. The lien for seamen's wages, for towage services, and for salvage services. The reasons for the rule in these cases are obvious, and arise out of the necessities of the situation. * * * The peculiar exigency of the situation in all these cases, supplies the reason for the rule of presumption of lien, as it has been long recognized in the administration of the general admiralty law. The exigency for such services, as are above enumerated, so generally exists that the rule of presumption of lien is sometimes dissociated from the reason upon which it is founded. The service of a diver can be imagined as rendered under circumstances so exigent as to come within the reason of the rule of presumption of lien, as the service may have been necessary to prevent the immediate sinking of a vessel, but the service of the same diver in examining a sunken wreck, or the bottom of a ship lying in port, to discover whether its general condition required that the ship should be docked, would come within a different rule. So a towage service, as ordinarily performed, is a maritime service, which from the peculiar situation of the parties and of the circumstances of necessity surrounding it, and in the absence of proof to the contrary, creates a presumption of credit given to the vessel and a consequent lien. But why, where the relation of the parties and the circumstances attending the performance of the service are different from those ordinarily obtaining, should this same rule of presumption apply? If the reason ceases, why should not the law cease?"

[2] The words "other necessaries," used in the statute, must, under the rule of ejusdem generis, be limited in their meaning to such things, of the general nature of repairs and supplies, as are fit and proper for the use of a ship. The J. Doherty (D. C.) 207 Fed. 997. The libelant has failed to establish that the labor and material furnished were ordered by any one who under the law could bind the vessels by maritime lien. It has failed to show that they come within the terms of the Act of June 23, 1910. It does appear that the services were rendered and the supplies furnished under such circumstances as to put the libelant upon inquiry which would have shown that under the charter of the vessels the repairs and supplies were to be at the expense of the charterer.

The libels are dismissed.

PRIMOS CHEMICAL CO. v. FULTON STEEL CORPORATION.
In re GILBERT.

(District Court, N. D. New York. July 14, 1920.)

1. **Corporations ⇐565(1)—Corporate officer's consent to receiver's appointment does not estop him from enforcing claim for breach of employment contract.**
   Consent by a corporate officer, who had a contract for employment by the corporation, to the appointment of a receiver, does not estop him from enforcing against the receiver his claim of breach of his contract.

2. **Corporations ⇐565(1)—Officer's contract of employment with receivers held not to waive claim for breach of contract with corporation.**
   Where receivers for corporation had been appointed by a court without jurisdiction, an officer who made a contract with the receivers for continuing his employment did not thereby waive a claim against the corporation for breach of his contract with the corporation, since he was only performing his duty to minimize damages.

3. **Corporations ⇐76—Stock subscriptions, void for want of required payment, may be ratified.**
   A subscription for corporate stock, which is invalid, because not accompanied by a 10 per cent. payment required by Stock Corporation Law N. Y. § 53, may be ratified by a subsequent payment by the subscriber.

4. **Corporations ⇐565(5)—Evidence held to show payment by subscriber to corporation was not on a stock subscription.**
   Evidence *held* not to show that a payment by claimant to the corporation was a payment of a stock subscription, and therefore did not ratify the subscription, and render claimant liable for the balance.

5. **Corporations ⇐562(2)—Representations of stock subscriptions to others do not estop attack on validity.**
   Representations by a claimant that he had subscribed to stock of the corporation for which the receivers were appointed, made to others, who were thereby induced to subscribe for stock, do not estop the claimant from attacking the validity of the subscription, since the misrepresentations resulted to the benefit of the corporation.

6. **Corporations ⇐308(6)—Sales manager of steel corporation held entitled to commissions only on steel delivered.**
   Where the contract of employment of a sales manager for the steel corporation gave him commissions on orders which the corporation should fill, and which should be paid for, he was not entitled to commission for orders procured by him, which the corporation did not fill, in the absence of fraud or bad faith by the corporation.

7. **Corporations ⇐559(1)—Appointment in valid proceedings does not terminate contract of employment.**
   The appointment of receivers for a corporation in proceedings of a court which was without jurisdiction did not terminate the contract of employment of the sales manager of the corporation.

8. **Corporations ⇐565(1)—Claim for commission on prospective sales allowable, if its amount can be proved.**
   The sales manager of a corporation can recover from its receivers the amount of prospective commissions under his contract, if he is able to establish such amount by proof.

9. **Corporations ⇐565(5)—Wide latitude granted in permitting proof of prospective commissions.**
   On the hearing of a claim against receivers by the sales manager of a corporation, wide latitude should be permitted to the evidence received to determine the amount of prospective commissions; but, notwithstanding

such latitude, final decision is with the trier of fact whether the amount of prospective commissions had been established.

10. **Corporations ⟸565(5)—Evidence held not to sustain claim for prospective commissions.**

Evidence in support of the claim of a sales manager against the receivers for prospective commissions, tending to show the amount of the orders claimant could have procured, is insufficient to establish the right to such commissions, where sales manager's contract gave him commissions only on orders filled by the corporation, and there was no proof that it could have filled any orders.

11. **Corporations ⟸565(2)—Contract with sales manager held to fix minimum compensation.**

A contract of employment as sales manager of a steel corporation, which provided for payment of commissions, and guaranteeing the manager a drawing account of $8,500 a year in addition to his expense account, to be deducted from the amount of his commissions, entitles him to a minimum compensation of that amount, so that he can recover it from receivers of the corporation for the unexpired term of his contract.

In Equity. Suit by the Primos Chemical Company against the Fulton Steel Corporation for the appointment of receiver. Report of special master, allowing claim of Joseph M. Gilbert, affirmed.

See, also, 254 Fed. 454; 255 Fed. 427; 266 Fed. 945.

Bick, Godnick & Freedman, of Brooklyn, N. Y., for claimant.

Wm. A. Mackenzie and Charles E. Spencer, both of Syracuse, N. Y., for receivers.

RAY, District Judge. The special master has found the facts as follows:

"First. That on or about February 19, 1918, claimant, Joseph M. Gilbert, and Fulton Steel Corporation, entered into a written contract, Exhibit 1–A for the employment of claimant by Fulton Steel Corporation upon the terms and conditions and for the time as set forth in said Exhibit 1–A.

"Second. On or about April 1, 1918, claimant entered upon his employment with Fulton Steel Corporation pursuant to said contract, and about one month thereafter was elected and became a director and the vice president of said Fulton Steel Corporation.

"Third. That on or about April 19, 1918, Fulton Steel Corporation duly ratified and confirmed said contract, Exhibit 1–A.

"Fourth. That said claimant from April 1, 1918, continued to perform his duties and to render work, labor, and services for Fulton Steel Corporation pursuant to said contract, Exhibit 1–A, until on or about November 29, 1918.

"Fifth. On or about October 14, 1918, such proceedings were had herein in the United States District Court, Southern District of New York, that a bill in equity praying for receivership of said Fulton Steel Corporation was filed in said court, and said court appointed receivers of said Fulton Steel Corporation.

"Sixth. That on or about November 29, 1918, said receivers so appointed by said United States District Court, Southern District of New York, entered into a contract of employment, Exhibit 1–V, under and by virtue of which claimant performed work, labor, and services for Fulton Steel Corporation until on or about December 20, 1918.

"Seventh. That on or about December 17, 1918, such other proceedings were had in United States District Court, Northern District of New York, that a bill in equity was filed therein, praying for a receivership of said Fulton Steel Corporation, and thereupon said United States District Court, Northern Dis-

trict of New York, appointed receivers of said Fulton Steel Corporation, who ever since have been and now are acting as receivers of said Fulton Steel Corporation, and said Fulton Steel Corporation is and since December 17, 1918, in such receivership.

"Eighth. On or about December 20, 1918, said receivers of said Fulton Steel Corporation so appointed in said proceedings in the United States District Court, Northern District of New York, notified claimant that his services under his said contract of employment heretofore set forth were terminated, and therefore prevented said claimant from performing any work, labor, and services under his said contracts of employment.

"Ninth. That claimant since December 20, 1918, has been at all times ready and willing to perform all the conditions, covenants and agreements on his part to be performed under and by virtue of said contract.

"Tenth. That between the dates of April 1, 1918, and October 14, 1918, the net sales of Fulton Steel Corporation invoiced, shipped, and paid for were in the amount of $138,484.70, upon which said sum claimant earned commissions at the rate of 5 per cent. thereof, in the sum of $6,924.24, no part of which has been paid, except as hereinafter found, and which is now due and owing to claimant from Fulton Steel Corporation.

"Eleventh. Between the dates of October 14, 1918, and December 17, 1918, the net sales of Fulton Steel Corporation, invoiced, shipped, or to be shipped, and paid for, or which will hereafter be paid for, were in the further amount of $80,923.70, upon which claimant has earned commissions at the rate of 5 per cent. thereof, amounting to the sum of $4,046.18, no part of which has been paid, except as hereinafter found, and which now remains due and owing from Fulton Steel Corporation to claimant.

"Twelfth. That the total amount received by claimant from Fulton Steel Corporation on account of his said services under said contract is $7,178.04.

"Thirteenth. That since on or about December 17, 1918, claimant has been prevented from continuing and has been unable to continue his employment with Fulton Steel Corporation under and pursuant to the contract, Exhibit 1–A, without fault on the part of claimant, and that since December 17, 1918, claimant has been ready and willing at all times to perform all of the covenants and agreements and conditions of said contract on his part to be performed.

"Fourteenth. That prior to October 14, 1918, claimant signed and executed an agreement whereby claimant promised and agreed to take and pay for at the rate of $100 per share 550 shares of capital stock of said Fulton Steel Corporation; that at the time said claimant so signed and executed said agreement said Fulton Steel Corporation had been incorporated; that no payment in any sum was ever made by claimant on account of his said subscription to said shares of the capital stock of said Fulton Steel Corporation; and that claimant never subsequently ratified or confirmed said attempted subscription so made by him.

"Fifteenth. That claimant has proved and has suffered prospective damages for and on account of his being prevented from continuing his employment under said contract, Exhibit 1–A, in the further sum of $21,250.

"Sixteenth. That no part of the claim of claimant herein is in any way secured."

And as conclusions of law the special master held:

"First. That the receivership proceedings herein in United States District Court, Southern District of New York, were and are wholly illegal, void, and of no effect, and did not operate to terminate or breach the contract, Exhibit 1–A.

"Second. That the receivership proceedings herein in United States District Court, Northern District of New York, breached the contract, Exhibit 1–A, on the part of Fulton Steel Corporation without the fault of claimant.

"Third. That said receivership proceedings in United States District Court, Northern District of New York, did not so terminate the contract, Exhibit 1–A,

as to prevent claimant from recovering his provable damages for the breach of said contract.

"Fourth. That the subscription of claimant attempted to be made by him for 550 shares of the capital of Fulton Steel Corporation was and is illegal and void.

"Fifth. That claimant, Joseph M. Gilbert, has and has proved a valid claim and damages over and above the offsets and counterclaims against Fulton Steel Corporation as follows:

5 per cent. on $138,484.70	$ 6,924.24
6 per cent. on $ 80,923.70	4,046.18
Damages for prospective profits for breach of contract	21,250.00
Total	$32,220.42

"Sixth. That no part of same has been paid, and is now wholly due and owing from Fulton Steel Corporation to claimant, except the sum heretofore paid by Fulton Steel Corporation on account of said services of said claimant amounting to the sum of $7,178.04.

"Seventh. Total claim and damages proved, $25,052.38, to the extent of which sum claimant, Joseph M. Gilbert, is entitled to share in the assets of Fulton Steel Corporation properly applicable thereto."

The special master's memorandum of opinion based thereon is as follows:

"This is a claim of claimant, Joseph M. Gilbert, for damages under a contract entered into between Fulton Steel Corporation and claimant dated February 19, 1918. The contract is in evidence as Exhibit 1–A, and so far as is necessary to be stated in this discussion of Mr. Gilbert's claim is in substance as follows:

"Mr. Gilbert was to become general sales manager of Fulton Steel Corporation, in charge of the selling forces thereof. His compensation for his services was based upon the total annual sales made by the company, invoiced, shipped and paid for. Upon such sales he was to have a commission of 5 per cent. on the first $500,000 in any one year, and further commissions in varying amounts upon sales in excess of such sum. The contract further provided that the Fulton Steel Corporation guaranteed claimant $8,500 per year, to be paid in equal monthly installments during the term of the agreement. This so-called drawing account was not for traveling expenses and selling expenses, which were to be paid to Mr. Gilbert in addition to said drawing account. The drawing account and traveling expenses were to be deducted at the end of the year from the commissions earned. The agreement was to take effect not later than May 1, 1918, and was to continue until at least December 30, 1920, after which it might be discontinued by either party giving the other a 6 months' notice in writing of such intention. The agreement further contemplated that Mr. Gilbert should become a member of the executive committee, and gave him an option of subscribing to a certain amount of the stock of the corporation.

"This agreement was accepted by Mr. Gilbert under date of November 19th, and he actually took up the duties of his position on or about the 1st of April, 1918. The contract was ratified and approved by the corporation on the 19th day of April, 1918 (Exhibit 1–B). On or about the 1st day of April, 1918, Mr. Gilbert entered upon the duties of his office, and so continued until the receivership proceedings herein were begun.

"October 14, 1918, the United States District Court for the Southern District of New York appointed receivers of the corporation in proceedings begun in that district. Later a new proceeding and a new bill in equity was filed in the Northern district of New York on the 17th day of December, 1918, and a new set of receivers were appointed by the court in said district. About November 29, 1918, Mr. Gilbert entered into an arrangement with the receivers whereby he was to receive compensation at the rate of $708.33 a month. Mr. Gilbert's claim is based upon commissions alleged to have been earned on

sales made by the company, and also upon damages for prospective profits which he would have earned, had the company been able to carry out its contract with him during the time stipulated.

"Certain defenses, together with an alleged set-off and counterclaim, which are interposed by the receivers, will be first disposed of.

[1] "(1) The receivers contend that Mr. Gilbert, as an officer of Fulton Steel Corporation, aided in bringing about the receivership and acquiesced in it, and also acquiesced in the subsequent sale of the property to Ontario Steel Company. Having done so, and so caused or aided in bringing about the condition which made it impossible for Fulton Steel Corporation to fulfill its contract with him, that he is here estopped from any claim for damages therefor. I do not agree with this contention. No cases have been cited by the receivers which sustain their position, and in the absence of precedent I am loath to believe that such a defense is good in equity. So far as appears, Mr. Gilbert acted in good faith in this regard. The desperate financial straits of Fulton Steel Corporation fully justified him and his brother officers in seeking the aid of a court of equity. They would have been remiss in their duty apparently, had they not done so. At any rate, after anxious and protracted thought, after considering every other expedient, they came apparently to the honest conclusion that this was the only available resource left to their corporation.

"If Mr. Gilbert is to be penalized for being active and diligent in conserving the assets and in furthering the best interests of the corporation of which he was a director, the result will be not an equitable, but a most inequitable, estoppel. The conscience of a court of equity will not, I believe, permit such a defense to be interposed, and I accordingly report and find that such defense is not available to the receivers herein.

[2] "(2) Nor do I think that Mr. Gilbert's contract of employment with the receivers was a waiver of any claim for damages. It was his duty to obtain employment if he could and so reduce his damages. His letter accepting the position shows that he intended to reserve all such rights to damages as he thought he had.

[3] "(3) The receivers assert that Mr. Gilbert subscribed to $55,000 worth of the stock of Fulton Steel Corporation after its incorporation, and while they admit that at the time of making such subscription he did not pay 10 per cent., or any other amount thereof, they say that subsequently he did make a payment by check of $1,000 to apply upon said stock subscription, and that therefore he ratified the same. Mr. Gilbert, on the other hand, while admitting that he so subscribed, insists that the subscription is invalid, because he did not pay the statutory 10 per cent. thereof at the time when he made such subscription. He denies ever having paid anything thereafter on account of said subscription, and insists that the special master here is limited by the order appointing him to ascertaining the claim against Fulton Steel Corporation, and cannot determine any claim which the Fulton Steel Corporation may assert against claimant, whether by way of set-off or counterclaim.

"I should be inclined to hold that, to the extent at least of a set-off, the special master has a right to make a finding, as otherwise the court would get no enlightenment as to the actual amount, if any, due to claimant, and this apparently is the object of the reference. It is not necessary, however, for me to decide this proposition here, as I have found that the stock subscription was not valid when made, and was not subsequently ratified by claimant. The Stock Corporation Law of the state of New York (Consol. Laws, c. 59, § 53) provides in regard to subscriptions to stock as follows: 'At the time of subscribing, every subscriber, whose subscription is payable in money, shall pay to the directors ten per centum upon the amount subscribed by him in cash, and no such subscription shall be received or taken without such payment.' This provision has been many times construed by the courts of New York state. They hold that this provision of the section is mandatory, and is not met by a payment by the subscriber of 10 per cent. by means of a check or a note. Harriman National Bank v. Palmer, 93 Misc. 431,

158 N. Y. Supp. 111; Hapgoods v. Lusch, 123 App. Div. 23, 107 N. Y. Supp. 331.

[4] "On the other hand, the courts have declared that a subscription, although invalid in this regard, may be ratified by a subsequent payment of the subscriber. B. & J. R. R. Co. v. Gifford, 87 N. Y. 294; Harris v. Wells, 57 Misc. Rep. 172, 108 N. Y. Supp. 1078. Therefore, if Mr. Gilbert subsequently paid $1,000 on his stock, he ratified his subscription and waived the initial illegality. But I think that the alleged payment of $1,000 is not proved. Mr. Gilbert sets forth in detail the transaction in regard to the $1,000 check which the receivers insist was given as a part payment upon his stock. He says that at the time when money was due him on account of his salary and commission that he was in need of $1,000, and applied to the vice president, George Coffing Warner, for payment; that Mr. Warner was unwilling to pay him anything, owing to the fact that he was preparing a statement of the assets of the concern for the purpose of getting further credit or obtaining loans, and did not wish to deplete its apparent bank account; that finally it was agreed, in order to accommodate Mr. Gilbert, so that he could get the $1,000 in cash, that the steel corporation should give Mr. Gilbert a check for $1,000, and that Mr. Gilbert should in return give his check to the corporation for a like amount; that this was done, and the check was finally paid.

"Mr. Gilbert made a most favorable impression on me while on the stand. He appeared to be absolutely honest, straightforward, and frank; nothing occurred or was brought out on the trial which would justify me in holding that he did deliberately fabricate out of whole cloth this circumstantial history of the giving of the $1,000 check. I am strengthened in this conclusion by the significant fact that the receivers made no effort to impeach this testimony by calling Mr. George Coffing Warner or Miss Dorn, the only other persons who knew of the transaction at the time it occurred. Nor did the receivers lack opportunity so to do. Both Mr. Warner and Miss Dorn were available, as is proved by their being produced as witnesses in regard to other claims herein. The inference is strong that the receivers were aware that, if called, these people would have corroborated Mr. Gilbert. It is true that Mr. Beaver testified to an alleged admission by Mr. Gilbert, made subsequent to the event. Mr. Gilbert denies having made any such admission, and, while I do not doubt the truthfulness of Mr. Beaver, I am constrained to believe that he misunderstood what Mr. Gilbert said to him.

[5] "One other phase of the stock subscription incident requires a brief comment. Two of the directors, Thomas H. Dinsmore and James T. McCleary, have testified to conversations with Mr. Gilbert, in which Mr. Gilbert said to them that he had subscribed for $55,000 worth of stock of the corporation, and Mr. McCleary says that he was induced to take stock in the corporation because of the fact that Gilbert had so subscribed. But this at worst worked no estoppel in favor of Fulton Steel Corporation against Mr. Gilbert. It is elementary that to constitute an equitable estoppel the acts or words of the parties sought to be estopped must have induced the aggrieved party to do something or to refrain from doing something to its detriment.

"Here, assuming that Mr. Gilbert was actually deceiving Mr. McCleary, the result was not a disadvantage, but a positive benefit, to the Fulton Steel Corporation, because it operated to bring to it an additional subscription to its stock. But I prefer to believe, and do believe, that Mr. Gilbert was wholly innocent of any deception in all this. At the time he made these statements he doubtless thought that his subscription was valid and enforceable. Later he consulted counsel, and, after then learning that he was not legally obligated, he elected to stand upon his legal rights. In this, too, I think he was morally justified, in view of the representations made to him by Warner as to the conditional character of his stock subscription at the time he made it.

[6] "With these contentions of the receiver disposed of, we come down to a consideration of the damages sustained and proved by claimant. Both parties agree that Mr. Gilbert is entitled to recover commissions earned prior to the receivership in the Southern district. They differ, however, in the computation. Mr. Gilbert claims commissions earned during such period upon the

amount of contracts for steel obtained, while the receivers insist that he is entitled only to commissions on sales actually filled and paid for. In this I think the receivers are right. The contract explicitly so provides. There is no evidence that Fulton Steel Corporation, or its officers, willfully, maliciously, or in bad faith refused to accept and fill any of the orders effected through Mr. Gilbert and his corps of salesmen.

"Mr. Gilbert complains that the company was mismanaged, and if it had been efficiently conducted it would have been able to care for all orders; but Mr. Gilbert is bound by his contract. He did not bargain for commissions on all orders which the company ought to fill, but only for commissions on orders which it should fill, and which should be paid for. By his contract he was to become and did become one of the officers who were to shape its policies. He knew its condition, and could form his own estimate of its probable ability to turn out steel. He took his chances in this regard, and contracted with that in mind. In the absence of fraud or bad faith on the part of the company, he can recover only that for which he bargained.

"The evidence shows that the gross sales of the company prior to the appointment of the receivers in the Southern district of New York, October 14, 1918, amounted $141,645.71. Out of these gross sales should be deducted the amount of goods returned and not paid for, amounting to $3,161.01, leaving net sales between April 1, 1918, and October 14, 1918, of $138,484.70. Mr. Gilbert is entitled to commissions of 5 per cent. upon this sum, and these amount to $6,924.24.

"From the time of the receivership in the Southern district of New York to the date of the sale of the assets to the Ontario Steel Company, Fulton Steel Corporation filled orders which were either paid for or are conceded to be good, and that they will be paid for, amounting in gross to the further sum of $101,752.24. From this sum should be deducted the amount of goods returned and not paid for, and various expenses connected therewith, amounting to $20,828.54, leaving net sales from October 14, 1918, to January 22, 1919, of $80,923.70. Of the amounts received for sales during this period, $19,861.51 was for orders taken during the receivership in the Southern district.

[7] "The receivers contend that Mr. Gilbert should not have commissions upon this later sum, upon the ground that the receivership terminated the contract by operation of law, and that Mr. Gilbert can recover no damages accruing after that time. But, whatever was the effect of the receivership in the Northern district of New York, there can be no doubt that the receivership proceedings in the Southern district of New York were wholly invalid. This court has so held, and by entertaining the new application for a receivership it necessarily ruled that the District Court of the Southern District of New York obtained no jurdisdiction in the prior proceeding. I think, therefore, that it is clear that Mr. Gilbert is entitled to 5 per cent. commissions on the further sum of $80,923.70, which amounts to $4,046.18.

[8] "We are now brought to a consideration of Mr. Gilbert's claim for prospective profits. I think he is entitled to maintain his claim in this regard. The case of Pennsylvania Steel Co. v. New York City Railway Co., 198 Fed. 735, 117 C. C. A. 503, is one in the Second Circuit and would seem to be a compelling precedent in this district. That case holds that a voluntary receivership does not operate so to dissolve the corporation as to terminate the contract, and declares that under such circumstances an existing contract which still has a period to run is breached by the appointment of receivers, and the party contracting with such corporation has a claim for his prospective profits and damages. But the right to maintain such an action is one thing. Adequate proof of damage justifying an award is another. The court in the above-cited case classifies claims as follows: '(1) Claims of which the worth or amount can be determined by recognized methods of computation at a time consistent with the expeditious settlement of the estates. (2) Claims which are so uncertain that their worth cannot be so ascertained. The second class of claims cannot be proved. They may be highly meritorious, but they cannot share in the estate, because their amounts cannot be ascertained.'

[9] "This case, together with many others cited therein, and to be found

elsewhere in the reports, all agree that in proving prospective damages latitude must necessarily be given in the reception of evidence. Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676. Proof of past earnings under the broken contract is admissible, and a certain amount of speculation may be indulged in, owing to the fact that often this is the only evidence, and therefore the best evidence obtainable.

"Applying this principle, the special master permitted claimant on the trial to enter into elaborate calculations, based on all sorts of hypothetical conditions, past and present, as to the amount of orders he could have obtained during the balance of the stipulated time of his contract. Counsel for the receivers protested vigorously that much of this evidence was merely 'dreaming'; but I think, under the above rule, it was properly admitted. However, the same cases which declare such evidence to be admissible all agree that its weight and sufficiency is for the trier of the fact, and further that such evidence must not be wholly speculative and illusive, to support a verdict for anything more than nominal damages. It is useless to cite cases in which this class of evidence has been held sufficient or not sufficient. Each stands by itself, like a negligence action in this regard.

[10] "In the case at bar I cannot discover that necessary solid substratum of fact or probability which will permit me to find that the claimant would have been able to earn any substantial sum as commissions under his contract. Even if his evidence be enough to justify finding that he could have obtained a certain amount of orders, yet he has wholly failed to show that Fulton Steel Corporation would have been able to fill any orders, and this he had to show to recover under the peculiar form of his contract. On the contrary, the evidence on the other case is overwhelming that, if Fulton Steel Corporation had not gone into the receivership, it could not have continued in business, and so could not have filled any orders. Bear in mind that claimant's contract is not based on orders obtained, but is limited to commissions upon actual sales filled and paid for. Having so contracted, he cannot be heard to complain because the company did not meet with that degree of success which would enable it to fill the orders obtained by claimant.

[11] "This would finally dispose of all claims for prospective profits based on commissions alone. But I do not think Mr. Gilbert's remuneration under the contract is wholly contingent upon commissions. His contract of employment (Exhibit 1–A) starts off by saying that his compensation shall be based upon commissions on total sales made by the company invoiced, shipped and paid for, but it goes on to provide that the company guarantees Mr. Gilbert a drawing account of $8,500 per year, to be paid in equal monthly installments, and that this sum is not for traveling or selling expenses, for which Mr. Gilbert is to be reimbursed in addition to said amount of $8,500 per annum. I can read this contract in no other way than that it provides for a minimum compensation in any event for $8,500 per annum, whether the commissions on sales amount to such sum or not. This is a very different provision than the ordinary one for a drawing account, out of which a person is to reimburse himself for his expenses.

