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

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

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

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CASES REPORTED

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ARRANGED UNDER THEIR RESPECTIVE CIRCUITS

FIRST CIRCUIT.

SECOND CIRCUIT.

SIXTH CIRCUIT.

SEVENTH CIRCUIT.

EIGHTH CIRCUIT.

NINTH CIRCUIT.

DISTRICT OF COLUMBIA.

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

SMITH v. PAYNE, Director General of Railroads.

(Circuit Court of Appeals, Third Circuit. November 24, 1920.)

No. 2595.

1. **Commerce ⇐27(7)—Railroad employee employed in interstate commerce.**
   A stipulation that a person when killed by a train was "assisting another man at work at or near a switch, which switch was connected with tracks used for both interstate and intrastate commerce" *held* to determine the character of the employment of both employé and carrier as interstate for purposes of an action under Employers' Liability Act, § 1 (Comp. St. § 8657).

2. **Death ⇐77—Alien parents shown entitled to recover under federal Employers' Liability Act.**
   Proof that the parents of plaintiff's intestate lived in Poland and that for several years before and since his service in the army he had periodically sent them remittances, receipt for the last of which was returned after his death, *held* sufficient to meet the requirement of Employers' Liability Act, § 1 (Comp. St. § 8657).

3. **Master and servant ⇐203(3), 205(1)—Risk of extraordinary dangers not assumed.**
   A track employé of a railroad company is not called upon to seek out and discover extraordinary dangers imposed on him by his employer but may assume that the employer and its agents have exercised for his safety such care as the circumstances reasonably admit.

4. **Master and servant ⇐288(3)—Trackworker's assumption of risk from train without headlight question for jury.**
   The operation of a train within yard limits on a dark and stormy night without a headlight on the engine *held* not an ordinary danger of a trackworker's employment the risk of which he assumed as matter of law.

In Error to the District Court of the United States for the District of New Jersey; Lynch, Judge.

At law. Action by Robert Smith, administrator of Peter Bogdan against John Barton Payne, Director General of Railroads. Judgment for defendant and plaintiff brings error. Reversed.

Frank M. Hardenbrook and Charles M. Egan, both of Jersey City, N. J., for plaintiff in error.

Collins & Corbin, of Jersey City, N. J. (Edward A. Markley and George S. Hobart, both of Jersey City, N. J., of counsel), for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. Bogdan was run down and killed by a train of the Erie Railroad Company on its main line of tracks in Jersey City, within yard limits. In this action his administrator charged the defendant with negligence in operating the train by an engine without a headlight and without giving "reasonable, and the usual and customary notice and warning" by bell or whistle. The trial court entered judgment of non-suit without giving its reasons. By this writ of error the plaintiff brings the judgment here, presenting for review all the grounds on which the defendant based his motions for non-suit, in order to cover with certainty the particular one which moved the court. Among these were failure of the plaintiff to show that the decedent was employed and the defendant engaged in interstate commerce at the time of the accident and his failure to prove pecuniary loss suffered by the decedent's parents, for whose benefit as his next of kin this suit was brought, thereby challenging the plaintiff's right to recover under the Federal Employers' Liability Act (Comp. St. §§ 8657–8665).

[1] On the first of these questions the parties stipulated that the

"Decedent was assisting another man at work at or near a switch, which switch was connected with tracks used for both interstate and intrastate commerce."

This stipulation, construed most favorably to the plaintiff on the defendant's concession, placed the decedent at the switch and made the switch a part of the tracks. The switch thus became an instrumentality as permanently devoted to commerce as the tracks themselves (Minneapolis & St. Louis R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54; Pedersen v. D., L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153), and determined the character of the employment of both employé and carrier as interstate.

[2] We think there was evidence sufficient to satisfy the requirement of the Act that the beneficiaries of the action had been injured and had sustained pecuniary loss by the death of their son. Michigan Central R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; American R. Co. v. Didricksen, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456; St. Louis, etc., R. Co. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 116. True, there was no direct proof that the decedent's father and mother were living at the time he was killed, a deficiency of evidence which the defendant insists was fatal. But there was evidence that the decedent's parents lived in Poland, and that for several years before going into the army the decedent had sent them money monthly and that after leaving the army he had sent them money at different periods, the last being on a

date so shortly before his death that the return card of the remittance was not received until after his death. This we think meets the requirement of the Act.

We now come to the main question, whether there was evidence that the decedent's death was due to negligence of the defendant, and to the related question, whether the decedent assumed the risk of such negligence. The case permits the latter question to be put in this way, for unless the defendant by his negligence subjected the decedent to dangers other than those normally incident to his employment the plaintiff cannot prevail.

Bogdan was a helper to Rosinsky, a steamfitter engaged in work about the yards of the Erie Railroad Company. Rosinsky was the only witness to the accident, and his testimony was the only evidence given in proof of the defendant's negligence. It was substantially as follows:

The night being cold, the defendant "had the steam on the switches." Under orders, Rosinsky with Bogdan, his helper, went upon the tracks to test the steam in the switch pipes. As work of this character, like that of trackwalkers in a yard, is highly dangerous, men, when called upon to do such work, were formed into gangs of two, or three, or four. At this time the gang consisted of only the two men named. It was the duty of one to watch while the other worked. Bogdan was not a new hand. On the night in question, perhaps because it was dark and snowing hard, Rosinsky, the superior, handed Bogdan a lantern, and, giving him the task of watching, told him explicitly to look out for trains and cautioned him to avoid danger by standing at least 4½ feet clear of the track. Bogdan's face was turned in the direction from which any train moving on that track would come. Rosinsky, with his back toward any on-coming train, leaned down to gauge the steam. Suddenly Bogdan and his lantern disappeared, and Rosinsky realized that Bogdan had been struck and carried away by a train.

At the trial, Rosinsky gave no testimony as to a reasonable, "usual or customary notice" to track employés in such situations, but testified that there was no headlight on the engine at the time Bogdan was hit.

From the lack of details of the accident and the limited description of the place of the accident, showing little more than that it occurred on the main right of way, yet within yard limits, we find nothing which imposed on the defendant a duty to warn the decedent by sound of the approaching train. Bogdan was a trackworker within the class of trackwalkers, who, because of the very nature of their work and the impracticability of giving them warning, are held to assume the risk of the great dangers normally incident to their employment. Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758; Connelley v. Pennsylvania R. Co., 228 Fed. 322, 142 C. C. A. 614; Hines, Director General, v. Jasko, 266 Fed. 336; Erie R. Co. v. Healy (C. C. A.) 266 Fed. 342.

[3] But in order to safeguard himself from the ordinary dangers of his employment, as the law requires him to do, a track employé is not called upon to seek out and discover extraordinary dangers imposed

on him by his employer, but may assume that his employer and his agents have exercised for his safety such care as the circumstances reasonably admit. C. & O. Ry. Co. v. De Atley, 241 U. S. 310, 315, 36 Sup. Ct. 564, 60 L. Ed. 1016; C., R. I. & P. Ry. Co. v. Ward, 252 U. S. 18, 40 Sup. Ct. 275, 64 L. Ed. 430. Did the defendant subject Bogdan to such extraordinary dangers; and, if so, were they so obvious that he must be held, in law, to have assumed the risks arising from them?

[4] There was testimony that the engine of the train which struck the decedent was operated by the defendant without a headlight, under conditions of darkness and storm which made it difficult or impossible for the decedent, though on watch for a train, to see it, and for his companion to know of its approach until it had come abreast of him and had struck the decedent. If lack of evidence of negligence on the part of defendant was the ground on which the learned trial judge entered judgment of non-suit, we think he fell into error, for he could not have held, as a matter of law, that the operation of a train in a forward movement, at night, without a headlight on the engine, was an ordinary danger of the trackworker's employment, the risk of which he had assumed, Hines, Director General, v. Knehr (C. C. A.) 266 Fed. 340; or, if it was an extraordinary danger involving negligence of the defendant, he could not have decided, as a matter of law, that the engine, in the darkness which enveloped it because of the absence of a light, was so obvious that an ordinarily careful person, under the circumstances, could, and therefore should, have seen it and appreciated the danger, Boldt v. Pennsylvania R. Co., 245 U. S. 441, 445, 38 Sup. Ct. 139, 62 L. Ed. 385; Gila Valley Ry. Co. v. Hall, 232 U. S. 101, 34 Sup. Ct. 229, 58 L. Ed. 521; Seaboard Air Line v. Horton, 233 U. S. 492, 504, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

As these were issues of fact which bore directly on the question of assumption of risk, we think they, together with the question itself, should have been submitted to the jury. McGovern v. P. & R. R. Co., 235 U. S. 389, 401, 35 Sup. Ct. 127, 59 L. Ed. 283; Director General v. Templin (C. C. A.) 268 Fed. 483.

The judgment below therefore is reversed and a new trial awarded.

AMERICAN BANK & TRUST CO. et al. v. FEDERAL RESERVE BANK OF ATLANTA, GA., et al.

(Circuit Court of Appeals, Fifth Circuit. November 19, 1920.)

No. 3552.

1. Removal of causes ⊂=27—Suit against federal reserve bank removable; "national banking association."

Federal reserve banks, which do not serve the public generally and locally are not "national banking associations," within Judicial Code, § 24(16), being Comp. St. § 991(16), which makes such associations citizens of the state where located for general purposes of jurisdiction of the federal courts, and a federal reserve bank may remove a suit on the

ground that it is a national corporation and that the suit is one arising under the laws of the United States.

2. **Removal of causes ⇐19(1)—Suit based on alleged ultra vires acts of federal reserve bank removable.**
A suit against a federal reserve bank to restrain it from pursuing a method of doing business as beyond the powers conferred by its charter and involving a construction of the act creating such banks, *held* removable as one arising under the laws of the United States.

3. **Banks and banking ⇐288½, New, vol. 11A Key-No. Series—Method of collecting checks by federal reserve bank.**
The provision of Federal Reserve Act Dec. 23, 1913, § 13(1), being Comp. St. § 9796(1), that no charge for remission of proceeds of checks shall be made against federal reserve banks, does not prohibit such banks from receiving from member and depositing banks checks drawn on nonmember banks, nor limit them to the customary method of collecting such checks by transmitting them to the drawee bank for remission of the amount, where by custom the drawee bank charges exchange on the remittance, and to avoid such charge and to aid in the purpose of the act to establish a par clearance system, a reserve bank may lawfully cause such checks to be presented for payment over the counter of the drawee bank.

4. **Banks and banking ⇐288½, New, vol. 11A Key-No. Series—Bill charging conspiracy by federal reserve bank and officers insufficient.**
A bill by state banks, not members of the federal reserve system, against the federal reserve bank of the district and its officers, complaining of the method of such bank in collecting checks drawn on complainant banks, *held* not to state a cause of action for equitable relief on the ground of conspiracy to oppress and coerce complainants.

Appeal from the District Court of the United States for the Northern District of Georgia; Beverly D. Evans, Judge.

Suit in equity by the American Bank & Trust Company and others against the Federal Reserve Bank of Atlanta, Ga., and others. Decree for defendants, and complainants appeal. Affirmed.

Alex W. Smith, of Atlanta, Ga., William H. Watkins, of Jackson, Miss., Orville A. Park, of Macon, Ga., T. M. Stevens, of Mobile, Ala., M. M. Baldwin, of Birmingham, Ala., Smith, Hammond & Smith, of Atlanta, Ga., Stevens, McCorvey & McLeod, of Mobile, Ala., Tillman, Bradley & Morrow, of Birmingham, Ala., and Watkins & Watkins, of Jackson, Miss., for appellants.

Hollins N. Randolph and Robert S. Parker, both of Atlanta, Ga., for appellees.

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

GRUBB, District Judge. This is an appeal from a decree in equity of the District Court of the United States for the Northern District of Georgia, dismissing the bill or petition for want of equity. The suit was originally brought in the superior court of Fulton county, Ga., and was removed to the District Court of the United States for the Northern District of Georgia by the appellee, the Federal Reserve Bank of Atlanta. The appellants were state banks of Georgia, not members of the federal reserve system. The relief prayed for in

the petition filed in the state court was an injunction against the appellees, restraining them from collecting checks drawn on appellants, "except in the usual and ordinary channel of collecting checks through correspondent banks or clearing houses"; the purpose being to prevent collection through agents presenting the checks over the banks' counter. The appellants moved to remand the cause to the state court, which was denied, and the bill was dismissed on the appellees' motion to dismiss for want of equity. The appeal presents the questions of the correctness of the rulings of the District Court (1) in refusing to remand the case and (2) in dismissing the bill on the merits.

1. The jurisdictional amount is conceded to be present. There was no diversity of citizenship claimed. Removal was granted because the cause was considered to be one arising under the Constitution and laws of the United States—this because (1) the defendant, the Federal Reserve Bank, was incorporated under an act of Congress, and was neither a railroad incorporation nor a national banking association; and (2) because the appellants' petition or bill, as amended, introduced a federal question into the record, in that it charged the acts of the defendants, sought to be enjoined, to be ultra vires of the powers of the appellee, the Reserve Bank, granted by the Federal Reserve Act (38 Stat. 251) and its amendments. If the District Court had original jurisdiction of the cause of action for either or both of the reasons mentioned, the cause was properly removed. The appellants contend that the Federal Reserve Bank is a national banking association, the presence of which as a party defendant would not introduce a question arising under the laws of the United States, and that there is no other such question presented by the appellants' petition or bill.

[1] We think the United States District Court had original jurisdiction of the cause of action for both of the reasons assigned. The case of Osborn v. Bank of the United States, 9 Wheat. 738, 6 L. Ed. 204, supported by many subsequent decisions of the Supreme Court, settles the question of the jurisdiction of the federal court in cases in which one of the parties is a corporation which owes its creation to an act of Congress, unless another act of Congress has withdrawn such jurisdiction. Nor is it important whether the federal incorporation occupies the position of plaintiff or of defendant in the action. This is true, unless a long line of Supreme Court decisions, in which jurisdiction was sustained upon this ground, without reference to the position of the corporation in the lineup of the parties, be disregarded. From this follows the right of a federal incorporation, made a defendant in a cause in a state court, to remove the cause to the federal court, unless prohibited by an act of Congress. Texas & Pacific Railway Co. v. Cody, 166 U. S. 606–609, 17 Sup. Ct. 703, 41 L. Ed. 1132; Washington & Idaho R. R. Co. v. Cœur d'Alene Ry. Co., 160 U. S. 77–93, 16 Sup. Ct. 231, 40 L. Ed. 355. Congress has withdrawn jurisdiction only in cases of railroad companies and national banking associations.

The contention of appellants is that the Federal Reserve Bank of Atlanta is a national banking association, within the meaning of the Act of July 12, 1882, c. 290 (22 Stat. 162), the Judiciary Act of March

3, 1887 (24 Stat. 552), as corrected by the Act of August 13, 1888, c. 866, § 4 (25 Stat. 436), and by section 24 of the Judicial Code of 1911 (Comp. St. § 991). The prohibiting clause of the latter is:

"And all national banking associations established under the laws of the United States shall for the purpose of all other actions against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located."

If this language applies to the Federal Reserve Banks, it withdraws jurisdiction from the federal courts in cases in which they are parties, and in which no other ground of jurisdiction appears in the record. We do not think it can be held to apply. At the time of the original limitation of jurisdiction in the Act of July 12, 1882, and at the time of its renewals in the Judiciary Act of 1887, and in the Judicial Code of 1911, federal reserve banks were unknown. The only national banking associations, then existent, were the national banks organized under the national banking laws. The question is whether Congress intended to include within this designation banks to be subsequently created of the nature of the federal reserve banks. The answer will depend upon the result of a comparison instituted between the national banks and the reserve banks, and is to be determined, not so much by points of identity (for all banks have many such), but by points of difference.

The important differences between national banks and reserve banks, so far as the solution of this question is concerned, are (1) the disparity in the number of each class, and (2) that the reserve banks are banks of deposit and discount for other banks only, and not for the general public. There are many other important differences, but we think the two mentioned are determinative. The one class, small in number, acts as governmental fiscal agencies, with no general clientèle; the other class serves the public generally and locally, and they are necessarily numerous. That all the provisions of the National Banking Act could be made applicable appropriately or safely to the class of reserve banks is clearly impossible. Yet the same reasoning that would apply the limitation of jurisdiction imposed upon national banks to reserve banks would make it necessary to apply all other limitations against and grants in favor of national banks to reserve banks. If the reserve banks are national banking associations, within the meaning of the Act of July 12, 1882, and its successors, for one purpose, they are so for all purposes, of the national banking laws. Such a conclusion would be a dangerous one, and lead to unforeseeable consequences.

We think it safer to conclude that Congress intended national banking associations to include those only that were then being created, or those of a kindred nature that might thereafter be created, and that the differences between ordinary banks of deposit and discount, with the public as customers, and banks whose only permissible stockholders and customers are the government and other banks, and which are more governmental agencies than private institutions, are not within the purview of national banking associations, as contemplated by

Congress when it enacted the limitation upon the jurisdiction of national banking associations. In view of the paucity in number of the reserve banks, and their more intimate relation to the government, and their more remote contact with the general public, Congress may well have found reason not to withdraw the jurisdiction of the federal courts from them by reason of their federal incorporation, though it had done so in the case of national banks. There is no express withholding of such jurisdiction. To imply it would necessarily lead to other implications so far-reaching and difficult to anticipate that we do not think it should be implied.

If the fact of federal incorporation of the reserve banks confers jurisdiction on the federal court, the fact that the officers of the appellee bank are made individual codefendants with it, and that they are citizens of Georgia, does not prevent removal. Matter of Dunn, 212 U. S. 374, 29 Sup. Ct. 299, 53 L. Ed. 558.

[2] 2. The amendment to the bill or petition of appellants charged that the acts of the appellees sought to be enjoined, if committed, would be committed in excess of the powers of the Federal Reserve Bank of Atlanta, and in violation of the provision of the Federal Reserve Act. Paragraph 9 of the amendment charges that—

"The coercive measures, now threatened, are not only not authorized or required by the terms of the Federal Reserve Act, which includes the charter of defendant reserve bank, but express provision is found therein for the performance of all clearing house functions, therein imposed in the regular way and through orderly banking channels, applicable to nonmember banks, as well as member banks. Wherefore plaintiffs charge that the threatened coercive measures are ultra vires the charter of defendant Reserve Bank, and the execution thereof by the individual defendants would be illegal and should be enjoined."

The purpose of the petition or bill was not to enforce the collection of compensation for services availed of by the defendant Reserve Bank, at their reasonable value under the common-law right. It was to compel the defendant bank to avail itself of such services, or, as an alternative, to abstain from handling the plaintiffs' check for collection. The bill prayed that the defendant bank be enjoined from presenting petitioners' or plaintiffs' checks for collection in any but the usual way through correspondence and remittance. Section 13 of the Federal Reserve Act provided that "no such charges [for remission] shall be made against the federal reserve banks."

Appellants' contention is that this prohibition prevents the federal reserve banks from expending money in any way for the collection and remission of the proceeds of checks and drafts, drawn on nonmember and nondepositing banks, and that any attempt to collect such checks and drafts, by presenting them over the counter to drawee banks, which would not remit for them at par, was unauthorized and ultra vires of the powers of the reserve banks, under the Federal Reserve Act; and appellants ask that the defendant bank be enjoined from handling such checks and drafts in the manner stated for that reason. Appellee the Reserve Bank asserts its right under the same provision of the Federal Reserve Act to collect such checks and drafts by any

method, provided it makes no payments to remitting banks for services in remitting. Plaintiffs' cause of action was the alleged wrong asserted by them to be caused by such collections. One ground upon which the wrong was urged is that the Reserve Bank is forbidden by the Reserve Act to make collection of checks and drafts in this manner. This presents for decision the proper construction of the quoted provisions of the Federal Reserve Act, and it was presented in the plaintiffs' own statement of their cause of action in the amendment to the bill, and not as a suggested or anticipated defense which the defendants might be expected to set up as an answer to the plaintiffs' cause of action. The solution of this question depends upon the construction to be given sections 13 and 16 of the Federal Reserve Act (Comp. St. §§ 9796, 9799), and not merely to a chartered power of the defendant bank. The plaintiffs having injected this federal question into their statement of their cause of action, the case was thereby made removable, as one arising under the laws of the United States.

We think the District Court of the United States properly entertained jurisdiction for both reasons.

[3] Coming to the merits, the appellants' cause of action is the prevention by injunction of the Federal Reserve Bank of Atlanta from collecting checks drawn on appellants' banks, in any other way than by correspondence and the remitting of the proceeds of the check by the bank on which it was drawn. The usage of the complaining banks had been to make a deduction from the amount of the check in remitting the proceeds to cover the so-called "exchange" or cost of remitting. This charge could only be applied in cases in which the check was forwarded through the mails to the drawee bank. If the check was presented over the counter of the drawee bank, either by the payee or his agent, the full amount of the check was required to be paid, and the drawee bank was defeated in its endeavor to collect exchange on it. The purpose of the bill was to prevent the Federal Reserve Bank from handling checks on appellants and on other nonmember state banks, except through the regular channel of correspondence or clearing. Section 13 of the Federal Reserve Act, as amended, prohibited the Federal Reserve Bank from paying for the cost of remission. Consequently it was disabled from collecting through the regular channel from all banks which insisted on deducting for the cost of remission. In the case of all such banks it had the alternatives of not handling their checks at all, or of presenting them for collection over the counters of the drawee banks by agents, express companies, or the postal authorities.

One contention of the appellants is that the Federal Reserve Act prohibited the reserve banks from handling any checks, the collection of which entailed any expense, to whomsoever payable, and that their endeavor to collect checks by presenting them at the counter of the drawee was ultra vires, because expense was necessarily incident to that method. Another contention of appellants is that, though the Federal Reserve Bank had the lawful right to handle such checks, it was making or intending to make an oppressive use of its right, by so

exercising it as to amount to coercion or duress and with a wrongful and malicious motive. If the Federal Reserve Bank had availed itself of the services of the complaining banks in the remission of the proceeds of checks sent them for collection through the mails, in view of their known usage to deduct for exchange, it would have been liable for the reasonable value of such services, except for the statutory inhibition against it. The purpose of the bill, however, is not to collect compensation for services rendered and to which the banks had a property right, but to compel the Federal Reserve Bank to avail itself of services which it was unwilling to and disabled from accepting, by restraining it from using any method which did not require the use of such services. Complaining banks had no property right that was infringed by the refusal of the Federal Reserve Bank to avail itself of their services in remitting, or that a court of equity could be called upon to protect. It was under no legal duty to accept the services of the complaining banks, even had there been no statutory obstacle to its doing so. It also had the legal right to present the checks of the complaining banks to them for payment singly or in numbers over their counters, and it was the absolute duty of the complaining banks to pay the full amount of such checks without deduction, when so presented.

This is disputed by appellants only because of the statutory prohibition against the federal reserve banks paying the cost of remission of the proceeds of checks collected by it. It is contended that this provision not only prohibited the reserve banks from paying exchange to remitting banks on which the checks were drawn, but also from paying expense of any kind or to any person for collecting checks, and that as a consequence the federal reserve banks were without power to handle any checks for collection, where such collection was attended with expense of any kind. If so, it would follow that the endeavor to collect checks over the counter through paid agents was within the prohibition of the Federal Reserve Act as amended and ultra vires. Whether appellants' construction of the prohibiting clause is correct depends upon the purpose it was intended to subserve. Appellants' contention is that its purpose was to conserve the assets of the Reserve Bank. Appellees' contention is that it was to aid in accomplishing a uniform par clearance system. In view of the purpose of Congress to effect the latter object, we think the appellees' construction is the correct one, and that the prohibition is limited to a charge against and payment of the charge to a remitting bank, and does not prevent the federal reserve banks from expending money for collection of checks in any other way in an endeavor to accomplish a uniform system of par clearance. It follows that the acts of the Federal Reserve Bank complained of are within its legal powers.

Conceding that they were ultra vires solely because entailing an unauthorized disposition of the banks' assets, the appellants and interveners, who were neither stockholders nor creditors of the Reserve Bank, would have no standing to complain of such a disposition, because of a collateral injury to them. The right to make complaint on

that ground would be confined to the United States or to individuals who were injured by the depletion of the banks' assets. If the purpose of the prohibition was altogether to save expense to the federal reserve banks, and if the statute evinced no policy to prevent the reserve banks from handling checks of nonmembers and nondepositing banks, if it incurred no expense, the mere incidental injury that appellants suffered from the handling of such checks would give it no right to complain of an expenditure from which it could suffer no injury. The Federal Reserve Act does not only not evince a purpose to deny to the Reserve Bank the power to collect checks of nonmember and nondepositing banks, but exhibits a general policy to encourage a uniform and universal system of par clearance, which would only be accomplished by conferring power upon the Reserve Bank to handle checks drawn on all banks upon any terms that might be essential, except the payment to the remitting bank of compensation for remitting.