"I do not believe that, if Mr. Gilbert had failed in any one year to earn commissions in the amount of $8,500 a year, the company could have recovered from him any amount of such $8,500 which had been paid him. If this is so, then the real meaning and intent of the contract is that Mr. Gilbert was to receive a salary of $8,500 a year, not based upon any commissions, and not contingent upon any commissions. I have found that this contract must be so construed. This being so, we have a measure of damages for prospective profits due to the breach of the contract by the receivership, which is fixed and determinable.

"The agreement for the payment of $8,500 a year during the term of the contract is not contingent on the success or failure of the corporation, or upon anything else. It is absolute. Therefore I may find, and I do find, that if the contract had not been breached claimant would have been entitled to receive from Fulton Steel Corporation an amount equal to the sum of $8,500 per annum during the time when the contract would have run. The earliest period at

which the contract could have terminated was July 1, 1921. The unexpired term of his contract is a few days over 2½ years. I therefore find that he has and has proved that his profits under the unexpired term of the contract would have amounted to $21,250, and that this sum is the measure of his damages for such time. Mr. Gilbert is accordingly entitled to the following amounts:

5 per cent. on $138,484.70	$ 6,924.24
5 per cent. on $ 80,923.70	4,046.18
Damages for prospective profits	21,250.00
Total	$32,220.42
Deduct from this sum the amount of which is the total amount received by Mr. Gilbert during his entire period of employment as stipulated	7,178.04
	$25,052.38

—which I have found to be the total amount of the damages to claimant in this proceeding."

I have arrived at the conclusion that the above findings of fact made by the special master should be approved and confirmed, and that his conclusions as above stated should also be confirmed, and the objections to the confirmation overruled.

There will be an order accordingly.

PRIMOS CHEMICAL CO. v. FULTON STEEL CORPORATION.

In re MILWAUKEE ELECTRIC CRANE & MFG. CO.

(District Court, N. D. New York. August 9, 1920.)

1. **Contracts ⟸213(1)—Provision against damage for delay does not extend time for completing contract.**
   Where a contract required the delivery of an electric crane within 75 days, a provision exempting manufacturer from liability for damage caused by delay beyond its control does not extend the term of contract, so as to authorize manufacturer to recover the contract price from buyers after delivery was delayed by prior war orders.
2. **Contracts ⟸326—Where loss is caused by fault of neither, the defendant must prevail.**
   Where neither party was to blame for delay resulting in the loss in controversy, defendant is in the better right, and must prevail.

In Equity. Suit by the Primos Chemical Company against the Fulton Steel Corporation. Report of special master, denying a claim of the Milwaukee Electric Crane & Manufacturing Company against the receivers confirmed.

See, also, 266 Fed. 937.

Joseph A. Corr, of New York City, for claimant.

Wm. A. Mackenzie and Chas. E. Spencer, both of Syracuse, N. Y., for receivers.

RAY, District Judge. The special master has found the facts as follows:

"First. That on or about July 20, 1918, claimant and Fulton Steel Corporation made and entered into the written contract, Exhibit 3 herein, whereby claimant agreed to furnish and Fulton Steel Corporation to take an electric crane: that the agreed sum to be paid by said Fulton Steel Corporation to said claimant for said crane was $12,600, 50 per cent. of which was to become due and payable upon receipt of invoice and bill of lading by Fulton Steel Corporation, and the balance in cash 60 days from the day of shipment of said crane to Fulton Steel Corporation; that said contract further provided that shipment of said crane by claimant should be not later than 75 days after receipt by claimant of complete data and O. K.'ed clearances; that said contract further provided that claimant would use every reasonable means to make shipment within the time specified, but assume no liability for loss or damage arising from nonfulfillment of said contract by reason of fires, strikes, delays in transportation, or any cause unavoidable or beyond its control.

"Second. That between the dates of July 20, 1918, and August 12, 1918, the parties to said contract mutually agreed and did modify said contract, by changing certain of the specifications for said crane at agreed further compensation to claimant of $850, but not otherwise modifying the terms of said contract.

"Third. That final and O. K.'ed clearances for said crane in accordance with said amended contract were mailed to claimant by Fulton Steel Corporation on or about the 18th day of August, 1918, and were received by claimant on the 19th day of August, 1918.

"Fourth. That on the 19th day of August, 1918, claimant received from Fulton Steel Corporation a priority certificate from the War Industries Board of the United States, No. P90820, permitting and authorizing claimant to manufacture and deliver said crane under class A-6; that said certificate is Exhibit 17 herein; that on or about July 20, 1918, claimant contracted with the American Bridge Company for said American Bridge Company to manufacture for claimant a portion of said crane, to wit, the girder or bridge thereon, with certain appurtenances thereto, and sent to American Bridge Company certain drawings and specifications therefor in accordance with the original specifications of claimant's original contract with Fulton Steel Corporation.

"Fifth. That said American Bridge Company did not deliver said girder and its fittings to claimant until December 11, 1918.

"Sixth. That subsequent to July 20, 1918, and prior to the date when said girder was contracted to be delivered to Fulton Steel Corporation, priority orders from the War Board of the United States government were received by claimant for other material and machines in process of manufacture by claimant, which priority certificates were of a higher classification than the priority certificate for the crane to be manufactured by claimant for Fulton Steel Corporation.

"Seventh. That subsequent to July 20, 1918, and before the time provided for the delivery of said crane to said Fulton Steel Corporation, certain persons representing themselves to be officials of the United States government visited the plant of claimant, and demanded and ordered that claimant proceed to manufacture and complete certain other cranes then in process of manufacture by claimant, before completing the crane to be manufactured and delivered by claimant to Fulton Steel Corporation.

"Eighth. That on or about December 19, 1918, at a time when claimant was in default in the delivery and manufacture of said crane pursuant to its contract with Fulton Steel Corporation, said Fulton Steel Corporation, through its receivers, duly elected to rescind said contract, and gave due notice of such rescission to claimant.

"Ninth. That claimant did not manufacture and complete said crane until on or about December 24, 1918.

"Tenth. That prior to July 20, 1918, the Fulton Steel Corporation contemplated and had prepared, through the T. W. Price Engineering Company, Incorporated, a general scheme and plan for the extension of its plant.

"Eleventh. That there was comprehended in said scheme and within the scope of said extension a steel building; that there was further comprehended in said scheme and within the scope of the extension an electric crane of a 10-ton capacity.

"Twelfth. That said electric crane was to be installed within and operated in said steel building; that on the 15th day of August, 1918, said Fulton Steel Corporation entered into a contract with Levering & Garrigues Company for the construction and erection of said steel building at the plant of Fulton Steel Corporation, Fulton, N. Y.

"Thirteenth. That the electric crane for which said Fulton Steel Corporation contracted with claimant herein was the crane which Fulton Steel Corporation contemplated installing in said steel building.

"Fourteenth. That said steel building referred to herein had not been completed or erected on the 22d day of December, 1918, and has never been completed and erected at the plant of the Fulton Steel Corporation."

And as conclusions of law the special master held:

"First. That claimant, at and prior to December 19, 1918, had breached the contract for said electric crane, by failing to complete and deliver said crane to Fulton Steel Corporation within the time specified in the contract, Exhibit 3, as thereafter modified.

"Second. That while claimant was in default, as set forth in the first finding of fact herein, Fulton Steel Corporation duly elected to and did rescind said contract, and gave due, timely, and sufficient notice of such rescission to claimant.

"Third. That claimant has failed to prove any just or legal claim or demand in any amount against Fulton Steel Corporation, which is the subject-matter of Exhibit 3 as modified.

"Fourth. That the claim of claimant, Milwaukee Electric Crane & Manufacturing Company, herein, should be and is hereby wholly disallowed."

The special master's memorandum of opinion based thereon is as follows:

"The written contract between claimant and Fulton Steel Corporation is dated July 20, 1918. It provides, in substance, for the manufacture of an electric crane by claimant for Fulton Steel Corporation, with shipment to be made in from 60 to 75 days from receipt of complete data and O. K.'ed clearances from Fulton Steel Corporation. The contract also contains the following clause: 'We will use all reasonable means to make shipment within the time specified, but assume no liability for loss or damage arising from nonfulfillment of contract by reason of fires, strikes, delays in transportation, or any cause unavoidable or beyond our control.' Certain modifications in the specifications for the crane were thereafter mutually agreed upon, but final complete specifications and O. K'ed clearances were mailed to claimant by Fulton Steel Corporation August 16, 1918, and received by it August 19, 1918.

"Upon signing the original contract, claimant had subcontracted with American Bridge Company for the girder or bridge which formed an essential portion of said crane. Correspondence ensued between American Bridge Company, claimant, and Fulton Steel Corporation, through its engineers, as to modifying the specifications for said girder. As a result of this correspondence specifications for this girder were changed, and it was the final modifications of the specifications which were received by claimant on August 19th. August 21, 1918, claimant sent a new bill of materials to the American Bridge Company; but it appears from the evidence that detailed drawings for the girder as modified were not sent by claimant to American Bridge Company for some time afterwards, and the American Bridge Company protested against the delay. Fulton Steel Corporation had procured and sent to claimant a priority order from the War Board of the United States government permitting and authorizing the construction of the crane under classification A–6. Claimant procured a priority certificate from the United States government per-

mitting American Bridge Company to construct the girder under classification A–5.

"The American Bridge Company failed to complete this girder, so that it was not received by claimant until on or about December 11th, and claimant did not finish the crane until about the 23d or 24th of December, 1918. In the meantime Fulton Steel Corporation had gone into the hands of receivers, and on the 19th day of December, 1918, the receivers wrote the claimant, canceling the contract. There is nothing which shows that Fulton Steel Corporation or the receivers extended the time for the completion of the contract. The letter signed 'S. S. Stevens,' of October 29, 1918, does not appear to have been authorized by Fulton Steel Corporation or by the receivers. Even assuming that it was so authorized, it was merely an inquiry as of that date, asking claimant how soon the crane could be completed. Claimant apparently did not reply to this letter, and therefore did not accept the proposition therein made.

"Subsequent to the time of entering into this contract there is some evidence that claimant had work on its hands covered by priority certificates of a higher classification than that which governed the crane in question, and there is some evidence that certain government officials from the Watervliet Arsenal had visited claimant's plant and demanded that certain work being done by it for the government be pushed. It does not appear, however, that any of this other work for the government done by the claimant covered by priority certificates interfered with its part of completing the crane. Concededly the delay was occasioned by the failure of American Bridge Company to deliver the girder. Whether the American Bridge Company was delayed in furnishing the girder by orders from the Government does not appear to me to be at all material.

[1] "It will be observed that the clause in the contract, 'We will use all reasonable means to make shipment within the time specified,' etc., provides against damages to the purchaser by reason of delay for the causes therein specified. It does not assume to extend the time of the completion of the contract because of any delays occasioned from such causes. But, even if it be assumed that claimant has established that it was prevented from completing the crane within the time specified in the contract by reason of the direct interposition of vis major, still I do not think it can recover herein. It is true that proof of such fact would protect claimant in an action brought against it by Fulton Steel Corporation for damages due to delay (Moore & Tierney v. Roxford Knitting Co. [D. C.] 250 Fed. 278); but here the vendee attempts to use this principle, not as a shield, but as a sword, with which to compel defendant to accept or pay for the crane. I know of no case which goes so far, nor has one been cited to me. In the absence of precedent, I am at a loss to discover on what theory defendant can be cast in damages.

"Both parties contracted with knowledge of war conditions and of section 120 of the National Defence Act (Comp. St. §§ 3115f–3115h). Moore & Tierney v. Roxford Knitting Co., supra. Defendant, it is true, entered into the contract, knowing that priority orders to claimant might render it impossible for claimant to deliver the crane on time, and it knew, or was presumed to know, that in such event it could recover no damages for nondelivery. But this, I think, is as far as the implication goes. I can discover no legal or equitable principle which justifies the assumption that, should delay ensue which would prevent the execution of the contract within the time limited, defendants by implication agreed to extend the time for delivery. Rather I think it must be held that claimant, knowing the conditions, deliberately took its chances, and, despite the risk it knew it ran, entered into a contract of which time was of the essence.

[2] "If it be argued that it is inequitable to compel claimant to bear this loss, occasioned by the demands of the United States government, and not by any fault of its own, the answer is that it would be equally inequitable to compel Fulton Steel Corporation to pay for a crane which was not delivered to it within the time for which it contracted, and which would have been of no use to it if it had taken it when it was ready for delivery. There seems to be

no reason in equity or in law why Fulton Steel Corporation should be required to bear the loss rather than claimant. Assuming that neither was to blame, the principle that, as between plaintiff and defendant, defendant is in the better right, must prevail.

"I accordingly find and report that claimant has failed to prove a valid claim against Fulton Steel Corporation, and that its claim should be wholly disallowed."

I have arrived at the conclusion that the above findings of fact made by the special master should be approved and confirmed, and that his conclusions as above stated should also be approved and affirmed, and the objections to the confirmation overruled.

There will be an order accordingly.

ADAMSON v. ADAMSON.

(District Court, E. D. Pennsylvania. July 8, 1920.)

No. 1973.

1. **Trusts ⟸237—Cestui que trust has election to accept or reject unauthorized investment.**

A trustee, who invests money of his cestui que trust, not intrusted to him for the purpose of investment, assumes the risk of proving that the investment was by authority; otherwise, he makes it subject to the right of the cestui que trust to either take the investment or reject it and demand the money.

2. **Principal and agent ⟸161(2)—Investment by agent held unauthorized and subject to rejection by principal.**

Defendant, who occupied a fiduciary relation to complainant and acted as her agent to receive money and property belonging to her, *held* to have invested the same in the stock of a corporation without her authority, which gave her the right at her election to demand repayment in money, of which right of election she was not deprived by the fact that the agent acted in good faith, believing that the principal approved or would approve of the investment made.

In Equity. Suit by Agnes M. Adamson against William Adamson. Sur trial hearing on bill, answer, and proofs. Decree for complainant.

Lester B. Johnson, of Philadelphia, Pa., for plaintiff.

John A. Brown, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. We dispose of this case by making general findings, in the nature of a history of the case, covering both its fact and its juridical history, so far as may be necessary or helpful to an understanding of the application of the specific fact findings made and the conclusions of law reached with respect to the legal principles also applicable. We will follow this narrative statement with specific findings of fact and conclusions of law, and, in addition, will answer the requests for fact findings and conclusions of law submitted by counsel. This general history of the case will be blended

with such a discussion of the fact features as will disclose the grounds upon which the findings are made.

History of the Case.

Broadly stated, this case is an illustration of the disputes which almost always are provoked whenever one person of business training and experience undertakes, in a business transaction, to act without compensation for another person, who does not know his rights or what is for his real interests. The almost certainty of misunderstandings is emphasized when such a trustee is a man, and the cestui que trust is a woman, and doubly emphasized when there is a relation either of blood kinship or marriage between them.

The evidence in this case would justify the finding, even if we were not asked by both parties to make it, that the relations between the plaintiff and defendant were relations of the utmost confidence and fullest trust, and that in addition to this a feeling of affection of one toward the other of such a degree that the plaintiff was in loco parentis and the defendant the intended recipient of the testamentary bounty of the plaintiff. Some sort of suspicion, it is true, is now cast upon the disinterestedness and the genuineness of the display of affection by the defendant, and some question raised of whether, in the transactions precedent to those with which this cause concerns itself, and which led up to the latter transactions, the plaintiff had departed from the standard of disinterestedness in what he did; but these aspersions have no other purpose than to base an attitude of suspicious scrutiny of his actions. All we feel called upon to do is to meet what is in effect the joint request of both sides, by making the finding that this relation of trust and confidence did exist between the parties, and that the defendant, in dealing with the property of the plaintiff with which we are now concerned, was acting as trustee for the plaintiff.

The plaintiff had succeeded to the ownership of shares of stock in a limited partnership or joint-stock company, known as M. L. Shoemaker & Co., Limited, organized under the provisions of the Pennsylvania act of assembly approved June 2, 1874. This concern was prosperous. Although it had those characteristics of a corporation which the law confers upon an organization of this kind, it was in real truth and fact a partnership or firm, and originally had been composed of those who were active in its business. The result was that the earnings of the business were distributed among those who managed its affairs in something like "just proportion to the source from which the profits sprang." In the course of years, however, by the death of some of the members and the transfer of the shares in the joint-stock company, persons became entitled to a share of the earnings who contributed nothing to the success of the company beyond the use by the company of the capital which the share represented.

In consequence of this changed relation of the partners to each other, the purpose came to the active partners to wind up the affairs of the joint-stock company and turn over its business to a new organization, membership in which was to be limited to those who were active in the management of its affairs.

Preliminary to the adoption of the liquidating resolution, and perhaps as preparatory to it, two policies were followed. One was to declare very liberal dividends. These were not limited always to the actual current earnings of the concern, and a draft was made upon the accumulated past earnings to make up the dividends which were declared. The other change of policy, and this was not adopted until a short time before the dissolution, was to pay what are characterized as unduly liberal salaries to the managing partners. The expected, if not unavoidable, result followed of discord among the members; those who had not been brought into the project of the new organization looking upon the whole plan as a freeze-out and resenting it as such.

We feel compelled to make the finding that the plaintiff, so far as she was capable of forming any definite purpose, was desirous of retaining her interest in the business, and, so far as she was capable of an understanding of what the project on foot was, wished to be a party to the new venture, taking in the new organization as large an interest as she could secure, limited only by what she was able to take, and this in turn being limited by what she had in the joint-stock company. Directly this represented 17 shares, subject to the payment of $17,000. For many reasons, one of which was her utter incapacity to attend to any business, and another of which was her expected absence on a trip to the Pacific Coast, it was arranged that her stock in the joint-stock company should be transferred to the defendant; she retaining, however, her interest therein after payment of what was owing thereon. There was another, and probably the controlling, purpose in making this arrangement, which may have been, and probably was, for obvious reasons, not disclosed to the plaintiff. This was that although, as already found, she desired to go into the proposed corporation, which was to take over the business of the joint-stock company, the organizers of this second company were unwilling to have her with them. They were willing, however, and indeed desirous, of having the defendant with them, and having him take as large an interest in the new venture as he could take. This was the real inducement to the making of the arrangement which was made. It had as its result that with respect to the other stockholders in the new company the defendant was a joint owner with them, and the plaintiff had no concern with the affairs of the new company. With respect to the plaintiff and defendant, however, the defendant was the owner of that part of the stock which came to be issued to him, so far as the source of the money which paid for it came from sources other than the plaintiff; but, so far as the stock held by him was issued for a consideration which flowed from the plaintiff of this part of the stock in his name, he was merely the holder of the legal title, the beneficiary interest therein being in the plaintiff.

This brings us to the point of the dividing of the ways between the parties. The theory of the plaintiff is that the defendant was acting for the plaintiff in the mere capacity of an attorney in fact, clothed with authority and power to receive whatever the plaintiff was entitled to receive upon the liquidation of the affairs of the joint-stock company, and to account to the plaintiff for what was thus received.

The position of the plaintiff further is, and it may be here fully stated, that the defendant must account to the plaintiff in money for what he received, and that he cannot account to her in shares of stock in the new company, without proof that the investment of the plaintiff's money in the stock of the new company was at her direction, or at least with her consent, and that the situation, as the defendant himself created it by what he did and what he failed to do, is such that the plaintiff has the right of election or option to take either money or stock as she may choose.

This is on the familiar doctrine that one with moneys in his hands belonging to another, who, without the authority of the one to whom the money belongs, invests it in a business venture, does what he does subject to the right of the person for whom he is acting to affirm what was done and take the investment, or to disaffirm it and demand payment of the money as if uninvested.

The position of the defendant, on the other hand, is that a transfer of this stock was made to him for the express purpose and with the intent that he was thereby clothed with power to become a party to the reorganization scheme, investing therein for the joint-stock company and all which was thus received.

The affairs of the joint-stock company were in regular course wound up through liquidating trustees appointed for the purpose. A company was also incorporated, and the tangible assets, formerly belonging to the joint-stock company, together with its good will as a going business, were in due course sold to the corporation, who thereafter conducted the business. At this sale settlement was made by the liquidating trustees, allowing a credit on the purchase price for what those of the members of the joint-stock company who were stockholders in the corporation were entitled to receive out of the assets of the joint-stock company, and the balance of the purchase price was received in cash. The liquidating trustees preserved a record of this settlement, by charging themselves in their account with the moneys thus actually received and charging themselves with what was not received as money, offset by a corresponding distribution credit. There is, in consequence of this, a differentiation which might be made between what the defendant received from the liquidating trustees on behalf of the plaintiff in money and the amount of the credit before mentioned, which belonged to her, not in money, but as if it were in money. As this credit approximated one-half of all to which the plaintiff was entitled on the dissolution of the joint-stock company, it might be found that the plaintiff received one-half of the fund with which he was chargeable in money, and the other half not in money, but as if it were money, and being in reality in a claim to the stock of the corporation to a corresponding sum.

Counsel for plaintiff and defendant, however, each and both have asked us to disregard any such distinction, and each has expressed his willingness to stand or fall by the finding which may be reached upon the whole transaction, as if the fund were all represented by money dividends, which had been received by defendant from the joint-stock

company and invested in stock of the new company. The practical situation presented is in consequence this:

The defendant, being called upon to account to the plaintiff, acknowledges his liability to account, and does so in effect by offering, to the defendant what we will call 660 shares of the stock of the corporation, at the par value of $100 each. This accounting the plaintiff rejects, by repudiating the investment of the moneys received by the defendant in this stock, and asserting the liability of the defendant to account, not in shares of stock, but in money.

The relations of the parties are further complicated by another transaction. As has already been stated, the defendant was the intended testamentary beneficiary of the plaintiff. She had made her will, by which she gave her holdings in the joint-stock company to the defendant upon the payment by him of $17,000, which was very much less than its estimated value. The sister of the plaintiff was then living. All this was before the proposal to dissolve the joint-stock company. After the organization of the company, which succeeded the joint-stock company, the plaintiff expressed her wish to change her will. This she did by a bequest to the defendant of stock out and out. The sister was then deceased.

There is a controversy whether what we have called the will of the plaintiff was by its terms the gift of the plaintiff's interest in the joint-stock company or in the corporation. This was followed or accompanied by a gift inter vivos of the same interest, subject to the reservation that the plaintiff should receive the dividends during her life (less the interest on the $17,000).

There is a like controversy over the averred and denied ambiguity of this gift with respect to whether it is in terms a gift of an interest in the joint-stock company or in the reorganization company.

Much and practically all of the testimony and evidence adduced on the part of the plaintiff has been directed to the acts and conduct of the defendant, in order to found an accusation that the defendant throughout all his dealings with the plaintiff has confused what was done for the purpose of blinding the plaintiff and hiding from any one who might attempt an investigation what the real truth of the transactions was.

The testimony and evidence on behalf of the defendant, on the other hand, is directed to the showing that the defendant had acted throughout, not merely as a faithful trustee, but that the results of his stewardship and the services rendered to the plaintiff, both in the settlement of her husband's estate and since, had been very much to her benefit. The defendant had, it was true, conducted himself in many respects as if the stock in this corporation had belonged to him, and not to the plaintiff. This, however, was only in his relations to other parties, and not with the plaintiff. There was good occasion for this. In the first place, the stock could not have been secured, if the plaintiff had been its avowed owner, because those who went into the new venture would not have associated themselves with the plaintiff. Another thing was that the defendant looked upon himself as the owner of this stock, subject to the right of the plaintiff to receive the dividends thereon,

and this, under the provisions of the will and deed of gift, was the actual situation.

We deem it wholly unnecessary to go into any findings either of commendation or criticism of the defendant. Such findings would have no other practical result than either the vindication or condemnation of the defendant. The situation, as we find it to be, is this:

[1] The defendant was and is in a fiduciary relation to the plaintiff. As her attorney in fact or agent he received moneys and property belonging to her, which he still holds, and which he admits to hold, as trustee for her. It follows, as a consequence, that he must account to her in money for what he has thus received, and he cannot compel her to accept of any investment which he may have made of this money, unless such investment was made at her direction, or with her knowledge and consent. A trustee who voluntarily invests the moneys of his cestui que trust (unless he is a trustee to invest and keep invested) puts himself in a position of assuming the risk of being able to show that the investment was made by authority of the principal, and if the investment was without authority, and a wholly voluntary one, he makes the investment subject to the right of the cestui que trust to either take the investment or reject it and demand the money.

[2] It follows that this defendant is bound to give the plaintiff the option to take either the shares of stock in which her money was invested by him, or to demand the money thus so invested, unless the finding can be made that the investment was made by her direction, authority or consent. In transactions between parties who hold relations of the character referred to, it is not enough that the trustee acted in good faith, and thought the cestui que trust was satisfied to have the investment made. The finding must go to the extent that the one to whom the money belonged directed the investment to be made, or authorized it, or consented to it, so far that it would be an inequitable thing to repudiate the investment, and because of this the cestui que trust is estopped from the exercise of any choice of election between the investment and the money.

We are unable to make such finding in this case, and our conclusion in consequence is that the plaintiff is not estopped from asserting the right of election which she otherwise has.

There is this further observation to be made, which brings us to the real kernel of this case. The defendant, as already observed, has made a very frank avowal of his trust relations with the plaintiff. He claims to have acted toward her at all times with due fidelity, and that his management of her interests has been crowned with success. Naturally he repudiates the charges, both of bad faith and bad management.

Whether it would be to the financial advantage of this plaintiff to accept of the stock which the defendant admits belongs to her, or whether it would be to her advantage to take her money, with the consequence that the stock would belong to the defendant, freed and clear of all trusts, is a question to which no clear answer can be given under such evidence as was presented.

Counsel for defendant has stated, and this statement we now

put of record as full notice to the plaintiff, that the stock is believed to have a greater value now than when issued. The defendant is therefore perfectly free to offer to the plaintiff her choice of ownership in the moneys which bought the stock or in the stock itself. In answer to this offer, with the consequent freedom which an election to take the moneys gives to the defendant, the plaintiff has elected to take the money. Whether the stock or the money is the property of the plaintiff, it is subject to whatever effect the deed of gift may have, the substantial intendment of which was that the plaintiff should have a life interest, with remainder in the defendant.

The conclusion reached is that, for the protection of the plaintiff, and of the defendant as well, a decree should be made finding defendant to have in his hands the moneys received by him from the liquidating trustees of the joint-stock company, subject to whatever interest therein belongs to him under and by virtue of the agreement between the plaintiff and the defendant. We have not the figures before us from which the decree above suggested may be entered. We understand there is no controversy over these figures. The parties may submit drafts of a decree in accordance with the views above expressed, and the findings of fact and conclusions of law herewith submitted. We retain jurisdiction of the cause for the purpose of determining the form of this decree, in the event of the parties differing with respect thereto.

THE BISCAYNE.

(District Court, S. D. Florida. July 1, 1920.)

1. **Collision ⇐72(1)—Mutual faults of dredge and tug.**
   A dredge and a tug both *held* in fault for a collision between the tug and the pipe line from the dredge to the shore, where the dredge was not working and had notice in time to disconnect the pipe line, and the tug, by stopping until the disconnection was made, could have avoided the injury.

2. **Collision ⇐130—Interest not allowable for unnecessary delay in submission of case.**
   Interest on the recovery in a collision case disallowed, where the case had been pending 12 years before submission.

In Admiralty. Suit for collision by the Atlantic Coast Line Railroad Company against the tug Biscayne. Decree for libelant for half damages.

John L. Doggett, of Jacksonville, Fla., for libelant.
N. P. Bryan, of Jacksonville, Fla., for respondent.

CALL, District Judge. On September 19, 1906, a collision occurred between the tug Biscayne and the pipe line of the dredge Port Tampa. The dredge was engaged in deepening a channel in front of the docks of the libelant down the river from Commodore's Point, with her pipe running to the shore under the docks.

On that morning the tug came down the river, passing the dredge to the eastward, and made fast to a three-masted schooner preparatory to taking her to sea. The schooner was loaded with lumber and drawing some inches over 16 feet.

The libel was filed March 9, 1908, claiming damage to the dredge and pipe line by reason of the collision. There is nothing to show when the first testimony was taken, but additional testimony appears to have been taken on May 12, 1910, June 15, 1915, and October 8, 1915, and deposition de bene esse of Arthur H. Hunter, in New York, June 1, 1915.

Usually evidence in collision cases is contradictory and irreconcilable, when the testimony of the different witnesses is taken soon after the accident, and the instant case is an example. The lapse of time between the giving of the testimony but adds to the difficulty of arriving at a satisfactory solution.

The undisputed facts may be stated as follows: The suction dredge Port Tampa was anchored somewhere about the middle of the channel being dredged in front of the docks of the libelant, with her pipe line out west to the land under the docks. On the morning of September 19, 1906, the tug Biscayne came down the river from the south, passed on the east side of the dredge, to a dock below the dredge, for the purpose of taking a loaded schooner to sea. The tug made fast to the schooner, taking her alongside; the bow of the tug being toward the

stern of the schooner. She lay alongside of the schooner an hour or more.

As I understand the situation, the channel to these docks was dredged some 400 or 500 feet wide, with a depth of about 19 feet, although this depth was not continuous, and the dredge was engaged in deepening this channel at the time of the collision. On that morning the dredge was not pumping, only two of her crew being aboard. The captain was ashore on business; the other members of her crew were under the dock, making some repairs to the pipe line. It was necessary for the tug to take the schooner up the river through this channel to the main channel of the river before she could go to sea. This could be done, either by going to the eastward of the dredge (the way she came in) or through the pipe line. Recognizing the necessity for opening the pipe line to allow vessels to pass through, provision to do so was made by the dredge crew.

The libelant claims that there was ample depth of water and width of channel for the tug to have taken the schooner to the eastward of the dredge. This is denied by the tug. It is also claimed by the libelant that the tug was negligent in not giving notice of her desire to have the pipe line opened in sufficient time to have this done; whereas, the tug claims to have given this notice on her way in by megaphoning to the dredge as it passed.

I am not in position to say from the testimony before me whether there was sufficient depth and width of channel for the tug with the vessel to have passed to the eastward of the dredge; but I think it is not necessary to decide this question, as the tug captain had a right to exercise his judgment as to the safest course to pursue, and had a right to have the pipe line opened for his passage, if in his judgment that was the safest.

There are two questions to be answered in this case: First, was the tug negligent? and, second, if she was, was the dredge also negligent?

[1] As to the first question, if the tug, without sufficient notice to the dredge to open her pipe line, ran into it in the light of day, there was negligence and liability for the damage occasioned; or if she ran into the pipe line, even after such sufficient notice, when the same could have been avoided, there would be liability. Was sufficient notice given to open the pipe line? If the tug captain's testimony is true, notice was given in ample time, according to the testimony of all the witnesses, to have had the pipe line opened; but this was not done, and no attempt made to do so, until the mate heard the tug's whistle and ran out on the pipe line with a wrench, but too late to accomplish his mission. At this time only the chief engineer and one oiler were aboard the dredge, and they came from the engine room to the deck, but made no effort to open the pipe line. It must be borne in mind that at this time the dredge was not pumping, and the pipe line was not in use, and obstructed navigation to the channel.

The testimony of the respondent is to the effect that the tug and tow drifted into the pipe line; but it seems to me that the damage done by the collision, as testified to, shows that the tug and tow must have been going at a greater speed than would have been the result of the

tide, just turned flood in that locality. It must have taken a very considerable force to have broken the spud of the dredge. The possession of the wrench by the mate with which the pipe line could be opened, unaccounted for in the testimony, would seem to corroborate the testimony of the tug that notice that she expected to take the schooner through the pipe line was given those on the dredge. There is no doubt that a whistle was sounded by the tug, which is a matter of dispute. However, it seems to me that it was negligence on the part of the dredge, under the circumstances, not to have its pipe line opened for navigation of the channel. There are no circumstances shown in the testimony which relieve the tug from the duty of avoiding the collision, or justifies the belief that it would be opened in time to let her through. Nor is any valid reason assigned why the tug did not reverse her engine, when it became apparent that the pipe line was intact, in time to prevent the collision.

I am of opinion that both the tug and the dredge were guilty of negligence contributing to the damage suffered.

Now, as to the amount of the damage: The testimony shows that libelant claims the value of the timber out of which the spud was made, and this is allowed. It also claims wages for the crew and a carpenter in shaping the timber; the wages paid the carpenter is a proper element. It also claims an amount per day for the days the dredge was unable to operate, in which the wages of the crew is again considered. It would be a double allowance of the wages for the crew of the dredge to allow the amount both in shaping the timber and also in computing the amount lost by the dredge for the time she could not operate. Therefore I disallow wages to the crew in shaping the timber, but allow $50 a day for the days the dredge could not operate; the aggregate of these amounts to be divided by two, and a decree for this last amount to be entered in favor of the libelant.

[2] Interest is asked by libelant on the amount decreed. It does not strike me as equitable to allow interest in a case like the present, when the damage occurred in 1906, libel filed in 1908, and the case brought to a hearing in 1920, upon testimony taken from 1910 to 1915.

THE CONISCLIFF.

(District Court, S. D. Alabama. July 19, 1920.)

No. 1772.

Seamen ⊂=20—Vessel entitled to offset against wages cost of medical treatment for disease not contracted in service.

Where the alien mate of an American schooner, while indulging his own vices on shore, contracted a venereal disease, and on arrival in a port was sent by the medical officer to a marine hospital, the vessel, which was required by the government authorities to pay for his treatment, *held* entitled to offset such payment against wages due him.

In Admiralty. Suit by Ernest Anderson against the American schooner Coniscliff. Decree for respondent.

Alex T. Howard, of Mobile, Ala., for libelant.
Stevens, McCorvey & McLeod, of Mobile, Ala., for claimant.

ERVIN, District Judge. This is a libel filed by Ernest Anderson, seeking to recover $88 as wages for services rendered as mate on said schooner. There is no dispute about the fact that he was employed to serve as mate, and that he did serve in that capacity, and that the amount claimed was owing to him for such services.

The vessel sets up in the answer, however, that Anderson is a citizen of Sweden, who has filed his declaration of intention to become an American citizen, but has not yet been declared such; that after he was employed, and entered upon the service as made, he contracted a venereal disease through indulgence of his vices, and not from any cause or causes incident to his employment; that when the vessel arrived at Mobile the disease had manifested itself, and the medical officer, upon examination of libelant at Ft. Morgan, ordered him to be sent to the Marine Hospital for treatment; that he was sent there, and remained some time, until cured; and that the cost of his treatment at such hospital was $130.75, which the vessel was required to pay.

It is well settled that, while the vessel is liable for the cure and maintenance of a sailor who is taken ill while serving the vessel, she is not liable for such maintenance and cure when the disease was contracted from the indulgence by the sailor in case of gross indiscretion, or indulging his own vices. There is no dispute in this case about the fact that libelant contracted the disease on shore in the indulgence of his own vices and not while in the service of the vessel. The question then arises whether the vessel has a right to set off against the libelant's demand for wages earned by him the amount she was forced to pay to the government for his maintenance and cure. The vessel makes no claim for anything more than the right to defeat the claim for wages sued on, though the amount they paid was in excess of the unpaid wages now due libelant.

It is true in this case that libelant was not sent to the hospital at his own request, but that he protested being sent there. It is also true

that, under the legislation by Congress in favor of sailors, he should have been entitled to treatment in the hospital free of cost; but, an appropriation not having been made by Congress sufficient to maintain the Marine Hospital Service, it was found necessary to make charges for such services, and the charges, when made, were required to be paid by the vessel.

In this case, Anderson not being a citizen of the United States, the vessel was required to send libelant to the hospital under the provisions of section 32 of the immigration laws (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼r), which provide:

"That no alien, excluded from admission into the United States by any law, convention, or treaty of the United States, regulating the immigration of aliens, and employed on board of any vessel arriving in the United States from any foreign port or place, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to regulations prescribed by the Secretary of Labor providing for the ultimate removal or deportation of such alien from the United States. * * *"

The claim of the answer for reimbursement is not based upon any request of libelant that he be sent to the hospital, but upon the doctrine of the general maritime law, giving a right to deduct from the wages of an officer damages caused to the vessel by his wrongful act or failure to serve faithfully. Willard v. Dorr, Fed. Cas. No. 17,680; Scott v. Russell, Fed. Cas. No. 12,546; The T. F. Whitton, Fed. Cas. No. 13,849; The Marjory Brown (D. C.) 134 Fed. 999; The Ellen Little (D. C.) 246 Fed. 151.

The vessel in this case was required under the federal regulations to send libelant to the hospital, and to pay the cost. This requirement grew out of the fact that libelant had contracted the disease while indulging in his own vices while ashore in Porto Rico, and this caused the immigration authorities to order him sent to the hospital at the cost of the vessel, and it seems to me, while not being literally a failure to serve faithfully, because in this case libelant did perform his services until he came here, still it is of the same nature as a failure to serve, because the damages were caused to the vessel by libelant's wrongful indulgence in his own vices. The vessel certainly would not have been required to pay this cost, but for the wrongful act of libelant.

The same question was presented and ruled on in the Alector (D. C.) 263 Fed. 1007, where Judge Waddill held, and I think correctly, that the ship had a right to be reimbursed the expense she had incurred by deducting it from the wages due to libelant.

A decree will therefore be entered, dismissing the libel, as the sum paid by the vessel exceeded the amount of the wages unpaid to the libelant.

PARKER et al. v. FIRST TRUST & SAVINGS BANK et al.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920.)

No. 3430.

1. **Master and servant ⟸70(4)—Contract of employment held not terminated by notice requesting new wage schedule.**
A contract between an employer and a committee of employés fixing terms of employment, including the schedule of wages, which required either party desiring to change any of the regulations to give the other party 30 days' notice, *held* not terminated by a written notice by the employés, requesting a readjustment of the wage schedule, and the employés are not entitled thereafter to recover for their services on quantum meruit.

2. **Master and servant ⟸16—War Labor Board's arbitrament of wage dispute held not binding.**
An interurban railroad company is not bound by a decision of the War Labor Board, increasing the wages of its employés, where it had refused to submit the controversy to the board, because it had no funds with which to pay any increased wages, though its superintendent, in trying to persuade the men to continue work, advised them to await the action of the War Labor Board.

3. **Master and servant ⟸16—Submission of wage dispute to War Labor Board's arbitrament held not shown.**
The receiver of a railroad company is not bound by decision of the War Labor Board, making an award of increased pay retroactive, because his superintendent had informed the men he could do nothing toward increasing their pay until the War Labor Board rendered its decision, where the receiver appeared before the War Labor Board and expressly declined to submit the matter to it.

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

Suit by the First Trust & Savings Bank against the Spokane & Inland Empire Railroad Company, in which F. E. Connors was appointed receiver of the defendant railroad company. A claim by Everett J. Parker and others against the receiver for retroactive payments of a wage increase was denied, and claimants appeal. Affirmed.

Turner, Nuzum & Nuzum, of Spokane, Wash., for appellants.

Silas H. Strawn and W. H. Jacobs, both of Chicago, Ill., and Graves, Kizer & Graves and Post, Russell & Higgins, all of Spokane, Wash., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Claimants, appellants, are members of the Amalgamated Association of Street & Electric Railway Employés, a corporation, and worked as motormen and conductors for the Spokane & Inland Empire Railroad Company in Spokane. Claimants worked under an agreement made in July, 1918, between the com-

pany and the executive committee of the association, wherein it was provided:

"The following rules and rates of pay effective February 8, 1918, will constitute an agreement between the Spokane & Inland Empire Railroad Company, Traction Division, and its conductors and motormen."

After provisions for definite pay, it was agreed:

"Either party desiring to change any of the foregoing rules or regulations shall give the other party 30 days' notice in writing of the change, or changes, so desired."

On July 8, 1919, the claimants notified the defendant company that the men wished "to reopen their agreement for further consideration of the wage scale within the next 30 days." The company asked the men to submit a memorandum of the changes desired to be made in the schedule then in effect. On August 5th the superintendent wrote to the claimants that the railway company was not in a position to incur additional expense at that time, and asked the men to postpone their demands for the present. The claimants answered that an early settlement was requested "on a new agreement or offer to submit the proposition to the War Labor Board for arbitration." On August 14th, at a conference between the company and the claimants, the superintendent of the company, Mr. Elliott, gave Mr. Parker, the president of the association of the employés, to understand that there would be no objection whether the claimants worked 8, 9, or 10 hours, but that it was entirely out of the question to grant an increase of pay owing to the financial condition of the company. Mr. Parker testified:

"While he [Elliott] admitted that we should have more money, and he would like to grant it to us, that he could not do it, owing to the fact that he could not get the money. He had no way of getting the money to pay us, so there wasn't very much more said, except that he asked in what way we figured we could increase the revenue of the company, and we told him that we had no way to increase the revenue of the company; what we were interested in was the wages. And we proposed submitting this proposition to the War Labor Board. * * * And Mr. Elliott partially agreed to that, but he asked us to defer action until he made a trip to Portland and communicated with St. Paul, and that he would give us an answer when he returned."

Witness said that a few days afterwards Elliott advised them that he had been unable to do anything with reference to the increase of wages at that time. The men had another conference with the superintendent, and again proposed submitting the whole case to the War Labor Board for settlement; but the company, by its agents, declined to do this, whereupon the men submitted the matter to the War Labor Board. This was in the latter part of August. The testimony was that at that time there was unrest among the men, and that further conferences were had. The superintendent of the railway company advised the men to go ahead and not delay matters, to change the runs a little, and not to discommode the company, as long as their case was before the War Labor Board. Witness said that on two prior contracts, where the men had asked new wage arrangements, the company had made the wages retroactive to the date of

the expiration of the former agreement. On cross-examination, Mr. Parker testified that the company had declined to accede to the demand in behalf of the men, and that the men had worked under the old wage scale, and were paid thereunder by checks in the usual form.

One of the employés of the railroad company testified that the superintendent wanted the men to go ahead with the work, and—

"he gave the men the impression that we were working under the Tacoma scale; that our last agreement had been signed under the Tacoma scale, and as we were working in the same district as Tacoma, and says whatever Tacoma was going to get we were going to get, and as all of our contracts were to be retroactive, we were to be paid, and that the men would be taken care of, if they stayed on the job."

On January 10, 1919, suit in foreclosure of the mortgage of the railroad company was filed in the United States District Court by the First Trust & Savings Bank as trustee. Receiver of the property and assets of the corporation was appointed. On March 27, 1919, the War Labor Board made report, and after reciting that the receiver had declined to submit the matter, recommended that the wages of platform men be increased to certain specified rates and the receiver of the railroad company should be permitted to charge higher fares on city and interurban lines. The receiver declined to act on the recommendation of the War Labor Board, but April 6th did make a horizontal increase of wage per hour for all the men, and drew a contract for the men to sign, but up to the time of the hearing of the present controversy the men had not signed it. The superintendent told the men that the proposed agreement was the best the company could do, but said nothing to the men about the agreement being retroactive, but said he "hoped" that they would get their back pay.

On April 7th claimants filed for unpaid wages for labor performed from August 8, 1918, to April 6, 1919, as recommended by the National War Labor Board March 27, 1919, and "agreed to in contract" with the company. The master disallowed the claims, and upon review the District Court held there could be no recovery upon a quantum meruit, or upon the ground that the railroad company and the receiver were bound by the decision of the War Labor Board. Claimants have appealed.

[1] We find it impossible to arrive at the conclusion that the contract of employment between the association and the railroad company was terminated upon the expiration of the 30 days' notice, and that from the expiration of such notice the men became entitled to recover as upon a quantum meruit. The testimony of Mr. Parker does not permit of such a legal view. Even though the course pursued under prior similar contracts was that, when differences arose, adjustments of wages operated retroactively in favor of the men, the evidence as to this particular contract affirmatively shows that one of the parties positively refused to yield to any relinquishment, and stated as a ground inability to pay increased wages.

[2] Nor can it be held that the railroad company was bound by the decision of the War Labor Board, for it is proven beyond all question that the representatives of the company always declined to sub-

mit the question of wages to the War Labor Board. The circumstance that the company refused to appear before the board, and that it refrained from having any communication with it, but strengthen the conclusion that the railroad company did not intend to subject the matter to the arbitrament of that board. And as further evidence that the contract was kept alive we have the circumstance that the men continued to work, accepted wages provided for under the scale embodied in the contract of February 10, 1918, and never made any agreement for increased wages with the company. It is not contended that there was a positive obligation on the part of the company to submit the matter to the War Labor Board, and we can deduce no rule of estoppel against the company because it knew that the men had appealed to that tribunal. We are inclined to believe that the representative of the company was earnestly trying to persuade the men that they should keep on with their work; but, inasmuch as the company had declined to submit to the War Labor Board, the advice to them that they should await the action of that body cannot be regarded as acquiescence in any award to be made.

Undoubtedly the first notice sent to the company was intended to make the question of wages the subject of conference, with a view of making new agreements; but the company made it plain that it would not accede to the requested increases. Afterwards the receiver increased the wages of the men on April 6, 1919, but declined to make the increase retroactive. What we have said is intended to apply to any claims that the men might have for increase in wages prior to the date of the appointment of the receiver, or January 28, 1919, and leads to the conclusion that the contract obtained up to that time.

[3] Counsel for the appellant urges that, even though the view of the court is against a right of recovery for time prior to the appointment of a receiver, nevertheless there should be an award in favor of the employés from January, 1919, when the receiver was appointed, until March 28, 1919, and that such award should be at least what the War Board recommended. Mr. Parker testified that he conferred with Mr. Ganoway, superintendent, by direction of the receiver; that Ganoway said he could do nothing until the War Board had decided the matter then before it; that in the meantime the board gave a decision increasing the scale of pay, but not as much as the men had wanted; that the receiver, however, offered a flat raise, but not as much as was asked, but up to the time of trial the men had not accepted it; and that Ganoway did not say anything about the pay being retroactive, but "hoped" the men would get back pay. It is proven that the men were restless, and persistently sought for an increase of pay; but, on the other hand, the receiver appeared before the War Labor Board on February 11 and 12, 1919, and expressly declined to submit the matter complained of by the employés to the board, and stated that as the receiver he was acting only with the funds derived from the property in his hands, and that he would be unable to comply with any award made which increased expenses.

It is apparent that, while the receiver was trying to keep the men satisfied and hoped that they would get such increases as the War

Labor Board might advise should be paid them, still, when it came to action, he was explicit in stating the financial limitations which must control his action. Under the circumstances, a court can find no ground upon which to rest a decision which would ignore the terms of the contract or require the receiver to act otherwise than he did.

Affirmed.

CHICAGO GREAT WESTERN R. CO. v. BIWER.

(Circuit Court of Appeals, Eighth Circuit. August 7, 1920.)

No. 5548.

Railroads ⇐328(2)—Automobile driver, whose view was obstructed, held negligent in not stopping to listen.

An automobile driver who approached a crossing where the view was obstructed, without stopping his car to listen, and was struck by a train whose approach he did not hear, though its rumbling was heard by numerous witnesses at greater distances, was contributorily negligent as a matter of law.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by Leo Biwer against the Chicago Great Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to grant new trial.

Fred P. Carr, of Des Moines, Iowa, George T. Lyon, of Dubuque, Iowa, and Clifford V. Cox, of Des Moines, Iowa, for plaintiff in error.

M. E. Geiser, of New Hampton, Iowa (Lee Elwood, of Elma, Iowa, and Hurd, Lenehan, Smith & O'Connor, of Dubuque, Iowa, on the brief), for defendant in error.

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

JOHNSON, District Judge. The plaintiff in error assigns the refusal of the trial court to direct a verdict in its favor as error, based upon the contention that the plaintiff below was guilty of negligence as a matter of law in (1) approaching the point of collision at a rate of speed of 8 to 12 miles per hour; (2) failing to still the noise of his automobile, so that he could have heard the approaching train.

The plaintiff in error invokes the application of the familiar rule —stop, look, and listen before going upon a railroad track at a highway crossing. The defendant in error claims the facts take the case out of the rule, or at least that the matter of the negligence of the plaintiff below was for the jury.

The plaintiff below owned and operated a garage in the town of Elma, Iowa. The garage was about 200 feet a little north of east of the railroad crossing. The garage faces west on Busti avenue. The line of railroad of the defendant company runs through the town in a slightly northwesterly and southeasterly direction. At the cross-

ing there is a switch track immediately east of the main line. A few feet north of the crossing east of the main line there are two switch tracks. Of these two switch tracks, the east track is called the loading track, and the west track is called the cut-off track. There is a platform east of the loading track, about 200 feet north of the crossing.

At the time of the accident a freight car was standing on the cut-off track just beyond the frog of the two switch tracks, probably about 70 feet from the crossing. One, perhaps two, freight cars were standing on the loading track in the neighborhood of the platform. The exact number of cars on the switch tracks at the time of the accident, in the vicinity of the platform and north of the crossing, is in dispute. Whatever the number, they were sufficient to cut off the view of the main line north of the car near the switch frog, except at one point referred to by the plaintiff in his testimony, and also by other witnesses in their testimony. Immediately north of the platform and east of the loading track were some coal sheds and a cement house, extending north probably about 100 feet, which obstructed a view of the main line from the east side.

Omitting immaterial matter and repetition, plaintiff testified in his own behalf substantially as follows:

I lived at Elma, Iowa, in April, 1917. I was doing a livery business at that time. Mr. Oldham came and asked me to take him out west of town. I started out with him in an Overland car. It was in good condition. Mr. Oldham got into the car, and I backed out of the garage to the north, and came around to the south, before I turned west and started to drive towards the railroad crossing. I looked to the south, to see if things were clear. I could see the tracks for half a mile or so, and there were no trains in sight. As I drove towards the crossing, I kept looking to the north. I paid attention to see whether or not a train was coming. After I had started towards the railroad track, there was one point where I could see between the cars across the track. That point was probable a couple of hundred feet north of the railroad crossing. There was no train on the main track at that time. As I drove on further, I kept watching, and when I got close up I began to listen. North of the crossing there were box cars. Before I started away from the garage, I didn't know that my view would be obstructed. As I was 10 feet or so away from the main track, this train shot out from behind a box car. When I first saw it, it came shooting out from behind a box car, which stood on the track east of the main line. The first side track is about 8 feet east of the main line. There was no point, except the one point I have testified to, where I could see the main line north of the first box car. From the time I left the garage until I got onto the crossing I was watching all the way. When I got to the main line, a train shot out from behind a box car. I had my foot on the clutch and brake, and reversed the car the first thing I did. When I approached the track, I did all I could to stop, and reversed before I got to it. The train hit the front of the car. I didn't see the train until I was 8 or 10 feet from the main track. I was paying attention, and didn't hear the train whistle nor the bell ring. There was no signal at all.

On cross-examination:

The tracks of the defendant company are probably 210 feet from the door of my garage. The situation has been the same during the two years that I occupied the garage prior to the accident. During these years trains of the defendant railway frequently passed in both directions, and some of the trains, both passenger and freight, did not stop at Elma, and went through there pretty lively; but I seldom saw them go through so fast without giving any signal. I have at times seen both passenger and freight trains come into Elma

without giving signals, and trains go through the town quite rapidly. When I left the garage, I backed out and started—after I got turned around—up to the crossing. I started in low and intermediate, and went into high when I was 60 or 80 feet from the garage. The railroad crossing is some little distance elevated above the level of the road coming out of the garage, probably 4½ feet above the level of the road. The brakes were in perfect shape. After I got on my way towards the crossing in high speed, I was going probably about 10 miles an hour. When I got close to the track, I was going about 8 miles. The top was on the automobile, and it had a wind shield. The car made some noise. After I left the garage I saw that there was no train from the south, and was watching and paying all my attention for a train from the north, having in mind that a train might be along any time. If there are no box cars in the way, you ordinarily have a view down the road for half a mile. As I approached the crossing, I saw my view was obstructed. I kept on driving, with the idea that I could see through. There was an opening where I could see across the main line. It was probably 200 feet north of crossing. The opening was probably 10 feet. At that time I was about 80 feet from the crossing. I then proceeded on at 10 miles an hour, looking for another place where I could see, and found no other place, until I got within 10 or 15 feet of the track. I found no other place I could see through, until I was 8 or 10 feet or so from the track, running about 10 miles an hour. I saw the train when I was about 10 feet from the main track. I did everything I could to stop, but was not able to stop before getting on the main line. At the time of the accident I did not hear the train before I saw it. I did not hear any one call to me to look out for the train. It was a still day as far as I remember; there was no other noise about the yard as I started to cross the tracks, except the noise that the machine made and whatever noise the train made. I was listening as I approached the tracks, and did not hear the noise or rumbling of the train until it came out from the box car. As I approached the track I was trying all the time to get a view of the main line, and to see if a train was coming. I knew that, if a through train was coming, it would be on the second track. I was unable at any time to get a view of the main line until I was from 8 to 12 feet from the main line.

Mr. Oldham, who was riding with the plaintiff at the time of the accident, was called as a witness, and corroborated the testimony of the plaintiff. The plaintiff called also a number of other witnesses, who were in the village at the time of the accident, and who observed the approaching train. None of them heard the bell ring or the whistle sound. They estimated the speed of the train variously from 25 to 35 miles per hour. Some of them saw the train approaching, and all of them heard it.

Dan Conway testified that at the time of the accident he was at the east end of the Chapman Lumber Company's yards, about a block north of the crossing. He said:

"What attracted my attention to the train was the rumbling of it. I was about half a mile away from it."