[4] The appellants contend further that, even if the Federal Reserve Bank had the right to handle checks of nonmember banks by presenting over the counter, it could not exercise that right oppressively; that it was threatening to do so, and should therefore have been enjoined. The prayer of the bill is not limited to an oppressive use of the method complained of, but extends to any use of it whatsoever. The bill seeks to enjoin the appellee bank—

"from collecting or attempting to collect any check against petitioners, or against any other bank in like condition, who may become a party hereto, except in the usual and ordinary channel of collecting checks through correspondent banks or clearing houses; said channels being well established and well understood by defendants and all others familiar with the banking business."

Appellants' complaint is of the method, and not of an abuse of it. The effect of the writ prayed for would be to entirely prevent the appellee bank from collecting checks in any other way than by transmission to the drawee bank, and the remission of the proceeds by the drawee bank through the mails, and so to prevent their collection by presentation over the counter, even though presented regularly and without accumulation.

The right to the relief sought is also based upon the doctrine of conspiracy. An illegal conspiracy is not predicable upon the doing of a lawful thing by lawful means, even when done in concert or combination. The bill fails to show a concert or combination that would amount to a conspiracy in law, though its object or the means by which it was to be accomplished were unlawful. The acts complained of were those of the defendant the Federal Reserve Bank. No legal conspiracy could exist between it and its officers, the other defendants. The amended bill charges a conspiracy between the Federal Reserve Bank of Atlanta and the federal banks of other districts, upon the theory that all the federal reserve banks are under control of the Federal Reserve Board. The federal reserve banks of other districts have no power to act upon the petitioners or the interveners. Their jurisdiction in that respect is confined to their own districts. Being without power to injure the complaining banks, they could not be

members of a conspiracy against such banks. The members of the Federal Reserve Board are not charged as conspirators. That other federal reserve banks had taken coercive steps against state banks in their districts to enforce the par clearance policy, as charged on hearsay information in the amended bill, has no bearing on the cause of action relied upon by appellants in this case. Appellants can take nothing from the doctrine of conspiracy.

The principle that one must so use his property as not to unnecessarily and maliciously injure his neighbor, even though his act is otherwise lawful, is also invoked. Conceding that the accumulating of checks, and their presentation, when accumulated, with the intent to embarrass and injure the drawee bank, might constitute an actionable wrong and one that might be prevented by injunction; we do not think the amended bill presents any such case. There is no specific charge in the bill of any threat to present the checks in any accumulated or oppressive manner, on which a court of equity would be justified in acting. Nor does the bill charge the appellee bank with acting from a merely malicious motive, if that is material. It does aver that the purpose of the appellee was to compel the appellants to accept the lesser of two evils and to remit at par for checks drawn upon it. If this charge was borne out by the exhibits, which it is not, it would not constitute legal duress, on which a legal complaint could be predicated. The exhibits show that the adoption of a system of universal par clearance was advocated in good faith by the appellee bank as a proper banking policy, and as well by Congress and the Federal Reserve Board. The adoption of appropriate means by the appellee bank to accomplish this end cannot with any propriety be attributed to malice on its part against appellants and other banks in like condition.

Nor does the adoption of the method of presenting checks over the counters of the drawee bank imply an attempt to coerce them into becoming member or depositing banks. The Federal Reserve Bank was interested to supply a universal clearance at par for its member and depositing banks. It could accomplish this only by accepting from its member and depositing banks all checks tendered it by them upon whatever banks drawn. If drawn upon a nonmember and nondepositing bank, which refused to remit at par, it was disabled under the statute from handling such checks through the method of transmission of the checks and remittance of the proceeds through the mails. It could only collect such checks by presentation in person to the drawee bank. It is therefore reasonable to suppose that its declared purpose of making such presentations was in furtherance of its policy of furnishing complete clearing facilities to its member banks, and was not for the purpose of injuring or destroying the drawee banks, or of coercing them into becoming member or depositing banks with it. It constituted an essential step, without which universal par clearance was not possible of accomplishment.

We conclude that the District Court had jurisdiction, and that its decree dismissing the bill for want of equity was without error, and it is therefore affirmed.

DENDY et al. v. SOUTHERN PINE LUMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1920.)

No. 3481.

1. **Appeal and error ⇐849(2)—Review in cases tried without jury.**
Where an action at law is tried by the court by stipulation, and a general finding only is made, only rulings made during the trial and excepted to at the time are reviewable.

2. **Judgment ⇐517—Not subject to collateral attack for matter of defense in original suit.**
A judgment for taxes in favor of the state against the unknown owners of a tract of land, under which the land was sold as a single tract, cannot be collaterally attacked by the owners of a part of the tract on the ground that a part of the taxes for which their land was sold was against other land, which was a matter of defense in the original suit.

In Error to the District Court of the United States for the Eastern District of Texas; William R. Smith, Judge.

Action at law by Alfred Dendy and others against the Southern Pine Lumber Company and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

B. B. Perkins, of Rusk, Tex., for plaintiffs in error.

R. E. Minton, of Groveton, Tex., for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The plaintiffs in error, who were all of the heirs at law of James M. Dendy, except Jesse Dendy, filed a statutory action of trespass to try title against the Southern Pine Lumber Company in the United States District Court for the Eastern District of Texas. They claimed title to 200 acres of land out of a tract of 320 acres, known as the Harmon Ellis survey. They alleged that this survey was patented to J. H. Dendy, who died leaving two heirs, J. M. Dendy and Larkin Dendy. Larkin died, leaving J. M. Dendy as his sole heir.

Administration of the estate of J. M. Dendy was had in the probate court of Cherokee county, Tex. Two hundred acres of said land were by order set apart as the homestead of the children of the deceased, and 120 acres were by order of court sold to L. M. Allen, to whom the administrator of Dendy made a deed.

On May 14, 1898, pursuant to proceedings had in the district court of Cherokee county, a judgment was rendered in favor of the state of Texas for the taxes due it for the years 1884 to 1896, inclusive, on the tract of land described by the courses and distances contained in the patent to J. H. Dendy, and it was ordered sold to pay said taxes. A sale was had pursuant to said judgment. The land was purchased by Laura A. Sloan. The deed described the land by courses and distances identically as described in said judgment. By mesne conveyances the land has been conveyed from Mrs. Sloan to the defendant.

It was stipulated that each purchaser since Mrs. Sloan has paid an

adequate and valuable consideration for the lands purchased. The Southern Pine Lumber Company introduced a chain of title from Jesse Dendy (one of the heirs at law of J. M. Dendy) to itself. The case by agreement was tried by the court without a jury.

The plaintiffs introduced the patent from the state of Texas to J. H. Dendy. It was stipulated that he died intestate, leaving only two children. James M. and Larkin Dendy; that Larkin Dendy died, leaving J. M. Dendy his sole heir; and that plaintiffs and Jesse Dendy are the heirs at law of J. M. Dendy, deceased.

The plaintiffs also introduced in evidence the record of administration on the estate of James H. Dendy, showing the appointment of an administrator therefor, the setting apart in 1859 of 200 acres of land as a homestead for the children of the deceased, and the sale of 120 acres of said land in July, 1860, to L. M. Allen, with the deed executed by said administrator on November 19, 1860, to said Allen, and its record; the index stating the grantee as S. M. Allen.

The defendant introduced in evidence the judgment in the proceedings in the district court of Cherokee county, Tex., entitled "The State of Texas v. Unknown Parties," which adjudged that the state do recover from said unknown parties the taxes due "on each of the following described tracts or parcels of land, to wit: Seventy-six dollars and forty cents, due on the following described land, being a part of the H. Ellis survey, about 14 miles S. W. from Rusk survey No. 820" (here followed the courses and distances covering the entire survey as described in the patent to Jas. H. Dendy), and ordering a sale of the land to pay said taxes.

Defendant proved that an order of sale correctly describing the land was issued, and introduced a return of the sale, referring to an attached order of sale for a more complete description; also a deed from the sheriff of Cherokee county, reciting said order of sale, and said judgment and decree of sale, and conveying the land by the same courses and distances as were given in said judgment and decree of sale to Laura H. Sloan, wife of John A. Sloan.

The plaintiffs objected to the introduction of said deed on the ground that neither the judgment nor the return on order of sale contained the same description as in the deed, or any description whatever, which being overruled, plaintiffs excepted. The defendant then proved title in itself, derived from Laura H. Sloan and John A. Sloan.

It was agreed that the lands had not been returned by any one for taxes since 1882 to 1897, that no taxes had been paid on them for said years by plaintiffs, or any one, and that they had been assessed by the assessing officers for taxes against "unknown owners" for said intervening years. The land was vacant.

The description of the land by courses and distances in the judgment, in the order of sale, and in the deed is the same. The only difference is that in the judgment it is stated to be for the taxes due "on each of the following described lots or parcels of land as follows: Seventy-six dollars and forty cents, on the following described land, being a part of the H. Ellis survey," etc.—then giving courses and distances. The judgment shows this amount of taxes was adjudged

against the land described by these courses and distances. The order of sale and the return shows that the land in such courses and distances was that sold for its taxes. The deed conveys the land in such courses and distances being the Harman Ellis survey.

That the judgment did not intend to treat the one parcel of land described as consisting of more than one tract is evident from its language. It renders judgment "for the taxes, etc., due on each of the following described lots or parcels of land, as follows: Seventy-six dollars and forty cents due on the following described land"—and then describes the land by courses and distances, stating it to be a part of the H. Ellis survey.

There is no intention here disclosed to treat this land as being more than a single tract, and the preceding expressions, to the effect that the taxes of each separate tract were separately assessed against each, when followed by the language of this decree, can only indicate that it finally dealt only with a single tract therein described as such. The general words describing it as a part of the Ellis survey in the judgment and as the Ellis survey in the deed are rendered immaterial, and controlled by the particular descriptions by courses and distances in each, which are identical, and which show that the judgment, order of sale, and deed each described the same land and related to the same tract. Sherry v. McKinley, 99 U. S. 496, 25 L. Ed. 330; Cox v. Hart, 145 U. S. 376, 387, 12 Sup. Ct. 962, 36 L. Ed. 741.

[1] There was no request for special findings, and none were made in this case. After the evidence was submitted, the court rendered a judgment in favor of the defendants. It is true that the judge states his opinion as to the validity of the judgment rendered in the case of State of Texas v. Unknown Owners, the foundation of the defendant's title, and that the plaintiffs' cause of action amounts to a collateral attack thereon; but the court makes no special finding, rendering judgment generally in favor of the defendant. This would seem to leave no matter on which error could be assigned, besides the exception reserved to the admission of the sheriff's deed to Mrs. Sloan above disposed of. No objection or exception to the introduction or effect of the judgment is noted. British Queen Min. Co. v. Baker Silver Min. Co., 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147; Northern Idaho & Montana P. Co. v. A. L. Jordan L. Co. (C. C. A.) 262 Fed. 766, 777; United States v. Sioux City Stock Yds. Co., 167 Fed. 126, 127, 92 C. C. A. 578; York v. Washburn, 129 Fed. 564, 565, 566, 64 C. C. A. 132.

[2] But it seems to us that the opinion of the court that the judgment of the district court of Cherokee county in State of Texas v. Unknown Parties was not subject to the collateral attack made on it in this case was correct. The proof showed that for years this land had not been returned for taxes by any one; that it had been assessed as a single tract by the proper officers to owners unknown for 15 years. No record in the county showed any individuals as the owners since the year 1860. The original petition in this cause shows that the present plaintiffs all reside out of the state of Texas. No present claimants of the part of the tract alleged to have been sold to Allen appear. No one had appeared to pay taxes as the claimant of any part of the en-

tire tract. The court rendering the judgment heard testimony on the question whether there was any known owner and that the inquiries directed to be made of the county clerk and other officers had been made and no owners could be found. No attack is made on the several steps taken in the case.

"It must appear from the record in the cases, in which the judgments were rendered under which appellee claims the tracts of land in controversy, that such judgments were void, and therefore subject to collateral attack, before they can be overcome as a barrier to plaintiffs' right of recovery, even though, but for appellee's deed under them, they had shown title to the premises." Young v. Jackson, 50 Tex. Civ. App. 351, 354, 110 S. W. 74, 76.

In a case arising under a very similar statute in the state of Arkansas the Supreme Court of the United States held that whatever would have been a good defense to the original suit brought for the taxes was not the subject of attack in a subsequent suit brought to recover lands sold under the decree in the first suit, and that the decree was not subject to collateral attack because such point may have been incorrectly decided. In that case, as in this, it was urged that the plaintiff only owned a part of the land sold for taxes, and—

"Thus, it is urged, the lands plaintiffs in error owned were sold to pay the levee taxes on land they did not own, and their lands were thereby taken without due process of law. * * * What lands were properly assessed to Ballard and what lands he owned were facts to be alleged in the original suit and established by the proof there introduced or by admission through the default of the owners of the lands. If there was error it cannot be a ground for setting aside the decree if the court had acquired jurisdiction to render the decree. Error or irregularities in the suit does not take from it or its decree the attribute of due process. Central Land Company v. Laidley, 159 U. S. 103; Iowa Central R. R. Co. v. Iowa, supra. It is only this aspect of the suit and decree with which we are concerned. No defense, therefore, which could have been made or rights which could have been taken care of in the suit can now be set up to impugn its decree. The statutes of the state, under which the taxes were levied, virtually make the land a party to the suit to collect the taxes. It is from the lands alone, and not from their owner, that the taxes are to be satisfied, and each acre bears its part. The burden of taxation could have been easily and definitely assigned by the court. Mistakes in ascribing the ownership of the lands did not increase the taxation or cast that which should have been paid by one tract of land upon another tract." Ballard v. Hunter, 204 U. S. 241, 258, 27 Sup. Ct. 261, 267 (51 L. Ed. 461).

The judgment of the District Court is therefore affirmed.

ASSOCIATED OIL CO. v. MILLER et al.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1920.)

No. 3558.

Mines and minerals ⇐74—Person who will be affected by decree held indispensable party to suit by grantee of rights under lease.

Where by a contract an oil company conveyed to another company all its rights in the oil and gas in leased lands for the purpose of development and operation, the parties to share in the production as therein provided, the grantor reserving the right to re-enter and terminate the con-

tract for default by the grantee, the grantor *held* an indispensable party to a suit by the grantee against the owner of a tract of the land to enforce its rights claimed under the lease.

Appeal from the District Court of the United States for the Northern District of Texas; James C. Wilson, Judge.

Suit in equity by the Associated Oil Company against W. L. Miller and others. Decree for defendants, and complainant appeals. Affirmed.

C. L. Carter, of Houston, Tex., for appellant.

O. C. Funderburk, of Eastland, Tex., and R. E. Hardwicke, of Ft. Worth, Tex., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. This case arises on a bill in equity filed in the United States District Court for the Northern District of Texas by the Associated Oil Company, a corporation chartered under the laws of California, and as such a citizen of California, the appellant, against W. L. Miller and wife and the Gulf Production Company, a corporation, all alleged to be citizens of Texas, the appellees, to enjoin them from in any way resisting or contesting the complainant's right of entry and use of the premises stated hereinafter, in the exercise of certain rights claimed by said complainant under an instrument executed between it and the Rio Bravo Oil Company, a corporation of and citizens of Texas. It was dismissed on motion of the defendants on the ground that the Rio Bravo Oil Company, a citizen of the same state as the defendants, was an indispensable party plaintiff thereto, and that said court was therefore without jurisdiction of the case.

The parties entered into an agreed statement of fact, by which it appeared that the rights of the complainant arose wholly under a conveyance signed by the Rio Bravo Oil Company and accepted by complainant in writing; the same being executed on the 7th day of July, 1919. The conveyance recited that in consideration of the sum of $10, and in consideration of the performance by the complainants of the terms and conditions thereinafter stipulated, the Rio Bravo Oil Company granted, bargained, sold, and conveyed to said complainant, subject to the performance of said conditions, all of those certain oil, gas, and mineral rights owned by the Rio Bravo Oil Company in and under 87 described tracts of land, including the N. W. ¼ of section 27, block 4, H. & T. C. Ry. Co. survey, Eastland county, Texas.

"Also all other oil, gas, and minerals or mineral rights, and all easements of every kind owned and held or claimed by the Rio Bravo Oil Company in Eastland county, Texas, and in Comanche county, Texas; it being the purpose of this conveyance to vest in the Associated Oil Company all such rights as the Rio Bravo Oil Company has in and to oil, gas and other minerals in and under lands in Eastland and Comanche counties, Texas, whether hereinabove particularly described or not, and also all rights and easements of any and every kind owned or held by it for the purpose of exploring for, producing, and marketing all such oil, gas, and other minerals.

"There is hereby conveyed also, all the rights of ingress and egress, rights of way, and all other rights and easements of any and every kind owned or held by the grantor in and to, over, or upon said premises, hereby investing the grantee with every such right and interest as the grantor has therein.

"To have and to hold the above-described oil, gas, and mineral rights, rights of way, and easements of any and every kind, unto the said Associated Oil Company, its successors and assigns, forever, upon the conditions following."

The conveyance declared its consideration to be as follows:

"The consideration to the grantor for the execution of this conveyance is the payment of the royalties and performance of the obligations hereinafter imposed upon the grantee, said payments and said obligations each being conditions upon default in the performance of which the rights herein conveyed to said grantee shall cease and terminate (unless such default is one that comes within the arbitration clause hereinafter set out), and all such rights shall thereupon be revested in the grantor, the Rio Bravo Oil Company."

These conditions reserve to the Rio Bravo Oil Company: (a) The equal one-eighth part of all oil produced and saved from any of the premises above mentioned, or, at its election, the market price thereof prevailing the day the oil is run into the pipe line or storage tanks, with provision for time of payment in the event of such election. (b) If gas only is found, and the well or wells are operated for gas, the Rio Bravo Company receives at its election one-eighth of the gas or one-eighth of all sums realized from the sale of such gas. (c) For all gas produced from any oil well and used in the manufacturing of gasoline, or any other product, the Rio Bravo Oil Company is to receive at its election one-eighth of said gas, or one-eighth of all sums of money realized from the sales of said gas, gasoline, or other products. (d) In the event any minerals other than oil or gas are found in paying quantities, the Rio Bravo Oil Company shall receive as a royalty one-half of the sums realized from such minerals.

Then follow conditions requiring the opening of wells within certain specified times, and providing for the drilling or making of an offset well or wells, for the development or production of all minerals which may be found in paying quantities, for furnishing to the Rio Bravo Oil Company any or all information derived from drilling or development of any of the properties, with the right to have a representative present at all times, to assist in gauging and measuring all oil, gas, and other minerals, and with the right to inspection of all books and papers.

The contract then provides that the complainant shall at its own expense do all drilling and other development work, keeping an accurate account of such cost and expense; that the royalties above specified shall be first deducted from the value and proceeds of all oil and gas; that the complainant shall then reimburse itself for all cost and expense in said contract specified; and that one-half of the remainder of such production shall be paid or delivered, as provided in the case of royalties, to said Rio Bravo Oil Company.

Provision is made for arbitration in the event that either of the parties should conclude that any of the operations for development of the properties should be in a manner or way different from that provided in the contract. An extension of time is provided, if the carrying out of the contract is interrupted or delayed by certain specified causes, and that no divestiture of the complainant's title should become effective until the Rio Bravo Oil Company shall give 30 days' written

notice of its intention to enforce such divestiture, within which time the complainant may prevent the divestiture by performance of the conditions of the contract. The contract provides also for abandoning drilling or other development work on a tract covered by this conveyance, or if the production shall cease to be profitable; complainant having the right to remove all improvements it has placed on said tract.

It is contended by the complainant that the effect of this conveyance is to vest in it the entire full and complete estate in fee simple to the oil and other mineral rights in this tract of land, together with the right of entry for the purpose of taking the same; that it has been and is being prevented from so doing by the defendants, who claim to have certain rights as owners of the land, and who deny complainant's rights under said conveyance; that said claims of defendants are not valid; that they have no right to exclude complainant from said land; and that the assertion of this right on part of respondents constitutes a cloud upon complainant's title. The bill also alleges that the oil and gas owned by complainant under the tract of land above described will be drawn away and be an entire loss to the complainant; that the said oil and gas are being developed in lands contiguous to the described premises; and that unless an injunction is granted, as prayed in this case, irreparable damage to the complainant will follow.

The respondents say that the nature of the foregoing conveyance is to create an option in the complainant to enter upon this land for the purpose of prospecting for oil and gas and other minerals; and there is such a right, title, and interest reserved to the Rio Bravo Company that no decree can be rendered in this case without its presence as a party, as it will be necessarily and directly affected by such decree.

It is quite evident that, whether the effect of this conveyance is to vest a title to the oil, gas, and other minerals, therein described as conveyed to the complainant, as in the cases of Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F, 989, and Crabb v. Bell, (Tex. Civ. App.) 220 S. W. 623, or an option, as in the cases of National Oil & Pipe Line Co. et al. v. Teel (Tex. Civ. App.) 67 S. W. 545 (affirmed by the Supreme Court of Texas 95 Tex. 586, 68 S. W. 979), and Hitson v. Gilman (Tex. Civ. App.) 220 S. W. 140, the same does not divest the interest of the grantor in the entire oil, gas, and other minerals, but that it reserves to the Rio Bravo Oil Company an interest in each and every part of the oil and gas so conveyed. While the conveyance purports to grant the entire right in whatever oil and other minerals are contained in this land, it does so only for the purposes of developing and raising the same for the benefit of both grantor and grantee, and a failure to carry on these operations for joint account divests all title in complainant, and revests it in the Rio Bravo Oil Company. While a nominal consideration of $10 is mentioned, the instrument recites that—

"The consideration to the grantor is the payment of the royalties and the performance of the obligations hereinafter imposed upon the grantee, said payments and obligations each being conditions upon default in the performance of which the rights herein conveyed to said grantee shall cease and terminate (unless such default is one that comes within the arbitration clause herein-

after set out), and all such rights shall thereupon be revested in the grantor, the Rio Bravo Oil Company."

The consideration of the conveyance is to be derived from the exploration for the oil and other minerals in the land for the joint benefit of the two parties to the conveyance, reserving to the Rio Bravo Oil Company the title in kind to one-eighth of the oil and gas produced, at its election, and also a one-half interest in the remainder of the oil and gas so produced, after the payment of the royalty mentioned and the defraying of the expenses of production, as specified. The instrument is therefore an executory contract for the production of the oil and other minerals for the benefit of both the Rio Bravo Oil Company and complainants, and the Rio Bravo Oil Company has rights of re-entry and reinvestiture of title upon a failure of the complainant to perform its part of this contract, or upon its abandonment thereof.

The effect of the decree in this case, either for the complainant or against it, would operate as directly and effectively upon the rights of the Rio Bravo Oil Company under this contract as it would upon the rights of the Associated Oil Company. The situation of the Rio Bravo Oil Company comes directly within the description of an indispensable party, as laid down in the leading case of Shields v. Barrow, 17 How. 130, 15 L. Ed. 158:

"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."

The same question was presented to this court in the case of Vincent Oil Co. v. Gulf Refining Co. of Louisiana, 195 Fed. 434, 115 C. C. A. 336. Vincent and associates were the owners of 144 acres of land situated in Louisiana. They made a conveyance or lease conveying all oil, gas, and mineral in the land to one Staiti, a citizen of Texas, reserving a one-eighth royalty. Staiti transferred this lease to Vincent Oil Company. Vincent and associates, claiming that this lease had been forfeited and annulled, and treating it as void, leased a portion of said land to George W. Hooks. Hooks assigned one-half undivided interest in said lease to the Gulf Refining Company, a Louisiana corporation, and by a separate instrument at a later time assigned the other one-half interest to the Producers' Oil Company, a Texas corporation. The Vincent Oil Company filed a bill against the Gulf Refining Company, not making the Producers' Oil Company a party defendant, seeking relief alone against the Gulf Refining Company in respect to its one-half interest. It was conceded that the Producers' Oil Company was omitted because, being a Texas corporation and the assignor of complainant being a citizen of Texas, its presence would oust the jurisdiction of the court. The court held:

"It has always been the constant aim and purpose of an equity court to do complete justice by deciding and settling the rights of all persons interested in the subject of the suit, so as to make it safe to the parties to obey the orders of the court and prevent future litigation. To attempt to settle the disputes described in the bill without the presence of the Producers' Oil Company would not only affect its rights and possession, but would leave the

controversy itself in an unsettled condition—a condition tending to cause further litigation. * * * The principles announced in decisions which are controlling here fully sustain the view that the Producers' Oil Company is an indispensable party to this suit. California v. Southern Pacific Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683; Minnesota v. Northern Securities Co., 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499; Barney v. Baltimore City, 6 Wall. 280, 18 L. Ed. 825; Christian v. Atlantic & N. C. Railroad, 133 U. S. 233, 241, 10 Sup. Ct. 260, 33 L. Ed. 589."