Charles Keefe, who was about 100 feet south of the crossing as the train approached, testified:

"I saw the train and heard it, both."

Henry Heinemiller was in front of Miller's store, about two blocks north of the garage. He testified:

"The first I knew of the train was when it was up back of the stockyards a way, about three blocks from where I was standing. I heard it, but could not see it."

Richard Keefe, who was also at Miller's store, testified:

"When I first heard the rumbling of the train, it was about half a mile north."

Joe Biwer, a brother of the plaintiff, was at the garage at the time of the accident. He testified:

"I saw the smoke of the train back of the cement house. All I could see of the train was the smokestack. * * * When I first saw the train, I hollered to him [the plaintiff], 'Look out for the cars.' * * * There was no other noise at that time, besides the noise of the train."

John Mahoney was at the garage, and he testified:

"I heard the rumbling of the train. The first I could see of it was the smokestack, and smoke over the cement house. * * * It was the rumbling of it that attracted my attention. There was no other noise, besides the noise of the train. I suppose the automobile made a little noise. I heard the noise of the train above the noise that was made by the automobile. As the train approached the crossing, the noise of the train became louder."

On this appeal it must be assumed that the defendant was negligent in respect to some one or more of the matters charged in the complaint. The sole question for our determination is: Was the plaintiff himself negligent in not having his machine under such control that he could have stopped it before reaching the main line of defendant's railroad, and thereby have avoided the injury suffered by him, or was he at fault in failing to stop his car before reaching the main line of the railroad of the defendant company and listen for the oncoming train?

The cars standing upon the side tracks were in plain view of the plaintiff as he approached the crossing in his automobile. Except the one point testified to by the plaintiff, and referred to by other witnesses, where he caught a momentary glance of the track of the main line of the railroad, the view of the main line track was obstructed north of the south end of the car standing upon the cut-off track. Plaintiff did not rely upon the fleeting glance which he caught of the main line as he approached the crossing, for he testified that he continued to look, and as he drew near the crossing began to listen for the approaching train. He says that he listened and did not hear. It is a significant fact that the witnesses testifying in his behalf, some located north of the crossing, one south of the crossing, and some east of the crossing, all heard the approaching train, although it neither sounded its whistle nor rung the bell. Only the plaintiff and his companion, Oldham, failed to hear the rumbling of the approaching train. Assuming that they listened, as they testified they did, it must be that they failed to hear the approaching train because of the noise made by the automobile in which they were riding. The duty of the plaintiff in the premises is not an open question in this jurisdiction. Davis v. Chicago, etc., Co., 159 Fed. 10, 88 C. C. A. 488, 16 L. R. A. (N. S.) 424; Chicago, M & St., etc., Co. v. Bennett, 181 Fed. 799, 104 C. C. A. 309. The court in the Davis Case, supra, said:

"The duty to stop is a relative one. It depends upon the situation of the particular case, the knowledge the traveler has of the situation, and the reliance he may reasonably place under the circumstances on his opportunities for seeing and hearing without taking the last precaution of stopping. The authorities are quite in accord on the proposition that, if the view is unobstructed, so that an approaching train, before it reaches the crossing, can be seen, there is no occasion for the special exercise of the sense of hearing, listening, and therefore there is no reason why he should stop for that purpose. On the other hand, if the view is obstructed, interfering with the sense of sight, then he must bring into requisition the sense of listening carefully and attentively; and if there is any noise or confusion over which he has control, such as that of the noise of the horses' feet, or the grinding sound of the wheels, or the ordinary noise of the vehicle, interfering with the acuteness of the sense of hearing, it is his duty to stop such noise or interfering obstruction and listen for the train before going upon the track."

This court, in the Bennett Case, supra, quoted the above language with approval, and continued:

"The rule of law here announced is just and reasonable; it is supported, as the quotations in the opinion in that case show, by the decisions of the courts in Railroad Co. v. Hogeland, 66 Md. 149, 161, 7 Atl. 105, 59 Am. Rep. 159; Henze v. St. L., K. C. & N. Ry., 71 Mo. 637, 640; Blackburn v. Southern Pacific Ry. Co., 34 Or. 215, 55 Pac. 225, 229; Chase v. Railroad, 167 Mass. 383, 45 N. E. 911; Seefeld v. C., M. & St. P. R. Co., 70 Wis. 216, 222, 35 N. W. 278, 5 Am. St. Rep. 168; Shufelt v. Flint & P. M. R. Co., 96 Mich. 327, 55 N. W. 1013; Stepp v. Chicago, R. I. & P. Ry. Co., 85 Mo. 235; Merkle v. Railway Co., 49 N. J. Law, 473, 9 Atl. 680; and Denver City Tramway Co. v. Norton, 141 Fed. 599, 607, 608, 73 C. C. A. 1, 9, 10; and we are unwilling to depart from or relax it. If the plaintiff had stopped his horses just before he drove them into their dangerous position, stilled the noise of their feet, of the wagon, and of the brakes, and then listened, he would probably have heard the approaching train and have escaped his injury. If he had stepped off his wagon, and gone to the track before them, and looked to the east, he would certainly have seen the coming train. Looking where he could not see it, and listening while other noises prevented his hearing it, were futile. It is no more the exercise of ordinary care to look and listen, when and where looking and listening are useless, than it is to fail to look and listen, where looking and listening would be effective. The evidence of the contributory negligence of the plaintiff was conclusive in this case, and the court below should have instructed the jury to return a verdict for the company."

In addition to the authorities cited in the above quotation, the rule therein announced is supported by the following authorities: Askey v. C., B. & Q. Ry., 101 Neb. 266, 162 N. W. 647; Cathcart v. O. W. R. & Nav. Co., 86 Or. 250, 168 Pac. 308; Wash., etc., Ry. Co. v. Lacey, 94 Va. 460, 26 S. E. 834; Wehe v. Railway Co., 97 Kan. 794, 156 Pac. 742, L. R. A. 1916E, 455; Fluckey v. Southern Railway, 242 Fed. 468, 155 C. C. A. 244; Lancaster v. Foster, 260 Fed. 5, 171 C. C. A. 41; Rothrock v. Ala. G. S. Ry. Co., 201 Ala. 308, 78 South. 84; Rayhill v. Southern Pacific Ry., 35 Cal. App. 231, 169 Pac. 718; Robison v. O. W. R. & Nav. Co., 90 Or. 490, 176 Pac. 598.

The increasing use of the automobile upon our public highways, and the constantly recurring accounts of deplorable accidents resulting from collisions of automobiles with railroad trains upon public crossings, convince us that the rule of law announced in the

foregoing cases is reasonable, and one which should not be departed from or relaxed.

The judgment is accordingly reversed, and the case is remanded to the District Court, with directions to grant a new trial.

ROBINSON v. J. R. WILLISTON & CO.

In re ROBINSON.

(Circuit Court of Appeals, First Circuit. August 30, 1920.)

No. 1440.

1. **Bankruptcy ⟸407(5)—Materially false statement in writing, barring discharge, not created by inference alone.**
   While a materially false statement in writing, barring bankrupt's discharge, cannot be confined to a financial statement, but may include a statement for the purpose of obtaining money or property on credit, such false statement should not be created by inference alone from acts of the bankrupt.
2. **Bankruptcy ⟸407(1)—Discharge to be denied only for reasons specified in Bankruptcy Act.**
   A discharge should not be denied a bankrupt, unless for reasons specifically stated in Bankruptcy Act (Comp. St. §§ 9585–9656).
3. **Bankruptcy ⟸407(5)—Giving worthless check not making "materially false statement in writing."**
   The giving of a check on a bank in which the account of the bankrupt has been overdrawn does not constitute a "materially false statement in writing," within Bankruptcy Act (Comp. St. §§ 9585–9656), relating to denial of discharge.

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

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

In the matter of Henry E. Robinson, bankrupt. From a decree denying the discharge of said bankrupt, on objection of J. R. Williston & Co., he appeals. Reversed.

See, also, 256 Fed. 55.

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

Lee M. Friedman, of Boston, Mass. (Percy A. Atherton and Friedman & Atherton, all of Boston, Mass., and Thomas P. McKenna, of New York City, on the brief), for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. The bankrupt was denied a discharge on the ground that he had "obtained money or property on credit upon a materially false statement in writing made by him" to the appellees, who were his creditors, for the "purpose of obtaining credit from them."

Other grounds of objection to the bankrupt's discharge were that he had, "with intent to conceal his financial condition, destroyed or concealed such records as he had, returned checks, duplicate bank deposit slips, receipted bills, and other books, documents, letters, papers, or memorandum from which said condition might be ascertained," and that he had committed an offense punishable by imprisonment under the acts of Congress relating to bankruptcy.

Both the referee and the learned judge of the District Court have found that none of these objections were sustained by the evidence. We are satisfied with these findings. In regard to the objection based upon the bankrupt having made a "materially false statement in writing," the referee and District Judge were not in accord, the referee having found that a check given by the bankrupt to J. R. Williston & Co., drawn upon the International Trust Company of Boston, where he had no funds and his account was overdrawn, was not a "materially false statement in writing," contemplated by the Bankruptcy Act, and the learned judge having found that a check given under these conditions constitutes a "materially false statement in writing." Both have found that the bankrupt obtained money or property on credit by means of said check, and that it was given to J. R. Williston & Co. for the purpose of obtaining credit from them.

The question presented for our consideration, and the only one which we find it necessary to consider, is whether the giving of a check upon a bank in which the account of the maker has been overdrawn constitutes a "materially false statement in writing," as contemplated by the act, so that his dicharge should be denied him.

The legislative history of the amendment of 1910 to the Bankruptcy Act, by which section 14b 3 (Comp. St. § 9598), was inserted in its present form, shows that Congress had in mind by a "materially false statement in writing" the statement of the debtor's financial condition which he might make for the purpose of obtaining money or property upon credit. The House of Representatives adopted in 1910 an amendment which would make general statements in writing made to mercantile agencies, if materially false, a bar to the discharge of the bankrupt; but the Senate refused to concur in this amendment, and substituted an amendment of its own, in which the House concurred, and which is as follows:

"Or (3) obtained money or property upon credit upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person."

In its report the Senate Judiciary Committee stated that it considered the House amendment too harsh, and that "any tendency to make the Bankruptcy Act unduly harsh is to be avoided."

[1] We agree with the learned District Judge that a "materially false statement in writing" cannot be confined to a financial statement made by the bankrupt, or a statement of his financial condition, and that it may include any "materially false statement in writing" made by the bankrupt for the purpose of obtaining money or property on credit and by which said property or money is obtained; but we think such

false statement should not be created by inference alone from acts of the bankrupt.

In re Oliner et al. (C. C. A. 2d Circuit) 262 Fed. 734, the following headnote is fully sustained by the opinion:

"The provision of Bankruptcy Act, § 14b (3), Comp. St. § 9598, authorizing refusal of discharge to a bankrupt who has 'obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit,' especially in view of its legislative history, is not to be extended by construction."

And again in the same circuit (In re Rosenfeld, 262 Fed. 876, 878) the court said:

"The Bankruptcy Act is very liberal towards the bankrupt as to his discharge, and the act in so far as it relates to his discharge is to be given a strict construction in favor of the bankrupt. The purpose of the act is to release honest debtors from the burden of their debts."

[2] We think this rule of construction is correct, and that a discharge should not be denied the bankrupt, unless for reasons specifically stated in the act.

Congress was very careful to provide that the statements which should constitute a bar to a discharge should not only be false and material, but that they should have been made in writing, so that the bankrupt might not be deprived of the benefit of a discharge by evidence of any alleged oral statements.

[3] Did the bankrupt in this case, by signing a check, which is simply a request to a bank to pay to the payee a certain sum of money upon its presentation, make any "materially false statement in writing"? It is true that a check purports to be drawn upon a bank where the maker has funds or credit, and from his act in giving the check this may be inferred. If the bankrupt had made an oral statement at the time the check was given, that it was good, or would be paid when presented, or that his account was overdrawn, but that he had made arrangements with the bank on which it was drawn by which it would be paid, none of these oral statements would have been a bar to his discharge.

We think it was the evident design of Congress to confine the objecting creditor to the limits of a specific statement in writing made by the bankrupt, and that such statement cannot be extended beyond the fair and necessary meaning. This is the view taken of this section by the Court of Appeals for the Eighth Circuit in International Harvester Co. of America v. Carlson, 217 Fed. 736, 133 C. C. A. 430. In this case the bankrupt had made a financial statement, and under the head of "assets" upon one page had listed certain property which he possessed and stated its value; and upon another page, under the heading of "business liability," there were numerous subheads, such as "Owing for merchandise, notes, or accounts past due, owing to banks, borrowed money other than bank, taxes, rent, or other bills payable," etc., and opposite these various items was a column for the insertion of the proper amount. He left the schedule of liabilities entirely blank in the statement, and it was contended that, because he had done so,

he had stated that he owed nothing that could properly come under either of these heads, whereas, in fact, he was indebted in considerable sums under each head; and the court said (217 Fed. at page 739, 133 C. C. A. 432):

"We do not think that an omission constitutes a 'material statement,' within the meaning of section 14 of the Bankruptcy Act. There is nothing in any other part of the form which declares that blanks unfilled are to be construed as representing that nothing is owing under the heading. A 'material statement' means, not a blank, nor an inference from a blank. There must be a direct statement, either negative or positive, which is false, to justify the denial of the bankrupt's discharge."

We think this is the correct construction to be placed upon this section. In Re Rea Brothers (D. C.) 251 Fed. 431, District Judge Bourquin held that a check drawn upon a bank where the maker had neither money nor credit, while a false representation, was not a false statement which will defeat the bankrupt's right to a discharge.

While we do not fully concur in the distinction, which is made by the learned judge, between a false representation and a false statement, we think the conclusion that he reached was right. No other reported case has been cited by counsel, and after a careful examination we have been unable to find one in which the exact question which we are considering has been before the court.

The decree of the District Court is reversed, with costs to the appellant in this court, and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

MICHIGAN MUT. LIFE INS. CO. v. THOMPSON.

(Circuit Court of Appeals, Second Circuit. June 9, 1920.)

No. 214.

1. **Insurance ⟸79—Grounds for termination, specified in agency contract, not exclusive.**
   An agency contract, fixing no time for duration, but specifying certain grounds for which the company might terminate the relation, did not, by implication, exclude any other ground for termination.
2. **Insurance ⟸84(4)—Agent had no vested right to commissions on renewal premiums.**
   An agency contract, specifying the amount of commissions on first-year business and on succeeding years' collections, and providing that the agent "will not collect renewal premiums, unless upon receipt furnished to him for that purpose," gave the agent no vested interest for commissions on renewal premiums, on termination of the agency by the company.
3. **Contracts ⟸215(1)—Terminable at will, where duration is not fixed.**
   The general rule is that contracts not expressly made for fixed period are terminable at the will of either party.

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

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

Action by Albert T. Thompson against the Michigan Mutual Life Insurance Company. From a judgment for plaintiff, defendant brings error. Reversed.

Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y. (W. V. Moot, of Buffalo, N. Y., and J. V. Oxtoby, of Detroit, Mich., of counsel), for plaintiff in error.

Herbert J. Stull, of Rochester, N. Y., for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. [1, 2] April 14, 1902, Thompson agreed with the insurance company to take over the business of the company at Rochester then conducted by one Doescher, and to pay the company any indebtedness due by Doescher for advanced commissions for premiums on Provident policies due after that date not settled for by him, in consideration whereof Thompson was made the company's general agent at Rochester and vicinity, in accordance with a contract made between him and the company on the same day, the material provisions of which are as follows:

"For and in consideration of the services above described, and in compensation in full therefor, the said Michigan Mutual Life Insurance Company hereby agrees to pay the said party of the first part a commission upon all business taken by him and paid for in cash, according to the following schedule, which shall be the commission basis of this agreement."

Then follow a table describing the various classes of policies issued by the company, followed by these words in writing:

"*Nonparticipating* policies (regular, 65% on the first-year business and 5% on succeeding years' collections. *Provident* policies, 75% on first twelve successive monthly installments of premium paid in cash and 20% on all following successive installments of monthly premiums. The company will allow the sum of $25.00 per month for office expenses up to January 1, 1903. * * *

"It is further understood and agreed that all commissions shall cease after the first full annual premium has been collected, and the above-named commissions shall not be allowed on the second or any subsequent annual premium. And the said company agrees to pay said party of the first part a collection fee of 7½ per cent. upon all second and subsequent years' premiums collected by him in cash, except on nonparticipating and provident, as above mentioned. * * *

"It is further distinctly understood and agreed that the party of the first part is not authorized to make, alter, or discharge contracts, waive forfeitures, name an extra rate for special risks, or bind the said company in any way whatever, whether in reference to policies of insurance, or to advertising, printing, rent of office, or any other expense of business; and the party of the first part hereby stipulates that he will not thus undertake to act for the said company, or to make it responsible for any such act, *and that he will not collect renewal premiums, unless upon receipt furnished to him for that purpose,* his duties being simply such as are described in this agreement, and in the rules and instructions of the said company, and that he will not deliver policies or renewal receipts, except on payment in cash of the premiums, or settlement, by good note as provided in his instructions.

"In case the party of the first part shall violate any of the provisions of this agreement, or fail to reasonably increase the business of the said company, the party of the second part may at any time terminate this agreement. Should the party of the first part, by himself, or by collusion with any medical ex-

aminer, policy holder, applicant for a policy, or any other person, defraud the said company, or wrongfully increase the liabilities by any corrupt act or false representation, or attempt thus to defraud, or wrongfully increase the liabilities of the said company, or should he fail to remit to the said company, as required by this agreement, money collected by him, or to make every or any report required of him, then in every such case all rights of the said party of the first part under this agreement shall become and be forfeited to the said company, and the said company shall thereupon be discharged from every liability to the said party of the first part." (Italics ours.)

This agency continued until January 1, 1907, at which time the company discontinued its business in New York, and on December 31, 1906, the company and Thompson entered into another agreement, the material provision of which is:

"That the said party of the first part, in consideration of the covenants and agreements of the said party of the second part herein contained, hereby agrees to engage in the service of the said party of the second part in the capacity of collecting agent of such collections of premiums of company on business now on the books of said company in Rochester, N. Y., and vicinity, as the renewal receipts may be sent to him from time to time for that purpose, and to deliver said renewal receipts to the persons entitled to the same when said premiums are lawfully paid in accordance with the rules of said company."

This arrangement continued until April 20, 1918, when the company discontinued the agency and notified all policy holders to remit their premiums to the company's main office at Detroit, Mich. Thompson signed this second agreement upon the assurance of the company that it was terminable only upon the same conditions as was the original contract of 1902. Thus the question of law is presented whether under the original contract Thompson had, as he claims, a vested interest for commissions on renewal premiums on policies obtained by the Rochester agency, whether collected by him or by the company, or whether, as the company contends, he was only entitled to a collection fee or commission on renewal premiums collected by him in cash for which the company sent him its receipts to be delivered to the policy holders. The trial judge charged the jury that Thompson had such a vested interest, and left as the only question for their determination the amount he was entitled to recover.

If the contract of December 31, 1906, exclusively regulated the relations of the parties, it is clear that Thompson had no vested interest, but only a right to a collection fee on premiums collected by him in cash against receipts furnished to him by the company. However, assuming that it was understood between the parties that the contract was intended to secure the same rights as did the contract of April 14, 1902, we think the learned judge erred in holding that Thompson had any vested interest under that contract. He construed the provision as to the termination of the contract by the company in certain contingencies as defining the grounds upon which the company could terminate the contract, and by implication excluding any other ground. But this provision is added only out of abundant caution. Willcox v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882; Moore v. Security Co., 168 Fed. 496, 93 C. C. A. 652. In the former case Mr. Justice Harlan said:

"If Ewing had the privilege, upon reasonable notice, of severing the connection between him and the company after 1875, upon what ground could a like privilege be denied the company, if it desired to dispense with his services? He contends that his life, or the continuance of the company in business, was the shortest duration of the contract, consistently with its provisions, provided he did his duty. This position is untenable. His appointment was made and accepted subject to the conditions expressed in the agreement. No one of those conditions is to the effect that, so long as he devoted his time, attention, and abilities to the company's business, he should retain his position as its exclusive vendor, within the territory named, without regard to its wishes. If the parties intended that their relations should be of that character, it was easy to have so stipulated. The only part of the contract that gives color to the theory for which the plaintiff contends is the part declaring that a violation of the spirit of the agreement 'shall be sufficient cause for its abrogation.' This clause, it may be suggested, was entirely unnecessary, if the parties retained the right to abrogate the contract after 1875, at pleasure, and implies that it could be abrogated only for sufficient cause, of which, in case of suit, the jury, under the guidance of the court as to the law, must judge in the light of all the circumstances. We cannot concur in this view. The clause referred to is not equivalent to a specific provision declaring, affirmatively, that the contract should continue in force for a given number of years, or without limit as to time, unless abrogated by one or the other party for sufficient cause. It was inserted by way of caution, to indicate that the parties were bound to observe equally the spirit and the letter of the agreement while it was in force."

[3] The general rule is that contracts not expressly made for fixed periods are terminable at the will of either party. This is admitted by the plaintiff, who only contends that the termination of the contract does not terminate any existing vested right created by it. The explicit provisions of the contract preclude such a construction. The trial judge also thought that there was an inconsistency between the written and the printed parts of the contract. We discover none. The table of premiums and commissions must be understood as fixing commissions payable in accordance with the terms of the contract.

We have no doubt whatever that the only right Thompson had under either contract was a collection fee or commission upon renewal premiums collected by him in cash which the company employed him to collect, and for that purpose sent him its receipts to be delivered to the policy holders. The defendant relies greatly upon Hercules Society v. Brinker, 77 N. Y. 435, but in it a commission was expressly given to the agent on renewal premiums, whether collected by him or by others.

The judgment is reversed.

HINKHOUSE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920.)

No. 3395.

1. **Criminal law ⇐878(4)—Acquittal under one count consistent with conviction under another containing additional element.**
   An acquittal on the second count of an indictment for violating the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a–10212k) is not inconsistent with a conviction under the first count, where the first count contained the element of intent to interfere with the success of military service, which did not enter into the offense alleged in the second count.
2. **Criminal law ⇐1159(4)—Where testimony of person to whom statements violating Espionage Act were made supported charge, conviction not reversed.**
   Where there was direct testimony by the witness to whom defendant was alleged to have made statements counseling surrender of declaration of intention of citizenship to avoid selective service, which supported the charge, plaintiff in error's contention that conviction was not authorized is without merit; the credibility of the testimony being entirely for the determination of the jury.
3. **Criminal law ⇐371(1)—Evidence of other similar statements admissible to prove intent.**
   In a prosecution for violation of the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a–10212k), evidence of other statements made by defendant similar to those charged in the indictment is admissible, when limited by the court to the determination whether the statements alleged were willfully made and for the purpose alleged.

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Frank Hinkhouse was convicted of violating the Espionage Act, and he brings error. Affirmed.

Horatio S. Davis and McCarthy & Edge, all of Spokane, Wash., for plaintiff in error.

Francis A. Garrecht, U. S. Atty., and Charles H. Leavy, Asst. U. S. Atty., both of Spokane, Wash.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was indicted in the court below under the act of Congress known as the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a–10212k), which made it a crime, among other things, for any person willfully and unlawfully to make or convey false reports or false statements, with intent to interfere with the operation and success of the military and naval forces of the United States, or to utter language intended to bring the military forces of the United States into contempt, scorn, or disrepute, or to willfully and unlawfully attempt to obstruct the recruiting and enlistment service of the United States.

The indictment contained three counts, the first of which alleged

in substance that on or about July 20, 1918, in the county of Grant, state of Washington, while the United States was at war with the Imperial German Government, the plaintiff in error did willfully and unlawfully make and convey certain specified false reports and statements to certain named persons, with intent to interfere with the operation and success of the military and naval forces of the United States; and the second count alleged that at the same time and place he willfully and unlawfully made to the same named persons the same statements, with intent to bring the military forces of the United States into contempt, scorn, and disrepute.

The third count of the indictment charged that on or about October 5, 1918, at a place within the jurisdiction of the court below, the plaintiff in error did willfully and unlawfully attempt to obstruct the recruiting and enlistment service of the United States, by then and there advising, counseling, directing, and urging one Peter T. Dirks, and other persons to the grand jurors unknown, to surrender their declarations of intention to become citizens of the United States, thereby freeing themselves from liability to induction into the military forces of the United States; such persons then and there being male persons between the ages of 18 and 45 years inclusive, residing within the United States, and having declared their intentions to become citizens thereof, and being subject to registration for military service under the act of Congress of May 18, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), entitled "An act to authorize the President to increase temporarily the military establishment of the United States," as amended by the act of August 31, 1918 (40 Stat. 955).

The trial resulted in a verdict of guilty under the first and third counts of the indictment, and not guilty under the second. The plaintiff in error contends that the verdict respecting counts 1 and 2 is inconsistent, and in effect that his acquittal under the second count is virtually an acquittal under the first also.

[1] That is plainly not so, we think, for, as said by the court below in its charge to the jury, the crime charged in the first count consists of four elements, one of which is the intent to interfere with the operation or success of the military service of the United States, which element in no wise enters into the offense charged in the second count.

[2] In respect to the crime charged in the third count, it is contended for the plaintiff in error that there was no sufficient proof of it, in answer to which contention it is sufficient to point to the testimony of the witness Dirks, who gave direct testimony tending to support the charge, the credibility of which testimony was, as a matter of course, entirely for the determination of the jury.

[3] The record shows that other testimony was introduced by the government tending to show that the defendant to the indictment had made similar statements and declarations on other occasions, which the plaintiff in error contends was erroneously admitted; but it was admitted, as the court below expressly stated, for the sole purpose of enabling the jury to determine whether the statements alleged in the third count of the indictment to have been made by the defendant

thereto, if made, were made willfully and for the purpose charged in the indictment, and the court below was careful to instruct the jury that beyond that such other statements could not be considered at all.

The judgment is affirmed.

HOLZMACHER v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. May 26, 1920.)

No. 2768.

1. **Criminal law ⇐371(1)—Evidence of irrelevant matters to show intent is error, where intent is immaterial.**

In cases where there are eye or ear witnesses to the happening of an isolated transaction, and the sole question is whether it happened or did not happen, it is not proper or competent to permit the introduction of evidence of other remote and disconnected matters, not charged in some good count in the indictment, to prove intent, where the element of intent is not involved in the crime charged.

2. **Criminal law ⇐371(1)—Evidence of prior disloyal utterances held inadmissible.**

In prosecution under Espionage Act, tit. 1, § 3, refusal to withdraw, and instruction allowing consideration of, evidence that accused, over a month before the amendment to the act by act May 16, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), uttered disloyal language about the government and the flag, was error, where defendant was tried on a count charging him with the use of disloyal and abusive language about the military and naval forces of the government in the fall of 1918; there being no question of intent involved.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Peter Holzmacher was convicted of an offense under the Espionage Act, and brings error. Reversed and remanded.

Thomas H. Riley and D. B. Brillow, both of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and John H. Lally, both of Chicago, Ill., for the United States.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

PAGE, Circuit Judge. On August 31, 1918, Holzmacher was indicted on two counts, each charging an offense punishable only under section 3 of the Espionage Act as amended May 16, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c). A demurrer to the first count, on the ground that, at the time when it is charged the language was used, there was no such offense, was overruled, and a trial was had on both counts. A great deal of evidence was introduced under the first count, but at the close of the evidence the court took the first count from the jury, and this proceeding is to reverse the judgment, under which a sentence to a federal penitentiary was imposed under the second count.

The first count charged that the defendant on, to wit, April 7, 1918, over a month before the above amendment, uttered language about the form of government of the United States and the flag of the United States, with intent to bring them into contempt. Any language shown that tended to prove the first count was all used prior to April 7, 1918; so of course it could not violate an act passed over a month later, and the court was right in taking the first count from the jury. When the first count was taken from the jury, the evidence introduced under that count was not withdrawn. On the contrary, the court instructed the jury that—

"Evidence as to language used by him on other occasions was allowed to go in for and against, solely for the purpose of enabling you to determine the question of intent of the defendant, to enable you to question the spirit and purpose—the fact of his being the kind of man, during that period of time, that would harbor such an intent."

The question here is as to whether the failure to withdraw the evidence introduced under the first count and the giving of the above instruction constituted harmful error. The charge in the second count is that the defendant did utter profane, scurrilous, and abusive language about the military and naval forces of the United States, in that he did state in substance as follows, to wit:

"The American soldiers are all a lot of damned bums, and it is a good thing to send them across the ocean to Germany. Then they won't never come back."

The question of intent was in no way involved in this count of the indictment, and the sole question was: Did the defendant use the above language?

[1, 2] In cases where there are eye or ear witnesses to the happening of an isolated transaction, and the sole question is whether it happened or did not happen, it is not proper or competent to permit the introduction of evidence of other remote and disconnected matters, not charged in some good count in the indictment, to prove intent, where the element of intent is not involved in the crime charged. Prettyman v. United States, 180 Fed. 36, 103 C. C. A. 384; People v. King, 276 Ill. 145, 114 N. E. 601; Fish v. United States, 215 Fed. 549, 132 C. C. A. 56, L. R. A. 1915A, 809; Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077. What the defendant said or did not say in April could have no possible bearing upon the question as to whether he, in the fall of that year, uttered the language charged in the second count; and the admission of the evidence under the first count and the failure to withdraw it when the count was withdrawn, and the instruction that the jury could consider it upon the question of intent, constituted harmful and reversible error; and the judgment is reversed, and the cause remanded, with instructions to proceed in harmony with this opinion.

MEDUSA CONCRETE WATERPROOFING CO. v. McCORMICK WATERPROOF PORTLAND CEMENT CO. et al.

CHICAGO BONDING & INS. CO. v. MEDUSA CONCRETE WATERPROOFING CO.

(Circuit Court of Appeals, Seventh Circuit. May 26, 1920.)

No. 2782.

1. **Appeal and error ⟸1237—District courts have power to render summary judgments on supersedeas bonds.**
   District Courts have power to render summary judgments on supersedeas bonds, statutory in form, given under Comp. St. § 1660 (Rev. St. § 1000), and rule 13 of the Seventh Circuit (150 Fed. xxviii, 79 C. C. A. xxviii).

2. **Appeal and error ⟸1234(6)—Supersedeas bond in patent infringement appeal did not cover profits ascertained after appeal, but arising before appeal; "damages."**
   In an appeal from a decree finding infringement of a patent, granting a permanent injunction, and ordering a reference to a master to take and state an account of profits, such profits, etc., arising before the taking of the appeal, but ascertained after and fixed by a final decree, *held* not such "damages" as were covered by the statutory condition of the supersedeas bond, which covers only damages for delay caused by the appeal and all costs, including the remanding order.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Damages.]

3. **Appeal and error ⟸1237—Sureties on supersedeas bond are quasi parties.**
   In an appeal from a decree finding infringement of a patent, granting a permanent injunction, and ordering a reference to a master to take and state an account of profits, sureties on supersedeas bond become quasi parties, and are entitled to notice, and to an opportunity to be heard on matters by which they are to be bound.

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

Suit by the Medusa Concrete Waterproofing Company against the McCormick Waterproof Portland Cement Company and others. From a decree for plaintiff, defendants appealed; the Chicago Bonding & Insurance Company becoming surety on their supersedeas bond. From a judgment for plaintiff on the supersedeas bond, the surety appeals. Reversed and remanded.

See, also, 222 Fed. 288, 138 C. C. A. 14.

E. R. Goldsmith, of Chicago, Ill., for appellant.

Francis W. Parker, Jr., of Chicago, Ill., for appellee.

Before BAKER and PAGE, Circuit Judges, and SANBORN, District Judge.

PAGE, Circuit Judge. There are three questions raised in this case:

[1] 1. Whether District Courts have power to render summary judgments on supersedeas bonds, statutory in form, given under section 1660, U. S. Compiled Statutes 1916 (R. S. § 1000), and rule 13

of this court (150 Fed. xxviii, 79 C. C. A. xxviii). This is answered affirmatively, on authority of Pease v. Rathbun-Jones Eng. Co., 228 Fed. 278, 142 C. C. A. 565; Id., 243 U. S. 278, 37 Sup. Ct. 283, 61 L. Ed. 715, Ann. Cas. 1918C, 1147.

[2] 2. In an appeal from a decree finding infringement of a patent, granting a permanent injunction, and ordering a reference to a master to take and state an account of profits, etc., whether such profits, etc., all arising before the taking of the appeal, but ascertained after and fixed by a final decree, were such "damages" as were covered by the statutory condition of the bond? The bond covered only damages for delay caused by the appeal, and all costs, including the remanding order. Pease v. Rathbun-Jones Eng. Co., 228 Fed. 278, 142 C. C. A. 565; Racine Engine & M. Co. v. Confectioners' M. & Mfg. Co., 234 Fed. 879, 148 C. C. A. 474.

[3] 3. It is unnecessary, in view of our findings above, to answer the question whether the surety was entitled to notice of the hearings before the master on the accounting which formed the basis of the final decree. However, such sureties become quasi parties (Babbitt v. Finn, 101 U. S. 7, 25 L. Ed. 820), and are entitled to notice and an opportunity to be heard on matters by which they are to be bound.

The case is reversed and remanded, with costs to appellant, but with direction to permit Medusa Concrete Waterproofing Company to amend its papers, so as to make proper showing as to damages and costs to the extent herein permitted.

DOAN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920.)

No. 3404.

1. **Internal revenue ⟸47—Acquittal of conducting distilling business not inconsistent with conviction for fermenting mash.**
   An acquittal on two counts of the indictment, which charged defendant with carrying on the business of distilling without bond and of engaging in such business without notice to the collector of internal revenue, contrary to Rev. St. §§ 3281, 3259 (Comp. St. §§ 6021, 5995), does not invalidate a conviction under the third count, which charged her with fermenting a mash fit for distillation in a place not a distillery authorized by law, contrary to section 3282 (section 6022).

2. **Internal revenue ⟸47—Evidence held to support conviction for fermenting mash for distillation.**
   Evidence by two witnesses that they were familiar with mashes and stills, and that the mash found in plaintiff's house was fermenting and fit for distillation, *held* sufficient to sustain a conviction for making and fermenting a mash fit for distillation.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Mrs. L. Doan was convicted of fermenting a mash for distillation outside a distillery, and she brings error. Affirmed.

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

William C. Keith, of Seattle, Wash., for plaintiff in error.

Robert C. Saunders, U. S. Atty., and Charlotte Kolmitz, Asst. U. S. Atty., both of Seattle, Wash.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The indictment against the plaintiff in error contained three counts, the first of which charged her with having, at a certain stated time and place in the city of Seattle, unlawfully and feloniously carried on the business of a distiller without having given bond, as required by law; the second charged that at the same time and place she engaged in the business of a distiller, having knowingly and unlawfully failed to give notice in writing to the collector of internal revenue of the collection district in which the place was at the time in question situated, as required by section 3259 of the Revised Statutes (Comp. St. § 5995); and the third count charged that at the same time and place, to wit, in her dwelling house, the same not being a distillery authorized by law, she unlawfully and feloniously made and fermented a certain mash fit for distillation, to wit, 13 gallons of corn meal mash. She was convicted by the verdict of the jury under the last-mentioned count, and acquitted under the first two.

[1] On her behalf it is here contended that her acquittal under the first two counts was in effect an acquittal under the third. We think there is no merit in the contention. The first two counts related to the business of a distiller, regulation of which and violations thereof are provided for by sections 3281 and 3259 of the Revised Statutes (Comp. St. §§ 6021, 5995). The third count, under which the conviction was had, was for a violation of section 3282 of the Revised Statutes (Comp. St. § 6022), which, among other things, declares:

"No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law."

[2] In response to the contention that there was a lack of evidence sufficient to justify the verdict of conviction, it is enough to point to the testimony of the witnesses Revelle and Klein, the former of whom testified in effect that he was a police officer and "one of the raiding party," and was familiar with mashes and stills; that when mash begins to bubble and make a heavy foam it is used for distilling and that the mash found in the house of the plaintiff in error was in that condition; and the other witness mentioned testified in effect that it was a part of his business to know what mash is, and when it is fit for distillation, and that the day after the raid referred to he filled the bottle of the mash out of a 10-gallon keg of it, and at the time of doing so it was fermenting and fit for distillation.

The judgment is affirmed.

MANCOURT-WINTERS COAL CO. v. SILBERMAN et al.

(Circuit Court of Appeals, Sixth Circuit. July 29, 1920.)

No. 3372.

Corporations ⇐473—Finding as to delivery of bonds sustained by evidence.
A finding by a master, concurred in by the trial court, that bonds of defendant corporation were delivered to complainant only tentatively in contemplation of an arrangement for credit which was never consummated, and that the bonds remained in fact unissued, *held* sustained by the evidence, including allegations of complainant's own pleading.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit by the Mancourt-Winters Coal Company against the St. Clair Paper Company and Samuel Silberman, its receiver. From an order (260 Fed. 330) denying the ownership of certain bonds of defendant corporation, complainant appeals. Affirmed.

Arthur P. Hicks and Henry C. Walters, both of Detroit, Mich. (Walters & Hicks, of Detroit, Mich., on the brief), for appellant.

Wallace T. Stock, of Schenectady, N. Y. (Lewis & Kelsey, of New York City, on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. The sole question presented by this appeal is whether, at the time the receiver was appointed for the St. Clair Paper Company, its mortgage bonds, to the amount of $6,500, were lawfully held by the Mancourt-Winters Coal Company as security for the merchandise indebtedness to it, or whether the delivery of the possession of the bonds to the coal company had been only tentative, contemplating an arrangement upon which the minds of the parties never met, so that the bonds were, in legal effect, still in the treasury of the paper company. Upon this issue of fact there was conflicting testimony, and a finding by the master that there had been no effective delivery. This finding was confirmed by the District Court. If in truth, when the bonds were received by the coal company, it intended and determined to keep them as security for past-due debts, the proofs so strongly tend to show acquiescence by the paper company that we would feel compelled, in spite of the concurrent findings below, to consider seriously whether the conclusion was rightful—the matter of a contract to be implied from acquiescence by one party in the stated terms of another not having been directly considered below.

However, the intent of the coal company to treat these bonds as finally issued and delivered to it is at the basis of this theory, and, under the pleadings, there is no room for its maintenance. Of the $100,000 of mortgage bonds, $87,000 had been issued and sold long before the controversy arose. Out of the remaining $13,000 of bonds unissued, the paper company undertook to use $6,500 in making a contract with the coal company for further credit. It is clear that, if this contract

was not thus consummated by an effective delivery and the meeting of minds, $87,000 still remained the total of the bonds issued, while, if the $6,500 of bonds had been delivered and accepted in a binding way, the total was $93,500. The coal company filed the bill upon which the receiver was appointed, and in this bill it twice alleged that $87,000 was the amount of the bonds which had been issued, and its own merchandise claim is apparently included in the unsecured class. When, several months later, the complainant undertook to prove its claim secured by these $6,500 of bonds, it was obliged to take the contrary position to that assumed in the bill of complaint. As a matter of pleading, it cannot be permitted to do so; and, as a matter of evidence, the allegation of the bill is sufficient to show that the coal company had not received and did not then hold the bonds with the intent which it later claimed to have.

The order below must be affirmed.

McCUTCHEON et al. v. TOWNLEY et al.

(Circuit Court of Appeals, Eighth Circuit. August 23, 1920.)

No. 5428.

Bankruptcy ⇐414(3)—Mere grounds for suspicion of concealment of assets will not prevent discharge.

Evidence that the bankrupt had a large measure of control over a corporation which owned two newspapers and was formed by the Non-Partisan League to protect the members from individual liability, and which at most raised a suspicion that the bankrupt had a proprietary interest in the corporation, is insufficient to prevent his discharge in bankruptcy for failure to schedule his interest in the corporation as part of his assets.

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Voluntary proceedings in bankruptcy by A. C. Townley and others. From an order discharging the bankrupts, E. D. McCutcheon, as trustee, and a creditor, appeal. Affirmed.

Francis Murphy, of Minot, N. D., for appellants.

James Manahan, of St. Paul, Minn. (William Lemke, of Fargo, N. D., on the brief), for appellees.

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

HOOK, Circuit Judge. This is an appeal by a trustee in bankruptcy and a creditor from an order discharging a bankrupt.

A. C. Townley and a partnership of which he was a member were adjudged bankrupt September 28, 1917, on their voluntary petition. He scheduled individually a large amount of debts and a small amount of assets; the latter being claimed as exempt. Objections to his discharge were made upon the ground that he had hidden assets and had

made false oath about them. The question at the trial was whether he had a proprietary interest in a concern known as the Non-Partisan Publishing Company, and through it of two newspapers—the Non-Partisan Leader and the Courier-News. The trial court found that the Publishing Company was an agency of the Non-Partisan League, established with the idea of saving the members of the League from individual liability for financial results, and that the bankrupt had no proprietary interest.

The court was right. The issue being purely one of fact, it would not be useful to extend this opinion by a review of the voluminous record of the trial. At the most there was but a suspicion, rather strong, but not reaching the quality of proof, that he owned the properties and funds. It was due to an uncommon situation and the very large measure of control intrusted to the bankrupt.

The order is affirmed.

ROBERTS CONE MFG. CO. et al. v. BRUCKMAN et al.

(Circuit Court of Appeals, Eighth Circuit. June 12, 1920. Rehearing Denied October 1, 1920.)

No. 5310.

1. **Patents ⊜327—Consent decree conclusive of issues between parties.**
A consent decree, adjudging the validity, scope; and infringement of a patent, is conclusive between the parties of such issues, and in a supplemental bill by complainant, seeking to extend the relief to another machine, claimed to be essentially the same as the old one, defendant is estopped to deny that the latter infringed.

2. **Patents ⊜328—1,071,027, for machine for making ice cream cones, pioneer and infringed.**
The Bruckman patent, No. 1,071,027, for a machine for making ice cream cones, although using in the machine a number of old elements, has added new essential elements by which it effects a new and highly useful result which entitles it to construction as a pioneer; also *held* infringed.

Appeal from the District Court of the United States for the Western District of Missouri; Joseph W. Woodrough, Judge.

Suit in equity by Frederick A. Bruckman and others against the Roberts Cone Manufacturing Company and others. Decree for complainants, and defendants appeal. Affirmed.

See, also, 255 Fed. 957, 167 C. C. A. 249.

H. A. Toulmin, of Dayton, Ohio (Culver & Phillip, of St. Joseph, Mo., and H. A. Toulmin, Jr., of Dayton, Ohio, on the brief), for appellants.

Albert E. Dieterich, of Washington, D. C., for appellees.

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

STONE, Circuit Judge. Appeal from decree of infringement of Bruckman patent No. 1,071,027, covering a machine to manufacture

ice cream cones. This decree was on a supplemental bill. The original proceeding was for infringement of the same patent by another machine, and resulted in a consent decree, adjudging validity and infringement of the Bruckman patent, and enjoining use of the machine there involved. This consent decree was entered during the trial of the case as a result of a licensing arrangement then made. Thereafter appellants changed the machine being used by them and refused to pay royalties under the license upon the new machine, claiming that it was an essentially different machine. Thereupon appellees applied for a contempt citation, and asked discovery of the new machine. The trial court ruled that there was no cause shown for such citation, allowed discovery, and stated that appellees might reform their pleadings into a supplemental bill, which they did, praying injunction, accounting, and cancellation of the former license as applicable to the new machine, and for general relief. A motion to reverse and transfer to the law docket of the trial court, filed in this court, was adversely determined. 255 Fed. 957, 167 C. C. A. 249.

The contentions of the parties here are most conveniently stated from the standpoint of the appellees, and are as follows: (1) That the consent decree estops appellants from questioning, in this supplementary proceeding, the validity of the Bruckman patent and the infringement by the old machine used by appellants at the time of that decree; (2) that the construction of the Bruckman patent in regard to equivalents should be liberal, as that patent was a pioneer in the industry of automatic cone making machines; (3) and that the new machine is in essence the same as the old, and therefore an infringement. The appellants claim the contrary as to these three contentions.

[1] 1. Consent decrees as to validity, scope, and infringement in patent cases are regarded as constituting no adjudication of such matters which will affect other than the parties consenting thereto. But they are intended by the parties to control their rights in respect to the matters covered thereby, and they do have that effect. The method of enforcing this result is by estopping either party from denying the binding effect of the decree so procured. When, as here, a patent is, in a consent decree, adjudged valid, and infringed by a certain machine, that decree has, as between those parties, settled that that patent is valid, and that machine is an infringement. When thereafter complainant desires by a supplemental bill to extend the relief to another machine, which he claims is essentially the same as the one held to be an infringement, the issue thus presented is whether, in the light of the patent as valid, the new machine is essentially the old infringement.

[2] 2. Such an inquiry into the similarity of the new machine and the old infringement must, of course, be made in the light of the claims, scope and character of the patent. It is therefore of importance to examine the contention of appellees that these patents should be liberally construed as to equivalents, because the patent is a pioneer. Appellants contend that this claim of pioneering is dissipated by an examination of the prior art and the prior commercial usage in the industry. It is therefore necessary to examine the patented machine and

the prior art and commercial usage. The purpose and accomplishment of the patented machine is to receive sweetened batter, and through a continuous operation, during which the product is not touched by hands, to bake, extract, and place upon a receiving table finished ice cream cones. The method of operation is for a dipping arm to pick up batter from a receptacle, deposit this batter in proper quantity in cone-shaped molds, to place and secure the cores in the molds for the purpose of properly distributing and forming the cones, to pass this combination over a heating surface, where the batter is cooked, to then carry the cooked cone away from the baking place, to release the core and open the mold in such a manner that the cone will drop into a cutting tube, where surplus adherences of cooked batter are removed, and to deposit the finished cone upon a conveyor, where it is carried on to a packing table. A prime commercial result accomplished by the machine is the elimination of all contact of human hands with the cones during the process of production. There is considerable heat about cone machines, because of the baking unit. Handling under such conditions would be highly unsanitary; also, the sugar in the batter tends to cause adherence of the cones and the overflow from them to the molds, thus necessitating much handling to detach the cones. It is also claimed that it was difficult and hazardous for employés to handle these hot cones in the hot machine. By eliminating these objectionable features this machine has accomplished a desirable result in a novel and useful manner.

While only 13 of the 70 claims of the patent are involved here, yet, for the purpose of testing the character of this patent as a pioneer, it should be considered as a whole, having in mind the entire invention, its purposes, and its results. The Bruckman patent was applied for May 11, 1910, and issued August 26, 1913. Appellants claim that at most it is but an assemblage of early known elements. Appellants classify these elements and their several anticipations as follows: The horizontal rotatable wheel, anticipated by Trewick, No. 967,147, application May 28, 1908, issued August 9, 1910; Flagstad, No. 1,200,600, application March 15, 1909, issued 1916; Croskey, No. 820,479, issued 1906; Dennison, No. 841,644, issued 1907. A series of separable molds, made in halves capable of opening and closing, with locking devices which are automatically operated to lock and unlock the mold halves, such mold being mounted on a horizontal rotatable table, Flagstad, supra; Dunn, No. 416,450, issued 1889; Croskey, supra; Dennison, supra. An adjunct to the molds, consisting of an arrangement of toggle bars to form locks for locking the mold halves together, and operable, at certain intervals, by cam devices by which the toggles are opened to unlock the mold halves and are closed to relock them, Dunn, supra; Croskey, supra; Lanier, No. 1,063,981, application March 21, 1908, issued June 10, 1913. A series of radial bars or arms, supported on a rotatable wheel and carrying each a series of cores, these bars being capable of extending out beyond the wheel and dipping down into a stationary batter tank standing near by, and thence traveling back and down to the molds, so that the cores carried by these bars will enter the molds with their adhering batter to fill the space

between the cores and the interior of the molds, Lanier, supra. A lock or latch to lock each radial core bar and its cores in the molds, and to unlock them, through the action of a certain cam bar or track, Lanier, supra. Individual ovens or casings to inclose each mold and its cores, to retain the heat from burners in order to bake the batter, Lanier, supra; Hauge, No. 907,797, issued 1908; Flagstad, supra. A device to trim the ragged edges off of the large end of the cones after or when they are discharged from the machine, Williams, No. 740,346, issued 1903; Hauge, No. 909,999, issued 1909.

In addition to this piecemeal treatment, appellants rely upon certain patents as having anticipated, as a whole, the general purpose and result of the Bruckman patent. The patents so treated are: Aegeter (Swiss No. 1,443), issued 1889; Dunn, No. 416,450, issued 1889; Valvona, No. 701,776, issued 1902; Baker, No. 712,473, issued 1902; Williams, No. 740,346, issued 1903; Hauge, No. 909,999, issued 1909; Marchiony, No. 746,971, issued 1903; Lanier and Driesbach No. 839,488, issued 1906; Dennison, No. 841,644, issued 1907; Lanier, No. 1,063,981, application 1908, issued 1913; Hauge No. 907,797, issued 1908; Flagstad et al., No. 1,086,448, application 1909, renewal 1913, issued 1914; Flagstad et al. No. 1,200,600, application 1909, issued 1916; Trewick, No. 967,147, issued 1910. Appellants also rely upon limitations in various interferences shown in the file wrapper.

Appellants also claim that appellees' machine is not truly automatic, since it requires the constant attention of an attendant to dislodge adhering cones.

A consideration of the patents suggested as anticipatory leads to the conclusions following:

(a) There was nothing new in a horizontal mold-carrying table as shown by Trewick, which was a pastry machine and automatic, containing hinged pans, revolving table partially within oven, and cover-locking device of rollers on covers and arcuated track; by Flagstad (application 1909, issued 1916), which was an automatic cone machine having horizontal rotatable table and mold-carrying; by Croskey, an automatic glass machine having a horizontal mold-carrying table; by Dennison, which was an automatic concrete post machine having horizontal mold-carrying table.

(b) Molds having separable halves automatically locking and unlocking were not new, but are shown in Flagstad, Dunn, Croskey, and Dennison patents.

(c) Mold located on a turntable, and automatically locked and unlocked by the operations of a cam device, were not entirely new, as shown by Dunn, Croskey, and Lanier. However, the analogy of the Dunn and Croskey patents is not complete, as they were for metal and glass, respectively, which substances did not involve one important problem presented in the extraction of cake cones, namely, the adherence of the cones to the molds. The applicability of the Lanier patent is weakened by the circumstance that it was yet in the Patent Office when the Bruckman application was filed.

(d) The dipping device seems in principle the same as Lanier (1,063,981).

(e) The extraction feature of partially removable cores is only faintly, if at all, suggested by the secondary cores in Lanier (1,063,981). The Bruckman method is automatic, eliminates need for a secondary set of cores, and thus reduces the operations, mechanism, and time required.

(f) The individual oven feature seems new.

(g) The trimming device is not shown in the Williams or Hauge citations.

Other earlier patents or applications showing details of the cores, separable cones, locking devices, rotatable wheel, are Aegeter, 1889; Valvona, 1902; Baker, 1902; Lanier, 1906; Flagstad et al., No. 1,086,448, application 1909; and Marchiony, 1903.

This examination of the prior art in connection with the Bruckman patent results in the conclusion that Bruckman, though using several known elements, has added other new essential elements, has in a novel manner assembled and combined all in one machine, operated through a single transmission of power, and thereby has accomplished a new and desirable result. Bruckman has created a machine which automatically takes a semifluid adhesive batter from a tank, carries it through all intermediate stages of formation, baking, trimming, and conveyance, and finally deposits it as a finished, fragile, commercially perfect crust cone on a table ready for packing into cartons. No such result had ever been accomplished before; it was a useful result, and accomplished in a highly satisfactory and sanitary manner. This entitles his machine to be considered a pioneer in the field of automatic production of sanitary batter cones. This conclusion has been reached on the district by a very able and careful judge in Bruckman et al. v. Stephens et al., 268 Fed. ——. The file wrapper and its limitations do not affect this conclusion, and is answered by the broad claims allowed by the Patent Office.

The claim that the machine is not automatic, because the extraction of cones must be assisted, is not impressive. This assistance seems exceptional, and not the rule. The circumstance that an attendant must be present, because it cannot be foreseen just when a cone will adhere, is simply the necessity which arises from the care of any machine operating with a material and under conditions which are not constant.

3. As to the infringement, the inquiry is a comparison between the old and new machines in the light of the Bruckman claims found to have been infringed by the court in the consent decree. When so examined, the new machine reveals but one element worthy of consideration, namely, the endless chain conveyor, in place of the rotatable table. Whether or not these two elements are exact mechanical equivalents it is unnecessary to decide, for this one substituted element cannot remove the entire machine, which contains so many infringing elements (as found in the consent decree), from antagonism to appellees' machine.

The infringement is established, and the decree should be and is affirmed.

MIAMI CYCLE & MFG. CO. v. WALD.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1920.)

No. 3293.

Patents ⊂⊃328—Reissue 13,946, for bicycle coaster brake, held not infringed.
The Wald reissue patent, No. 13,946 (original No. 1,058,280), for a bicycle coaster brake, as limited by the prior art, *held* not infringed.

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

Suit in equity by Michael J. Wald against the Miami Cycle & Manufacturing Company. Decree for complainant, and defendant appeals. Reversed.