The present suit is brought to enforce the rights created by the contract entered into between the Rio Bravo Oil Company and the Associated Oil Company, the complainant. The prayer of the bill is to remove the adversary rights asserted by the respondents as a cloud upon the title to the interests described in said conveyance, so as to permit the carrying out by the complainant of its prospecting for said oil and minerals. The Rio Bravo Oil Company has a vital interest under said contract or conveyance. A decree adverse to the complainant will deprive the Rio Bravo Oil Company of all of its anticipated rights and benefits under this contract. A decree in favor of the complainant will inure equally to its benefit. The decree in this case, therefore, will operate as directly and effectively upon the rights of the Rio Bravo Oil Company as upon the rights of the Associated Oil Company. McConnell v. Dennis, 153 Fed. 547, 82 C. C. A. 501; Arkansas S. E. R. R. Co. v. Union Sawmill Co., 154 Fed. 304, 83 C. C. A. 224.

It is evident, therefore, that the court did not err in sustaining the motion to dismiss because of the absence of the Rio Bravo Oil Company as a party complainant to said cause, and the decree of the District Court is affirmed.

HEWEY, County Treasurer, et al. v. CUDAHY PACKING CO.

(Circuit Court of Appeals, Eighth Circuit. October 25, 1920.)

No. 5442.

1. **Municipal corporations ⇐38—Word "adjacent" as used in statute for attachment of territory to city for school purposes.**
   The word "adjacent," as used in a statute authorizing cities to attach territory outside the city limits, but adjacent thereto, to the city for school purposes, has a broader meaning than contiguous, and signifies also neighboring, or in close proximity, though not touching.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adjacent.]

2. **Municipal corporations ⇐38—City held authorized to attach territory for school purposes, though not part of city, but within limits.**
   Under Gen. St. Kan. 1915, § 9114, authorizing cities of the first class to attach to the city for school purposes territory outside the city limits, but adjacent thereto, *held* to authorize the city to attach a tract of land which, although within the city limits, was not a part of the city, but was entirely surrounded by city streets and blocks.

3. **Municipal corporations ⇐38—Application for attachment of territory for school purposes need not be signed by residents on each subdivision.**
   A provision of such statute that territory may be attached on application by a majority of the electors of such adjacent territory does not

require the application to be signed by residents on each subdivision thereof, but it is sufficient if signed by a majority of the electors of the entire territory and may bring in an included tract on which no one resides; nor is it material that the territory attached is separated into two parts by an intervening strip of the city.

4. Municipal corporations ⇐38—In attaching territory for school purposes, notice to each landowner not required.

In a proceeding under such statute notice is not required to be given to each owner of land within the territory sought to be attached.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by the Cudahy Packing Company against W. R. Hewey, County Treasurer of Sedgwick County, Kan., and others. Decree for complainant, and defendants appeal. Reversed, and remanded for further proceedings.

Glenn Porter, of Wichita, Kan. (S. B. Amidon, D. M. Dale, S. A. Buckland, and H. W. Hart, all of Wichita, Kan., on the brief), for appellants.

C. H. Brooks, of Wichita, Kan. (J. D. Houston and Willard Brooks, both of Wichita, Kan., on the brief), for appellee.

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

HOOK, Circuit Judge. The question in this case is whether the board of education of the city of Wichita, Kan., acting under section 9114, G. S. Kan. 1915, lawfully attached 20 acres of land belonging to the Cudahy Packing Company to the city school district for school purposes. The trial court held it did not, and enjoined the enforcement of the resulting excess school taxes. The statute referred to provides:

"Territory outside the city limits of any city of the first class, but adjacent thereto, may be attached to such city for school purposes, upon the application being made to the board of education of such city by a majority of the electors of such adjacent territory. And, upon the application being made to the board of education they shall, if they deem it proper and to the best interests of the school of said city and territory seeking to be attached, issue an order attaching such territory to such city for school purposes and to enter the same upon their journal, and such territory shall, from the date of such order, be and compose a part of such city for school purposes only, and the taxable property of such adjacent territory shall be subject to taxation and bear its full proportion of all expenses incurred in the erection of school buildings and in maintaining the schools of said city. Such territory shall be attached to the several wards of such city contiguous thereto as shall be determined by the board of education of any such city, and when so attached shall remain parts of such for school purposes only."

Prior to the action of the board of education the land of the Cudahy Packing Company was a part of rural school district No. 63, of Sedgwick county, Kan. At one time the school district comprised an integral body of land north of the city and contiguous to its northern corporate boundary. From time to time the city limits were enlarged and extended and it came to pass that a portion of the school district containing 120 acres became entirely surrounded by streets, blocks and

lots of the city. The 120 acres of which the Cudahy tract is a part was separated from the remainder of rural school district No. 63 by an intervening municipal strip 80 rods in width. This was the condition when the board of education entered the order of which complaint is made. The application to the board was for the attachment to the city for school purposes of the 120 acres surrounded by city limits and also about 640 acres outside, all a part of district No. 63. The application was signed by a majority of the electors of the territory sought to be attached taken in its entirety. No electors, however, resided on the Cudahy tract; it was occupied by a packing house and appurtenances. After the board made the order in question, the county school superintendent disorganized district No. 63 and attached what was left of it to another rural school district.

[1, 2] Observing the provisions of the statute above quoted, two questions arise: First. Was the land of the Cudahy Packing Company, surrounded as it was by the city limits, "adjacent" to such limits? Second. Was the requirement that the application be made "by a majority of the electors of such adjacent territory" complied with, bearing in mind that the end sought was the attachment to the city, not only of the territory surrounded by the city limits, but also of the territory beyond? Of these in their order. The term "adjacent," as employed in the statute, has a broader meaning than "contiguous." It signifies also neighboring or in close proximity, though not touching. In Board of Education v. Jacobus, 83 Kan. 778, 112 Pac. 612, the Supreme Court of Kansas so held in construing a similar statute, in which the term was used in precisely the same connection. There the territory attached to a city of the second class for school purposes did not touch the municipal boundary, but was separated from it by rural territory which had been previously so attached. If there were any doubt about the true construction, the well-reasoned opinion of the Kansas court would dispel it. But, even if the statute required contiguity, it is not perceived that a different result would follow. The Cudahy tract, though surrounded by the city, is not a part of it. It is conceded to be outside the city limits in the legal sense, and it adjoins or touches those limits on two sides. However construed, the letter of the statute is satisfied, and its spirit also.

[3] We also think the application was sufficiently signed by electors. The Cudahy tract was as much a part of the rural school district as if it had been contiguous to the 640 acres lying wholly beyond the city limits. Its separation from the larger portion presented an anomalous condition—physically, but not legally, or in a jurisdictional sense. It is true no electors resided on it, but doubtless that would have been so, if the growth of the city had not surrounded it; and in that case the absence of resident electors would have been unimportant. There is no requirement in the statute that the application must be signed by electors residing on each part or parcel of the territory affected. In School District v. Board of Education, 102 Kan. 784, 171 Pac. 1154, a like order of a board of education was attacked because it embraced a valuable quarter section of land contiguous to, but in a different township from, the remainder, and no elector residing on it signed the application. It was also charged that those who did sign had no in-

terest directly or indirectly in the quarter section. The objection to the transfer from the rural school district to the city was denied. The court said:

"The statute authorizing annexation does not intimate that the board of education may annex part of the territory which is proposed for annexation and leave out isolated tracts here and there throughout its extent because the owners may object or because some such tracts may have no resident electors; nor need the board of education concern itself that the territory to be annexed may lie in different townships or in different school districts."

[4] The difference between that case and the one at bar is that there the territory in question was a single, integral body, while here it was separated into two parts by an intervening strip of the city. But, as already observed, we do not regard the difference as material. Finally it is said that no notice of the proceeding was given the owner of the Cudahy tract. The statute requires none, and it is not seriously contended that it is unconstitutional for that reason. In the case last cited it was held that the validity of the proceeding was not affected by the failure to give notice of it to the district from which the territory was detached. In acting under the statute a board of education is an agency of the legislative branch of the state government. The legislative power of a state in respect of the boundaries of its subordinate political divisions is very broad. See Laramie County v. Albany County, 92 U. S. 307, 23 L. Ed. 552. That changes of boundaries may result in changes in burdens of taxation does not make the proceeding one for taking private property of the inhabitants. The proceeding is not one for the direct imposition of taxes, but is political; the matter of taxes is merely an incident that follows, as it is in much that is done legislatively.

The decree is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

HEWEY, County Treasurer, et al. v. JACOB DOLD PACKING CO.

(Circuit Court of Appeals, Eighth Circuit. October 25, 1920.)

No. 5443.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by the Jacob Dold Packing Company against W. R. Hewey, County Treasurer of Sedgwick County, Kan., and others. Decree for complainant, and defendants appeal. Reversed and remanded for further proceedings.

Glenn Porter, of Wichita, Kan. (S. B. Amidon, D. M. Dale, S. A. Buckland, and H. W. Hart, all of Wichita, Kan., on the brief), for appellants.

C. H. Brooks, of Wichita, Kan. (J. D. Houston and Willard Brooks, both of Wichita, Kan., on the brief), for appellee.

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

HOOK, Circuit Judge. This is a companion case to No. 5442, Hewey, County Treasurer, v. Cudahy Packing Co., 269 Fed. 21, just decided. In all

material respects the cases are alike, and the same conclusion follows in this as in the other.

The decree is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

WHITEHEAD v. RAILWAY MAIL ASS'N.*

(Circuit Court of Appeals, Fifth Circuit. December 11, 1920.)

No. 3560.

Insurance ⇐455—Death held not through accidental means; "injury through external, violent, and accidental means."

The death of an insured resulting from his voluntary act in getting off a moving railroad train, while passing over a bridge, *held* not due to injury through external, violent, and accidental means within the terms of the policy.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Accident; Accidental.]

In Error to the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Action at law by Julia A. Whitehead against the Railway Mail Association. Judgment for defendant, and plaintiff brings error. Affirmed.

J. A. Teat, of Jackson, Miss. (Chalmers Potter, of Memphis, Tenn., on the brief), for plaintiff in error.

William H. Watkins, of Jackson, Miss., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. This was an action on a benefit certificate to recover the amount payable in the event of the death of the insured resulting from bodily injury through external, violent, and accidental means. The averments of the declaration to the effect that the death of the insured was caused by such means were put in issue. The evidence without dispute showed that the insured's death resulted, not from accidental means, but from his voluntary act in getting off a moving railroad train to a place underneath a bridge over a creek, the car he was in being, at the time he so left it, on that bridge. The court did not err in instructing the jury to find for the defendant.

Affirmed.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 375, 65 L. Ed. —.

SHAAR v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 14, 1920.)

No. 3535.

Customs duties ⊜130—Internal revenue ⊜46—Imported bullion forfeited for failure to make entry and pay tax.

An owner of gold and silver bullion, who intrusted it to another in Mexico to be delivered to a bank in the United States, but with no instructions as to the means of bringing it in, or as to its entry or declaration at a custom house; *held* bound by the action of such person in delivering it to a third person to be taken across the boundary, and in failing to make entry of it and pay the internal revenue tax thereon, and the bullion *held* forfeitable for importation in violation of law.

In Error to the District Court of the United States for the El Paso Division of the Western District of Texas; William R. Smith, Judge.

Libel by the United States against 1,135 ounces of silver bullion and 56 ounces of gold bullion; Antonio L. Shaar, claimant. From a judgment of forfeiture, claimant brings error. Affirmed.

John T. Hill, of El Paso, Tex., for plaintiff in error.

Edmund B. Elfers, Asst. U. S. Atty., of El Paso, Tex.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This was a proceeding to enforce a forfeiture of a quantity of gold and silver bullion, upon the ground that it was imported from Mexico into the United States, without being entered or declared, and without the payment of the consular fee and internal revenue tax required by law.

Plaintiff in error, herein designated as claimant, interposed a claim to the bullion. A jury was waived and the trial court made the following findings:

"The evidence, as I understand it, showed, and the court finds therefrom, the following facts:

"That the bullion in controversy in these cases was delivered by the claimant, Antonio L. Shaar, at Parral, Mexico, to one Scott, with instructions to Scott that he should bring it to El Paso, Tex., in the United States, and there deliver it to the Union Bank & Trust Company. That claimant gave Scott no instructions as to the means of bringing said bullion to El Paso, or as to making entry thereof into the United States. That Scott was a man who was informed and experienced in making entries of merchandise from Mexico into the United States.

"That afterwards said bullion was found in El Paso, and was seized by the United States customs officers. There was no testimony as to the exact time or manner in which it was crossed over the international boundary line between Mexico and the United States of America, but the testimony showed that none of the requirements of the customs laws was complied with.

"The bullion was not entered through a port of entry, and, while it was not dutiable, the value being over $100, the importer should have obtained from the American consul in Mexico a consular certificate or invoice, and should have paid a fee of $2.50 for same, and should have paid an internal revenue tax of $1 to the United States, and have had affixed to the entry a $1 internal revenue stamp as evidence of the payment of this tax. The importer should have declared and presented a manifest to the United States customs officers

at the international boundary line for said bullion, and he should have appeared at the custom house at the point of entry and made the necessary entry papers for the said bullion. None of these requirements was complied with.

"That there was no legal testimony as to how said bullion was crossed into the United States, but Mr. Hill, counsel for claimant, was permitted to testify, without objection, that some time prior to the trial he went to Juarez, Mexico, and there had a conversation with said Scott, who told him that claimant gave the bullion to him to bring from Parral, Mexico, to El Paso, Tex., and that on arrival at Juarez he delivered it to one Leon, and instructed him to bring it to El Paso, but he did not know how Leon brought it across, and never inquired."

Upon the foregoing findings of fact, the court made the following findings of law:

"That the bullion described in the petitions herein was crossed from Mexico into the United States fraudulently and knowingly, and was therefore contrary to law.

"The statute is broad, and makes no exceptions, and if any person, whether the owner or not, brings bullion across into the United States from Mexico, contrary to law, it is forfeitable. Whether the claimant intended that said bullion should be brought into the United States without compliance with the provisions of the law is immaterial.

"That therefore the bullion in controversy is subject to be forfeited, although the owner may not have given any instructions to his agent, Scott, that he should not comply with the law in bringing it in.

"The court further finds that whatever Scott did towards the importation of said bullion into the United States was done within the scope of his authority as the claimant's agent. If he delivered it to Leon, he was acting within the scope of his authority, and the claimant was bound by it, and the case is as if claimant had imported it himself.

"The court concludes, therefore, that the property in controversy in both of these cases should be forfeited to the United States government; and it is so ordered."

Error is assigned upon the finding of law that Scott acted within the scope of his authority, assuming that he entrusted the bullion to Leon in Mexico. In view of claimant's testimony that he gave Scott no instructions as to the manner or means to be employed, the latter was at liberty to perform the service, personally or through others, in any necessary or proper manner.

There is no finding of a breach of duty by any of the divers parties who at one time or another may have had possession of the bullion. It is not out of harmony with the court's findings that the very things were done which claimant contemplated would be done.

Error is also assigned upon the findings of law, to the effect that forfeiture did not depend upon claimant's intention to comply with the requirements of law, nor upon his instructions to Scott relative thereto. These findings were intended to mean no more than that claimant was bound by the acts of his agent, Scott. So construed, they state a proposition of law which is conceded to be correct.

None of the assignments of error is well founded.

The judgment is affirmed.

MACMILLAN CO. v. JOHNSON, State Superintendent of Public Instruction.

(District Court, E. D. Michigan, S. D. August 27, 1920.)

No. 313.

1. **Schools and school districts ⟸167—Statute regulating sale of school text-books constitutional in part.**
   Pub. Acts Mich. 1919, No. 380, regulating the sale of school text-books, by prohibiting school officers from buying for use of the schools any books except from those listed with the state superintendent of public instruction, and at prices therein fixed, etc., *held* constitutional and valid, except as to section 7, which in broadly making it unlawful for any retail dealer to sell any books so listed at higher prices than those prescribed, without limiting such prohibited sales to school officers, exceeds the power of the state and is void.
2. **Constitutional law ⟸239—Restricting purchase of books by school districts not class legislation.**
   A state statute prohibiting school districts from buying text-books, except from publishers who list their books and prices with the state superintendent of public instruction, and contract with him to furnish books at such prices, *held* not invalid as class legislation.
3. **Constitutional law ⟸295—Publisher not deprived of property without due process by statute restricting right to contract with school districts.**
   A state statute prohibiting school districts from buying text-books, except from lists filed with the superintendent of public instruction at prices therein named, *held* not unconstitutional, as depriving a publisher of property without due process of law, since he is not compelled to sell to such districts.
4. **Constitutional law ⟸92—Publisher of school books has no vested right to contract with districts.**
   A publisher of school text-books has no vested right to contract with public school districts for the sale of its books, and a statute imposing limitations on such sales is constitutional.
5. **Commerce ⟸55—Fixing price to be paid for books by school districts not interference with interstate commerce.**
   A state statute restricting the power of school districts, in purchasing text-books, to such books as are listed with the superintendent of public instruction, and at prices therein fixed, *held* not unconstitutional as to a nonresident publisher, as an attempt to regulate interstate commerce.
6. **Statutes ⟸64(1)—Not invalid because of unconstitutionality of one provision.**
   The unconstitutionality of one provision of a statute does not render it invalid as a whole, where such provision may be stricken out without altering the meaning, purpose, or effect of those remaining.
7. **Schools and school districts ⟸167—Statute authorizing appointment of agents to sell books to pupils at fixed prices valid.**
   A statute authorizing school districts to designate retail dealers as their agents to sell text-books to their pupils, and limiting the price which may be charged therefor, *held* within the power of the state, and valid.

In Equity. Suit by the Macmillan Company against T. E. Johnson, as Superintendent of Public Instruction of the State of Michigan. Decree for complainant in part.

Goodenough, Voorhies & Long, of Detroit, Mich., and Thurman, Hume & Kennedy, of Chicago, Ill., for plaintiff.

Alex J. Groesbeck, Atty. Gen., of Michigan, and Sheridan F. Master, Asst. Atty. Gen., of Michigan, for defendant

TUTTLE, District Judge. [1] This case involves the constitutionality of the so-called "School Text-Book Act" of the State of Michigan, being Act No. 380 of the Michigan Public Acts of 1919, the title of which, so far as it is material here, is:

"An act to regulate the sale, exchange, and use of school text-books within this state."

The sections of this act material to the present controversy are as follows:

"Section 1. No board of education or school official in any school district in this state shall purchase, procure by exchange, adopt, or permit to be used in the schools of any such district any school text-book which is not listed with the superintendent of public instruction as hereinafter provided. Any person, firm or corporation desiring to offer school text-books for adoption, sale, or exchange in the state of Michigan shall file with the superintendent of public instruction copies of all such text-books together with a sworn statement of the usual list price, the lowest net wholesale price, and the lowest exchange price at which said book is sold or exchanged for an old book on the same subject of like grade and kind but of a different series. No text-book shall be listed by the superintendent of public instruction unless the person, firm, or corporation offering the same shall enter into a written contract with the superintendent of public instruction, acting on behalf of the state of Michigan and the school districts thereof, which said contract shall embrace the following terms and conditions:

"(a) That said person, firm, or corporation will furnish any of the books listed in said statement, and in any other statement subsequently filed by him, at any time within a period of one year after such filing, to any such district or any school corporation in the state of Michigan at the lowest price contained in said statement, and that said prices shall be maintained uniformly through the state.

"(b) That the prices, as set forth in said statement, shall be automatically reduced in the state of Michigan whenever reductions are made elsewhere in the United States, after January 1, 1918, so that at no time shall any book so filed and listed be sold or offered for sale by such person, firm, or corporation in the state of Michigan at higher net prices than are received for such book elsewhere in the United States, and regardless of whether such book is so sold or offered for sale elsewhere in accordance with the terms of a contract, or otherwise. * * *

"(f) That the superintendent of public instruction may, if he ascertains at any time that any person, firm, or corporation listing books with him as herein provided is selling or offering for sale any such book or books elsewhere in the United States at lower prices than those for which said book or books are sold or offered for sale in the state of Michigan, cancel all filings on the part of any such person, firm, or corporation, and remove from the list hereafter referred to all books sold or offered for sale by such person, firm, or corporation: Provided, that nothing in this act shall be construed to disturb contracts entered into with school boards previous to January 1st, 1919. * * *

"Sec. 4. The superintendent of public instruction shall annually, and at such other time or times as he may deem expedient, publish and send to each board of education within the state a copy of all lists of school text-books then in force in his office showing the prices at which such books may be purchased. Any list so issued shall remain effective until superseded or cancelled. No school text-book shall be purchased, adopted, or used for or in the schools of any school district within the state unless the same is contained

in the list so put forth by the superintendent of public instruction and in effect at the time of the purchase, adoption, or exchange. In no case shall any filing by any person, firm, or corporation become effective until the publication of a list by the superintendent of public instruction. * * *

"Sec. 7. It shall be unlawful for any retail dealer in text-books to sell any books listed with the superintendent of public instruction as hereinbefore provided at a price to exceed fifteen per cent. advance on the net wholesale price as so listed, and the cost of transportation. * * *

"Sec. 9. School districts are hereby authorized to purchase text-books from the publishers at the prices listed with the superintendent of public instruction as hereinbefore provided and to designate a retail dealer or dealers to act as the agent of the district in selling text-books to pupils. The said dealer or dealers shall at stated times make settlement with the district for such books as have been sold up to the stated time. Said dealer or dealers shall not sell text-books at a price which shall exceed a ten per cent. advance on the net wholesale price as listed with the superintendent of public instruction. * * *

"Sec. 11. Any school official or member of any school board or other person violating or knowingly permitting or consenting to any violation of the provisions of this act shall be deemed to be guilty of a misdemeanor and on conviction shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding three months, or both such fine and imprisonment in the discretion of the court."

Plaintiff is a New York corporation, engaged in publishing in New York, and selling in, and shipping to, Michigan and other states, to school boards, book dealers, and the general public, school text-books and other books. It files this bill against the defendant, as superintendent of public instruction of Michigan, to restrain him from taking any steps to enforce the statute just mentioned, which it alleges is unconstitutional on grounds which may be conveniently grouped as follows:

(1) That the statute prevents plaintiff from selling in, or shipping to, Michigan its schoolbooks, except at prices which would cause it such tremendous loss that it would not undertake to do so, and that therefore the enforcement of such act would deprive plaintiff of its property without due process of law, in contravention of the Fourteenth Amendment;

(2) That the act attempts to regulate interstate commerce, by regulating the prices of books shipped into Michigan in such commerce, and is for that reason unconstitutional; and

(3) That the statute discriminates in favor of dealers in schoolbooks for use in the public schools of Michigan against various other dealers in books, and that therefore it denies plaintiff the equal protection of the laws.

[2] Plaintiff does not refer in any of its briefs to the contention urged in its bill to the effect that this statute is unconstitutional as class legislation, and has apparently waived such contention. However this may be, it is clear that the only classification involved in the act is purely incidental to the purposes of the statute and necessary to the enforcement thereof, is reasonable in nature, and of uniform and impartial application to all members of the same class. That the act is not open to any objection based upon its alleged arbitrary discrimination is too plain for further discussion.

Obviously, it was the intent and purpose of the Michigan Legislature, in enacting this law, to regulate the method of the selection and

purchase, by the public school authorities of the state, of the text-books to be used in its public schools. This intent and purpose, as well as the method thus prescribed by the statute, are shown by the first sentence thereof, providing that—

"No board of education, or school official in any school district in this state shall purchase, procure, buy, exchange, adopt, or permit to be used in the schools of any such district any school text-book which is not listed with the superintendent of public instruction as hereinafter provided."

[3] The act in question fixes and announces the only terms and conditions on which the state is willing to deal with persons desiring to sell schoolbooks to the authorities in charge of its public schools, for use therein; but no attempt is made to compel any one to so deal with these public authorities. It was proper for the Legislature to prescribe such conditions and to require that the school officials should comply with the regulations, inasmuch as the general power of control of the public schools of this state is vested in the Legislature. MacQueen v. Port Huron, 194 Mich. 328, 160 N. W. 627.