F. B. Brock, of Washington, D. C. (B. F. Harwitz, of Middletown, Ohio, on the brief), for appellant.

Carl P. Goepel, of New York City, for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The defendant below, the Miami Company, appeals from a decree for the usual preliminary injunction and accounting based upon its infringement of reissue patent No. 13,946, to the plaintiff, Wald, dated July 13, 1915, for an improvement in bicycle coaster brakes, the original patent having been numbered 1,058,280, issued April 8, 1913, upon an application filed January 28, 1911. The appeal can rightly be disposed of upon consideration of one matter only, which will make unnecessary detailed reference to many features involved.

It was desirable for ordinary forward progress in a bicycle that the driving sprocket and the hub of the rear wheel should be rigidly connected, while for braking by back-pedaling pressure the sprocket should be disconnected from the hub and united to the brake member, and for coasting, when the pedals are to be held stationary, the three members—driving sprocket, hub, and brake—should be free each from the other. Long before Wald's application, these results had been accomplished by O'Horo, whose patent therefor had been reissued to him September 28, 1909, No. 13,023; by Townsend, whose patent was issued April 9, 1907, on an application filed in 1898, and was numbered 850,077; and by Robinson, No. 968,604, August 30, 1910 (filed 1902). This Townsend patent was fully considered in our opinion in Davis Co. v. New Departure Co., 217 Fed. 775, 133 C. C. A. 505, where may be found a more complete description of the principles involved than is now necessary.

Each of these four patents—Townsend, O'Horo, Robinson and Wald—employs the same general form, having a driving sprocket, a stationary axle, a revolving hub shell, and a brake member anchored to the axle. The driving sprocket, which may be thought of as at the right end of the hub, carries a sleeve extension surrounding the axle,

and upon the external surface of this sleeve is a worm. The inner portion of the hub at the right carries a clutch member, and further to the left, midway of the hub and surrounding the axle, is a clutch member, connected to and operating the brake mechanism. Between these two respectively fixed clutch members is an intermediate floating or shiftable clutch member, in the form of a sleeve surrounding the worm sleeve of the driving sprocket and having an interior worm thread. When this is carried to the right by the forward rotation of the driving sprocket and this worm thread connection, its right end engages with the hub, and driving sprocket and hub are locked together. When the rotation of the sprocket is reversed, this intermediate member is carried to the left, and its left face engages with the brake member, and then driving sprocket and brake are firmly united. When this third member is in intermediate position, and neither of its clutch faces is in engagement, the pedals may be held stationary, the hub will rotate freely forward or backward, and the brake will remain inactive. This double-acting intermediate clutch member is called by O'Horo a shifter, by Townsend a connector, by Robinson a clutch sleeve, and by Wald a sliding bur.

All agreed that another element was desirable, although, theoretically, it was not absolutely essential. If this connector were carried merely by this worm sleeve engagement, it would tend to rotate in unison with that sleeve, and hence the engagement would not be certainly effective to cause the connector to move longitudinally upon the sleeve. Obviously, it should remain relatively stationary, so far as revolution is concerned, while the worm sleeve is turning one way or the other, and yet it cannot be fixed to the stationary axle, because, after it is in clutching engagement upon either face, it must revolve one way or the other. All these patentees accomplish this result by a spring which insures friction with the connector so as to retard both its revolution and its longitudinal motion (at least in one direction), and yet will permit both when the frictional effect of the spring is overcome.[1] In every case such retarder spring not only compels longitudinal motion upon the worm sleeve when the latter is rotated, but also (unless in Robinson) holds the shifter against such longitudinal motion when there is no such rotation; in other words, during coasting, it will tend to hold the connector midway between the two clutch faces and out of engagement with either.[2]

In Robinson's form, his clutch sleeve carried bevel gear teeth upon each end, and the opposing clutch faces of the hub and brake members had correspondingly shaped bevel gear teeth. In Townsend's con-

[1]The Robinson spring seemingly must operate in this way to accomplish its described results, but some details are not clear.

[2]In attributing to Wald this capacity to hold the shifter in intermediate position, we accept the statements of his counsel; though, since the hub and shifter are in constant spring frictional contact, and this must tend to induce constant rotation of the shifter, it would seem that it would not stand in the intermediate position, but would always make at least a dragging contact at one end or the other. Possibly this is a reason why the specific Wald form has never been built, even in a model for the hearing.

struction, the outside of his connector was largest in the center, tapering towards each end, and the corresponding interior hub and brake surfaces were likewise tapered; the result being, at either end of the motion, a tapered friction clutch approximating a cone clutch. O'Horo had a shifter, carrying at the left a positive engagement shown by serrations or teeth engaging with corresponding teeth upon the brake member clutch, and at the right a tapered or cone friction clutching surface, substantially like Townsend, with a similar friction clutching surface upon the hub also substantially like Townsend. Mindful of that equivalency between different common forms of clutch which, in this art, is illustrated by Townsend and Robinson, O'Horo said:

"The right-hand end of the outer surface of the shifter is formed into a conical clutch surface adapted to engage the internal conical clutch surface *34* provided in the hub near its right-hand end. Positive clutch members on the shifter and hub may be substituted for the frictional clutch members shown. The left-hand end of the shifter is provided with a clutch surface, in the present exemplification consisting of corrugations or serrations *28*, and the adjacent end of the clutch *23* [on the brake member] has a clutch surface consisting of similar corrugations or serrations *25*; this surface sometimes being identified, particularly in the claims, as a 'clutch member.' The nature of the clutching engagement between the shifter and clutch *23* may be varied. For instance, frictional engagement may take the place of the positive engagement provided at the corrugations *25*, *28*."

It would not be easy to make a statement of the equivalency of contemplated variations which should be broader, in this particular, or more clear and intelligible. O'Horo declares that the left clutching surface for the brake may be either positive or frictional, and that the right clutching surface for the hub may be either positive or frictional. He does not, in so many words, say that both may be frictional, as Townsend made them, or both may be positive, as Robinson made them; and, if it may be conceivable that there would be invention in doing either one of these things, in view, alone, of O'Horo's declaration, no such thought can be entertained as to such a step taken after Townsend and Robinson had done both. Yet, as to his connector or sliding bur, Wald made no change from O'Horo, save to provide positive engagement for both faces, instead of for one; and he did not even provide some new form of positive engagement for the right end of the shifter. He used practically the same form which O'Horo had on the other end. It is too plain for doubt that there was no inventive merit in this change—made by Wald in 1911.

As to the retarder spring, it is not clear how it may be very important whether the retarding friction is directly between hub and shifter, or mediately between axle and shifter. Wald employed the former; O'Horo the latter. Either may insure both the longitudinal motion of the shifter when desired, and its stationary central holding when desired. Whether there is in Wald's form of spring sufficient novelty and utility to give validity to the two claims in suit we need not consider, because it is not used by defendant. The Miami Company was the owner of the O'Horo patent, and it manufactured for a time a device in the specific form shown by the drawings of that patent. It finally changed its construction, so as to have the positive

or toothed clutch action on both ends, like Wald, instead of on the left end only; but it did not modify its form of spring. Very possibly this change was made after the Wald patent issued; indeed, it may be that the superintendent or officer who made the change got the suggestion from the Wald patent, instead of from the O'Horo patent; but, if so, it was because he had not read what O'Horo said. The owner of an earlier patent, who manufactures the device shown and described in his patent, save only that he substitutes in one particular a form which not only is plainly a mere mechanical equivalent for the form in his patent drawing, but was so declared to be by the specification, certainly cannot thereby infringe upon a later patent, which has embodied and claimed that change, in connection with others.

Claims 3 and 5 are the only ones now involved. Claim 3 is in the same form as in the original patent, and is plainly limited to Wald's specific type of retarder spring, in combination with his double-faced sliding bur; 5 is a new claim, added in the reissue, and is broader, in that it claims, in the same combination, "resilient means" for holding the shifter in intermediate position. To give to claim 3 a construction broad enough to find infringement would make it invalid, and we think it should be construed more narrowly, and should be held not infringed. As to claim 5, it can have no validity, unless its general language implies a spring of the Wald rather than of the O'Horo type—in which case, defendant does not infringe. Its possible validity, thus limited, is therefore not necessary to decide.

The decree must be reversed, and the case remanded, with instructions to dismiss the bill. There is no occasion to consider whether the expansion of the reissued claim is permissible as against the alleged intervening rights.

GENERAL ELECTRIC CO. v. NITRO TUNGSTEN LAMP CO.

(Circuit Court of Appeals, Second Circuit. June 2, 1920.)

No. 227.

1. **Patents ⇐328—1,180,159, claims 4, 5, 12, 13, for incandescent electric lamp held valid.**
   Claims 4, 5, 12, and 13 of the Langmuir patent, No. 1,180,159, for incandescent electric lamp having a tungsten filament of large effective diameter and filled with compressed gas, *held* valid, notwithstanding disclosures of the prior art.
2. **Patents ⇐165—Limiting claims, so as not to exclude contentions at suit, not abandonment.**
   The limiting of broad, general claims which would cover the whole field of the art, to claims covering more specifically the invention, but not in such a manner as to abandon any elements of the invention relied on in the infringement suit, is not an abandonment which defeats the right to enjoin the infringement.
3. **Patents ⇐118—Claims of patent of nitrogen filled tungsten lamp held sufficiently definite.**
   Claims in a patent for a nitrogen filled tungsten lamp, which merely specify that the filament shall be of large effective diameter and the

gas in the bulb of greater than stated minimum pressures, are not too indefinite to be valid, where the relative sizes and pressures of the elements vary in lamps of different size.

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

Suit by the General Electric Company against the Nitro Tungsten Lamp Company for infringement of a patent. Decree for plaintiff, and defendant appeals. Affirmed.

As assignee of Langmuir's patent, No. 1,180,159, dated April 18, 1916, plaintiff sues on claims 4, 5, 12, and 13. The patent is for an "incandescent electric lamp," and according to the specification "relates to improvements" whereby is produced "a lamp capable of operating at extraordinarily high efficiency and giving a light of marked increase in intrinsic brightness and whiteness."

The patentee declares in his specification that it is not "new in the art to use an incandescent lamp filament of tungsten," but that, though "it has been suggested in the past to introduce into a lamp bulb a neutral atmosphere at a fairly high pressure, I am not aware that any such lamps have ever been used commercially or have been technically successful." That success the patentee declares he has reached by the means set forth perhaps most generally in claim 4, viz.:

"The combination of a lamp bulb, a filling therein of dry nitrogen at a pressure materially in excess of that corresponding to 50 millimeters of mercury and a filament of tungsten of large effective diameter; the filament being thereby adapted for operation at a temperature higher than that which it would have if operated in a vacuum at an efficiency of one watt per candle."

The fifth claim varies the fourth, by defining the pressure as one "high or higher than that corresponding to 300 millimeters of mercury." The twelfth claim defines the elements of the combination in terms of relation to the filament temperature thus:

"In an incandescent lamp, the combination of the lamp bulb, a tungsten filament therein, and a gaseous filling, the effective diameter of the filament being sufficiently large and the heat conductivity of the filling being sufficiently poor to permit the lamp to be operated with a filament temperature in excess of that of a vacuum tungsten lamp operating at an efficiency of one watt per candle and with a length of life not less than that of such a lamp."

The thirteenth claim describes the style of filament which has gained commercial recognition and evidently seeks to enlarge the range of the patent in respect of the gaseous bulb filling. It is as follows:

"An incandescent electric lamp having a closely coiled tungsten filament, the coil giving the effect of a filament of large diameter, an inclosing bulb, and a filling of gas having a materially poorer heat conductivity than hydrogen and at a pressure as high or higher than 300 millimeters of mercury, the filament being adapted for operation in said gaseous filling at a temperature higher than that which it would have if operated in a vacuum at an efficiency of one watt per candle."

Langmuir's lamps have achieved commercial success. It is often known as the "gas-filled" or "nitrogen" lamp, in contradistinction to the vacuum lamp of an art approximately 40 years old, and it is admitted that, if the patent is valid, defendant has made and sold an infringing article. The court below held with plaintiff; defendant appealed.

William A. Redding, William B. Greeley, and Charles J. Holland, all of New York City, for appellant.

Frederick P. Fish and Hubert Howson, both of New York City, and Albert G. Davis and Alexander D. Lunt, both of Schenectady, N. Y., for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] That Langmuir's lamp is in a sense a new thing is not denied; nor is it questioned that the thing has proved fit for use, especially for display and advertising purposes, and in that field achieved a measure of success. But the path of invention in respect of electric lighting has now been trodden by the feet of so many men of talent, and research even into its bypaths been so thorough, that the first defense offered is that "the teachings of the prior art are such as to leave no room for the exercise of patentable invention on the part of Dr. Langmuir."

As a second defense it is urged that the claims in suit are (a) too indefinite to be regarded as legal definitions of invention, and (b) are the result of proceedings in the Patent Office of such a nature as to deny the claims a construction rendering defendant an infringer. In one sense the case deals with a concrete article of commerce; in another, it is plain that this decision may be thought to affect the rights of the public in respect of lighting devices quite different from anything as yet constructed, so far as this record shows, under the protection of this patent. The field of experimental investigation has been, we think, greatly enlarged by the practical success of Langmuir's tungsten nitrogen lamp, and merely noting the admitted fact that the patent may possibly hereafter be construed to cover filaments other than tungsten, and gaseous fillings not named in the specification, this decision is to be restricted (as was done in the court below) to ascertaining whether the particular claims in suit confine to plaintiff the right of making, etc., the alleged infringing article.[1]

The subject, then, of this litigation, is what defendant has made and sold, viz. the "comet" or "standard multiple gas-filled tungsten" lamp, having (in a typical lamp) a tungsten filament .003 inch in diameter, helically coiled to a coil diameter of about .017 inch; dry nitrogen in the bulb at a pressure (cold) of about 700 mm.; and a starting efficiency of .82 to .95 watt per candle. After 500 hours' operation at rated voltage, the temperature of the filament will still be approximately 2520° C., or about 400° higher than that of one of same metal in a vacuum lamp operating at about 1 watt per candle. This is so close a copy of plaintiff's lamp in the 150-watt form, and every claim before us so plainly reads upon it, that it states the case to ask whether the man who first made this thing—admittedly new to commerce when plaintiff offered it to the world—was an inventor.

One basis for the answer to this question is the amount of knowledge imputed by law to that necessary legal fiction, the "man skilled in the art," when Langmuir applied for his patent in 1913. We may be brief, for there is little controversy over the historical facts; the inferences therefrom produce the conflict. The early history of incandescent electric lighting as revealed by evidence has been written by Wallace and Lacombe, JJ., in the Edison Lamp Case, 52 Fed. 300, 3 C. C. A.

[1] Plaintiff apparently sued on all the patent claims; the trial judge rested decision solely on those first enumerated; defendant only appealed. For this reason, also, we express no opinion as to any of the other claims.

83, affirming (C. C.) 47 Fed. 454. In that litigation Mr. Edison (testifying in May, 1890) said:

"The discovery I made was that a fine filament of carbon under the conditions I had did not disintegrate to any extent. That was the discovery as set forth in my patent, but * * * it required invention to carry out the discovery which I made."

The decisions referred to scarcely do more than judicially validate the patentee's estimate of his own performance. Edison's lamp, perhaps somewhat aided by success in litigation, established for many years as the fundamentals of incandescent electric lighting the "conditions" to which Edison referred, viz. a filament, a vacuum, and an all-glass inclosing globe.

Vacuum meant a commercial vacuum as established by experience and experiment, and the Edison combination was not defeated by the introduction into the bulb of a small quantity of bromine gas for the purpose of improving "the stability of the carbon and the diminution of the blackening of the glass of the lamp." Whether the bromine was serviceable or not is immaterial, for its presence, as long as a commercial vacuum was maintained, neither affected the courts (Edison, etc., Co. v. Waring, etc., Co. [C. C.] 59 Fed. 358, affirmed 69 Fed. 645, 15 C. C. A. 700), nor led to essential modification in the art. By various subsidiary inventions, such as the "getter" devices (Malignani v. Jasper Marsh, etc., Co. [C. C.] 180 Fed. 442), Edison's original lamp, with a life of 600 hours at about 6½ watts per candle, was improved as time went on; but the filament remained carbon, and that filament still wore out, and in wearing blackened the bulb. The improvements did not wholly fulfill the belief or hope expressed by Mr. Edison in his 1890 testimony in saying:

"I thought that perhaps, having gotten rid of all oxygen, this disintegration would not be so large a factor as to prevent the use of a lamp for commercial purposes, and the discovery I made was that this did not take place under the conditions of a high, stable vacuum. Q. What causes the blackening of the globe in an ordinary incandescent lamp? A. I have spent over a hundred thousand dollars in trying to find out, and I don't know."

Improvement in vacuum having apparently reached its ultimate, search for a new and improved filament to put into the vacuum resulted in the discovery by Just and Hanaman of the tungsten filament (patent No. 1,018,502), broadly upheld in General, etc., Co. v. Laco-Philips Co., 233 Fed. 96, 147 C. C. A. 166, to which may be added the improvement of Coolidge in respect of preparing or treating tungsten (patent No. 963,872).

Thus in 1913 the tungsten vacuum lamp (dating from about 1905) with a life of a thousand hours at scarcely over 1 watt per candle, with the filament heated to about 2,100° C., represented the last word in incandescent electric lighting; and it seems to us that the situation as practical men viewed it was summed up, when in that year Mr. Alexander Siemens publicly said that it was—

"very doubtful whether it will be possible to construct a much more economical glow lamp (than the vacuum tungsten), so that the consumer will have to look for further economy to the improvement and cheapening of the electric supply."

The foregoing summary is the view of the practical man of skill, but there were other phenomena known to the scientist. In any scheme of incandescent lighting, the energy supplied to the filament is subject to three forms of expenditure; it radiates in light waves; it escapes as heat, and is dissipated by the movement or "sweeping action" of whatever gaseous material may be in contact with the incandescent substance. These forms of loss are duly set forth in the patent as radiation, conduction, and convection. The object of the vacuum was to do away with convection by dispensing with the gaseous surrounding. Yet it had long been appreciated that raising the heat of the incandescent light giver produced more light, which was, of course, desirable; but, the higher the heat, the more rapid the deterioration of the incandescent filament. The reasons for this deterioration were obscure. The "air washing" of Edison (duly carried into the opinion in the Edison Lamp Case) had become an obsolete phrase. But, passing other theories, we think it uncontradicted on this record that Dr. Langmuir was the first to establish (so far at least as tungsten is concerned) that to heighten heat hastened a true evaporation of the heated substance. It was also known that the introduction of an inert gas, usually nitrogen, into the lamp bulb, delayed what we may now call the evaporation of the filament; but it brought back and accentuated convection losses, which the vacuum had minimized with world-famous commercial results.

Every design or machine is in a sense a compromise, and it is unquestionably true that during the whole history of electric incandescent lighting there had been suggestions that it would be possible to utilize a gaseous filling (usually nitrogen) in the bulb that the life of the filament might be extended. Thus Prof. Anthony said before the American Institute of Electrical Engineers in 1894:

"With such a gas [bromine] in the lamp and a properly proportioned filament, the initial efficiency may be carried as high as in the vacuum lamp, and the efficiency and illuminating power will be well preserved to the end."

Yet he qualified the assertion by saying:

"If we could in any way * * * further check the circulation of the gas within the lamp chamber, we should still further check the waste of the filament and prolong the life of the lamp."

But neither he nor his principals ever did it.[2] When the rare and refractory metals, thorium et al., began to be hopefully regarded as possible supplanters of carbon filaments, it was suggested (as in Sander, British 14,411 of 1901) that if the lamp bulb be filled with "a mixture of nitrogen and carburetted hydrogen the lamp will also have an excellent lighting capacity." But it was never reduced to practice. This history of hopeful suggestion is sufficiently elaborated in the opinion of the District Court in this case. 261 Fed. 606.

To us it seems fairly certain that both the commercial and the theoretic art had been put on the wrong road by Mr. Edison through the

[2] Prof. Anthony was the expert for defendant in Edison, etc., Co. v. Waring, etc., Co., supra, and his Institute address is substantially his evidence in that case.

disclosure of his patent No. 274,295, when, in 1883, he proposed to fill a carbon filament bulb with an "inert gas," viz. nitrogen, at a pressure of about two-thirds of an atmosphere, and stated as one of the means of his hoped-for success that—

"The filament before carbonization may be reduced to a smaller cross-section than usual heretofore in order to produce reduction of radiating surface."

This was unquestionably wrong, and we fail to find any suggestion in the evidence regarding scientific discussion and theoretic statement that, before Langmuir, any scientist disclosed to the world that in the nitrogen-filled bulb the loss by convection would be diminished, and a working compromise reached between that loss and the gain in filament life, by increasing the "effective size" of the filament itself.

The patentee on this record was also the first to establish another crucial and illuminating fact, viz. that with a tungsten filament nitrogen of ordinary or commercial dryness was worse than useless. There is no evidence that any one before Langmuir had even suggested that, in order to prevent a bulb-blackening fatal to the success of any lamp, the removal of water vapor, not only from the gaseous filling, but from the bulbs and filaments themselves, must be carried to an extent theretofore unused, if not undreamed of. In short, it was not through isolated experiments, but by correlating deductions from many of them, that the patentee produced in 1913 a lamp which in the larger sizes can operate on the usual 115-volt current with an efficiency as low as a half a watt per candle.

This thing defendant has copied, and of it defendant's expert says:

What "made possible the success of the gas-filled lamp was the fact that the drawn wire tungsten filament was developed. The general design of a gas-filled lamp was well known in the art at that time (i. e., 1913). It was only by substituting tungsten for the materials which were not satisfactory that a satisfactory gas-filled lamp was developed."

We are compelled to think this the result of partisanship. It is not true that merely putting nitrogen in a tungsten vacuum lamp will make anything worth having; it is true that a nitrogen-filled bulb will permit the "overrunning" of even a carbon lamp for a little while, and for its short, but expensive, life the lamp will be brilliant. But not even as a laboratory experiment had a gas-filled lamp lived a commercial life before Langmuir. This court had no difficulty in Marconi, etc., Co. v. De Forest, etc., Co., 243 Fed. at page 564, 156 C. C. A. 258, in finding invention in the transference of a "laboratory problem to a new and very practical field of usefulness." The difference between that case and this is that not even the laboratory problem had been solved before this patentee did it, and we hold with the lower court that invention was present.

[2] The defense resting on the wording and history of the claim may be thus presented:

When the application was filed, the solicitor suggested (inter alia) the following comprehensive claim:

"The combination of a lamp bulb, a filling therein of dry nitrogen at a relatively high pressure, and a filament of tungsten."

It may be said generally that from claims of this breadth or simplicity the patentee was compelled to recede and accept (inter alia) the claims before us. A claim is both a definition and an assertion. The definition must be justified by the disclosure; the assertion stands alone. The claim as proposed would have found support in the disclosure, but as an assertion it said too much, in that it would have read on some of the experimental failures of previous scientists, if only any known tungsten filament were substituted for carbon. But such a lamp would not have worked at all, and it would not have been Langmuir's contribution to the sum of human knowledge.

He did not invent any nitrogen-filled bulb with any tungsten filament in it, but a special article of special proportions and a carefully stated co-ordination of parts. We therefore think it plain that the claims in suit have been narrowed from those first propounded, and are not open to the familiar objections arising from abandonment under compulsion. Langmuir abandoned nothing that he is trying to get in this suit, and that is the commonest and best test of the rule's applicability.

[3] Nor is it perceived that any claim before us is open to the charge of indefiniteness. On the contrary, if such a claim as that originally suggested and above quoted had been allowed, it would surely have been accused of attempting "to corral the art by the use of comprehensive indefinite terms," and to "foreclose broadly against the future." Kintner v. Atlantic, etc., Co. (D. C.) 249 Fed. at page 77. We reassert the statement of Eibel, etc., Co. v. Remington, etc., Co., 234 Fed. at page 632, 148 C. C. A. 390, that it is well not to attempt definition, but to consider the alleged indefiniteness of a claim in the light of the facts of each particular case. On the present facts, it is clear that it was (1) impossible to define the parts of Langmuir's lamp in millimeters or other dimensional units; and (2) no such effort was necessary to instruct the skilled man how to make the lamp of the patent.

It was impossible to give exact measurements, because the economic object of the lamp was to diminish the wattage per candle, and dimensions must be proportioned to the designed wattage; i. e., substantially to the size of the lamp—something to be worked out according to rules presumably long familiar to a competent electrical engineer. It was unnecessary to do more than state the limits of invention in terms of result, because the results desired are not functional, and do indicate limits in terms of lamp life and candle power which are likewise presumably quite familiar to any competent electrician. When a claim defines achievement in words no broader than the disclosure, and in phrases which, as interpreted by competent workers in the art, tell one how to do what the patentee did, it can rarely be called indefinite.

For the reasons foregoing, and confining ourselves wholly to the claims in suit and defendant's lamp, we are of opinion that the decision below was right, and it is affirmed, with costs.

UNITED STATES v. BROCKLEY.

(District Court, M. D. Pennsylvania. September 14, 1920.)

No. 1204.

1. **Intoxicating liquors ⟸255—Court can modify during term order directing sale of confiscated property.**
   The court, which condemned an automobile used for transporting intoxicating liquor and directed its sale, can during the term at which the order was entered, as fixed by Act June 30, 1902, modify or vacate the order.
2. **Intoxicating liquors ⟸255—Return of automobile used to transport liquors may be ordered in discretion of court.**
   Under National Prohibition Act, § 26, providing that the court shall, unless good cause to the contrary is shown by the owner, order the sale of property seized, the question whether good cause is shown is addressed to the judicial discretion of the court, and the property is not subject to forfeiture absolutely, if voluntarily committed to the person who used it unlawfully, as is the case under Rev. St. § 3450 (Comp. St. § 6352).
3. **Intoxicating liquors ⟸255—Car loaned to another, who transported liquor therein without owner's knowledge or suspicion, returned to owner.**
   An owner of an automobile, who loaned it to another, who transported intoxicating liquor therein, is entitled to a return of the automobile, where he had no knowledge of the purpose of the borrower, and no facts which should have aroused his suspicion were shown.

William G. Brockley was convicted of transporting intoxicating liquors, and the automobile in which the liquor was found was condemned and directed to be sold, and John S. Cozine and another filed petition for the reclamation of the automobile, which they claimed to own. Petition granted.

R. L. Burnett, U. S. Atty., of Scranton, Pa.

M. J. Martin and John Gunster, both of Scranton, Pa., for defendant.

WITMER, District Judge. George Brockley was convicted, as William George Brockley, at the June term of court at Williamsport, for transporting intoxicating liquor. He was sentenced June 7, 1920, to pay a fine of $500 and costs, which he paid, and the automobile in which the liquor was found was at the same time condemned and directed to be sold. Subsequently, June 15, 1920, John S. Cozine and William Brockley presented their petition, to which no answer has been filed, representing themselves to be the owners of the automobile, and stating furthermore that "George J. Brockley borrowed the said automobile from your petitioners, without stating the purpose for which the same was to be used, and further, without the knowledge and consent of your petitioners, used the said automobile for the purpose of transporting intoxicants without first having secured a permit therefor," praying for an order on the person in possession for the return or release of the same to the petitioners.

[1] The term of court at which the order directing the sale was entered began the second Monday of June and ends the third Monday of

October next, as authorized by the act of Congress creating the Middle district of Pennsylvania (Act June 30, 1902, 32 Stat. 549); hence there is nothing in the court's way, if such might have been otherwise so regarded, of modifying or vacating the order entered. The matter will therefore be decided upon the admitted facts stated in the petition.

[2] The National Prohibition Act (41 Stat. 315, tit. 2), violated by George Brockley, provides that:

"Sec. 26. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized," etc.

Whether the property seized shall be confiscated and sold depends upon the facts appearing, and whether the facts presented constitute good cause or reason to the contrary is a question addressed to the judicial sense and judgment of the court. This provision in the act is not analogous, as was contended for by the government's attorney, to that found in section 3450 of the Revised Statutes (Comp. St. § 6352), under which it has been held that the ignorance of the owner of a vehicle used by a third person for the removal of goods with the intent to defraud the United States will not save his property from confiscation. Logan v. United States, and Wisdom & Strickland v. United States (C. C. A.) 260 Fed. 746; United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555. From these cases, as well as from the general provisions of the revenue laws therein construed, it is conclusive that personal property voluntarily committed by the owner to the possession of a third person, for use by him, becomes subject to forfeiture absolutely, whether or not good cause appears to the contrary.

[3] The admitted facts in the present case show ownership and want of knowledge on the part of the vehicle's owners as to the purpose for which the vehicle was to be employed. Without any other attending circumstances, this is sufficient to warrant the court to order its return. It might be otherwise if, from the reputation of the person intrusted with the vehicle or other circumstances attending his occupation or employment, the inference would arise that the owners had reason to suspect that their property might be used for the purposes it was employed.

The construction contended for by the learned representative of the government would admit of no reason or cause for the return of property used in connection with a violation of the provisions of this statute, if such was intrusted to the violator of the same and used in connection therewith. This would work greater hardship upon innocent owners of such property than was contemplated by the legislators; otherwise they would not have provided for the return on good cause shown.

The order formerly entered is vacated, and the property seized, one Hudson touring car, No. 632—971, is to be delivered to the petitioners, when storage and charges, if any, are paid by the owners.

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

(District Court, M. D. Pennsylvania. July 23, 1920.)

No. 280.

1. **Removal of causes ⇐37—In condemnation, owner, joined as plaintiff, may remove as a defendant.**
   In a proceeding by a railroad company under the Pennsylvania statute to condemn land, the landowner, a New Jersey citizen, although made technically plaintiff by the statute, is in fact defendant, and is to be so regarded for the purpose of the removal statute.

2. **Removal of causes ⇐89(1)—State court without jurisdiction to deny removal.**
   Under Judicial Code, § 29 (Comp. St. § 1011), the filing of a sufficient petition and bond for removal ipso facto removes the cause, and deprives the state court of further jurisdiction; any question of the right of removal being for the federal court.

3. **Removal of causes ⇐81—Delay in filing petition does not defect removal.**
   Mere delay before filing petition and bond *held* not to defeat the right of removal, where the case is still in the condition as to pleadings prescribed by the statute.

At Law. Action by John W. Williams against the Delaware, Lackawanna & Western Railroad Company. On motion to remand to state court. Denied.

H. M. Streeter and H. C. Reynolds, both of Scranton, Pa., for plaintiff.

J. H. Oliver, of Scranton, Pa., for defendant

WITMER, District Judge. Under the right of eminent domain, the Delaware, Lackawanna & Western Railroad Company appropriated some land located in Susquehanna county, Pa., belonging to John W. Williams, a citizen of New Jersey. A formal petition and bond for the purpose, in accordance with the Pennsylvania procedure, was filed in court on March 23, 1914, to No. 105, April term, 1914. Exceptions to the bond were filed, which were afterwards dismissed, and the bond was approved. A bill in equity was filed by Williams after the land was appropriated, one day before the petition and bond was filed as indicated. The equity suit, addressed to No. 100 April term, 1914, was tried in the lower court, and on appeal to the Supreme Court the bill was dismissed. 255 Pa. 133, 99 Atl. 477.

[1] This suit was independent from the condemnation proceedings instituted to No. 105 of April term, and should not be confused with it. In the latter proceeding, the railroad company is the aggressor and Williams defendant; even though the Pennsylvania statute made him technically the plaintiff, so far as the removal statute is concerned, he is nevertheless to be regarded as the defendant. In condemnation proceedings the words "plaintiff" and "defendant" can only be used in an uncommon and liberal sense. Mason City R. R. Co. v. Boynton, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629.

[2] Without proceeding further, the defendant, Williams, on July 19, 1919, presented his petition and bond, asking for removal of the case to this court on the ground of diversity of citizenship. The order of removal was denied for the following reasons:

(1) "There was no suit or action pending at the time of the presentation of the petition and bond, and the application was premature."

(2) "The petitioner, John W. Williams, is not defendant in the suit or action, the nature of which is an action by him, as plaintiff, against the railroad company, as defendant."

There was no occasion for a formal order for removal, and such order is in fact of no effect. The right of removal is statutory, and is established immediately on the filing of a proper bond and petition, showing on its face that the case is one which the defendant has a right to remove under the provisions of the statute. No issue of fact raised upon the petition or record can be tried in the state court. Duff v. Hildreth, 183 Mass. 440, 67 N. E. 356. Where jurisdictional facts authorizing removal of a cause from a state to a federal court exist and are properly pleaded, and all the requirements of the law are met, the cause is in contemplation of law removed, and further proceedings in the state court are void, for the cause is ipso facto removed. Miller v. Soule (D. C.) 221 Fed. 493. Under the statute (section 29 of the Judicial Code [Comp. St. § 1011]) it is the duty of the state court to accept the petition and bond when tendered in proper form, and certify the case to the federal District Court, which will determine for itself whether the case was wrongfully or improperly removed thereto.

[3] It may be readily conceded that considerable time has elapsed before the defendant, Williams, filed his petition for removal, yet there is nothing in the statute to deny to him the right of so doing when he came. The Judicial Code (section 29) provides that such petition may be made and filed at "any time before the defendant is required by the laws of the state or the rule of the state court in which suit is brought, to answer or plead to the declaration" or statement, so that, if the cause should be removed, the validity of any and all of its defenses should be tried and determined in the District Court of the United States. Though tardy, this may all as yet be accomplished in the case before the court.

The information presented is sufficient to satisfy the court that the cause is within the jurisdiction of the court, and the motion to remand is denied.

UNITED STATES ex rel. WATTIS v. LANE, Secretary of the Interior.

(Court of Appeals of District of Columbia. Submitted October 7, 1919. Decided December 1, 1919.)

No. 3295.

1. **Public lands ⟸35(1)—"Soldier's additional right" defined.**
A "soldier's additional right" is the right of a soldier, who has received from the government less than 160 acres of land, to receive as much more land as will be necessary to make up the 160 acres, under Rev. St. §§ 2304, 2306, 2307 (Comp. St. §§ 4592, 4594, 4602).

2. **Mandamus ⟸85—Arbitrary refusal of Secretary of the Interior to act may be remedied by mandamus.**
If the Secretary of the Interior arbitrarily refuses to give one a patent to land to which he is entitled under Rev. St. §§ 2304, 2306 (Comp. St. §§ 4592, 4594), mandamus will issue to compel him to do so.

3. **Mandamus ⟸85—Ruling of Secretary of the Interior held not arbitrary, and reviewable by mandamus.**
There is room for the construction that, under Rev. St. §§ 2304, 2306, 2307 (Comp. St. §§ 4592, 4594, 4602), a soldier's additional right to receive land is not subject to testamentary disposition, but, when not exercised or transferred by the soldier in his lifetime, passes to the widow or orphan children, and it cannot be said that the Secretary of the Interior, in so deciding, was guilty of an arbitrary act, reviewable by mandamus.

Appeal from the Supreme Court of the District of Columbia.

Proceeding by the United States, on the relation of Edmund O. Wattis, to compel Franklin K. Lane, Secretary of the Interior, to issue a patent for land. From a judgment denying a writ of mandamus, relator appeals. Affirmed.

H. A. Hegarty and S. S. Ashbaugh, both of Washington, D. C., for appellant.

C. E. Wright and C. D. Mahaffie, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. [1] James H. Barnish was a soldier of the Civil War. According to section 2304, Revised Statutes (Comp. St. § 4592), he was entitled to receive from the government 160 acres of land under certain conditions. By section 2306, Revised Statutes (Comp. St. § 4594), it is provided that a person so entitled, who entered less than 160 acres, should have the right to receive as much more land as would be necessary to make up the 160 acres. This is called a "soldier's additional right." Barnish entered 72.73 acres and died without exercising the additional right. He left a will, in which he bequeathed some money to a niece, and then devised all the rest of his real and personal property to his nephew, Samuel Barnish Glover. Through mesne assignments Wattis, appellant here, acquired the interest, if any, in the soldier's additional right which came to Glover under his uncle's will. Wattis, asserting that he possesses that right, seeks to secure title to 78.28 acres of public lands by virtue of it. The Secretary of the Interior takes the position that the soldier could not

dispose of the additional right by will, and hence that Wattis did not acquire it. Wattis' application for a mandamus to compel the Secretary to issue to him a patent for the land was denied, and he appeals.

Sections 2306 and 2307 (sections 4594, 4602) are as follows:

Sec. 2306. Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Sec. 2307. In case of the death of any person who would be entitled to a homestead under the provisions of section twenty-three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvements therein contained; but if such person died during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title.

[2] Appellant argues that the language of those sections is "plain and unmistakable," that according to them the additional right may be disposed of by will, that the Secretary acted arbitrarily in holding otherwise, and that, in consequence, we have the power to grant the relief prayed. If the assumption that the Secretary acted arbitrarily be sound, appellant is right. Roberts v. United States, 176 U. S. 221, 231, 20 Sup. Ct. 376, 44 L. Ed. 443; Lane v. Hoglund, 244 U. S. 174, 182, 37 Sup. Ct. 558, 61 L. Ed. 1066. But is it?

[3] Looking at the statutes themselves, unaided by judicial construction, we are not able to agree with the appellant. Section 2307 declares that, in case of the death of any person "who would be entitled to a homestead" under section 2304, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, "shall be entitled to all the benefits enumerated in this chapter." This, of course, includes those given by section 2306 of the chapter. It does not say that the widow or the children shall be entitled to the right in the event the father had not willed it away, but their right to it is made to accrue upon his death. If it was the intention of Congress that the right could be disposed of by will, or, in the event of no will, should descend to the father's heirs, why the provision with respect to the widow and children? It seems to us that there is room for the construction that under these statutes the right is not subject to testamentary disposition, but, when not exercised or transferred by the soldier in his lifetime, passes to the widow or orphan children, as the case may be. And, if there is, we cannot say that the Secretary was guilty of an arbitrary act in holding that the right could not be willed. United States ex rel. Ashley v. Roper, 48 App. D. C. 69, 75, and cases cited there; United States ex rel. Johnson v. Lane, 48 App. D. C. 169, 174; Sykes v. Lane, 47 Wash. Law Rep. 299.

Counsel for appellant cites Mullen v. Wine (C. C.) 26 Fed. 206, Barnes v. Poirier et al., 64 Fed. 14, 12 C. C. A. 9, and Webster v. Luther, 163 U. S. 331, 16 Sup. Ct. 963, 41 L. Ed. 179, in support of his contention, but we do not think they help him. In the Mullen Case the right was in the minor children of the soldier, and the question

before the court was as to whether or not the children, through their guardian, were authorized to sell it. It was decided that they were. To the same effect is the holding in Barnes v. Poirier, where the only question passed upon was the power to assign the additional right in the lifetime of the owner. It was urged there that the assignment was "in contravention of the laws of the United States, against public policy, and void." But the court said no, that it contravened no statute or public policy, and added that restraints upon alienation are not favored by the law; but it did not say, because the question was not before it, that under section 2306, when construed as it must be with sections 2304 and 2307, the additional right could be devised by the soldier. The question passed upon by the Supreme Court in the Webster Case was also as to whether or not the right was assignable.

In none of them, nor in any found by us, is there any warrant for the contention that the soldier may will the right, and thus defeat the interest of his widow or orphan children, given to them by section 2307. The expressions running through these opinions, that the statute places no restrictions on the holder of the right, must be read in the light of the question which the court was considering, and cannot be taken as a warrant for holding that the right might be willed. There is authority for the proposition that the right of the owner to sell his property rests on a different footing from the right to make testamentary disposition of it. Wright, Tenures, 173; In Re Fox, 52 N. Y. 530, 533, 11 Am. Rep. 751; In re Noyes' Estate, 40 Mont. 178, 187, 105 Pac. 1013. If this be correct, and we think it is, there is a good reason for differentiating between the power to sell land and the power to dispose of it by will.

We have said this much, not for the purpose of deciding whether or not the right may be devised, for we are not required to do that, but to show that the Secretary of the Interior was acting within the scope of his discretionary power under the statute when he refused the patent. He may have erred, but with that we have nothing to do. All we hold is that his action was not arbitrary, but within the domain of his discretion, and therefore not subject to our review. The last expression of the Supreme Court of the United States upon this subject is found in Alaska Smokeless Coal Co. v. Lane, 250 U. S. 549, 40 Sup. Ct. 33, 63 L. Ed. 1135, decided November 10, 1919. It is there said, speaking of the Secretary's power in a case of this character:

"But where there is discretion, as we think there is in this case, even though its conclusion be disputable, it is impregnable to mandamus"—citing United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074. Ness v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610.

The judgment is affirmed, with costs.

Affirmed.

HOY v. LANE, Secretary of the Interior.

(Court of Appeals of District of Columbia. Submitted October 7, 1919. Decided December 1, 1919.)

No. 3294.

Appeal from the Supreme Court of the District of Columbia.

Suit by Frank M. Hoy against Franklin K. Lane, Secretary of the Interior. Decree for defendant, and plaintiff appeals. Affirmed.

H. A. Hegarty and S. S. Ashbaugh, both of Washington, D. C., for appellant.
C. E. Wright and C. D. Mahaffie, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. Appellant asked for an injunction to restrain the Secretary of the Interior from canceling his entry of certain public lands and to compel him to accept for the lands the soldier's additional right, given by section 2306, Revised Statutes (Comp. St. § 4594). This right belonged to one Sylvester Ramey, a soldier, was not exercised or disposed of by him in his lifetime, and is claimed by the appellant through an assignment from a residuary legatee under the will of Ramey. The injunction was denied.

The question presented is the same as that this day decided in U. S. ex rel. Wattis v. Lane, 49 App. D. C. 385, 266 Fed. 1005, namely, whether the Secretary of the Interior, in holding that a soldier's right to enter additional land under section 2306 could not be disposed of by the latter through a will, acted arbitrarily or within the discretion lodged in him by the statute. The ruling in the Wattis Case must control here. Consequently the decree is affirmed, at appellant's cost.

Affirmed.

GROOT v. REILLY.*

(Court of Appeals of District of Columbia. Submitted October 10, 1919. Decided December 1, 1919.)

No. 3252.

Constitutional law ⇐227, 249—Eminent domain ⇐2(1)—War ⇐10(1)—Saulsbury Resolution, prohibiting landlord from recovering possession, unconstitutional.

The Saulsbury Resolution, prohibiting recovery of possession of leased real estate during the war, so long as the tenant continues to pay the rent at the agreed rate, is unconstitutional, as taking private property without just compensation, and as being discriminatory between owners of property.

Appeal from the Supreme Court of the District of Columbia.

Action by Caroline I. Reilly against Gertrude Groot. Judgment for plaintiff, and defendant appeals. Affirmed.

W. C. Prentiss, of Washington, D. C., for appellant.
M. N. Richardson and E. L. Wilson, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. Appellee brought action against appellant to recover possession of certain premises. She was defeated in the municipal court. On appeal to the Supreme Court she prevailed.

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

*Writ of error dismissed 254 U. S. —, 41 Sup. Ct. 61, 64 L. Ed. —.

It appeared from her affidavit of merit, filed under rule 19, that the lease under which appellant held possession had expired and that the required notice to quit had been given before the institution of the action in the municipal court. This appellant did not deny in her affidavit of defense, but she set up certain matters on the assumption that under the Saulsbury Resolution (40 Stat. 593) they justified her in retaining possession. This was her only defense. As we have held that resolution to be unconstitutional (Willson v. McDonnell, 49 App. D. C. 280, 265 Fed. 432), her position is untenable.

The judgment is affirmed, with costs.

Affirmed.

STEPHENS et al. v. DALY.

(Court of Appeals of District of Columbia. Submitted November 4, 1919. Decided January 5, 1920.)

No. 3217.

1. **Cancellation of instruments ⇐1—Equity will relieve against conveyances for support on nonperformance.**
   Equity will afford some form of relief from conveyances for support on nonperformance of the agreement.
2. **Cancellation of instruments ⇐57—Under bill for rescission of conveyance for support, lien may be impressed.**
   Under a bill praying rescission of a conveyance for support on nonperformance of the agreement by reason of death of the grantee, where the estate is small and the expense of accounting necessitated by rescission will be great, equity may impress a lien on the property in favor of the grantor for the carrying out of the contract for support.
3. **Cancellation of instruments ⇐57—Lien imposed, instead of rescission, should be imposed only on interest conveyed.**
   On the death of the grantee of an undivided half of land conveyed by her tenant in common, in consideration of the grantor's support and the subsequent failure of such support, equity improperly imposed a lien on the entire estate, instead of the interest conveyed.

Appeal from the Supreme Court of the District of Columbia.

Bill by Alice V. Daly against Francis H. Stephens, executor and trustee, and Dorothea Stephens, by Robert L. Williams, guardian ad litem. Decree for plaintiff, and defendants appeal. Plaintiff dying pending the action, Cornelius T. Daly, her executor, was substituted in her place. Modified and affirmed.

F. H. Stephens, of Washington, D. C., for appellants.

Roger J. Whiteford, of Washington, D. C., for appellee.

ROBB, Associate Justice. In 1890 Alice V. Daly and her daughter, Ida May Daly, purchased premises No. 922 T Street, Northwest, in this city, as tenants in common. The purchase price was $6,000, of which $4,500 was paid in cash. For the next 19 years they shared equally either in the use of the property when occupied by them as a home or in the net rents and profits during the time it was under lease.

In 1909 the mother conveyed her interest or equity to the daughter; the consideration being an agreement by the daughter to provide a home for her mother, with her or at some other place of the mother's choice, and to pay the mother $20 per month for life in addition. This agreement was faithfully performed by the daughter up to the time of her death in 1912. Under the provisions of the daughter's will the entire estate was left in trust, the income and so much of the principal as in the discretion of the executor should be necessary to be applied to the mother's support. Upon the death of the mother the residuum of the estate was to go to third parties. At the time of the daughter's death the property had depreciated considerably in value and was producing no net income.

The bill herein, filed after the daughter's death, prayed a reconveyance to the mother "of her equity in said real estate." The decree impressed a lien upon the entire estate for the continued performance of the terms of the conveyance of the mother's one-half interest to the daughter, directed the payment of $2,700, representing 60 monthly payments of $45 each, beginning with the daughter's death (the mother having testified that board furnished her by the daughter was equivalent to $25 per month), and also directed future payments of $45 per month. Trustees were appointed, who were directed to sell the property for the purpose of carrying out the terms of the decree, anything remaining to be paid to the residuary legatees mentioned in the daughter's will. The mother died February 17, 1918.

[1-3] The jurisdiction of equity is not challenged, nor could it be successfully, for courts have held with substantial unanimity that equity will afford relief from conveyances for support on nonperformance of the agreement, though there has been a divergence of view as to the grounds and form of relief. Russell v. Robbins, 247 Ill. 510, 93 N. E. 324, 139 Am. St. Rep. 342; Wilson v. Wilson, 38 Me. 18, 61 Am. Dec. 227; Eastman v. Batchelder and Wife, 36 N. H. 141, 72 Am. Dec. 295; Morgan v. Loomis, 78 Wis. 594, 48 N. W. 109; Abbott v. Sanders, 80 Vt. 179, 66 Atl. 1032, 13 L. R. A. (N. S.) 725, 130 Am. St. Rep. 974, 12 Ann. Cas. 898; Keister v. Cubine, 101 Va. 768, 45 S. E. 285; 4 R. C. L. p. 519; 18 C. J. 380, par. 439. In the present case the grantor elected to waive the provisions of the grantee's will and to rely upon the terms of the agreement. While a rescission and a restoration of the status quo was prayed, and might have been decreed upon terms, the good faith of the grantee being conceded (Maddox v. Maddox, 135 Ky. 403, 122 S. W. 201; Morgan v. Loomis, 78 Wis. 594, 48 N. W. 109; 6 Pom. Eq. § 688), "the power of a court of equity in a proper case to rescind the contract and restore the property to the grantor would certainly include the power to afford a less drastic relief, if the facts pointed to the latter as more consonant with justice" (Keister v. Cubine, 101 Va. 768, 45 S. E. 285). In that case rescission was prayed, but the court impressed a trust upon the property in favor of the grantor. That a trust may be impressed has been ruled in other cases. Powers v. Powers, 39 S. W. 825, 19 Ky. Law Rep. 266; Storey-Bracher Lumber Co. v. Burnett, 61 Or. 498, 123 Pac. 66; Price v. Hobbs, 47 Md. 359; Doescher v. Spratt,

61 Minn. 326, 63 N. W. 736; Childs v. Rue, 84 Minn. 323, 87 N. W. 918; Chase v. Peck, 21 N. Y. 581.

Should we award a rescission here, equity would demand that the grantor account for the amount received by her up to the time of the grantee's death, and that the grantee account for the net income of the property conveyed to her by the grantor. A further accounting would be necessary from the date of the grantee's death. As the estate is small, and the delay and expense of such an accounting would be considerable, we incline to the view that in the circumstances justice will be done by charging the interest conveyed to the grantee with an equitable lien in favor of the grantor for the carrying out of the contract forming the real consideration for the conveyance. This will necessitate a modification of the decree, since the grantor in no event is entitled to more than the interest she conveyed.

As modified, the decree is affirmed, with costs to appellant.

Modified and affirmed.

HEITMULLER v. STOKES.

(Court of Appeals of District of Columbia. Submitted December 2, 1919. Decided January 5, 1920.)

No. 3273.

Eminent domain ⟸2(1)—United States ⟸69—No implied contract by United States to pay for property under Saulsbury Resolution.

There was no taking of private property for public use under the Saulsbury Resolution, within the meaning of the Constitution, and hence there was no implied contract on the part of the United States to pay the value of the property taken, as under such resolution the landlord was deprived of his property for the benefit of the tenant.

Appeal from Supreme Court of the District of Columbia.

Action by Slyvanus Stokes against Anna Heitmuller. Judgment for plaintiff, and defendant appeals. Affirmed.

Chapin Brown and C. B. Bauman, both of Washington, D. C., for appellant.

W. E. Lester, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment in the Supreme Court of the District for the plaintiff, appellee here, under law rule 19 of that court, in a landlord and tenant proceeding instituted in the municipal court.

Appellant challenges law rule 19, and relies upon the Saulsbury Resolution (40 Stat. 593). Rule 19 was sustained in Borden v. Carter, 261 Fed. 458, decided by this court on November 3, 1919 (47 Wash. Law Rep. 749), while the Saulsbury Resolution was declared unconstitutional in Willson v. McDonnell (D. C.) 265 Fed. 432, decided December 1, 1919.

Counsel for appellant suggest that the decision in United States v. Lynah, 188 U. S. 455, 23 Sup. Ct. 349, 47 L. Ed. 539, may have some

bearing upon the constitutional question. In that case it was ruled that—

"When the government appropriates property, which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates."

But it was not ruled that a statute would be constitutional that authorized the taking of private property for public use without any provision for compensation. In Chicago, Burlington & Q. R. Co. v. Chicago, 166 U. S. 226, 236, 17 Sup. Ct. 581, 584 (41 L. Ed. 979), the court said:

"The Legislature may prescribe a form of procedure to be observed in the taking of private property for public use; but it is not due process of law, if provision be not made for compensation."

However, we need not pursue the question, for under the Saulsbury Resolution, as we already have indicated, one individual (the landlord) was deprived of his property for the benefit of another individual (the tenant), so that there has been no taking of private property for public use within the meaning of the Constitution. It necessarily results that there is no such implied contract on the part of the United States as appellant here invokes.

The judgment is affirmed, with costs.

Affirmed.

FREED v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted March 1, 1920. Decided April 5, 1920.)

No. 3314.

1. **Indictment and information ⇐110(51)—Indictment for violating White Slave Traffic Act, paraphrasing statute, held proper.**
   An indictment charging that on a certain day accused transported, caused to be transported, and aided and assisted in transporting in interstate commerce, a certain woman for the purpose of prostitution, was in proper form; Act June 25, 1910 (Comp. St. §§ 8812–8819), contemplating that the offense may be committed in various ways, and the pleader merely paraphrasing the statute.

2. **Indictment and information ⇐129(1)—Indictment for violating White Slave Traffic Act properly included transportation of several women.**
   Where driver of an automobile, receiving a commission on its earnings in addition to salary, aided two women in procuring men with whom illicit relations were to be had, and, having brought the men and women together, drove across the Potomac into Virginia, where the illicit acts took place, the two offenses growing out of the transaction were so connected as to be within the provision of Rev. St. § 1024 (Comp. St. § 1690), and were properly included in different counts in one indictment.

3. **Criminal law ⇐510—Uncorroborated testimony of accomplice sufficient at common law.**
   At common law the uncorroborated testimony of an accomplice will support a verdict of conviction.

4. **Criminal law ⊜780(1)—Court should direct attention of jury to nature of accomplice evidence.**
While there is no absolute rule of law preventing convictions on the testimony of an accomplice, the jury should be instructed and cautioned as to the character of such testimony, and the danger of convicting without supporting evidence.

5. **Criminal law ⊜780(2)—Evidence held to require instruction as to whether women transported to another state for prostitution were accomplices.**
In a prosecution for transporting women in interstate commerce for the purpose of prostitution, *held*, under the evidence, that the jury might have found that each of the women, who testified against accused, was an accomplice, entitling accused to an instruction concerning such evidence.