[4] Plaintiff is not compelled to sell its books to the school authorities of Michigan, and it has no vested right to make any contract of sale with such authorities without the consent of the authorities representing the state. It is therefore in no position to complain of the terms imposed by the state upon those desiring to deal with it in respect to the sale of such books, or to question the right of the state to fix the conditions upon which it will purchase text-books to be used in its public schools. Polzin v. Rand, McNally & Co., 250 Ill. 561, 95 N. E. 623, Ann. Cas. 1912B, 471. Assuming, therefore, that in order to comply with the conditions thus attached to the purchase and sale of school text-books by the school officials from the plaintiff, it would be necessary for the latter to sustain financial loss, and that therefore it would not or could not undertake to do so, I fail to see wherein the plaintiff is deprived of any right without due process of law, or in contravention of any of the provisions of the federal Constitution. Waugh v. Board of Trustees of University of Mississippi, 237 U. S. 589, 35 Sup. Ct. 720, 59 L. Ed. 1131.

[5] The foregoing considerations are applicable also to the contention of plaintiff that this statute is an illegal attempt to regulate interstate commerce. Plaintiff has no vested right, without the consent of the state, to sell and ship its books to the school officials of Michigan in interstate commerce. This situation is controlled, not by the question of place of residence or the law applicable to sales in interstate commerce, but depends on the old, familiar rule that a sale or contract cannot be made without the consent and agreement of both of the contracting parties.

There is a sentence in the first section of this statute which, standing alone, might seem to go beyond the purpose and proper scope of the statute, and, if so construed, to be invalid. It will be noted that the second sentence of section 1 provides as follows:

"Any person, firm or corporation desiring to offer school text-books for adoption, sale, or exchange in the state of Michigan shall file with the superintendent of public instruction copies of all such text-books, together with a

sworn statement of the usual list price, the lowest net wholesale price, and the lowest exchange price at which said book is sold or exchanged for an old book on the same subject of like grade and kind but of a different series."

This sentence, however, must be read and construed in connection with its context, the preceding, and the following, sentence, these three sentences comprising the entire section. When so construed and considered it is apparent that the provision requiring the filing of this sworn satement with the superintendent of public instruction was intended, and must be interpreted, to apply only to persons desiring to sell text-books to the public school officials referred to in the preceding sentence, and that the filing of such statement, with copies of such text-books, is merely a step in the listing provided for by said first sentence as a prerequisite to the sale to such officials and therein required to be made "as hereinafter provided." Being so limited and thus construed, the provision just quoted is not open to the objection urged against it and the latter is overruled.

Section 7 of the act is as follows:

"It shall be unlawful for any retail dealer in text-books to sell any books listed with the superintendent of public instruction as hereinbefore provided at a price to exceed fifteen per cent. advance on the net wholesale price as so listed, and the cost of transportation."

The language of this whole section is so broad as to prohibit all sales of the school text-books mentioned without complying with the provisions of the act, whether the sale be to school officials or to the general public, and whether or not the dealer be an agent of a school district. This language has no proper relation to the object and subject-matter of the statute as a whole or to the source of the power of the Legislature to enact it. This section must be construed according to its plain terms, and, so construed, is an unwarranted interference with freedom of contract and with the right to engage in the private business of bookselling at retail, and as the extent of the sales of plaintiff to retail dealers depends on the right of the latter to resell, the effect of such section would be to deprive the plaintiff of its property without due process of law. Section 7 is therefore unconstitutional and void.

[6] As, however, this provision is distinct and independent of the other portions of the statute, and readily separable therefrom without affecting the true meaning, purpose, or effect thereof, its invalidity does not render the balance of the act unconstitutional or void. Brazee v. People, 241 U. S. 340, 36 Sup. Ct. 561, 60 L. Ed. 1034, Ann. Cas. 1917C, 522; United States v. Stephens (D. C.) 245 Fed. 956; Mathias v. Cramer, 73 Mich. 5, 40 N. W. 926.

[7] Section 9, authorizing school districts to designate retail dealers to act as their agents in selling text-books to pupils, and providing that such dealers shall not sell text-books at a price in excess of a 10 per cent. advance on the net wholesale price as listed with the superintendent of public instruction, stands upon a different basis than the provision just considered, and is a proper and lawful exercise of the power of the state to prescribe the terms and conditions on which its school officials may, if they desire, appoint agents of their own

selection. This is merely another application of the general power, on the existence of which the validity of this statute is based.

A decree will be entered declaring section 7 of the statute involved void, and all other portions of such statute valid, and granting and denying the relief prayed accordingly.

UNITED STATES v. SACEIN ROUHANA FARHAT.

(District Court, S. D. Ohio, E. D. October 26, 1920.)

No. 1348.

1. **Internal revenue ⇐2—Laws not repealed by National Prohibition Act.**
   Under National Prohibition Act, tit. 2, § 35, providing that "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," there is no general repeal of the internal revenue laws relating to the manufacture of liquor and any provision of such laws that can stand with those of the act is not repealed by implication.
2. **Criminal law ⇐200(4)—Internal revenue ⇐2—Conviction under Prohibition Act not bar to prosecution under internal revenue laws.**
   Rev. St. §§ 3258, 3260, 3279 (Comp. St. §§ 5994, 5997, 6019), requiring distillers to register their stills, to give bond and to maintain signs on tneir distilleries and imposing penalties for their violation, *held* not repealed by the National Prohibition Act, and a prosecution thereunder *held* not barred by a prior conviction for violation of tit. 2, § 6, of such act by manufacturing liquor without a permit.
3. **Criminal law ⇐196—Identity of offenses defined.**
   The test of identity of offenses, when double jeopardy is claimed, is whether the same evidence would sustain a conviction in either case.

Criminal prosecution by the United States against Sacein Rouhana Farhat. On motions for new trial and in arrest of judgment. Overruled.

James R. Clark, U. S. Dist. Atty., of Cincinnati, Ohio, and Wm. J. Ford and Dana F. Reynolds, Asst. U. S. Dist. Attys., both of Columbus, Ohio.

F. S. Monnett, of Columbus, Ohio, for defendant.

SATER, District Judge. Two indictments, Nos. 1349 and 1348, were returned at the same time against the defendant. Indictment No. 1349, consisting of a single count, was laid under the Act of October 28, 1919, known as the National Prohibition or Volstead Act (41 Stat. 305), and charges that he unlawfully and willfully manufactured at his residence for beverage purposes whisky containing more than one-half of 1 per cent. of alcohol by volume, without having obtained a permit or authorization so to do. He entered a plea of guilty and was fined.

Indictment No. 1348 charges, in the first count, that at the same time and place, in violation of section 3258, Rev. St. U. S. (Comp. St. § 5994), he had in his possession, custody, and control, a set-up still

and distilling apparatus for the production of spirituous liquors, without having the same registered as required by law; in the second count, that under section 3260 (section 5997) he carried on the business of a distiller of spirituous liquors without having given the lawfully required bond; in the third count, that in disregard of section 3257 (section 5993) he engaged in the business of a distiller of spirituous liquors with intent to defraud the United States of the tax on the spirits distilled by him; and in the fourth count, that contrary to the provisions of section 3279 (section 6019) he worked in a distillery for the production of spirituous liquors upon which no sign bearing the words "Registered Distillery" was placed and kept. When his plea of guilty was entered in case No. 1349, his counsel gave notice that he would assail the second indictment on the ground that the National Prohibition Act had repealed the internal revenue statutes, and that the defendant, if tried under indictment No. 1348, would be twice placed in jeopardy for the same offense. The question was not, however, raised until the case was called for trial to a jury. On account of the unexplained delay in presenting the tendered questions and the court's doubts of their meritoriousness, the plea in abatement was overruled and the trial progressed. The defendant was acquitted on the third count, but found guilty on the first, second, and fourth. A motion for a new trial and also in arrest of judgment followed. The case is now for decision on the motions.

[1] The primary object of the Prohibition Act is the prevention of the use of intoxicating liquors as a beverage, although it retains features of a revenue law. To effectuate that purpose the statute requires that all of its provisions shall be liberally construed. Section 3, title 2. That the manufacture of intoxicating liquors is still permissible, note the enacting clause of the statute and sections 3, 10, 11, 12, 25, and 28 of title 2. The right thus to manufacture is necessarily implied by sections 6, 18, 21, and 29 of the same title. Section 35 provides that—

"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 any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor."

Then follows the further provision that, if there be an illegal manufacture or sale, the tax assessed against the offender shall be double the amount provided by the then existing law, with a further penalty added as to retail dealers and manufacturers, and that payment of the tax or penalty shall give no right to engage in the manufacture or sale of liquor or relieve from a criminal or civil liability incurred under existing laws. Section 28 also contemplates the continuance of the revenue laws in so far at least as they pertain to both the manufacture and the sale of intoxicating liquors in that it provides that—

"The Commissioner [of Internal Revenue], his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this act or any provisions thereof which is conferred by law for the

enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States."

Section 9, title 3, pertaining to industrial alcohol, exempts industrial alcohol plants and bonded warehouses established under that title from the provisions of a large number of sections of the revenue law, of which sections 3258, 3260, and 3279 are a part.

The act, not specifying any statute or part of a statute to be repealed, contains no express repeal. 26 Am. & Eng. Ency. Law, 718. Whatever repeal of prior statutes is effected arises by implication. By the very language of section 35, the repeal extends only to those acts or parts of acts on the same subject, which are inconsistent and irreconcilable with the provisions of the repealing act, and only to the extent of such conflicting provisions, and such must be the effect given to its repealing provisions. 26 Am. & Eng. Ency. Law, 719, 725; Beals v. Hale, 4 How. 37, 11 L. Ed. 865, note; Wood v. U. S., 16 Pet. 342, 366, 10 L. Ed. 987; Street Ry. Co. v. Pace, 68 Ohio St. 200, 67 N. E. 490. In State v. Roosa, 11 Ohio St. 16, 27, it is ruled that a strong repugnancy or irreconcilable inconsistency must exist, else the later statute does not by implication repeal the prior one. The provision for repeal of inconsistent acts strongly implies that there may be acts on the same subject that are not repealed. Hess v. Reynolds, 113 U. S. 73, 79, 5 Sup. Ct. 377, 28 L. Ed. 927. If the Prohibition Act and the sections of the internal revenue law here in question may both stand, such sections are not repealed. State v. Roosa, supra; Ludlow's Heirs v. Johnston, 3 Ohio, 553, 564, 565, 17 Am. Dec. 609; Edgington v. U. S., 164 U. S. 361, 363, 17 Sup. Ct. 72, 41 L. Ed. 467. Implied repeals of the revenue law are not favored. In U. S. v. 67 Packages of Drygoods, 17 How. 85, 93 (15 L. Ed. 54), Mr. Justice Nelson, in speaking for the Supreme Court, said:

"In the interpretation of our system of revenue laws, which is very complicated, and contains numerous provisions to guard against frauds by the importers, this court has not been disposed to apply with strictness the rule which repeals a prior statute by implication, where a subsequent one has made provision upon the same subject, and differing in some respect from the former, but have been inclined to uphold both, unless the repugnancy is clear and positive, so as to leave no doubt as to the intent of Congress, especially in cases where the new law may have been auxiliary to and in aid of the old, for the purpose of more effectually guarding against the fraud."

The fact that the portion of the revenue law under consideration in that case related to duties on imported goods does not render the rule inapplicable. See, also, Wood v. U. S., 16 Pet. 342, 363, 10 L. Ed. 987; Saxonville Mills v. Russell, 116 U. S. 13, 21, 6 Sup. Ct. 237, 29 L. Ed. 554; Zickler v. Union Bank & Trust Co., 104 Tenn. 277, 57 S. W. 341.

The Volstead Act was designedly made drastic in its provisions. The contention that the revenue laws relating to the manufacture and sale of liquors are repealed does not consist with the provisions of the act that its regulations for the manufacture of intoxicating liquors shall be construed to be in addition to existing laws, that the tax imposed by the revenue laws shall be continued, and that the laws

relating to the manufacture or sale of intoxicating liquors shall be enforced. Section 9, title 3, by exempting industrial alcohol plants and bonded warehouses from the requirements of given sections, necessarily implies that manufacturers operating other kinds of liquor producing plants are not thus exempt. If the act repealed the revenue laws as an entirety, that section is superfluous. Such a conclusion is not permissible, if a construction can be legitimately found which will give force to and preserve all the language of the statute. Leversee v. Reynolds, 13 Iowa, 310; 36 Cyc. 1128.

There can be no general repeal of the revenue laws by the Prohibition Act, for the reason the Congress by necessary import declared by section 35 that no such repeal was intended. Blain v. Bailey, 25 Ind. 165, 166; Robinson v. Rippey, 111 Ind. 112, 116, 12 N. E. 141. In the last-named case it was held that, in the face of an express and unequivocal assertion in a statute that it is not the intention to repeal a former law, no such intention can be implied from the fact that the new statute covers the whole subject, if both acts may stand. It will not be presumed that the Congress intended a general repeal of the prior statutes, unless the Prohibition Act is so broad in its terms and so clear and explicit in its words as to show it was intended to cover the whole subject, and therefore to displace the prior statute. Frost v. Wenie, 157 U. S. 46, 58, 15 Sup. Ct. 532, 39 L. Ed. 614; Diver v. Savings Bank, 126 Iowa, 691, 696, 102 N. W. 542, 3 Ann. Cas. 669. An analysis of that act and the revenue laws discloses that the act does not cover the entire subject. On this point see, also, U. S. v. Turner (D. C.) 266 Fed. 248.

[2] There being no general repeal of the revenue laws, the question remains: Are the sections of those laws here in question inconsistent with the Prohibition Act? The Congress might have provided that a person may manufacture liquor without requiring the registration of his still, the giving of a bond to conform to stated requirements of the law, the payment of a tax on the liquor produced, or the display of a sign bearing the words "Registered Distillery," or their fair equivalents. Compliance with these statutory requirements has nothing whatever to do with the mere process of manufacture, and, had the Congress seen fit so to do, it need not at any time have imposed any of them. Each of the sections under consideration contains a requirement of a manufacturer not found in the Prohibition Act, and imposes a penalty for its disregard. We have seen that the act specifically provides that the taxing features of existing laws shall be retained, but we are required to look to the revenue laws to see what tax is imposed. This provision would dispose of the claim, adversely to the defendant, that section 3257, under which the third count is laid (if that section were now before us), is repealed.

The law making body authorized the manufacture of intoxicating liquors for other than beverage purposes, subject, however, to existing laws not inconsistent with the Prohibition Act. Prior to that time the illicit manufacture of liquors—moonshining—was in some portions of the country quite common. Such manufacture was prohibited. Penalties for such unlawful manufacture were imposed. It was competent

for the Congress, when, by the enactment of the prohibition law, it limited the manufacture of intoxicating liquors to other than beverage purposes, to provide that the same penalties as were imposed on those who manufactured unlawfully prior to its passage should be inflicted on those who made liquors unlawfully after it became operative. This it could do and did do as effectually by retaining in force the then existing penalizing statutes as by enacting them anew in the prohibition law. Proof of manufacturing may be given, which will warrant a conviction under section 6, title 2, of the Volstead Act, without the submission of any evidence of failure to register the still, as required by section 3258, or to give bond, as required by section 3260, or to place and maintain the sign of a registered distillery on the occupied premises, as required by section 3279.

In the trial of the present case the United States offered proof of the unauthorized manufacture of liquor by the defendant, as it would have been required to do to convict under indictment No. 1349, had defendant contested the charge made in it; but it also introduced evidence to show that the provisions of each of the three above-named sections had been violated. It was necessary that it should do so in order to convict. The proof which would bring conviction under section 6 of the Prohibition Act would have fallen short of establishing the government's case on any of the counts in the case under consideration. The Volstead Act is manifestly not a substitute for the revenue statutes. The two statutes denounce different offenses. The penalties provided by each are enforceable. Sections 3258, 3260, and 3279 are not inconsistent with the provisions of the Prohibition Act.

[3] The defendant, so the jury found, sinned against two statutes. A conviction under one is no bar to conviction and sentence under the other. In Gavieres v. U. S., 220 U. S. 338, 342, 343, 31 Sup. Ct. 421, 423 (55 L. Ed. 489), Mr. Justice Day, speaking for the Supreme Court, quoted with approval from Morey v. Commonwealth, 108 Mass. 433, as follows:

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. 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."

See, also, Carter v. McClaughry, 183 U. S. 365, 394, 395, 22 Sup. Ct. 181, 46 L. Ed. 236; Burton v. U. S., 202 U. S. 344, 377, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; U. S. v. Turner, at pages 250, 251; Byrne, Fed. Cr. Proc. § 217. In Kelly v. U. S., 258 Fed. 392, 397, 169 C. C. A. 408, 413 (C. C. A. 6), the plea of autrefois acquit was urged. In disposing of it Judge Warrington said:

"Such a plea, however, is unavailing, unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea."

See, also, Bens v. U. S., 266 Fed. 152, 160 (C. C. A. 2).

The test of identity of offenses, when double jeopardy is claimed, is whether the same evidence is required to sustain them. If not, then the fact that both charges relate to and grow out of one transaction does not make a single offense, where two are defined by the statutes. Morgan v. Devine, 237 U. S. 632, 641, 35 Sup. Ct. 712, 59 L. Ed. 1153. The offenses charged in the indictment under consideration (No. 1348) are not the same as that laid in the other indictment.

The sections of the internal revenue law under which the defendant was convicted not having been repealed by the Prohibition Act, the defendant has not been twice put in jeopardy for the same offense. In considering the case the court has not been unmindful of the rulings made in U. S. v. Windham (D. C.) 264 Fed. 376, U. S. v. Sohm (D. C.) 265 Fed. 910, U. S. v. One Essex Automobile (D. C.) 266 Fed. 138, and U. S. v. Turner (D. C.) 266 Fed. 249.

Both motions are overruled. Exceptions may be noted.

BALDWIN LOCOMOTIVE WORKS v. MISSOURI, O. & G. RY. CO. et al.

(District Court, E. D. Oklahoma. November 1, 1920.)

No. 2022.

1. **Railroads ⇐30—Trustee under reorganization plan may be a nonresident.**

Under a railroad reorganization plan, the residence of a trustee for stock in the new company is not required to be in the court's judicial circuit, and the custom is to the contrary.

2. **Railroads ⇐30—Trustee in reorganization proceedings selected by court.**

A railroad reorganization plan, permitting a majority of the bondholders in the old company to select stock trustees, and allowing the court to make minor changes in the plan, does not authorize such a selection, where less than a majority of the bondholders concur; but, where it appears that the consenting bondholders probably represent a majority of the bonds now existing, the court will appoint the trustees recommended by such bondholders, under a provision of the reorganization plan authorizing the judge to appoint and discharge stock trustees.

Suit by the Baldwin Locomotive Works against the Missouri, Oklahoma & Gulf Railway Company and others, in which receivers were appointed. On petition by the Fidelity National Bank & Trust Company, and Henry C. Flower, Lester W. Hall, and George T. Tremble, trustees. Petition dismissed.

Justin D. Bowersock and Jules Rosenberger, both of Kansas City, Mo., for complainants.

Frank Hagerman and Henry L. Jost, both of Kansas City, Mo., and George H. Williams, of St. Louis, Mo., for defendants Frank Hagerman and B. Haywood Hagerman.

Arthur Miller and Maurice H. Winger, both of Kansas City, Mo., for defendant New.

Scarritt, Jones, Seddon & North, of Kansas City, Mo., for American Car & Foundry Co. and Barney & Smith.

Warner, Dean, Langworthy, Thomson & Williams, of Kansas City, Mo. (O. H. Dean and Roy D. Williams, both of Kansas City, Mo., of counsel), for Day and Hoffman.

George H. Williams, of St. Louis, Mo., for St. Louis Union Trust Co.

New, Miller, Camack & Winger, of Kansas City, Mo., for defendant Kansas, O. & G. Ry. Co.

HOOK, Circuit Judge. On March 30, 1920, counsel for the Fidelity National Bank & Trust Company of Kansas City, Mo., and Henry C. Flower, Lester W. Hall, and George T. Tremble, trustees, advised William C. Hook, United States Circuit Judge, of their desire to present a petition to be filed in the receivership case of the Missouri, Oklahoma & Gulf Railroad in the United States District Court for the Eastern District of Oklahoma. On March 31 counsel was directed first to file it with the clerk of the court at Muskogee, and to advise the judge of its general purport, so that he might estimate the time proper for a hearing. This direction was upon the assumption that it was an orderly pleading in seemly terms for the redress of grievances. It subsequently appeared that counsel had previously mailed the petition to the clerk; also that he had done so as a matter of right, and as not subject to the equity practice regarding interventions. An exhaustive hearing of the matter was had at Kansas City April 12 to 15, 1920, and every reasonable aid and indulgence to its full presentation was accorded. A transcript of the evidence at the hearing was not received by the judge until shortly after the middle of July, 1920. Since that time consideration has been given it as promptly as consistent with the demands of other public business. The following is a brief review of the case of the Missouri, Oklahoma & Gulf railroads:

The railroads comprise a system of about 329 miles, extending from Baxter Springs, Kan., across Eastern Oklahoma, to Denison, Tex. They were owned by four railroad companies, organized by or in the same interests to make a connected line. The stocks in the companies were directly or indirectly owned or controlled by William Kenefick and his associates. The enterprise became insolvent, and on December 11, 1913, the Baldwin Locomotive Works filed a creditor's bill in the United States District Court for the Eastern District of Oklahoma, for the appointment of a receiver and the marshaling of assets. Mr. Kenefick, as the moving spirit in the construction of the railroads, was appointed receiver by consent of the parties. The St. Louis Union Trust Company, of St. Louis, Mo., was the trustee in several mortgages on the railorads constituting the system, securing issues of first mortgage bonds, of which $12,241,100 had been marketed and were outstanding in the hands of purchasers. On January 2, 1914, the St. Louis Union Trust Company, as trustee, filed an intervening petition to preserve the unity and integrity of the properties. The original bill of the Baldwin Locomotive Works and the intervention of the St. Louis Union Trust Company, trustee, were consolidated. On January 8, 1914, the complainants, Baldwin Locomotive Works and St. Louis Union Trust Company, the receiver, William Kenefick, a

reorganization committee of bondholders, other large bondholding interests, and unsecured creditors appeared before the court. Mr. Kenefick voluntarily retired as receiver. Counsel for the parties above mentioned thereupon recommended the appointment of Mr. Alexander New and Mr. Louis S. Posner as receivers. Their recommendations were entered in the record of the cause and the appointment was made the same day. Mr. New was regarded as being favored by Mr. Kenefick, and Mr. Posner was a partner of Mr. John R. Dos Passos of New York, who represented a French committee of bondholders holding several million dollars of the first mortgage bonds.

The financial condition of the railroad companies and the physical condition of the properties were so very bad that the question of the issue of receivers' certificates soon arose. The proposal to issue such certificates originated with the parties in interest, and not with the court. The court neither took the initiative nor recommended the measure. On the contrary, it declined to authorize the issue of receivers' certificates unless and until all the important interests in the property, including the first mortgage bondholders, joined in or expressed their approval of record. It was generally understood that nearly all of the first mortgage bonds had been marketed abroad, the great majority of them, about $10,000,000 in the provinces of France and in Belgium, and there was difficulty in definitely ascertaining who owned or held them. Consequently on January 4, 1914, the court appointed Mr. Herman C. Huffer to make inquiry and report upon the ownership of the bonds, or who represented the bondholders, to the end that their view regarding the issue of receivers' certificates on property in which they were so heavily interested might be ascertained. Mr. Huffer was related to L. Huffer & Co., of Paris, France, which itself owned and represented a considerable amount of the bonds, and whose counsel in this country was Mr. George Whitelock, secretary of the American Bar Association. Mr. Huffer went abroad in 1914, and after much difficulty succeeded in locating the owners of the larger part of the bonds or their representatives. He made three reports to the court, showing finally the owners or representatives of $9,322,400 out of a total of $12,049,600 sold abroad, leaving $2,717,200 unlocated.

An application for authority to issue $1,750,000 of receivers' certificates was filed December 3, 1914. It was consented to by the railroad companies constituting or controlling the Missouri, Oklahoma & Gulf system, by the construction companies owning a majority of their capital stocks, by the St. Louis Union Trust Company, trustee in the first mortgages, in a qualified way and to the extent of its authority in the premises, by the representatives of a majority of the outstanding first mortgage bonds, and by a large number of intervening creditors claiming a lien on the railroad properties. These consents were entered upon the record of the cause, and on February 19, 1915, an order authorizing the issue of the certificates was made. A few days afterwards $750,000 of the certificates were sold to the Fidelity Trust Company, of Kansas City, Mo., at 94 per cent. of their face value; the price being the best obtainable, and having been consented to by the parties in interest similarly to the consent authorizng their issue. On February 23, 1915, Mr. Posner resigned as receiver, and a few

days later Mr. Henry C. Ferris was appointed in his place. This change was made at the instance of representatives of the foreign bondholders, and particularly at the suggestion of gentlemen who were endeavoring to reorganize the property, one of whom was an experienced railroad man of national reputation. Mr. Ferris was highly recommended to the court as a practical operating railroad man. He was at once put in charge of the road and of the immediate expenditure on the property of the proceeds of the receivers' certificates so far as available for that purpose.

The Missouri, Oklahoma & Gulf was heavily indebted to the Baldwin Locomotive Works, the Barney & Smith Car Company, and the American Car & Foundry Company for rolling stock and locomotives sold on the customary equipment contracts of lease or conditional sale. On February 20, 1915, the aggregate of such indebtedness, with interest, was a little short of $1,000,000, of which $743,034 was principal. The three equipment companies agreed to take $250,000 of the receivers' certificates at par and apply the amount on their claims. On April 26, 1915, the receivers, Mr. New and Mr. Ferris, were authorized to consummate the transaction, and it was done. This left $750,000 of certificates authorized, but not disposed of. On October 16, 1915, the receivers filed a voluminous petition, setting forth in itemized detail the repairs and improvements necessary for the property in their possession, and asking authority to sell $500,000 of the remaining certificates to the Fidelity Trust Company at the same price as before, and to apply the proceeds on the work. The order was entered and the certificates sold accordingly. Subsequently additional certificates were similarly sold, until the amount outstanding was $1,720,000.

It may be observed that, when the receivers were appointed, the railroad property was in very bad physical condition. It was impossible to operate it and comply with the public statutes, or to operate it at all except at a heavy and constantly growing loss. The equipment and motive power were run down. The companies had no shops or other facilities for making their own repairs. Engines had to be sent to other railroads to be overhauled. More than half of the railroad mileage was unballasted, and considerable of it embedded in the earth. In December, 1916, 156 main line derailments were reported to the Oklahoma Corporation Commission. The court was informed that the chairman of the commission had expressed the view that the condition of the railroad made it a public nuisance and its operation should be stopped. The supports under steel bridge spans had sagged, and there was great difficulty in restoring and maintaining necessary parts of the railroad against destruction by floods. These, with many other similar physical conditions, and financial conditions in keeping with them, presented a serious task for the receivership. The major part of the proceeds of the sales of receivers' certificates were applied as soon as possible toward the restoration of the property, a very large percentage to necessary ballasting. Such debts as threatened its integrity were paid with the assent of the parties. From time to time the receivers made reports of their expenditures and the purposes for which

they were made, which met the approval of the court and apparently of all the parties. No objections were made to them by any party.

The efforts at reorganization, originating with the parties in interest, failed because of the war in Europe, which was growing in intensity. Consequently a general conference was called for April 11, 1917. It resulted in the following order made of record in the cause:

"Order.

"This cause came on for hearing this April 11, 1917, upon a general conference between the receivers, mortgage trustees, parties to the causes, representatives of bondholders, creditors, and stockholders. The conference was called by the receivers, at the request of the court, to consider what steps should be taken to speed the cause to final hearing and close the receivership. Thereupon the court, after announcing the purpose of the conference, stated to those present that the receivership had already continued an unusual length of time, because most of the first mortgage bondholders were citizens of European nations at war since August, 1914, and have not been personally accessible, but that it should not be further continued indefinitely, even for that reason, if it can be wound up with substantial justice to all interested, whether present or not. At the request of the court there was a general expression of views by those present. It appeared that a large part of the first mortgage bonds were held in small amounts by residents of France, Belgium, and Great Britain, particularly the former; that prior to the beginning of the war some steps had been taken on behalf of the bondholders and stockholders to reorganize the property of the defendant railroad companies; that the efforts appear to have been abandoned; that some substantial amount of new capital is imperatively necessary for such a reorganization, and to enable the railroads to be operated as a going concern and to perform their duties to the public; that it is impossible for the first mortgage bondholders to raise the new capital now, or within any definite, reasonable period in the future, nor, considering the value of the property and existing financial conditions, is it practicable to raise such funds by assessment upon or voluntary subscriptions from the second mortgage bondholders, the creditors, or the stockholders. The conclusion, concurred in by most of those who spoke upon the subject, was that no organized effort on the part of the security holders to reorganize the properties and close the receivership could reasonably be expected within any definite period of time, and that it remained for the court to take action. That is also the view of the court. It is therefore ordered:

"(1) The St. Louis Union Trust Company, trustee, hereby consenting and having authority to do so, shall promptly file herein a bill or bills for foreclosure and speed the same to hearing and decree.

"(2) The receivers herein are directed to employ some one of competent legal ability to prepare and submit to the court for its consideration and determination a plan of reorganization of the properties in their hands as fair and just to all as conditions will permit. The plan in general outline shall contain provisions for the raising and securing of such new capital as may be vitally necessary, for the recognition of the existing security holders and creditors, so far as practicable, considering the value of the property, for the equitable adjustment of their respective relations to the property, giving the security holders, particularly the holders of first mortgage bonds in Europe, such time and opportunity to avail themselves of the provisions made for them as can reasonably be given, and for the future corporate government and control of the reorganized corporation or corporations.

"April 11, 1917. William C. Hook, United States Circuit Judge."

Pursuant to the above order the receivers employed Mr. Frank Hagerman, of Kansas City, Mo., to prepare a plan of reorganization for submission to the court, and on June 27, 1917, the St. Louis Union Trust Company, trustee, filed bills for the foreclosure of the mortgages. Mr. Hagerman prepared a plan of reorganization and several

modifications of it, but was unable to satisfy the conflicting interests to such an extent that they would accept it. A meeting largely attended by the parties or their representatives from the East and the Middle West was held at St. Paul, Minn., in May, 1918, when the failure of the receivers' plans was reported, and the judge of the court undertook to solve the difficulties by a formulation of a plan himself. The problem to be met was three-fold: First, the securing of new funds, which, under the conditions then existing, could only be obtained from the United States Railroad Administration, this because cash assessments customary in such reorganizations were impracticable; second, the adjustment of conflicting interests prior to the old first mortgage bonds, including the costs and expenses of reorganization, receivers' certificates, receivers' liabilities, etc.; third, the treatment to be accorded the old first mortgage bonds, held almost wholly in Europe and many then in the immediate theater of the war. The amounts to be obtained, if possible, from the Railroad Administration, were fully discussed at the meeting in all their bearings, and also the methods of reconcilement of the other interests. It was a difficult problem, and the judge devoted much time to it and to the matters which immediately arose under it.

A plan was prepared, dated August 31, 1918, and first officially submitted to the Railroad Administration at Washington for its consideration. It was conditioned upon the making of a contract with the Railroad Administration for operation during federal control and for advancement or loan of the necessary funds. The arrangements were finally made with the Railroad Administration, and consummated December 21, 1918, by a signed memorandum of agreement, to be a part of the standard form of contract when executed. It may be said here that the Railroad Administration afterwards abandoned the practice of standard contracts, and substituted particular settlements in their place. This, however, did not affect the agreement of December 21, 1918. The plan was changed in a few respects, to make it harmonize with the agreement, and it was formally promulgated December 31, 1918. The Railroad Administration expressly approved the plan. The railroad was taken under federal control as of the following day, January 1, 1919. The plan and the agreement fixed the amounts the Railroad Administration was to advance or loan and the purposes, and provided that the government should have a paramount lien.. A new company was to be organized to bid for the property at the foreclosure sale, and if successful to take title. The major part of the allowances and costs in the receivership, which ordinarily are first paid, were by those entitled to them voluntarily reduced to the class of receivers' certificates and other receivers' liabilities, to which were given class A bonds of the new company, next in security to the paramount lien of the government. Provision was made in the plan that other claims determined to be prior in lien or equity to the old first mortgage bonds should be paid in class B bonds of the new company, next in lien to class A. The holders of the old first mortgage bonds were to receive half of the principal of their holdings in class C bonds, inferior in lien to A and B, and for the balance and accrued interest were to have

the preferred stock of the new company. That stock will constitute the great controlling majority.

Ample opportunity was accorded the foreign bondholders to avail themselves of the plan and to save their equity in the property. There were other and minor provisions, but the above in general is the financial structure of the plan of adjustment. Large powers were conferred upon the judge to carry out and consummate the plan, including the appointment of trustees to hold and control the stock of the new company until it should be finally surrendered to those ultimately entitled to it. These powers were conferred upon the judge, not upon the court in which the receivership was pending, and upon his death or disability to act they devolve, not upon the court, but upon his successor in office. Assurances were given by creditors from time to time of their assent to the plan. A meeting was held in May, 1919, also largely attended, at which suggestions and objections were heard and considered, and the plan was formally declared fair, equitable, and operative. For the information and convenience of the parties, the plan and the subsequent orders marking steps in its consummation were filed with the clerk of the court at Muskogee, Okl., regardless of whether they pertained to the receivership or not.

Mr. Ferris resigned as receiver, effective January 1, 1919, and became the operating superintendent under the Railroad Administration. On April 15, 1919, a final decree of foreclosure of the old mortgages was entered. An order of sale was issued, and on July 8, 1919, the commissioner sold the property to Arthur Miller, Esq., who acted on behalf of the plan of adjustment and the new company to be formed under its provisions. On July 31, 1919, the new company, by the name of the Kansas, Oklahoma & Gulf Railway Company, was organized, and the title was thereupon conveyed to it. It may be observed here that, as customary, the first directory of the company was intended as temporary, and under ordinary circumstances would soon have given way to one more permanent and representative. On December 1, 1919, the judge appointed the three stock trustees under the plan of adjustment, one of whom was the Fidelity National Bank & Trust Company, a petitioner in this case.

It is not necessary to take up the petition in detail. Its character and the truthfulness of its charges are sufficiently illustrated by what will be said. The petition charges that Mr. Hagerman was counsel for the Banque Franco-Americaine; that between the Banque and the railroad companies large unsettled demands existed when the receivers were appointed; also that the Banque or its successor was still (March 31, 1920) asserting claims against the railroad companies or the receivers, and was claiming preferential liens and bonds of the new railroad company equal in rank to the bonds allottable under the plan of adjustment to the petitioners. The manifest intention of the petitioners was to charge that Mr. Hagerman was guilty of gross professional misconduct, in that he was pretending to serve at the same time two sides in a case having conflicting interests—the receivership, in which all creditors were interested, on the one hand, and on the other a personal client, whose demands were adverse to the interests of the

other creditors, and particularly to the interests of the petitioners. The court record in the case, accessible to everybody, plainly shows the charge to be untrue in both letter and spirit. This is so manifestly the case that there was no justification for making the charge, much less for putting it in the records of a court of justice. After giving publicity to the charge, there was no serious attempt to prove it. The facts in the matter are these:

Before the receivership, the railroad companies had employed the Banque Franco-Amercaine, of Paris, France, as an agency to market their bonds. When the receivership came, the Banque had in its possession unsold several million dollars of the bonds of the companies, and also had claims against them for various disbursements made and liabilities incurred. The necessity of adjusting the accounts and of getting possession of the unsold bonds, so they could be canceled and no longer exist as an apparent charge upon the property, was made the subject of averment in the first pleading filed in the case—the bill of complaint of the Baldwin Locomotive Works. The Banque Franco-Americaine went into liquidation, and Mr. J. Dumas, of Paris, became its liquidator. On February 19, 1915, Mr. Hagerman, as counsel for Mr. Dumas, filed in the receivership cause a detailed statement of the matter and a proposition of adjustment. The parties to the cause—that is to say, the plaintiffs Baldwin Locomotive Works and the St. Louis Union Trust Company, trustee, the defendant railroad companies, the French committee of bondholders, and the receivers, all recommended that the adjustment be made. Their recommendations were in writing, and were put of record in the cause. On the same day the court made an order authorizing the adjustment. The claim of the Banque Franco-Americaine thereupon disappeared as a disputed matter in the cause. This was more than two years before Mr. Hagerman was employed to act for the receivers in the matter of the reorganization. The amount allowed in the adjustment was for taxes imposed by the republic of France on the sale of the railroad bonds in that country, for which the Banque Franco-Americaine had obligated itself. No claim has ever been made by or for it, or Mr. Dumas, its liquidator, as is alleged in the petition, that they should have class A bonds of the new company under the plan of adjustment, or that they should have, in the language of the petition, "bonds of equal rank with bonds of your petitioners." Moreover, no such claim could be made or allowed under the plan. Every reasonable person interested in the case and in the reorganization of the railroads knows this to be so.

There is much more in the petition designed to reflect injuriously upon the integrity of Mr. Hagerman and upon the propriety of his employment in the receivership and the reorganization. Most of it is in general terms, interwoven here and there with specific averments, some of which are wholly untrue, and others partly true, but where the full truth would deprive the averments of all bearing or significance. A single instance of the latter will suffice to show their character. For example, the petition charges the following:

"Said Hagerman also, at the special instance and request of said judge, negotiated with the officers of the United States Railroad Administration

for extensive loans to be made to the receivers, or the new company referred to in said plan, and for the terms of compensation to be paid by the government for the use, during the period of government control, of the railroad property in the hands of the receivers; said loans to be secured by a paramount lien on said property."

Elsewhere in the petition is the following averment:

"The amount of the government lien authorized to be secured as a paramount lien under said plan will not be less than $2,280,000."

In a qualified sense the first averment is true; but it is not all of the truth. Known facts were omitted, so that an untrue inference was necessarily conveyed by the averment, taken with the balance of the petition. The inference conveyed by the language employed is that, at the instance of the judge, Mr. Hagerman dealt with the Railroad Administration without the consent or participation of the petitioners and other creditors, and arbitrarily negotiated the terms of compensation for government control, and also for large loans, which were made paramount liens upon the property ahead of the receivers' certificates. The facts are these:

It was known by all that funds from some source were essential to any effective plan of reorganization, and all knew that the funds could not be raised by assessment upon the creditors, the bondholders, or the old railroad companies, as is customary in other reorganizations of railroads. Those conditions were conceded by all. Government control of railroads, which began January 1, 1918, and the power to advance or loan moneys to the carriers, furnished a way out. At the open meeting in May, 1918, attended by representatives of the principal creditors, bondholders, and other interested parties, including the Fidelity Trust Company, the above situation was fully discussed in connection with a plan of adjustment to be formulated by the judge. Amounts and purposes were fully discussed.

The position of the court, always maintained and never departed from, was that it would contract for no loans from the Railroad Administration to be secured by a lien prior to the receivers' certificates, except pursuant to a plan of adjustment acceptable to a sufficient number of the creditors, including the holders of the certificates, to make the plan effective, and that in such case the loans and paramount lien would be at the instance of and on behalf of the creditors themselves, instead of through an arbitrary exercise of power by the court or judge. That position was definitely made known to the Railroad Administration on June 29, 1918, at Washington, whilst the judge was working on the plan of adjustment which was afterwards promulgated.

The plan prepared by the judge was completed August 31, 1918, but the negotiations with the Railroad Administration were not completed until December 21, 1918, when the written agreement was signed. The plan was thereupon modified in a few particulars to conform with the agreement, and finally dated and promulgated December 31, 1918. The agreement with the Railroad Administration specifies the sums of money to be loaned and the purposes. According to express terms in the agreement, $255,000 was loaned that day, December 21, 1918, of which $225,000 was imperatively needed to meet back pay awarded

employees, who were threatening to strike because of delay in paying them, and taxes due January 1, 1920. This was the first money obtained from the Railroad Administration. It may be stated broadly that no money was then or thereafter borrowed from the Railroad Administration, except with the consent, formally or informally expressed, of a sufficient amount of creditors, including those holding receivers' certificates, to make the plan of adjustment effective.

That this is true as to the petitioners appears from the following: The Fidelity Trust Company, whose interests are now represented by the individual petitioners, employed counsel, who went to Washington and ably aided Mr. Hagerman in the arguments and negotiations that resulted in the agreement of December 21, 1918, under which the moneys loaned by the Railroad Administration were obtained, and which in terms provides for a first lien on all the property of the new railroad company. How well calculated, therefore, to misrepresent and deceive, is the allegation that at the instance of the judge said Hagerman negotiated for extensive loans from the government, to be secured by a paramount lien.

As already observed, it is elsewhere alleged in the petition that the amount of this paramount lien "under said plan will not be less than $2,280,000." The averment of this large sum was calculated to aggravate the inference conveyed by the other. The plan shows on its face that the averment is not true. Moreover, the amount fixed by the agreement of December 21, 1918, with the Railroad Administration, which controls the matter and of which petitioners had full knowledge, is less than $1,500,000. Accurately, the amount is $1,411,687.30, and it includes $86,687.30 of principal of equipment obligations, which, assuming that the railroad will be operated and continue as a going concern, is to that extent merely a change from one form of paramount obligation to another. The petition exaggerates the true figures by over $800,000.

It is shown that Mr. Hagerman is unfriendly to one of the individual petitioners. The averments of the petition disclose that the feeling is fully reciprocated. With it and its causes the court, the judge, and the other parties, whose interests are many times more than those of petitioners, are not concerned, except as they may obstruct or imperil the consummation of the plan of adjustment. The feeling has not been allowed to affect the legal rights of the petitioners, or to prevent them from presenting their claims and views to the court and judge, the same as other parties of all classes have felt free to do, and as has been done many times. All important acts of record in the receivership, the plan of adjustment, and steps toward consummating it have been those of the court or the judge, upon full consideration. Necessarily considerable of subordinate importance and detail had to be in the first instance intrusted to others, but always with the right to a hearing on differences that developed. That course was so necessary, and its conditions so generally understood and observed by the parties, that contentions now to the contrary have no basis in truth.

Mr. Hagerman is a lawyer of national reputation, and is universally regarded as one of eminent ability and of the highest integrity. The

breach of friendly relations above mentioned, about which much evidence was given at the hearing, occurred in 1916. Mr. Hagerman was employed for the reorganization the following year, 1917. At the hearing of the petition in April, 1920, the individual petitioner referred to, in speaking as of 1917, testified as follows:

"I regarded him as a very fit person to do it; probably the best they could have employed."

This feature of the petition need not be pursued further.

[1] Objection is made to Alexander New as a stock trustee under the plan of adjustment, because he does not reside in this United States judicial circuit. There is no requirement of such residence. Moreover, the custom is to the contrary. It is a common practice in the case of Western railroad properties to select as stock trustees men who reside in New York, and sometimes even residents in Europe. The existence of the custom is so well known that it cannot be assumed petitioners were ignorant of it. New York, where Mr. New resides, at present is the gateway into this country for the Missouri, Oklahoma & Gulf foreign bondholders, who will be entitled to most of the trusteed stocks.

Again Mr. New is assailed as a receiver. He was a receiver when the Fidelity Trust Company first negotiated with him for receivers' certificates, and from that time until this petition was filed, a period of over five years, no objection was ever made to the court that Mr. New was not qualified in every way, was not competently discharging his duties, or was not faithful to his trust. It is true that Mr. New is not a practical railroad man, but neither are any of those whom the petitioners name for appointment as officers of the new railroad company. Mr. New's associate, Mr. Ferris, was directly in charge of operations, and Mr. New, after he removed to New York, was continued as a receiver to aid efforts on behalf of the European bondholders to reorganize the railroads and to deal with the Eastern equipment companies holding, principal and interest, nearly $1,000,000 of obligations of the railroads. In this latter matter he performed a very valuable service. The removal of Mr. New as receiver is sought at this time, when the slightest inquiry would have developed the fact that after the master's sale of the railroads and the conveyance of them to the new company in 1919 his position as receiver was but a nominal one, with little or no compensation. He was continued in office after his active duties ceased, to meet possible contingencies of belated litigation, in which some one holding such a position would be a necessary party. The course is customary in receivership cases. It is unimportant who holds the position, but the litigation, if any ensues, is attended to by counsel for the new or reorganized company.

Again, it is alleged that Mr. New is "seeking large fees" as receiver. On February 19, 1915, an order was entered covering the compensation of Mr. New and Mr. Posner to that date; the latter being about to retire. No other order has been made or applied for. Mr. New is entitled to, and will be paid, compensation from that time to the day the railroad was turned over to the new company; but, on account of the financial condition of the receivership, he has not drawn it, nor

has he to this time asked that it be allowed or paid. In the offensive sense, naturally conveyed and evidently intended, the allegation is untrue.

Again it is alleged that Mr. New is a member of a certain law firm in Kansas City which, as attorneys for William Kenefick and the William Kenefick Construction Company, are "asserting claims to a large amount against the receiver, or the new company," and seeking to have them declared preferential to the old first mortgage bonds. This charge, read with others, means that Mr. New, while a receiver and also a trustee for future stockholders of the new company, to whom he owed the highest duty of fidelity and good faith, was at the same time prosecuting a claim that would lessen the value of their interests. Both phases of this charge are untrue. Mr. New has not been a member of the law firm for several years, and for several years has had no financial or other interest in its business. This could have been learned by casual inquiry of those with whom the petitioners were in daily contact. In the next place, neither Mr. New nor the law firm in question were asserting for Mr. Kenefick or the construction company any claim against the receiver or the new company. Alexander New is regarded by all who know him as one who both entertains and practices in business affairs and in private life the highest code of ethics. The attack upon him in the petition has not the excuse of a personal quarrel, and is explicable only by some ulterior purpose.

The same unfair course has been employed against Mr. Ferris, the operating receiver until January 1, 1919, then general superintendent under the Railroad Administration until the end of government control March 1, 1920, and thereafter, until recently, an official of the new company in charge of operations. The records of his management prior to January 1, 1918, and the reports to the Interstate Commerce Commission, definitely show a steady progress in the restoration of the property and the growth of its business. Mr. Ferris became a receiver March, 1915. For the year 1915 there was an operating revenue deficit of $191,216. For 1916 there was a surplus of $195,678, and in 1917 a surplus of $316,864, an increase over 1915 of more than $500,000. In 1917 there was a net income of $62,739. During 1918 the operating officials of the Railroad Administration took the position that the Missouri, Oklahoma & Gulf was not under government control, and as a result much of its natural traffic for that year was diverted to the large government-controlled railroad systems surrounding it. At the same time it was compelled to meet the increased wage schedules ordered by the government, the awards of back pay, and the rising cost of materials. It was not even allowed to route its office supplies, destined to its offices at Muskogee, Okl., over its own lines. As compared with the preceding year, 1917, a loss in net operating revenues of $547,776 was inflicted, and the net income of $62,739 was changed to a deficit of $447,838. So grievous were these conditions and so manifest the injustice to the property that an exposition of them at Washington in December, 1918, greatly influenced a change of policy by the Railroad Administration, and the agreement of December 21, 1918, was soon made. The agreement provides affirmatively for government control

as of January 1, 1919. No reasonable-minded person would hold Mr. Ferris responsible for the showing in 1918.

While Mr. Ferris was receiver, his acts were being subjected to close and unfriendly scrutiny by persons in his service, afterwards discharged. Their criticisms were detailed on the witness stand. For the most part they were so petty and meticulous that they need not be further mentioned. Two things were emphasized. Both occurred during government control, and the responsibility, if any, was to the Railroad Administration, not to the receivership or the new company. One related to the keeping of the accounts of the repair of an implement owned by him and of its use on the railroad property. The accounting method was irregular, but not dishonest. No secret was made of it. The other related to the purchase of railroad materials considerably in excess of normal. This was characterized as wasteful and improvident. It appeared that during its control the Railroad Administration had allotted $690,000 for materials and labor upon the railroad, without creating a debt of the receivership or the new company, and that Mr. Ferris was endeavoring to give the property the benefit of it while government control lasted. That course was generally pursued by the railroads of the country under government control, and if the right and opportunity was abused it would seem that complaint should originate with the government instead of with parties claiming an interest in the welfare of the property.

Two other matters in the petition and evidence at the hearing may be noticed. It is claimed by petitioners that at a general conference of parties in interest in May, 1918, assurances were given by the judge, or a statement made by him, that the Fidelity Trust Company would be appointed as one of the three stock trustees. The date is material. The weight of the evidence shows, and the judge knows, that no such assurances were given and no such statement was made, and that nothing was said, directly or indirectly, from which such a conclusion could be reasonably inferred. The object of petitioners in this particular is obscure. It is explainable only on the theory that they claim such appointment as an element of a contract with them. What was said on that subject occurred several months later, was said to its counsel, and was not of a character from which a contract obligation could be inferred, or even a moral obligation, regardless of the conduct or attitude of that company towards the reorganization.