6. **Criminal law ⊜780(3)—Instruction as to accomplice testimony held insufficient.**
In a prosecution for transporting women in interstate commerce for purpose of prostitution, where the jury may have found that the women, who testified for the prosecution, were accomplices, and accused requested proper instructions concerning accomplice testimony, an instruction by the court concerning the witnesses: "You have noticed their manner of testifying, and you have heard more or less about what kind of people they are. All these things you should keep in mind when your are weighing the testimony of any witness, in order to determine what credibility it is entitled to"—amounted to nothing more than the general admonition, which it is proper for the court to give in all cases, and fell far short of the requirements of the situation.

7. **Criminal law ⊜827—Request for instruction held sufficient to point out that some witnesses might be considered accomplices.**
While a request for instructions as to accomplice testimony included only two of a number of witnesses, it was sufficient to bring to the attention of the court the fact that some of the witnesses at least might be considered accomplices, and hence that the jury should be cautioned and advised concerning such testimony.

Smyth, Chief Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

David Freed was convicted under an indictment charging that he transported and aided and assisted in transporting in interstate commerce certain women for the purpose of prostitution and appeals. Reversed, and new trial awarded.

J. A. O'Shea, of Washington, D. C., for appellant.

J. E. Laskey, U. S. Atty., and T. Hardy Todd and Morgan H. Beach, Asst. U. S. Attys., all of Washington, D. C.

ROBB, Associate Justice. Appellant, defendant below, was convicted in the Supreme Court of the District under two counts of an indictment, the first of which charged that on a certain day he transported, caused to be transported, and aided and assisted in transporting, in interstate commerce for the purpose of prostitution, a woman by the name of Sue McLain; the second count being a duplicate of the first, except that the name of the woman was Blanche Phillips. The sentence was 5 years in the penitentiary.

The defendant was 20 years of age and the driver of an automobile, receiving a commission on its earnings in addition to wages. The evidence for the government tended to show that he aided the two

women named in procuring men with whom illicit relations were to be had; that, having brought the men and women together, the party would be driven across the Potomac river into Virginia in defendant's automobile, where the illicit acts would take place (but not in the presence of defendant), the men paying the women, and also paying defendant for transporting them. The witnesses for the government were the two women named in the indictment, a third woman who accompanied them and participated in the occurrences upon which the indictment was based, and two of the men who were members of the party. One other witness testified to seeing defendant drive the party away from the place in this city where the two women were stopping on the night in question.

[1, 2] The indictment was in proper form. Kidwell v. U. S., 38 App. D. C. 566; Wiborg v. U. S., 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Anderson v. U. S., 170 U. S. 481, 18 Sup. Ct. 689, 42 L. Ed. 1116. The statute (36 Stat. 825 [Comp. St. §§ 8812–8819]) contemplates that the offense denounced therein may be committed in various ways, and the pleader has merely paraphrased the statute. The two offenses, growing out of the same transaction, are so connected as to be within the provisions of section 1024, R. S. (Comp. St. § 1690), which we reviewed in the Kidwell Case.

A more serious question is involved in the next contention of defendant, based upon his request for an instruction that, if the jury should find that the women named in the indictment were accomplices, they then would have to inquire whether or not there was corroborating evidence, and for another instruction that the testimony of these women should not be taken as that of ordinary witnesses, but "ought to be received with suspicion, and with the very greatest care and caution." These prayers were refused, and the only instruction given in this connection was the following:

"Now a general comment in regard to the witnesses. You have seen the witnesses on the stand, and you have heard what they have had to say; you have noticed their manner of testifying, and you have heard more or less about what kind of people they are. All these things you should also keep in mind when you are weighing the testimony of any witness, in order to determine what credibility it is entitled to."

[3, 4] At common law the uncorroborated testimony of an accomplice will support a verdict of conviction. But the decisions all recognize the unsatisfactory character of such testimony, and the serious infirmities with which it is attended, and in many jurisdictions the common-law rule has been changed by statutes expressly declaring that the uncorroborated testimony of an accomplice cannot sustain a conviction.

"These statutes crystallize in a rule of positive law what was already a rule of practice, which to greater or less extent courts regarded themselves bound to observe; for it has long been the custom, both in England and America, for the courts, not only to caution the jury as to the danger of acting upon the unsupported testimony of an accomplice, but to advise them not to convict, unless there is some corroborating evidence." 1 R. C. L. p. 167.

For more than 40 years in this jurisdiction it has been the practice to safeguard the interests of accused in prosecutions for serious of-

fenses, where the testimony of accomplices has been admitted, by bringing directly to the attention of the jury the nature of such evidence, and the danger of convicting unless they should find supporting or corroborating evidence. Thus in United States v. Neverson, 1 Mackey (12 D. C.) 152, the court instructed the jury:

"That the testimony of accomplices is admitted from necessity, it being often impossible to bring the principal offenders to justice, without having recourse to such evidence; and the jury may, if they see fit, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement. * * * The court advises the jury that, if they shall believe from the evidence that Johnson [a witness] was an accomplice in the murder, the jury should not convict the prisoners upon the testimony of Johnson alone and without corroboration."

In Maxey v. U. S., 30 App. D. C. 63, the jury had been instructed that—

"The general rule is that, where an accomplice testifies in a case, his or her testimony is to be taken with great caution, because of the guilt which he has to admit himself as against himself. And the rule is that the jury are to be cautioned not to find defendants guilty upon the uncorroborated testimony of accomplices. They may do so, but the rule is for the court to caution them * * * not to do that without corroborating testimony."

In Thompson v. U. S., 30 App. D. C. 352, 12 Ann. Cas. 1004, a woman upon whom an abortion had been committed was a witness, and the defendant insisted that she was an accomplice. The trial court rejected this contention, but instructed the jury that—

"While she is not an accomplice, strictly speaking, inasmuch as, from her own evidence, she morally implicates herself in the act, the jury should consider that circumstance as bearing on her credibility."

This court found she was not an accomplice and that—

"The instruction in regard to the credibility of the witness was as much as the defendant had a right to expect."

The latest expression of the Supreme Court of the United States upon this subject is to be found in Caminetti v. U. S., 242 U. S. 470, 495, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168. There the trial court had been asked to instruct the jury that certain witnesses were accomplices, a controverted question. The court referred to its decision in Holmgren v. U. S., 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778, where the trial court had been asked, in effect, to rule as matter of law that a witness was an accomplice, and the Supreme Court said:

"The request did not properly state the law, as it assumed that Werta [a witness] was an accomplice, a conclusion which was controverted, and against which the jury might have found in the light of the testimony. It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them. But no such charge was asked to be presented to the jury by any proper request in the case, and the refusal to grant the one asked for was not error."

It thus will be seen that, while the Supreme Court recognizes that there is no absolute rule of law preventing convictions upon the testi-

mony of an accomplice, the jury should be instructed and cautioned as to the character of such testimony and the danger of convicting without supporting evidence. The inference is plain, we think, that the judgments were sustained in the Caminetti and Holmgren Cases because defendants asked too much, or, as the court said in the Holmgren Case, the instructions requested "did not properly state the law," in that they assumed as facts matters which were in controversy. Certain it is that the Supreme Court has not ruled that the refusal of a trial court to grant a proper instruction, in a case where there is little, if any, evidence other than that of accomplices, is not so prejudicial to the accused as to warrant an appellate court in awarding him a new trial.

[5-7] Coming back to the present case, unquestionably the jury might have found that each of the three women who testified was an accomplice as to the others. Bennett v. U. S., 227 U. S. 333, 339, 33 Sup. Ct. 288, 57 L. Ed. 531. Not only were these witnesses accomplices as to one another, but under the evidence they might have been found guilty of conspiracy. United States v. Holte, 236 U. S. 140, 35 Sup. Ct. 271, 59 L. Ed. 504, L. R. A. 1915D, 281. The testimony of the two male members of the party was even more tainted, for unquestionably under that testimony their conduct was as culpable as that of defendant. The fact that they so freely implicated themselves in testifying against this defendant is significant, especially as it does not appear that either has been prosecuted. The situation confronting the trial court, therefore, was unusual. There was no direct evidence that was untainted. While it is not improbable that the same result would have been reached, had the court cautioned and advised the jury as to the danger of convicting upon the uncorroborated testimony of accomplices, it is not for us to speculate upon this question and resolve it against the accused. The charge of the court fell far short, in our view, of the requirements of the situation. It amounted to nothing more than the general admonition, which it is proper for the court to give in all cases.

The question which the defendant sought to have brought to the attention of the jury, presenting a material, if not vital, issue in the case, was not even mentioned. Had the court defined an accomplice, and brought sharply to the attention of the jury the character of the government's testimony against the defendant, it cannot be doubted that his counsel would have been in a better position to present his case to the jury, and who may say that the point of view of the jury might not have been different. While the request included only two of the witnesses, it was sufficient to bring to the attention of the court the fact that some of the witnesses, at least, might be considered accomplices, and hence that the jury should be cautioned and advised concerning such testimony. When we come to consider that in many jurisdictions it is a positive rule of law that no conviction may be had upon the uncorroborated testimony of an accomplice, the importance of the rule in this and other jurisdictions, requiring caution and advice in this connection, is apparent. The jury may convict without corroborating evidence, but in a case like the present the accused is entitled to have the court first caution and advise the jury.

As to the failure of the defendant to include in his request all of the witnesses who might have been regarded as accomplices, see Skuy v. U. S., 261 Fed. 316, where the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Sanborn, said:

"The contention that proper objections were not made, and proper exceptions were not taken, to permit the consideration in this court of the issues which have been discussed, has not escaped attention, but it fails to convince. Hall v. United States, 150 U. S. 76, 80, 82, 14 Sup. Ct. 22, 37 L. Ed. 1003; Waldron v. Waldron, 156 U. S. 361, 380, 381, 382, 15 Sup. Ct. 383, 39 L. Ed. 453. And even if it were tenable, this is a trial for an alleged crime, it involves the liberty of the citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception, or assignment. Wiborg v. United States, 163 U. S. 632, 659, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; August v. United States, 257 Fed. 388, 391, 393, — C. C. A. —."

Believing that the defendant was not accorded the fair and impartial trial to which he was entitled, and that his interests may have been substantially affected, we are constrained to reverse the judgment and award a new trial. Surely, if it was the duty of the trial court to caution and advise the jury in the respects pointed out, and we are certain that it was, nothing short of a reversal of the judgment will save the defendant from the harm that may have resulted from the want of such caution and advice.

Judgment reversed, and case remanded, with instructions to grant a new trial.

Reversed, and new trial awarded.

SMYTH, Chief Justice (dissenting). I am constrained to dissent because in my judgment:

(a) The women were not accomplices. Hays v. United States, 231 Fed. 106, 110, 145 C. C. A. 294; Diggs v. United States, 220 Fed. 545, 553, 136 C. C. A. 147; United States v. Holte, 236 U. S. 140, 35 Sup. Ct. 271, 59 L. Ed. 504, L. R. A. 1915D, 281. And, if they were,

(b) The refusal to give the requested instruction was not reversible error. Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Wallace v. United States, 243 Fed. 301, 310, 156 C. C. A. 80. These cases are all later than United States v. Neverson, 1 Mackey (12 D. C.) 152.

DAVIDGE v. SIMMONS.

(Court of Appeals of District of Columbia. Submitted February 4, 1920. Decided April 5, 1920.)

No. 3293.

1. **Tender ⟸14(5)—Statement on checks that they were for "rent" for certain period equivalent to statement that it was all that was due.**
   A statement on checks offered by a tenant, "rent" for certain periods named, was equivalent to saying that they represented "the sum agreed upon" or the "compensation," not a part, but all, "for the use of the property"; rent commonly meaning "a certain pecuniary amount, agreed upon between a tenant and his landlord, and paid at fixed intervals by the tenant to the landlord, for the use of land or its appendages." Hence the offers of the checks were conditional tenders, and not valid.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rent.]
2. **Tender ⟸14(1)—Must be unconditional.**
   To be effective as such, a tender must be unconditional.
3. **Jury ⟸17(1)—Supreme Court rule did not give party right to jury trial on appeal in landlord and tenant case.**
   Supreme Court rule No. 19 is applicable to landlord and tenant cases, and on an appeal a party cannot demand a jury.
4. **Appeal and error ⟸712—Matter not in record cannot be considered.**
   On appeal, the court can consider only what the record discloses.
5. **Landlord and tenant ⟸284—Acceptance of rent does not abate action.**
   Acceptance of rent already in arrears does not abate a landlord's right of action for possession.
6. **Appeal and error ⟸767(2)—Brief containing disrespectful language stricken.**
   A brief using disrespectful language with respect to opposing party or counsel will be stricken on motion.

McCoy, Chief Justice of Supreme Court, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Action by Leo Simmons against John W. Davidge. Judgment for plaintiff, and defendant appeals. Affirmed.

Julius I. Peyser and Geo. E. Edelin, both of Washington, D. C., for appellant.

Bates Warren, W. H. Sholes, and B. L. Simmons, all of Washington, D. C., for appellee.

SMYTH, Chief Justice. Davidge occupied an apartment belonging to Simmons under a lease which reserved a rental of $1,260 a year, payable monthly in installments of $105, and which expired September 30, 1918. After the expiration of the lease Davidge became a tenant at sufferance for a month. Simmons refused to permit him to remain longer, unless he paid a rental of $1,386 a year, payable in installments of $115.50 a month. Davidge declined to pay the additional rent, and, after due notice to quit, refused to vacate the premises, but, resting on the Saulsbury Resolution (40 Stat. 593), sent to Simmons each month his check for $105, the old rent. The check for November had written upon it these words, "Rent Apt. 42, 2139

Wyo. Ave. Nov. '18," and each check thereafter had a similar statement, except the name of the month and the year which were changed to correspond with the period for which the rent was offered. Simmons refused to receive the checks and returned them to the sender. Davidge insists that the checks constituted a good tender, and that, in consequence, he is entitled to the protection of the Saulsbury Resolution.

[1, 2] Webster's Dictionary says that rent commonly means "a certain pecuniary amount agreed upon between a tenant and his landlord and paid at fixed intervals by the tenant to the landlord for the use of land or its appendages." According to the Standard Dictionary "rent" is defined, in the popular sense, as "the compensation paid for the use of any kind of property, movable or fixed." The statement on the several checks that they were "rent" for the periods named was equivalent to saying that they represented "the sum agreed upon" between Simmons and Davidge, or the "compensation"—not a part, but all—"for the use of the property." It was so understood by Simmons, for that was the reason why he refused to accept the checks; and Davidge says, in his affidavit of defense, that the several checks were "intended to be a receipt in full for the month indicated." Thus the parties agree upon the interpretation to be placed on the statement. Taking this interpretation as correct, the statement contained a condition—made the tender a conditional one. To be effective as such, a tender "must be unconditional." Hepburn & Dundas v. Auld, 1 Cranch, 321, 2 L. Ed. 122; Taylor v. Ruppert et al., 39 Wash. Law Rep. 66; Elderkin v. Fellows, 60 Wis. 339, 341, 19 N. W. 101; Richardson v. Boston Chemical Laboratory, 9 Metc. (50 Mass.) 42, 52; Henderson v. Cass County, 107 Mo. 50, 56, 18 S. W. 992; Moore v. Norman, 52 Minn. 83, 87, 53 N. W. 809, 18 L. R. A. 359, 38 Am. St. Rep. 526; Tompkins v. Batie, 11 Neb. 147, 153, 7 N. W. 747, 38 Am. Rep. 361; Holton v. Brown, 18 Vt. 224, 226, 46 Am. Dec. 148.

"The tender," says the court in the Elderkin Case, quoting Greenleaf on Evidence, § 602, "must be understood as a tender, and be absolute and unconditional." In the Henderson Case it was held:

"A tender, to be of any avail, must be unconditional. The debtor cannot insist that the creditor shall admit that no more is due in respect of the debt for which the tender is made."

According to the Supreme Court of Nebraska in Tompkins v. Batie:

"There must not be anything raising the implication that the debtor intended to cut off or bar a claim for any amount beyond the sum tendered."

Bowen v. Owen, 63 Eng. C. L. R. 130, 135, when considered in the light of its facts, may seem to be in conflict with the views expressed in the American decisions from which we have quoted, although the principle announced therein is in harmony with them. Mr. Justice Erle said that if the person who makes the tender "requires the other party to accept it as all that is due, that is imposing a condition; and, when the offer is so made, the creditor may refuse to consider it as a tender." Davidge required Simmons to accept the checks in payment of "all that was due," and this constituted a condition which, according to the Bowen Case, rendered the tender ineffective. If Simmons

had accepted the checks and cashed them, it might, in the language of the Tompkins Case, have compromised "his rights in seeking to recover more"; and the law did not require him, in the circumstances, to do anything which would have that effect. The rent not having been paid, and a sufficient tender thereof not having been made, Davidge is not entitled to the shield of the Saulsbury Resolution, even if it were valid.

[3] It is urged that rule 19 of the Supreme Court, under which the judgment was rendered, is inapplicable to landlord and tenant cases. This court has recently held otherwise. Borden v. Carter, 49 App. D. C. 116, 261 Fed. 458.

[4, 5] We are informed in the brief for Davidge that since the decision in the court below Simmons commenced action and recovered judgment in the municipal court against him for the value of the use and occupation of the property from the date on which the notice expired down to the institution of the action. The judgment has been satisfied, and it is urged that because of this Davidge is entitled to have the case reversed. A ready answer to the claim lies in the fact that there is nothing in the record to that effect, and of course, we can consider only what the record discloses; but, even if it was in the record, the result would be the same. Acceptance of rent already in arrears does not abate a landlord's right of action for possession. Edwards v. Totten, 48 App. D. C. 418.

[6] Complaint is made of certain language in the brief of Simmons which is intended to reflect upon Davidge. We regret to say that the complaint is well founded. There is nothing in the record to support the reproachful allusions. Davidge did nothing but what he believed, in good faith, he had a right to do under the law. For this he is not subject to criticism. Counsel should understand that language used in briefs or oral argument with respect to opposing party or counsel must be respectful. We are glad to say that infractions of this salutory rule are very rare at our bar. The motion to strike the brief is sustained.

The judgment is affirmed, at the cost of the appellant.

Affirmed.

Chief Justice McCOY, of the Supreme Court of the District of Columbia, sat in the place of Associate Justice ROBB, who took no part in the decision or consideration of this case.

McCOY, Chief Justice (dissenting). I feel obliged to dissent. It seems to me that the tender made by the appellant was a good one. In Bowen v. Owen, 63 Eng. C. L. R. 130, it appeared that the tenant sent the amount admitted by him to be due for rent, with a letter reading as follows:

"I have sent with the bearer £26, to settle one year's rent of Nant-y-Pair."

See, also, Jones v. Bridgman, 39 Law Times Reporter, 500, which follows Bowen v. Owen, stating that that case overruled Hastings v. Thorley, cited at 38 Cyc. 153, note 59. In Robinson v. Ferreday,

34 Eng. C. L. R. the tender was accompanied by the words that the amount was "all that was considered to be due," and that was held to be a good tender. See, also, Preston v. Grant, 34 Vt. 201; Foster v. Drew, 39 Vt. 51. It is true that Davidge admits in his affidavit of defense that the checks were tendered in payment of a month's rent, and intended to be a receipt in full; but as he did not say anything to Simmons indicating that intention, beyond the indorsements on the checks, the interpretation of the acts of sending the checks rests entirely upon what construction the law places upon the use of the words so indorsed.

If the tender was good, it is necessary to decide whether the appellant was protected by the Saulsbury Resolution. The question of the constitutionality of the resolution was not argued; counsel assuming that a previous decision by this court was controlling. If the present appeal had to be decided upon a consideration of the Saulsbury Resolution, obviously it should be passed upon by those only who are justices of this court, and not by one who is merely an acting justice; but, as the decision is not to turn upon the validity of the resolution, it is probably not improper to say that, as I am not satisfied that the resolution is clearly unconstitutional, the defendant, in my opinion, is protected by it.

I concur in granting the motion to strike the brief, as it is scandalous and impertinent.

ATLAS PORTLAND CEMENT CO. et al. v. FOX.

(Court of Appeals of District of Columbia. Decided April 5, 1920.)

No. 3289.

Dissenting opinion.

For majority opinion, see 49 App. D. C. 292, 265 Fed. 444.

SMYTH, Chief Justice. This case, as observed by the majority, is to be determined by a correct interpretation of section 499 of our Code. It presents, therefore, but very little difficulty, because the meaning of that section is as obvious and simple as the English language could well make it. It says that a deed of real estate shall take effect from the date of its delivery, "except that as to creditors and subsequent bona fide purchasers and mortgagees without notice of said deed, and others interested in said property, it shall only take effect from the time of its delivery to the recorder of deeds for record." The deed from Colburn to Reardon, and the one from her to Fox, were not delivered to the recorder of deeds for record until nearly 20 months after Colburn had acquired title to the property. During all this time appellants' judgment against Colburn remained unsatisfied; yet the majority says that it is not entitled to priority over the unrecorded deeds just mentioned. The section says that all such deeds as to creditors and subsequent bona fide purchasers and mortgagees shall not take effect until they have been delivered to the recorder for record. If they, Reardon's and Fox's deeds, did not take effect before that, then what, I ask, prevented the lien of the appellants' judgment from taking precedence of them?

The majority hold that a creditor, who reduces his claim to judgment before the vesting of title to a certain piece of property in his debtor, is not entitled to the benefit of the section as to that property; in other words, that the section applies only to creditors whose judgments were rendered after the acquisition of title by the debtor—that creditors are in the same class as bona fide purchasers and mortgagees. Thus, in effect, the majority amend the section by transferring the word "subsequent" from the place where Congress wrote it to a position immediately in front of the word "creditors," so that, as changed, it reads, "subsequent creditors and bona fide purchasers," etc. I submit that there is no legal warrant for this action.

An extract from American Savings Bank v. Eisminger, 35 App. D. C. 51, 55, 21 Ann. Cas. 861, is offered by the majority in support of their holding, but that extract, to be properly understood, must be read in the light of what immediately precedes it. The court in that case was combating the argument of Eisminger that the judgment lien was "limited to the actual, real interest of the judgment debtor in the land. * * *" It said that the argument was not sound, that the section must "be interpreted in the light of the general policy in respect of record notice of titles and interests, expressed in preceding sections, the purpose and effect of which are important in its efficient operation." Then follows what the majority quote. The opinion lends no countenance to the construction now placed upon the section.

No notice is taken by the majority of Ruppert v. Haske (decided by the Supreme Court of this District, sitting en banc, in 1886) 5 Mackey, 262. The particular part of the section here involved was then in force, and had been for about 8 years. The contest was between a judgment creditor and the holder of an unrecorded equitable mortgage. Each claimed priority with respect to certain real property of the judgment debtor. The judgment was recovered in 1879, and the title to the property vested in the judgment creditor in 1880. We have, then, a case exactly in point. The court held that the judgment lien was entitled to precedence over the mortgage. In support of its conclusion it cited McCoy v. Rhodes et al., 11 How. 131, 13 L. Ed. 634, and Taylor v. Doe, 13 How. 287, 14 L. Ed. 149. The former is especially pertinent. It construes a Louisiana statute quite similar to ours. In doing so it said:

"The next ground of defense relied on is the conveyance made by Rhodes to Montgomery of the 7th of December, 1839. It was recorded December 10, 1841. According to the statute law of Louisiana, no notarial act [deed] concerning immovable property has effect against third persons, until the same shall have been recorded in the office of the judge of the parish where such property is situated."

Applying the statute, as thus interpreted, to the case in hand, it further said:

"The deed from Rhodes to Montgomery being a notarial act, it took effect on the 10th of December, 1841, against McCoy, the judgment creditor; and as the lien of the judgment, or judicial mortgage, attached the 24th of February, 1840, when the title was in Rhodes the debtor, *this deed is of no force as against the judgment*, nor are the subsequent deeds founded on it; * * *." (Italics mine.)

Looking at the instant case in the light of that decision, Fox's deed, in contemplation of law, "is of no force as against the judgment," because not recorded until about 20 months after title had vested in the judgment debtor, Colburn. This is exactly what our section says, namely, that the unrecorded deed "shall only take effect from the time of its delivery to the recorder of deeds for record." In principle this is what the Ruppert Case held, and it has stood as the law of this district for nearly 33 years. The majority ignore it, not making even a passing comment.

It is urged by counsel for the appellee that in all the cases cited by the appellants "the judgment debtor was the apparent record owner at the time of credit given or judgment entered." This is not strictly true, but, if it were, it would be immaterial, because it would only tend to show that the question now before us was not considered by those cases. On the other hand, the appellee has not presented any decision in which it was ruled that, under a statute like ours, a judgment rendered prior to the acquisition of title by the judgment debtor would not take precedence over an undisclosed deed. A careful search has failed to reveal to me such a case, and I should be very much surprised if one could be found.

The majority say "that, since the claims of the defendants neither accrued nor were reduced to judgment during the period of almost two years, during which the record title remained in Colburn, the liens will not attach." No distinction is made, it will be observed, between a situation where the judgment debtor acquired only a dry legal title and one in which he acquired the beneficial title. Under this reasoning, even if Colburn had the fee simple, the lien of the judgment would not attach, since the judgment was rendered before he acquired title. To say so, I submit, is to fly in the face of the plain mandate of the section.

Believing that the section means what it enjoins, and that the appellants are entitled to their lien, I dissent.

WHITTEMORE v. CRAWFORD.*

(Court of Appeals of District of Columbia. Submitted October 14, 1919. Decided December 1, 1919.)

No. 3254.

Appeal from the Supreme Court of the District of Columbia.

Action by Maud B. Crawford against Sarah A. Whittemore. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Wm. Shea and L. A. Bailey, both of Washington, D. C., for appellant.

Thos. M. Baker, of Washington, D. C., for appellee.

ROBB, Associate Justice. This is an appeal from a judgment in the Supreme Court of the District for the plaintiff, appellee here, under law rule 19 of that court, in a landlord and tenant proceeding instituted in the municipal court.

Since appellant relies solely upon the Saulsbury Resolution (40 Stat. 593), this case is ruled by our decision in Willson v. McDonnell, 49 App. D. C. 280, 265 Fed. 432. The judgment is therefore affirmed, with costs.

Affirmed.

*Writ of error dismissed 254 U. S. —, 41 Sup. Ct. 5, 65 L. Ed. —.

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⚖87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⚖ number sections 346–420, at the end of this topic, where the matter in this and future index digests will be found.
⚖99 (U.S.C.C.A.W.Va.) Both carrier and shipper liable for negligence in furnishing defective car to employés for loading.—Waldron v. Director General of Railroads, 196.

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