The other matter is this: On December 1, 1919, the judge at his chambers in Leavenworth, Kan., signed several orders relating to the reorganization and delivered them to Mr. Arthur Miller, counsel for the new company, to be filed with the clerk at Muskogee. One order was the appointment of the three stock trustees under the plan of adjustment, one of them being the Fidelity National Bank & Trust Company. Another order directed the receiver to transfer certain stock in the new company to the three trustees. The three trustees were named in this order and their trust capacity specified. The other orders related to other matters. All orders were dated December 1, 1919. Mr. Miller sent all the orders to the clerk at Muskogee, where they were filed December 11, except the first mentioned, which he mis-

placed in his office and did not discover until early in March, 1920, when he sent it to be filed. It was filed March 6, 1920.

Referring to the order appointing the three trustees, which was misplaced, the petition charges that it was concealed and suppressed by Mr. Hagerman for improper purposes, and was not discovered until counsel examined the records at Muskogee March 21, 1920. Of course, the charge is untrue. One of the individual petitioners testified that he was informed by letter as early as July 25, 1919, that the Fidelity National Bank & Trust Company would be appointed as one of the trustees, and that he immediately showed the letter to one of the other individual petitioners, both officers of the Fidelity National Bank & Trust Company; also that on November 12, 1919, he was informed who all three trustees would be. A witness for petitioners testified that in December, 1919 (after the order of appointment was signed), he told one of the individual petitioners that his institution was a trustee. The evidence at the hearing in its entirety shows that petitioners knew their institution would be appointed, and in December, shortly after the order was made, had actual knowledge of the appointment. Notwithstanding this, and Mr. Miller's statement that the oversight was his alone and was unintentional, the petitioners continued at the hearing to bring up the failure to file the order until March 6.

Counsel who examined the records at Muskogee March 21, and saw the other order, also dated December 1, and filed December 11, which recited the names of the trustees and their trust capacity, did not inform his clients of it. By itself the order which he saw was filed December 11 was legally equivalent to an appointment. Apart from the charge of misconduct in the petition, this matter may appear trivial; but its reiteration at the hearing led to an inquiry of one of the individual petitioners on the witness stand as to what prejudice could have been caused by the failure promptly to file the order. The shameful answer was made that the judge knew whether he signed the order on December 1 or not, but he immediately suspected that it had been prepared in March, and dated back of a controversy which occurred early in March with Mr. Hagerman. No more need be said of this, except that the position was so discreditable to the witness that he afterwards sought to escape from it.

Enough has been said to show that the petition was intended to be scandalous and to create a sensation in the neighborhood. It does not appear that the other interests petitioners represent joined with them in this proceeding, or approve of the methods employed. The reasonable inference is they do not. It is certain that very large interests on an equality with theirs and the representatives of the old bondholders, who will own the railroad, affirmatively disapprove. The petition is replete with false statements and statements of half truths, with misleading innuendoes and inferences. In its violence it is like what in physical activities against the government or established institutions is called "direct action." Occasionally such methods have been employed elsewhere, but fortunately the cases are not common. The redress of real grievances does not require them. Courts and judges, who have come to notice the new and exceptional practice, while

awarding justice at all times and under all circumstances, will grant nothing to violence and scandal. Real grievances lose nothing by their assertion in an orderly way.

The conduct of certain holders of receivers' certificates justifies the belief that they deliberately set about to capture this railroad from the bondholders, while the World War was on and the bondholders were powerless to protect themselves. It is admitted that, while those conditions existed, they discussed among themselves a sale and buying in of the road under their receivers' certificates. They objected to proposed plans of reorganization, unless they were put in control of the property. The crisis precipitated by the government control of railroads January 1, 1918, and the threatened exclusion therefrom of the Missouri, Oklahoma & Gulf, operated to coerce them to accept the plan of adjustment put out by the judge. This they admit, and they still say they do not like the plan. They are not in sympathy with it. Government control had hardly ceased March 1, 1920, when this proceeding was begun, and the honesty and integrity of almost every one who had prominently helped to bring the plan about, or to aid in its consummation, was attacked. They did not wish the Commerce Trust Company, of Kansas City, Mo., selected as trustee in the lien instrument securing the United States for its advances under the plan of adjustment and the agreement of December 21, 1918, a position which did not directly concern them or their legal interests. They objected to the selection of the St. Louis Union Trust Company as the trustee in the mortgage securing the bonds of the new company. The trust company had been trustee in the mortgages of the Missouri, Oklahoma & Gulf, and, so far as it could, had aided the plan of adjustment. They objected to the connection of certain men with the receivership and the new company because of lack of railroad experience, while at the same time insisting upon selections from some of their own number equally inexperienced. Again, the judge has been recently advised that some of them were considering a contest of the application of the new company to the Interstate Commerce Commission for a certificate of authority to issue the stocks and bonds of that company specifically required by the plan of adjustment. The granting of such authority was vital to the carrying out of the plan. So much of this has occurred in the history of this matter that it cannot reasonably be attributed to anything else than a spirit of opposition to the consummation of the plan of adjustment, which conditions forced them to accept.

[2] The petition is dismissed at the cost of the petitioners. The depositary under the plan of adjustment reports that there have been deposited with him and his subdepositaries, including the branch of the Equitable Trust Company of New York in Paris, France, first mortgage bonds of the old railroad companies aggregating $5,848,600 out of the total outstanding of $12,241,100 as specified in the plan. Counsel for committees of bondholders and of individuals holding bonds has presented a petition stating substantially the same facts; also that he is informed and verily believes that a large number of undeposited bonds have been lost or destroyed in the European war, and that the

amount deposited will prove to be a majority. He asks that the depositing bondholders may be authorized to select the voting trustees according to the provisions of the plan of adjustment. The petition and the report will be filed at Muskogee. The two individual trustees, Mr. New and Mr. B. H. Hagerman, have also advised the judge of the above figures, and that in their view the delivery of the property to representatives of the old bondholders, to whom nearly all of the stock will be issued, should be expedited by allowing them to select such officers. The plan provides that this may be done within any time fixed by the judge when a majority in amount of the holders of the old first mortgage bonds have accepted it; also that the judge might make minor changes in the plan, not affecting its substantial structure or the substantial rights of those who may have accepted it.

The judge is of the opinion that in advance of the acceptance by an actual majority of the amount of bonds specified in the plan and a verification of their holdings in some authoritative way a change in the plan such as is desired would not be a minor one within his power to make. He will, however, in view of the above representations, do what will work to the same practical end; that is to say, appoint as his appointees two trustees whose names are presented by counsel for the depositing bondholders, namely, Edmund F. Harding, Esq., and Cyril F. Dos Passos, Esq., both of New York. It is apparent that the remaining trusteeship should not be held by the corporate petitioner. At the same time it is necessary to observe the plan, which provides that one of the three trustees appointed by the judge "shall be selected from the holders of or the officers of one of the financial institutions which hold receivers' certificates." Suggestions will be received as to who should be appointed to that place. Orders carrying the above into effect will be made and filed at Muskogee.

When the railroad was turned over to the new company, it occupied a dual position. First, it was the owner and the operator of the property while not under government control. With those aspects neither the court nor the judge is interested, save in the general desire entertained by all that the operation be prosperous. But, second, the new company became a necessary agency or instrumentality of the judge in carrying out the plan of adjustment, for which he had obligated himself to the government and to every person and corporation who had accepted it. For the execution of every note, bond, lien instrument, mortgage, and certificate of stock, every essential corporate step in the plan and in the disbursement of a large sum of money advanced by the government, and not for use on the physical property, he is compelled to rely upon the new company, and therefore upon its officers, through whom alone it can corporately act. It was for this reason and to insure the carrying out of the plan that the power to appoint and displace the stock trustees was vested in him.

In re KENNY.

(District Court, W. D. Pennsylvania. November 19, 1920.)

No. 7390.

1. **Bankruptcy ⇐335—Validity of assignment of claims.**
Refusal of a referee to recognize assignments by creditors of an interest in their claims to another creditor in consideration of his assuming liability for the costs and expense of an action to recover assets, if unsuccessful, on the ground that the written assignments were insufficient, *held* error, where the consideration for the assignments was shown, and the assignors did not question their validity.

2. **Assignments ⇐41—No particular form essential.**
No particular form is necessary to constitute a valid assignment of a debt, but it is sufficient if words are used which show an intention to transfer the debt for a valuable consideration.

3. **Bankruptcy ⇐250(1)—Where assets are recovered by one creditor, he may deduct expenses.**
Where one creditor on his own responsibility has recovered assets of the estate by action, and is entitled to be reimbursed the reasonable expense of such recovery, under Bankruptcy Act, as amended in 1903 (Comp. St. § 9648), he may properly retain such expense from the proceeds of the judgment and pay over the remainder only to the trustee.

4. **Bankruptcy ⇐369—Referee without authority to surcharge trustee's account not excepted to.**
A referee is without authority to surcharge the account of a trustee, unless exceptions thereto filed by parties in interest are sustained.

In Bankruptcy. In the matter of John F. Kenny, bankrupt. On review of order of referee. Reversed.

John J. Kennedy, of Pittsburgh, Pa., for bankrupt.
L. C. Barton, of Pittsburgh, Pa., for creditors.
S. W. Bierer, of Greensburg, Pa., for trustee.
J. R. Smith, of Greensburg, Pa., for exceptants.

THOMSON, District Judge. This case presents the following situation:

The trustee of the bankrupt finds no assets of any kind, and the creditors refuse to advance to him the money necessary to test certain preferences alleged to have been given by the bankrupt. R. G. Gamble & Co., a small creditor, thereupon proposed to advance the necessary funds and protect the estate from costs, if unsuccessful, provided the trustee would assist, and permit the use of his name as trustee, to bring and prosecute the necessary actions. To this the trustee assented. Gamble & Co. then sent each creditor a letter, proposing that, if the creditors would assign to them one-half of their respective claims, they would make the contest and pay all the costs, if unsuccessful; if successful, the creditors to pay their pro rata share of costs, whatever they were. Of the 32 creditors, all but 4 assented, and made the necessary assignments, which were filed with the referee. The Scottdale Savings & Trust Company, one of the four, was afterwards paid in full by the indorser on its note, and is thus eliminated from this case.

Under this agreement, Gamble & Co. employed L. C. Barton, Esq., as attorney, and commenced actions in this court against several creditors. In these proceedings they recovered a judgment against the First National Bank of Scottdale, after two trials, which judgment, after a vigorous contest, was affirmed by the Circuit Court of Appeals, and the amount thereof, namely, $3,917.16, was paid to Mr. Barton as attorney. From this fund the attorney deducted a fee of $1,500 and $467.53 costs and expenses, paying the balance, $1,949.63, to the trustee. The latter filed his account, charging himself with the full amount of the judgment, and claiming credit for the amount so paid; his account showing a balance for distribution of $1,513.32. Several creditors filed exceptions to the account, which came up for consideration before the referee, and upon which testimony was taken. The exceptions and amended exceptions, as filed, were objected to by Gamble & Co. as "vague, indefinite, and uncertain"; but this contention was not sustained. On the merits of the exceptions, the referee says:

"The contention of exceptants is that the trustee made all payments, for which he has taken credit in his account, to R. G. Gamble & Co. and L. C. Barton, without authority; that L. C. Barton has no employment as attorney for the trustee, and, if he had, the trustee had no authority to employ him; and that, if these payments were made to Gamble & Co. and L. C. Barton in pursuance of an agreement existing between Gamble & Co. and various creditors, the trustee must be surcharged the amount paid, because neither the agreement nor a copy of it has been appended to the agreement."

The referee held that Mr. Barton did not act as attorney for the trustee, and was not employed by him, but was employed by, and did act for, R. G. Gamble & Co., in prosecuting the right of the bankrupt estate against the First National Bank of Scottdale; that the trustee after making a number of unsuccessful attempts to collect from the creditors the funds necessary to prosecute the suit, lending his name to Gamble & Co. for the purpose of prosecuting the action, and that the latter did so, that company to bear the expenses, if the issue thereof was adverse; that under the amendatory act of 1905 (Comp. St. § 9648), where property of the bankrupt was wrongfully transferred, as here, and the same has been recovered for the benefit of the estate by the efforts of one or more creditors, such creditor or creditors have a preferred claim for the reasonable expenses of such recovery. The referee concluded his findings by holding as follows:

"Because it is impossible to escape the finding in this case that property of the bankrupt, transferred and concealed by him before the filing of the petition, has been recovered for the benefit of the estate of the bankrupt by the efforts and expenses of one of the creditors, it is required that the demurrer of Mr. Barton to the exceptions filed be sustained, and the exceptions accordingly dismissed."

This disposed of the exceptions filed, and it will be noted that no exceptions had been filed by any creditor, alleging that the amount paid to Gamble & Co. was excessive or unreasonable. Notwithstanding this legal situation, the referee on his own motion surcharged the trustee with the sum of $1,967.53, and with whatever other sums

shall appear by the account to have been disbursed by him to Gamble & Co. for their expenses incurred in prosecuting the action in question.

[1] The referee also overruled the proofs of assignment of the respective claims of the Union Special Overall Company, of Cincinnati, the Victoria Waterproof Company, of Connecticut, L. Harris & Co., of Philadelphia, and the Commercial Skirt Manufacturing Company. The first three were overruled because such assignments lacked certainty, and the last because no valid consideration appears on the face of the purported assignment. The referee so held, although none of these creditors objected, or are now objecting, to the validity and binding effect of the said assignments. In this I think the referee erred. The letter sent to each creditor was clear and distinct in its terms. In reply to that letter, the Union Special Overall Company, under date of March 17, 1916, stated:

"Gentlemen: Replying to your letter of the 10th inst., advise that we are willing to accept the proposition in your letter. The amount owing us is $71.25, and you will certainly be entitled to what you ask if you succeed in winning."

Under date of April 20, 1916, the Victoria Waterproof Company replied as follows:

"Gentlemen: In replying to yours of the 18th, we beg to state that we will assign to you half of the amount of our claim, and you may do whatever you please in this matter. If there are any papers to be filled out, we will gladly do so."

Under date of March 13th, L. Harris & Co. replied:

"In replying to yours of the 11th, will say that we will agree to your proposition mentioned therein; that is, if you win the fight, we are to let you have half of what you get for our claim, and pay our pro rata share of the costs out of the other half; if you, on the other hand, are unsuccessful, you are to pay all the costs."

The Commercial Skirt Manufacturing Company, under date of March 13th, replied as follows:

"Gentlemen: Replying to yours of March 11th beg to state that we will assign the J. F. Kenny, of Scottdale, Pa., account to you on the conditions as mentioned in your letter. We do this in order to prevent, if possible, other people in cheating their creditors, more than expecting any financial results."

[2] These letters were filed and offered in evidence before the referee, and the latter, acting under the provisions of General Order 21, subd. 3 (89 Fed. ix, 32 C. C. A. xxii), sent to said creditors the notice required by said order, and none of them objected, or now object, to such assignments. The authorities agree that no particular form is necessary to constitute a valid assignment of a debt or other chose in action. If words are used which show an intention to transfer the chose in action to the assignee for a valuable consideration, this is sufficient. Ruple v. Bindley, 91 Pa. 296; Moeser v. Schneider, 158 Pa. 412, 27 Atl. 1088.

But, if the assigning creditors do not complain, who has a right to be heard? It is clear that, if their action is satisfactory to them, the rest of the world must be satisfied. Among all the creditors, one ob-

jection only was made to Gamble & Co.'s proof of an assignment; this by the attorney representing the International Raincoat Company. An examination of the correspondence does not convince me that there is substantial merit in the objection. To the letter of Gamble & Co., on April 24th, the attorney to whom the letter had been referred wrote:

"My clients are willing to accept your proposition, and if you will send me assignment, such as you want, I will see that it is executed."

An assignment in the usual form was sent, but it was not executed; the attorney objecting that it provided that, in case the action was successful, the Raincoat Company should pay its proportion of the expense out of the half received by them. The assignment appears to have been in harmony with Gamble & Co.'s letter, which had theretofore been accepted as satisfactory.

[3] As to the surcharge of the referee, made on his own motion, without any exceptions before him attacking the reasonableness of the charge, that a party who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses out of the fund is clear from the act of Congress. Trustee v. Greenough, 105 U. S. 527, 26 L. Ed. 1157. The money having been paid to the attorney of the party who recovered it, he had a lien upon it for his fees, and the payment of the balance is all that could lawfully be demanded of him. Meighan v. Twine Co., 154 Fed. 346, 83 C. C. A. 124. Balsbough v. Frazer, 19 Pa. 95.

[4] When the exceptions to the account of the trustee were dismissed by the referee, on what theory could he be surcharged? Gamble & Co. were the prosecutors of the suit; the trustee's name being used simply as a legal necessity. They recovered the fund and received it. They were entitled, not only as assignees to their half of the claim recovered, but to their costs and expenses as well. They were not bound to pay over the entire fund, and come knocking at the door of the estate for repayment of their share. They had a lien on that which was theirs, and had a right to retain it. The balance only, whatever that might be, the estate had a right to demand. It is said in Stitzel's Estate, 221 Pa. 227, 70 Atl. 749, 18 L. R. A. (N. S.) 284:

"A surcharge is an adjudication against the accountant, which cannot be made without notice to him and an opportunity to be heard before he is condemned; and a surcharge of the kind made in this case for an overpayment of counsel fees is not one that can be made at all by the court, without an exception by some interested party before it. There is no question of law or public policy involved, simply a question of the proper or improper amount paid for a proper charge."

It has been well said in Huber v. Reily, 53 Pa. 112, that a complainant is an essential part of a court, and that the court has no authority to proceed to make a decree on objections to credits in an account, except upon complaint by a party showing an interest therein, who appeared, filed exceptions, and became liable for costs. Other authorities to the same effect might be cited. It is said:

"In the absence of exceptions duly taken, a court has no authority to surcharge accountant by striking out credits in the account, or to do anything in such cases but examine, and after due consideration confirm, the account, and

if exceptions be filed, the court cannot surcharge accountant further than the exceptions demand. Gaston's Appeal, 1 Pitts. (Pa.) 48; Mengas' Appeal, 19 Pa. 221." Stitzel's Estate, 221 Pa. 227 (vide brief of attorney for appellant).

If this is true of the court, a fortiori is it true of a referee? Under General Order 17 (89 Fed. viii, 32 C. C. A. xix) and rule 9 of this court in bankruptcy, the final account of trustees is referred as of course to the referee for audit, who gives to the creditors notice of a meeting to examine and consider same. Exceptions may be filed at or before such meeting, and the referee shall dispose of the same and declare a final dividend. I know of no authority or principle of legal procedure which would justify the referee, where no exceptions were filed, or, having been filed, were overruled, to surcharge the trustee, as was done in this case. It may well be that the charge was greater than on full hearing might be awarded. But it is sufficient to say that there is no complainant before the court making such averment. No such question was raised before the referee, nor any testimony taken upon it.

As there appears to have been condemnation without a day in court, and as well-defined and orderly procedure is far more vital in the administration of justice than the allowance or rejection of some particular claim, the report and order of the referee, surcharging the accountant and dismissing the assignments, hereinbefore specifically referred to, is reversed and set aside.

GREENPORT BASIN & CONSTRUCTION CO. v. UNITED STATES.
YOUNG v. UNITED STATES.

(District Court, E. D. New York. November 18, 1920.)

1. **Internal revenue ⇐36—Protest before payment unnecessary to refund of excess profits tax.**
   Under Revenue Act 1918, § 252 (Comp. St. Ann. Supp. 1919, § 6336½uu), authorizing a refund of the amount paid as excess profits tax above the amount due, notwithstanding the provisions of Rev. St. § 3228 (Comp. St. § 5951), a taxpayer is entitled to refund as a matter of right, without proof of duress or protest.

2. **Internal revenue ⇐38—Computation under compulsion and claim for refund establish protest.**
   A complaint alleging that the excess profits tax was computed under compulsion of invalid regulations of the Commissioner of Internal Revenue and that the taxpayer filed claim for the abatement of the taxes before he paid them, shows compliance with every requisite of the payment under protest, the objects of which are to define the taxpayer's attitude and to notify the government thereof.

3. **Constitutional law ⇐77—Regulations as to computing excess profits tax cannot alter statute.**
   Regulations issued by the Commissioner of Internal Revenue, describing the method of computing the excess profits tax, have no binding force, if they alter, amend, or extend the statute levying the tax.

4. **Internal revenue ⇐25—Deductions not made from income before computing excess profits tax.**
   Under Revenue Act 1917, § 201 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336¾b), imposing a tax on the net income in excess of the de-

ductions and not in excess of 15 per cent. of the invested capital, and a tax at greater rates on income exceeding 15 per cent., the deductions are to be made only in computing the amount of the tax, not to be made from the net income before computation begins, especially in view of the Revenue Act of 1918, which contained a similar tax, but provided that the amount of deduction exceeding the income taxable at the minimum rate should be allowed from the amount taxable in the second bracket, thereby indicating a construction that there was no provision for such allowance under the law of 1917.

At Law. Separate actions by the Greenport Basin & Construction Company and by Ira M. Young against the United States. On demurrers to the complaints. Demurrers sustained.

Percy L. Housel, of Riverhead, Long Island, N. Y., for the motion.
Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y., opposed.

GARVIN, District Judge. These are two actions, each to recover an amount of excess profits tax paid by the plaintiff under the revenue Act approved October 3, 1917. Plaintiff claims that the regulations adopted by the Treasury Department, under which the tax was paid, go beyond the plain intent and meaning of the law. The cases come before the court on demurrers, which involve the same questions of law and are on the following grounds:

(1) That it appears upon the face of the said complaint that the complaint does not state facts sufficient to constitute a cause of action.
(2) That the complaint does not set out facts sufficient to constitute a cause of action against the defendant named herein.
(3) That this court has no jurisdiction of this defendant.

Only the first two need be considered; the defendant having abandoned the third.

[1] It is contended, first, that the complaint is insufficient because it does not allege that the taxes were paid under protest and duress before a cause of action arose. The statute (section 252, Revenue Act of 1918 [Comp. St. Ann. Supp. 1919, § 6336½uu) provides:

"That if, upon examination of any return of income made pursuant to this act, the act of August 5, 1909, entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States and for other purposes,' the act of October 3, 1913, entitled 'An act to reduce tariff duties and to provide revenue for the government, and for other purposes,' the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war profits or excess profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war profits or excess profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: Provided, that no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

Under the act, therefore, the refund is a matter of right, without proof of duress or protest. It has been so held under a similar statute. U. S. v. Hvoslef, 237 U. S. 1, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286.

[2] Even if it were necessary to plead duress or protest, the petition or complaint sets forth that the defendant computed the tax under compulsion of the regulations and filed a claim for abatement of the taxes assessed before payment. This complies with every requisite of a payment under protest. Chesebrough v. U. S., 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432; City of Philadelphia v. Collector, 5 Wall. 720, 18 L. Ed. 614. The government urges that it is necessary to make a protest at the time of actual payment, but it seems to the court that this would be a useless requirement. The objects of the protest are to define the taxpayer's attitude and to notify the government thereof. These have been fully accomplished by the objection of the taxpayer when the computation was made and by the filing of his claim.

The second ground of demurrer brings us to the consideration of whether the method of computing the tax was proper. Section 201 of the Revenue Act of 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336¾b), which does not appear to have been judicially construed, reads as follows:

"That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:

"Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year;

"Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital;

"Thirty-five per centum of the amount of the net income in excess of twenty per centum and not in excess of twenty-five per centum of such capital;

"Forty-five per centum of the amount of the net income in excess of twenty-five per centum and not in excess of thirty-three per centum of such capital; and

"Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital."

[3] Under articles 16 and 17 of Regulations, No. 41, issued by the Commissioner of Internal Revenue, which describe in detail the method of computing the excess profits tax, the deductions have been made, not from the net income before the computation of the tax, but as a part of the computation. These articles have no binding force, if they alter, amend, or extend the statute. Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267. It is necessary, therefore, to consider the language of the act, in order to ascertain what was intended by Congress.

[4] According to section 201 of the Revenue Act of 1917, supra, a tax is imposed at the rate of 20 per cent. upon "the amount of the net income in excess of the deduction * * * and not in excess of fifteen per centum of the invested capital for the taxable year," etc. While the entire section is not free from ambiguity, the court is of the opinion that, having in mind the necessity of adopting a construction in accordance with the intent of Congress when the act was adopted, that urged by the government must prevail. If it had been the purpose of Congress to have the tax computed as plaintiff contends, the first paragraph of section 201 would have provided for the levy of a tax

"equal to the following percentages of the net income less the deduction determined as hereinafter provided," making no mention of any deduction in the following paragraph.

If the section as it now reads is carefully analyzed, it is apparent that the amount of the net income which is to be taxed at the rate of 20 per cent. is not more than 15 per cent. of the invested capital for the taxable year. But not so much of the net income as is represented by such 15 per cent. is to be so taxed, because there must first be allowed the deduction. The following computation in the case of the Greenport Basin & Construction Company Tax, under Regulations, No. 41, shows how the actual wording of the act is followed under Regulations, No. 41, which are here under attack.

Greenport Case.

Computation of Greenport Basin & Construction Company Tax under Regulations, No. 41.

Invested capital	$215,615.55	Deduction estimated as follows:	
Income	76,361.20	7 per cent. of $215,615.55	$15,093.08
Deduction	18,093.08	Specific deduction	3,000.00
			$18,093.08

Schedule IV.

Classes of Income		Income	Deduction.	Balance Subject to Tax.	Rate.	Amount of Tax.
Over.	But Not Over.					
1	2	3	4	5	6	7
$ 0.00	15% inv. cap.	$32,342.33	$18,093.08	$14,249.25	20%	$2,849.85
15% inv.cap.	20% " "	10,780.77	None	10,780.77	25%	2,695.19
20% " "	25% " "	10,780.77	None	10,780.77	35%	3,773.27
25% " "	33% " "	17,249.24	None	17,249.24	45%	7,762.15
33% " "	.....	5,208.09	None	5,208.09	60%	3,124.85
Total		$76,361.20				$20,205.31

Pro rata for fiscal year: Five-sixths of $20,205.31=$16,837.76.

It is interesting to note, also, that as Congress continued to enact legislation designed to raise moneys for war purposes, the language employed became more specific. That part of the Revenue Act of 1918 which fixed the rates of the tax upon the percentages of the net income is worded substantially like the act under consideration, but has an additional paragraph (section 301 [Comp. St. Ann. Supp. 1919, § 6336^{7}/$_{10}$aa]) which reads as follows:

"(d) In any case where the full amount of the excess profits credit is not allowed under the first bracket of subdivision (a) or (b), by reason of the fact that such credit is in excess of 20 per centum of the invested capital, the part not so allowed shall be deducted from the amount in the second bracket."

While it is quite true that this is not controlling upon the construction of the act now before the court, it illustrates admirably how it would be quite possible for the full amount of the excess profit credit to be in excess of fifteen per centum of the invested capital, in which event

no provision would be made for allowing that part of the credit so in excess, under the law of 1917.

If the foregoing conclusions are correct, the demurrers must be sustained.

ARNOLD HOFFMAN & CO., Inc., v. MATHIESON ALKALI WORKS.

(District Court, D. Rhode Island. December 2, 1920.)

Action ⇐69—Federal courts will not stay action because of pendency of action in state court, where full relief can be given.

An action in a federal court, which first acquired jurisdiction will not be stayed to await determination of an action in a state court between the same parties and involving the same matters, where the federal court has power to grant full and complete relief.

At Law. Action by Arnold Hoffman & Co., Incorporated, against the Mathieson Alkali Works. On defendant's motion for stay. Denied.

Edwards & Angell, of Providence, R. I., for plaintiff.

Huddy, Emerson & Moulton, of Providence, R. I., and Rushmore, Bisbee & Stern, of New York City, for defendant.

BROWN, District Judge. The plaintiff, having placed this action at law on the calendar for jury trial, the defendant not contesting the jurisdiction of this court, moves for a stay on the ground that there is pending in the Supreme Court of the state of New York, county of New York, a suit between the same parties, which involves every question raised by the pleadings in this action, as well as other questions, and in which it is said fuller relief is obtainable than in this action at law.

The plaintiff objects to a stay on the ground that this court has acquired prior jurisdiction, and that the entire controversy can be determined in this court as completely as in the New York state court.

The jurisdiction of this court is broad enough to afford the defendant as complete relief at law and in equity as he may obtain in the state court. This court cannot suspend the exercise of its jurisdiction on the ground of its lack of power to afford full relief. Upon an appeal to its discretion this court must consider not only this action, No. 1383, but also the plaintiff's action, No. 1385. If we find that the plaintiff's two actions at law, with the defendant's legal and equitable pleas therein, comprehend all the matters at issue in the single suit in New York, we can give little weight to the argument that we should suspend the exercise of our jurisdiction in order that there should be a single trial, where all the issues can be decided and full relief afforded to both parties. As a practical matter we must compare the entire subject-matter of litigation pending in each jurisdiction.

The statutes which provide for consolidation of actions at law for trial, and for pleading equitable defenses, seem sufficient to enable the defendant to have in this jurisdiction a single trial, and as complete relief, as it could have in the New York court. It is a mere matter of procedure to obtain in this jurisdiction all affirmative relief that is

properly incident to any matter of equitable defense that may be proven in support of defendant's pleas. If the defendant has any doubt of the sufficiency of its equitable pleas to afford it full relief, it may appeal to the equity powers of this court to give such additional relief as may be necessary.

The motion for a stay is made only in one case, No. 1383. Were it granted, there would still remain in this court another action involving matters in issue in the New York case. If it is necessary to stay No. 1383, it would seem equally necessary to stay No. 1385.

The argument that all these matters should be tried in a single suit is one that properly may be made on a motion for consolidation for trial in this court.

The argument that the defendant has already consolidated them in a single suit in New York does not seem a sufficient reason for requiring the plaintiff to await the decision of that court, or for depriving it of the right to proceed in the court which first acquired jurisdiction, and in which an early trial may be had.

Motion for stay until the termination of litigation between said parties in the state of New York is denied.

HEPPES-NELSON ROOFING CO. v. LEWIS et al.

(District Court, E. D. New York. November 15, 1920.)

Pleading ⇐=349—Right to judgment for part of claim on answer merely setting up counterclaim requires admission of counterclaim.

Code Civ. Proc. N. Y. § 511, provides that, when the answer admits a part of plaintiff's claim to be just, the court may order the action severed and render judgment for the part admitted. Section 512 provides that, where the answer does not deny plaintiff's claim, but sets up a counterclaim for a less amount, plaintiff, by admitting the counterclaim, may take judgment by default for the excess. *Held* that, in the latter case, plaintiff is not entitled to severance and judgment under section 511, but to judgment only on admitting the counterclaim as provided in section 512.

At Law. Action by the Heppes-Nelson Roofing Company against Joseph Lewis and others. On motion by plaintiff for severance and judgment for part of claim. Denied.

Robert Ramsey and Harry D. Nims, both of New York City, for the motion.

Morrison & Schiff, of New York City, opposed.

GARVIN, District Judge. This is a motion for an order granting judgment in favor of the plaintiff in the sum of $10,375, admitted by the answer herein to be due the plaintiff, and directing that the action herein be severed, and, if the plaintiff so elects, that it be continued as to the remainder of the claim set up in the complaint, with like effect as to all subsequent proceedings as if it had been originally brought for the remainder of the claim. The complaint is based upon two bills of exchange, aggregating $25,375, exclusive of interest. The defend-

ants' liability is not denied, but the answer sets up a counterclaim for $15,000 for an alleged failure of plaintiff to deliver other goods pursuant to contract.

Plaintiff relies upon section 511 of the Code of Civil Procedure of the state of New York, which provides as follows:

"Where the answer of the defendant, expressly or by not denying, admits a part of the plaintiff's claim to be just, the court, upon the plaintiff's motion, may, in its discretion, order that the action be severed; that a judgment be entered for the plaintiff for the part so admitted; and if the plaintiff so elects, that the action be continued, with like effect, as to the subsequent proceedings, as if it had been originally brought for the remainder of the claim."

Defendant resists the motion, relying upon section 512, which reads as follows:

"In an action upon contract, where the complaint demands judgment for a sum of money only, if the defendant, by his answer, does not deny the plaintiff's claim, but sets up a counterclaim amounting to less than the plaintiff's claim, the plaintiff, upon filing with the clerk an admission of the counterclaim, may take judgment for the excess, as upon a default for want of an answer. The admission must be made a part of the judgment roll."

Under section 511 the court may act only in cases where a part of plaintiff's claim is admitted. The Legislature may have intended to include such a state of facts as is presented by the case at bar, but the language employed does not warrant judicial action predicated upon such assumption. An observation in the opinion in the case of Burgess v. House, 49 App. Div. 383, 63 N. Y. Supp. 512, indicates that the New York courts have reached the same conclusion. That opinion reads in part as follows:

"But, further, this section 511 relates to an admission of the justice of part of the plaintiff's claim as such, not to the establishment of a just balance by the deduction from the plaintiff's claim of the amount due upon a conceded counterclaim. The only provision on the latter head is found in section 512."

Motion for judgment denied.

ANDERSON et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. October 18, 1920. Rehearing Denied January 17, 1921.)

1. **Conspiracy ⟸43(11)—Indictment for seditious conspiracy sufficient.**
An indictment under Penal Code, § 6 (Comp. St. § 10170), for conspiracy to oppose by force the authority of the United States and by force to prevent, hinder, and delay the execution of its laws, *held* good where it charged a conspiracy between defendants and others as members, officers, and agents of the I. W. W. organization to advocate and encourage resistance to all laws, especially those enacted in furtherance of the prosecution of the war against Germany; that in carrying out such conspiracy defendants circulated newspapers and printed matter of the organization advocating sabotage and "slowing down" by workers, resistance to the execution of the Selective Draft Act, and finally the forcible revolutionary overthrow of all existing governmental authority in the United States; that one of the defendants, pursuant to said conspiracy, caused dynamite to be transported by a common carrier marked "glassware," in violation of law.

2. **Conspiracy ⟸43(8)—To intimidate and oppress citizens held sufficient.**
An indictment, under Penal Code, § 19 (Comp. St. § 10183), charging defendants with conspiracy to intimidate and oppress citizens in the exercise of their rights, and that in pursuance of such conspiracy they threatened and intimidated persons to prevent them from furnishing munitions, ships, and supplies to the government for war purposes under sales, orders, and contracts, *held* sufficient.

3. **Conspiracy ⟸43(11)—Indictment for conspiracy to violate Selective Service Act sufficient.**
An indictment under Penal Code, §§ 37, 332 (Comp. St. §§ 10201, 10506), for conspiracy to violate Selective Service Act, § 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044e), by inducing and aiding persons subject to the act in refusing to register thereunder, *held* sufficient.

4. **Conspiracy ⟸43(6)—Indictment for conspiracy to violate Espionage Act sufficient.**
An indictment under Espionage Act, tit. 1, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212d), for conspiracy to violate section 3 of the act (section 10212c), *held* sufficient.

5. **Indictment and information ⟸99—Following counts may incorporate by reference allegations of first count.**
Each subsequent count in an indictment may refer to and make part of it allegations contained in the first count.

6. **Indictment and information ⟸125(5½)—Single count may charge conspiracy to commit two offenses.**
A count in an indictment charging conspiracy to commit two offenses *held* not bad for duplicity.

7. **Criminal law ⟸1092(9)—Jurisdiction to extend time for settling bill of exceptions limited to term or extension given by rule of court.**
After the expiration of the term at which a judgment was rendered and of any extended time allowed by rule of court for settling a bill of exceptions, the court is without jurisdiction to grant any further extension of time, and such jurisdiction cannot be conferred by consent of counsel.

In Error to the District Court of the United States for the Northern Division of the Northern District of California.

Criminal prosecution by the United States against Edward Ander-

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 447, 65 L. Ed. —.

son and others. Judgment of conviction, and defendants bring error. Affirmed.

This case is a consolidation of writs of error sued out by the plaintiffs in error from the judgment against them upon a verdict of guilty under four counts of the indictment, the sufficiency of each of which to constitute a crime is challenged by the respective plaintiffs in error. If that contention be well founded, it is, of course, clear that the judgment must be reversed, whether or not we are at liberty to consider the bill of exceptions.

The first count alleges in effect the existence of a state of war between the United States and the Imperial German government, and that in those circumstances the defendants, with other persons therein named and with others to the grand jurors unknown, throughout a certain designated period and within the jurisdiction of the court below, entered into a conspiracy to by force prevent, hinder, and delay the execution of certain specified laws of the United States, all of which laws were enacted in support and furtherance of the said war, and that throughout the said period and theretofore there existed a certain organization of persons under the name of "Industrial Workers of the World, commonly called 'I. W. W.'s,' 'The One Big Union,' and 'O. B. U.'; that said organization during said period has been composed of a large number of persons, to wit, 200,000 persons, distributed in all parts of the United States, being almost exclusively laborers in the many branches of industry necessary to the existence and welfare of the people of the United States and of their government, among others the transportation, mining, meat-packing, canning, lumbering, and farming industries, and the live stock, fruit, vegetables, and cotton-raising industries; that said defendants during said period have been members of said organization, and among those known in said organization as 'Militant Members of the Working Class' and 'Rebels,' holding various offices, employments, and agencies therein; and that in their said membership, office, employments, and agencies said defendants during said period of time, with the special purpose of preventing and hindering and delaying the execution of said laws, severally have been actively engaged in managing and conducting the affairs of said association, propagating its principles by written, printed, and verbal exhortations, and accomplishing its objects, which are now here explained, and thereby and in so doing during said period, throughout the United States and in said division and district, have engaged in and have attempted to accomplish, and in part have accomplished, the objects of the unlawful and felonious conspiracy aforesaid.

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said organization, before and during said period of time, has been one for supposedly advancing the interests of laborers as a class (by members of said organization called 'the workers' and 'the proletariat'), and giving them complete control and ownership of all property, and of the means of producing and distributing property, through the abolition of all other classes of society (by the members of said organization designated as 'capitalists,' the 'capitalistic class,' 'the master class,' 'the ruling class,' 'exploiters of the workers,' 'bourgeois' and 'parasites'), such abolition to be accomplished, not by political action, or with any regard for right or wrong, but by the continual and persistent use and employment of unlawful, tortious, and forcible means and methods, involving threats, assaults, injuries, intimidations, and murders upon the persons, and the injury and destruction (known in said organization as 'sabotage,' 'direct action,' 'working on the job,' 'wearing the wooden shoes,' 'working the saboat,' and 'slowing down tactics') of the property, of such other classes, the forcible resistance to the execution of all laws, and finally the forcible revolutionary overthrow of all existing governmental authority, in the United States, use of which said first-mentioned means and methods was principally to accompany local strikes, industrial strikes, and general strikes of such laborers, and use of all of which said means and methods was to be made in reckless and utter disregard of the rights of all persons not members of said organization, and especially of the right of the United States to execute its above-enumerated laws, and with especial and

particular design on the part of said defendants of seizing the opportunity presented by the desire and necessity of the United States expeditiously and successfully to carry on its said war, and by the consequent necessity for all laborers throughout the United States in said branches of industry to continue at and faithfully to perform their work for putting said unlawful, tortious, and forcible methods for accomplishing said object of said organization into practice, said defendants well knowing, as they have, during said period, well known and intended, that the necessary effect of their so doing would be, as it in fact has been, to hinder and delay and in part to prevent the execution of said laws above enumerated, through interference with the production and manufacture of divers articles, to wit, munitions, ships, fuel, subsistence supplies, clothing, shelter, and equipment required and necessary for the military and naval forces of the United States in carrying on said war, and of the materials necessary for such manufacture, and through interference with the procurement of such articles and materials, by the United States, through purchases, and through orders and contracts for immediate and future delivery thereof, between the United States and persons, firms, and corporations too numerous to be here named (if their names were known to said grand jurors), and through interference with and the prevention of the transportation of such articles and of said military and naval forces; and that said organization, as said defendants during said period of time have well known and intended, has also been one for discouraging, obstructing, and preventing the prosecution by the United States of said war between the United States and the Imperial German government, and preventing, hindering, and delaying the execution of said laws above enumerated, by requiring the members of said organization available for duty in said military and naval forces to fail to register, and to refuse to submit to registration and draft, for service in said naval and military forces, and to fail and refuse to enlist for service therein, and by inciting others so to do, notwithstanding the requirements of said laws in that behalf, and notwithstanding the patriotic duty of such members and others so to register and submit to registration and draft, and so to enlist, for service in said military and naval forces, and notwithstanding the cowardice involved in such failure and refusal, which last-mentioned object of said organization was also to be accomplished by the use of all the means and methods aforesaid as a protest against, and as a forcible means of preventing, hindering, and delaying, the execution of said laws of the United States, as well as by the forcible rescue and concealment of such of said members as should be proceeded against under those laws for such failure and refusal on their part, or sought for service or for enlistment and service in said military and naval forces."

The indictment in its first count then set out a large number of overt acts, publications, and other matters alleged to have been committed, issued, and perpetrated by various ones of the alleged conspirators to effect and carry out the alleged conspiracy, the direct tendency of which was to show the conspiracies alleged, examples only of which acts, publications, and other such matters it is practically possible to set out in an opinion of reasonable length. Thus it was alleged in the first count, among other things, as follows:

"Said defendant William Hood, otherwise called Tim McCarthy, hereinabove named, on or about the 20th day of December, in the year of our Lord 1917, at Smart, in the county of Placer, in the Northern division of the Northern district of California, then and there being, did unlawfully, willfully, knowingly, and feloniously present and cause to be presented to a common carrier for shipment a package containing explosives, to wit, nine sticks of dynamite packed and incased in a wooden box, without having plainly marked on the outside of said package the contents thereof; that is to say: Said defendant, on or about the 20th day of December, in the year of our Lord 1917, at Smart, in the said county, division, district, and state aforesaid, then and there being, did present and cause to be presented to Wells Fargo & Co., a common carrier as aforesaid, for shipment from Smart, in the county of Placer, state of California, a package containing explosives, to wit, nine sticks of dynamite packed and incased in a wooden box consigned to Geo. Messingham, Sacramen-

to, Cal., marked and designated only as follows: 'Handle with care. 1 Box Glassware.' * * * Said defendant William Hood, otherwise called Tim McCarthy, hereinabove named, on or about the 21st day of December, in the year of our Lord 1917, at Smart, in the county of Placer, in the Northern division of the Northern district of California, then and there being, did unlawfully, willfully, knowingly, and feloniously carry upon and in a vehicle controlled and operated by a common carrier engaged in interstate and foreign transportation, exposives, to wit, nine sticks of dynamite, under a false and deceptive marking, description, invoice, and shipping order, and without informing the agent of such common carrier of the true character thereof at or before the time such carriage was made; that is to say: Said defendant, on or about the 21st day of December, in the year aforesaid, carried from Smart, in the county of Placer, state of California, upon train No. 23, and in a vehicle controlled and operated by the Southern Pacific Company, a common carrier as aforesaid, engaged in interstate and foreign transportation, and running between Goldfield, in the state of Nevada, and San Francisco, in the state of California, explosives, namely, nine sticks of dynamite packed and incased in a wooden box and marked and designated only as follows: 'Handle with care. 1 Box Glassware.'"

The first count also alleged as follows:

"Said defendants heretofore named, in the month of September, 1917, the exact date is to the grand jury unknown, at Sacramento, California, in said division and district, and in other places in the state of California, caused to be circulated a certain newspaper, called and known as 'Solidarity,' of the date of September 1, 1917, which said issue of said newspaper 'Solidarity' contained, among other things, the following:

"'Preamble.

"'Industrial Workers of the World.

"'The working class and the employing class have nothing in common. There can be no peace as long as hunger and want are found among the millions of working people, and the few, who make up the employing class, have all the good things in life.

"'Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

"'We find that the centering of management of industries into fewer and fewer hands makes the trade unions unable to cope with the ever-growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. However, the trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

"'These conditions can be changed and the interest of the working class upheld only by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work whenever a strike or lockout is considered on in any department thereof, thus making an injury to one an injury to all.

"'Instead of the conservative motto, "A fair day's wage for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system."

"'It is the historic mission of the working class to do away with capitalism. The army of production must be organized, not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old.'

"Said defendants heretofore named, in July and August, 1917, the exact date is to the grand jurors unknown, at Sacramento, California, in said division and district, and at other places in the state of California, caused to be circulated a certain newspaper called and known as 'Solidarity,' of the date of July 28, 1917, in which said issue of said newspaper there appeared, among other things, the following matter in print; that is to say:

" 'Were You Drafted?

" 'Where the I. W. W. Stands on the Question of War.

" 'The attitude of the Industrial Workers of the World is well known to the people of the United States and is generally recognized by the labor movement throughout the world.

" 'Since its inception our organization has opposed all national and imperialistic wars. We have proved, beyond the shadow of a doubt, that war is a question with which we never have and never intend to compromise.

" 'Members joining the military forces of any nation have always been expelled from the organization.

" 'The I. W. W. has placed itself on record regarding its opposition to war, and also as being bitterly opposed to having its members forced into the bloody and needless quarrels of the ruling class of different nations.

" 'The principal of the international solidarity of labor to which we have always adhered makes impossible our participation in any and all of the plunder squabbles of the parasite class.

" 'Our songs, our literature, the sentiment of the entire membership—the very spirit of our union, give evidence of our unalterable opposition to both *capitalism* and its wars.

" '*All members of the I. W. W. who have been drafted should mark* their claims for exemption "I. W. W.; opposed to war."

" 'Editor, Solidarity.' "

The first count further alleged as follows:

"Said defendants heretofore named, in the month of May, 1917, the exact date is to the grand jurors unknown, at Sacramento, California, in said division and district, and at other places in the state of California, caused to be circulated a certain newspaper called and known as 'Solidarity,' of the date of May 12, 1917, in which said issue of said newspaper there appeared, among other things, the following matter in print; that is to say:

"On page two, column two thereof:

" 'The Selective Draft.

" 'The selective draft, as outlined by the government at Washington, is the rankest, rawest, crudest piece of work that was ever attempted to be "put over" in the interests of Big Business under the lying mask of "patriotism."

" 'To drag workers against their wills into a war in which they have nothing to gain and to force them to fight with other workers with whom they have no quarrel. To compel them to suffer privation and encounter death, disease and mutilation on the blood-soaked fields of France, or to starve themselves at home in order that the capitalists in this country may amass fortunes by feeding Europe—all this speaks eloquently of the supreme confidence the parasites have in the ignorance and blindness of the American working class. And on top of all, the blood-puddlers of the Oligarchy have the gall to ask the workers to call the class struggle off until after the war. But we will not permit their loot-wrangle to obstruct our work of *organization* for a moment. Our Union is all we have—it is all that stands between us and the greed and tyranny of our industrial overlords—and we do not propose to let our enemies crush it at a time when we need it most.' "

The first count further set out, from subsequent issues of the paper mentioned, the following:

"One thing, however, our enemies are likely to overlook; that is, the power of the aroused membership in action. It is a mistake to think that the I. W. W. is a loosely knit and easily intimidated organization. The banner of the One Big Union is planted in every industry in every state of the Nation. Red card men are shrewd, determined, valorous and loyal to the cause they love. If they are hounded to desperation they will be a hard proposition to handle. There would not be soldiers enough in the country to round them up for arrest, nor jails enough to hold them, once arrested. The I. W. W. is so deeply rooted in America and the world that it can afford to take the chances of an open war a whole lot better than the powers that oppose it. * * * It was

the I. W. W. that first showed the world how to fight effectively against great odds. We have shown the world how to go to jail in huge numbers, exasperate the taxpayers and block the machinery of 'justice.' It was the I. W. W. that developed a system of telling tactics to be used in prison yards and rock piles. The 'slow down' plan and mass opposition to unjust regulations would work as well in detention camps, in jail, or on the job. The widespread knowledge of the effects of punitive sabotage upon modern industry gives the militant portion of the working class the power to stop or disrupt production at will. The membership of the I. W. W. is conscious of its power and knows how to achieve its ends, and is dead game to take whatever measures as necessary in order to do so. The preservation of the One Big Union is essential to the survival of the working class. In fighting for his union the I. W. W. is fighting for himself, and his class. And self-preservation, like the Copper Trust, knows no law. * * *

"The Rockford Frame-Up.

"One hundred and thirty-eight men are in the jails of Rockford, Freeport and Belvidere, as a result of the nonregistration parade on June 6th. Ten of them are charged with conspiracy. The bonds are set for ten thousand dollars. Eight of these fellow workers are members of the I. W. W. * * *

"117 Rockford Rebels Sentenced.

"Year and a Day at Hard Labor for Most of Them—One-Half of Those Sentenced I. W. W.'s.

"The Rockford rebels who refused to register on June 6th and gave themselves up to the authorities of the town of Rockford were given a thorough grilling, a bitter tongue-lashing, and, most of them, extreme sentences by Federal Judge Landis at Freeport, Ill., on July 5th. The prisoners were undisturbed by the diatribes of 'His Honor' and were defiant and uncowed to the end. * * * It is anticipated that we will have conscription here now, in spite of the recent referendum. It may precipitate a revolution and certainly a far-reaching industrial upheaval, and you can bet your socks that we of the wobblies will be in the van, as we were before. The miners are retaliating with the 'Dauge'; that is, limiting the output to less skips a day. That will reduce the general quantity of coal mined by about 35 per cent. The boss will have to burn up his surplus to keep the industry going. The slow-down tactics of the workers are getting the goods in this country, and it is one of the real tangible footholds toward industrial control, the ultimate objective of the Industrial Workers of the World. Less work, more jobs, less unemployed. * * *"

The first count further alleged:

"Said defendant, Albert Fox, otherwise called A. L. Fox, and Frederick Esmond, on or about February 1, 1918, prepared and sent a certain telegram, which said telegram is in the words and figures following, to wit:

" 'Western Union Telegram.

" 'Received at Forum Building, 1109 Ninth Street, Sacramento, Cal.

" 'Always open.

" '98 SF TN 51 2EXA.

" 'Mt. San Francisco Calif 113 A Feb 1 1918.

" 'Asst. District Attorney Johnson

" '72 Federal Bldg Sacramento Calif

" 'Today registering strong remonstrance Preston Gregory Local Officials inhuman treatment I W W Federal Prisoners your custody Sacramento also vigorous denunciation Your personal conduct lying press stories current week arrest Indictments matters indifference humane treatments prisoners profession of decency Federal Officials Imperative copies wire all press your official superiors Defense Committee Fox, Esmond.

" '1145A'

"Said defendants Albert Fox, otherwise called A. L. Fox, and Frederick Esmond, on or about February 1, 1918, prepared and sent a certain telegram, which said telegram is in the words and figures following, to wit:

" 'Western Union Telegram.

" 'Received at Forum Building, 1109 Ninth Street, Sacramento, Cal.
" 'Always Open.

" '96 SF TN30 1 EXA
" 'Mt. San Francisco Calif 1113A Feb 1 1918

" 'Gormley
" '70 Sheriff Sacramento Calif
" 'Complaining Washington local officials inhuman treatment I W W Federal prisoners Sacramento inquiring scoundrelly theft thirty dollars sent for jail comforts arrests Indictments matters indifference humane treatment prisoners imperative
Fox, Esmond.
" '1140A'

"Said defendants Albert Fox, otherwise called A. L. Fox, and Frederick Esmond, on or about February 1, 1918, prepared and sent a certain telegram, which said telegram is in the words and figures following, to wit:

" 'Western Union Telegram.

" 'Received at Forum Building, 1109 Ninth Street, Sacramento, Cal.
" 'Always Open.

" '97 SF TN
" 'Mt. San Francisco Calif. 1113A Feb 1, 1918

" 'Sacramento Bee
" '71 Sacramento Calif
" 'Strong complaint Washington local officials inhuman treatment I W W Federal prisoners Sacramento inquiring scoundrelly theft thirty dollars sent for Jail comforts Indictments arrests matters indifference humane treatment prisoners imperative resent worse than Ruhleben.
Fox, Esmond.
" '1141A.' "

The second count alleged in substance that the defendants named in the first count, throughout the period of time from April 6, 1917, to the finding of the indictment, at the city of Sacramento, unlawfully and feloniously conspired together and with certain other named parties, and with other persons to the grand jurors unknown, to injure, oppress, threaten, and intimidate a great number of citizens of the United States, the names and number of whom are to the grand jurors unknown, but who only can be and are by the grand jurors designated as the class of persons mentioned in the first count of the indictment, who in the free exercise and enjoyment by them, respectively, of their right and privilege, have been, during the period specified, furnishing and endeavoring to furnish to the United States, "in pursuance of sales, orders, and contracts between them and the United States, munitions, ships, fuel, subsistence supplies, clothing, shelter, and equipment, necessary for the military and naval forces of the United States in carrying on its war with the Imperial German government in said first count referred to, material necessary for the manufacture of those articles, and transportation of said articles and materials, and of said military and naval forces, all required and authorized to be procured by the United States from such persons and citizens under the several laws of the United States specifically mentioned in said first count as being the laws of which said defendants are charged in said count with conspiring to prevent, hinder, and delay the execution; that is to say, the right and privilege of furnishing, to said United States, without interference, hindrance, or obstruction by others, said articles, materials, and transportation which said conspiracy in this count mentioned has been one for injuring, oppressing, threatening, and intimidating said citizens, by interfering with, hindering, and obstructing them in the free exercise and enjoyment of said right and privilege, by and through the continued and persistent use and employment, by said defendants under the circumstances and conditions in said first count described, of the unlawful and tortious means and methods in that count set forth as the means and methods of accomplishing the objects of the unlawful and felonious conspiracy in that count charged against said defendants, the allegations of which said count in that behalf, and concerning the existence, character and objects of the organization called

'Industrial Workers of the World' and 'I. W. W.'s,' in said count mentioned, concerning the membership offices, employment, and agencies of said defendants in that organization, and concerning said unlawful and tortious means and methods, are incorporated in this count of this indictment by reference to said first count as fully as if they were here repeated."

The third count alleged in substance that, throughout the period of time from May 18, 1917, to the finding of the indictment, at the city of Sacramento, the defendants named in the first count, then being members of the organization therein described, unlawfully and feloniously conspired together and with certain other named parties, and with other persons to the grand jurors unknown, "to commit divers, to wit, ten thousand, offenses against the United States; that is to say, ten thousand offenses each to consist in unlawfully aiding, abetting, counseling, commanding, inducing, and procuring one of the ten thousand male persons other members of said organization, who on June 5, 1917, respectively attained their twenty-first birthday, and who did not on that day attain their thirty-first birthday, and who have been required by the proclamation of the President of the United States dated May 18, 1917, to present themselves for and submit to registration, under the act of Congress approved May 18, 1917 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k], and entitled 'An act to authorize the President to increase temporarily the Military Establishment of the United States,' at the divers registration places in the divers precincts in said Northern division of the Northern district of California, and in the divers other precincts in other states of the United States, wherein said persons have by law respectively been required to present themselves for and submit to such registration, whose names, and the designation of which said precincts, are to said grand jurors unknown, unlawfully and willfully to fail and refuse so to present himself for registration and so to submit thereto; none of such persons being an officer or an enlisted man of the Regular Army, of the Navy, of the Marine Corps, or of the National Guard or Naval Militia in the service of the United States, or an officer in the Reserve Corps, or an enlisted man in the Enlisted Reserve Corps in active service, and divers, to wit, five thousand, other offenses against the United States, that is to say, five thousand offenses each to consist in unlawfully and feloniously aiding, abetting, counseling, commanding, inducing, and procuring one of the five thousand persons, still other members of said organization, who should become subject to the military law of the United States under and through the enforcement of the provisions of the act of Congress in this count of this indictment above mentioned, and of the proclamation, rules, and regulations of the President of the United States made in pursuance of said act of Congress, and whose names are also unknown to said grand jurors, unlawfully and feloniously to desert the service of the United States in time of war; said defendants not then being themselves subject to military law of the United States. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that in and for executing said unlawful and felonious conspiracy, combination, confederation, and agreement in this count of this indictment charged, certain of said defendants, at the several times and places in that behalf mentioned in connection with their names under the heading 'Overt Acts' in the first count of this indictment, having done certain acts; that is to say, the several acts mentioned in said first count under said heading."

The fourth count alleged that, throughout the period of time from June 15, 1917, to the finding of the indictment, the defendants named in the first count, at the city of Sacramento, unlawfully and feloniously conspired together and with certain other named persons, and with others to the grand jurors unknown, "to commit a certain offense against the United States, to wit, the offense of unlawfully, feloniously, and willfully causing and attempting to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States, when the United States was at war; and this through and by means of personal solicitation, of public speeches, of articles printed in certain newspapers called 'Solidarity,' 'Industrial Worker,' 'A Bermunkas,' 'Il Proletario,' 'Industrial Unionist,' 'Rabochy,' 'El Rebelde,' 'Alarm,' and 'Australian Administration' circulating throughout the United States,

and of the public distribution of certain pamphlets entitled 'War and the Workers,' 'Patriotism and the Workers,' and 'Preamble and Constitution of the Industrial Workers of the World,' and same being solicitations, speeches, articles, and pamphlets persistently urging insubordination, disloyalty, and refusal of duty in said military and naval forces and failure and refusal on the part of available persons to enlist therein, and another offense against the United States, to wit, the offense of unlawfully, feloniously, and willfully, by and through means last aforesaid, obstructing the recruiting and enlistment service of the United States when the United States was at war, to the injury of that service and of the United States. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, in and for executing said unlawful and felonious conspiracy, combination, confederation and agreement in this count of this indictment charged, certain of said defendants, at the several times and places in that behalf mentioned in connection with their names under the heading 'Overt Acts' in the first count of this indictment, have done certain acts; that is to say, the several acts mentioned in said first count under said heading."

Otto Christensen, of Chicago, Ill., for plaintiffs in error.

Frank M. Silva, U. S. Atty., and Albert M. Hardie, Jr., and E. M. Leonard, Asst. U. S. Attys., all of San Francisco, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] The first count of the indictment was based on section 6 of the federal Penal Code (Comp. St. § 10170), which provides as follows:

"If two or more persons in any state or territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof"

—shall be punished in a prescribed way.

[2] The second count was based on section 19 of the same Code (section 10183), which declares:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured"

—shall be punished in a prescribed way.

[3] The third count charges a conspiracy under section 37 of the same Code (section 10201) to violate section 332 thereof (section 10506), and section 5 of the Act of May 18, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044e), commonly known as the Selective Service Act.

Section 37 of the Code, so far as necessary to be stated, is as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be"

—punished in a prescribed way; and section 332 of the same Code so referred to declares that:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal."

Section 5 of the Selective Service Act provides:

"That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this act; and every such person shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the District Court of the United States having jurisdiction thereof, be punished"

—in a prescribed way.

[4] The fourth count charges a conspiracy under section 4, tit. 1, of the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212d) to violate section 3 thereof (section 10212c). Section 4 of that act, so far as necessary to be stated, is as follows:

"If two or more persons conspire to violate the provisions of section 2 or 3 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy."

And section 3 of the Espionage Act, thus referred to, so far as necessary to be stated, reads as follows:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, * * * and whoever, when the United States is at war, shall willfully cause, or attempt to cause * * * insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct * * * the recruiting or enlistment service of the United States"

—to the injury of the service of the United States shall be punished in a prescribed way.

Having clearly in view the decisions of the Supreme Court in the cases of United States v. Cruikshank et al., 92 U. S. 542, 23 L. Ed. 588, and Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 30 L. Ed. 766, so much relied on by counsel for the plaintiffs in error, we have no doubt of the sufficiency of each count of the indictment upon which the judgment of conviction was based.

[5] It is well settled law that each subsequent count may refer to and make a part of it allegations contained in the first count. Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Crain

v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; Glass v. United States, 222 Fed. 773, 138 C. C. A. 321.

Counsel for the plaintiffs in error rely particularly upon the decision of the Supreme Court in Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 30 L. Ed. 766—saying in their brief:

"That case is so similar to the one at bar in the facts presented, and the opinion of the court is so pat that it leaves nothing for us to say, even by way of applying the principles involved."

We think the cases, both in fact and in principle, entirely different. In Baldwin v. Franks, Baldwin was held on a charge of conspiracy with one Wilson and others to deprive certain Chinamen belonging to—

"a class of Chinese aliens, being * * * subjects of the emperor of China, of the equal protection of the laws and of equal privileges and immunities under the laws, for that said * * * persons so belonging to the class of Chinese aliens did then * * * reside at the town of Nicolaus, in said county of Sutter, in said state of California, and were engaged in legitimate business and labor to earn a living, as they had a right to do, and they at that time had a right to reside at said town of Nicolaus, * * * and engage in legitimate business and labor to earn a living, under and by virtue of the treaties existing, and which did then exist, between the government of the United States and the emperor of China, and the Constitution and laws of the United States; but nevertheless, while said * * * persons were * * * so residing and pursuing their legitimate business and labor for the purpose aforesaid, said conspirators * * * did, * * * having conspired together for that purpose, unlawfully and with force and arms, violently and with intimidation, drive and expel said persons, * * * belonging to said class of Chinese, * * * from their residence at said town of Nicolaus, * * * and did * * * deprive them * * * of the privilege of conducting their legitimate business and of the privilege of laboring to earn a living, and, without any legal process, * * * placed said Chinese aliens * * * under unlawful restraint and arrest, and so detained them for several hours, and * * * by force and arms, and with violence and intimidation, placed them * * * upon a steamboat barge, then plying on the Feather river, and drove them from their residence and labor and from said county."

Baldwin was not charged with a conspiracy to overthrow the government, or with hindering or delaying the United States in the execution of any measures for the protection of the Chinese, or with in any way interfering with the exercise by the government of its authority, but, on the contrary, the conspiracy into which he entered was directed and exerted against the Chinese people themselves; the Supreme Court saying (120 U. S. at page 693, 7 Sup. Ct. at page 663, 30 L. Ed. 766):

"It cannot be claimed that Baldwin has been charged with a conspiracy to overthrow the government or to levy war, within the meaning of this section. Nor is he charged with any attempt to seize the property of the United States. All, therefore, depends on that part of the section which provides a punishment for 'opposing' by force the authority of the United States, or for preventing, hindering, or delaying the 'execution' of any law of the United States. This evidently implies force against the government as a government. To constitute an offense under the first clause, the authority of the government must be opposed; that is to say, force must be brought to resist some positive assertion of authority by the government. A mere violation of law is not enough; there must be an attempt to prevent the actual exercise of

authority. That is not pretended in this case. The force was exerted in opposition to a class of persons who had the right to look to the government for protection against such wrongs, not in opposition to the government while actually engaged in an attempt to afford that protection.

"So, too, as to the second clause, the offense consists in preventing, hindering, or delaying the government of the United States in the execution of its laws. This, as well as the other, means something more than setting the laws themselves at defiance. There must be a forcible resistance of the authority of the United States while endeavoring to carry the laws into execution. The United States are bound by their treaty with China to exert their power to devise measures to secure the subjects of that government lawfully residing within the territory of the United States against ill treatment, and if in their efforts to carry the treaty into effect they had been forcibly opposed by persons who had conspired for that purpose, a state of things contemplated by the statute would have arisen. But that is not what Baldwin has done. His conspiracy is for the ill treatment itself, and not for hindering or delaying the United States in the execution of their measures to prevent it. His force was exerted against the Chinese people, and not against the government in its efforts to protect them. We are compelled, therefore, to answer the third subdivision of the seventh question in the negative, and that covers the fourth subdivision."

[6] No impartial person can, in our opinion, read the counts of the indictment in the present case without seeing that the offense specified in each of them is a conspiracy aimed at the government itself, by hindering, delaying, and preventing the execution of laws it had enacted in the prosecution of the war in which it was at the time engaged. The highly criminal character of the means alleged to have been resorted to by the alleged conspirators is so plain as to require no comment. Nor do we see anything duplicitous about any of the counts of the indictment. Responding to a like objection made in the case of Frohwerk v. United States, 249 U. S. 204, 209, 39 Sup. Ct. 249–252 (63 L. Ed. 561), the Supreme Court said:

"Countenance we believe has been given by some courts to the notion that a single count in an indictment for conspiring to commit two offenses is bad for duplicity. This court has given it none. Buckeye Powder Co. v. Du Pont Powder Co., 248 U. S. 55, 60, 61; Joplin Mercantile Co. v. United States, 236 U. S. 531, 548. The conspiracy is the crime, and that is one, however diverse its objects."

See, also, Magon et al. v. United States, decided by this court and reported in 260 Fed. 811, 171 C. C. A. 537.

[7] The verdict of the jury was rendered January 16, 1919, finding each and all of the defendants guilty, and on the next day, January 17th, judgment against all of them, except Fox, Saffores, and Pollok, was entered. The three defendants last named entered a motion for a new trial, after which the case was, with the consent of the government, "continued to a later date for hearing of said motion." The court thereupon, and after hearing the attorneys of the respective parties, entered an order transferring the case as against the defendants Fox, Saffores, and Pollok to the Southern Division of the court "for all further proceedings," and subsequently, after hearing the attorney for those defendants—the attorney for the United States being present—denied the motion for a new trial and postponed the pronouncing of judgment against them until June 18, 1919, on which day such judg-

ment was rendered. Neither of the defendants Saffores nor Pollok having sued out a writ of error, no further reference to them need be made, except incidentally.

The term of the court for the Northern Division of the District expired April 13, 1919. Rule 9 of the Rules of Practice of the court applicable to both divisions of it, provides as follows:

"For the purpose of making and filing a bill of exceptions and of making any and all motions necessary to be made within the term at which any judgment or decree is entered, each term of this court shall be and hereby is extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered or decree entered."

The time thus fixed by the rule of the court expired in this instance prior to the termination of the term of the court, which was, as has been stated, April 13th. The record shows that four days after the expiration of the term during which the verdict was rendered and the judgment entered against all of the defendants except Fox, Saffores, and Pollok, that is to say, April 17, 1919, one of the Circuit Judges made this order in the case:

"It is hereby ordered that the time for preparing and serving bill of exceptions, on behalf of all of the defendants in the above-entitled action against whom judgment has been pronounced, be and the same is hereby extended to June 15, 1919."

The record further shows that on the 10th day of June, 1919, Judge Rudkin, before whom the case was tried, made this order:

"It is ordered that the time for proposing and filing a bill of exceptions in the above-entitled cause (United States of America v. Elmer Anderson et al.), except as to the defendants Saffores, Fox, and Pollok, is hereby extended to and including the 25th day of July, 1919."

The record does not show that the United States attorney consented to or had notice of the making of either of those orders, and in the brief on the part of the government it is asserted that its attorney had no notice of the application for them.

On the 18th day of July, 1919, Judge Hunt made this order:

"For satisfactory reasons appearing to the Honorable William H. Hunt, Judge, and by stipulation between respective counsel, it is hereby ordered that the time for the signing and sealing of bill of exceptions herein, as the same may be settled and signed, be and the same is hereby extended for 60 days after date hereof, and that, whenever so settled and signed, the said bill of exceptions herein shall stand as settled, signed, and filed, and made a part of the record herein as of the 7th day of April, 1919, which 7th day of April, 1919, is within the time originally allowed by the court for the presenting, signing, and filing of said bill of exceptions herein; and the United States shall have 60 days after service of the bill of exceptions in which to submit amendments."

The record further shows that on the 3d day of October, 1919, Judge Van Fleet made and entered this order in the cause entitled United States v. A. L. Fox:

"It is hereby ordered that plaintiff may have, and it is hereby given, to and including the 23d day of October, 1919, within which to prepare, serve, and file its proposed amendments to defendant's proposed bill of exceptions on writ of error to the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit, in the above-entitled case.

"It is understood that the granting of this order shall in no wise constitute a waiver of or prejudice the right of the plaintiff to make or file any motion or motions to strike from the files the said bill of exceptions upon the ground that the same was not served within the time allowed by the rules of practice of this court, or upon any other grounds.

"Dated October 3, 1919.

"Wm. C. Van Fleet, United States District Judge."

Thereafter, and on October 23, 1919, Judge Morrow made and entered in the same case this order:

"It is hereby ordered that plaintiff may have, and it is hereby given, to and including the 2d day of November, 1919, within which to prepare, serve, and file its proposed amendments to defendant's proposed bill of exceptions on writ of error to the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit, in the above-entitled case.

"It is understood that the granting of this order shall in no wise constitute a waiver or prejudice the right of plaintiff to make or file any motion or motions to strike from the files the said proposed bill of exceptions upon the ground that the same was not served within the time allowed by the rules of practice of this court, or upon any other grounds.

"Dated October 23, 1919. Wm. W. Morrow,

"Judge United States Circuit Court of Appeals, Ninth Judicial Circuit."

October 31, 1919, the attorney for the government filed in the Northern Division of the court, in the case entitled United States of America against all of the defendants except Fox, Saffores, and Pollok, and on the next day filed in the Southern Division of the court, in the case entitled United States against Fox, motions to strike from the files the proposed bill of exceptions, upon the grounds, in effect, that such bill was neither served nor filed within the time allowed by the rules of the court or by the law. The motions were based upon the records, as well as upon the affidavits on behalf of the respective parties, and resulted in a denial thereof by this order, made by Circuit Judge Hunt February 24, 1920:

"Upon reading the affidavits and hearing statements of counsel, it is proper to say that my own independent recollection of the circumstances connected with the order extending time for sealing and signing of the proposed bill of exceptions in the above-entitled case is not perfectly clear, but as I recall the matter it occurred as follows:

"As I had not presided at the trial of the case, and knew nothing in detail of the record, I was specially careful to advise Mr. Christiansen that I would grant no order of any kind in the case until he had seen and conferred with the United States district attorney. Subsequently Mr. Geis, Assistant United States Attorney, and Mr. Christiansen, came to my chambers and after some colloquy with respect to the proposed order and the period of time within which counsel for the United States might present any proposed amendments to the bill of exceptions, it was agreed between counsel that the order as signed by me was proper. In the presence of counsel I therefore inserted in my handwriting the words which appear in my handwriting in the original order, and in presence of counsel I signed the order and delivered it to them or to one of them.

"I am strengthened in my recollection by the fact that my practice is not to sign such orders until counsel for both sides have personally presented their views, and I am positive that the inserted words in my handwriting could only have been written by me upon the clear understanding on my part that they recorded the fact as stated.

"I must therefore deny the motion.

"Feb. 17, 1920.

Wm. H. Hunt, Judge."

We therefore take it, as a matter of course, that the order made by Judge Hunt July 18, 1919, and hereinbefore set out, was made "by stipulation between respective counsel." The question, however, remains: Were either of the orders so made of any validity?

As to all of the plaintiffs in error except Fox, we think it clear that we are precluded from considering the bill of exceptions as a part of the record, for the reason that the term of the court during which both the verdict and judgment against them were rendered had expired prior to the signing of either of the orders undertaking to extend the time for the preparation, service, or settling of such bill. In support of this conclusion we need to do no more than refer to the very recent decision of the Supreme Court in O'Connell et al. v. United States, 253 U. S. 142, 40 Sup. Ct. 444, 64 L. Ed. 827 (Advance Sheets, May 17, 1920). In that case the trial in the lower court took place during its July term, 1917, and continued from September 12th to September 25th. The next statutory term of the court began November 15th. September 29th the defendants to the action, against whom a verdict of guilty was rendered, were granted 30 days for preparation and presentation of a bill of exceptions. October 23d an order undertook to extend the time to November 15th; on November 12th a like order specified November 27th; on November 26th an order specified December 15th; on December 14th a further order undertook to extend it to December 24th, when a still further extension was ordered to December 31st. On the latter date a proposed bill was presented. January 9, 1918, the United States attorney procured an order granting time in which to prepare amendments to the proposed bill which were thereafter presented. The Supreme Court said:

"Under the statute the trial term expired November 15th; but, for the purpose of filing the bill of exceptions, a general rule extended it to December 4th—three months from the first Tuesday in September. The last order of court within the extended term designated December 14th as the final day for action"

—and held that the power of the trial court over the case expired not later than the 14th of December, 1917, and that all the proceedings concerning the settlement of the bill, therefore, were coram non judice.

Applying that decision to the facts of the present case, we think it impossible to hold that the court below had any jurisdiction to settle the bill of exceptions in question. As has been seen, the term of the court at which the case was tried expired April 13, 1919; and the rule of the court allowing three months for the preparation and settlement of such bill of exceptions expired the 7th of the same month. It was not until April 17, 1919, that the first of the orders undertaking to extend the time for the preparation and settlement of a bill of exceptions was made. But at that time the power of the trial court over the case as to all of the defendants as to whom it had not been transferred to the Southern Division of the District had expired, according to the express decision of the Supreme Court in O'Connell et al. v. United States, supra, and all proceedings subsequently undertaken, including the contested consent, were therefore coram non judice.

It is entirely true that the consent of the opposite party, given during

the term or any extension thereof, is as efficacious to extend the time for the preparation and settlement of such a bill as an order of the court or judge; but surely no such consent can at any time have any greater power in the matter than such an order. To so hold would, in effect, be to hold that consent can give jurisdiction to the judge, where, by law, his jurisdiction has expired. And so we find the Supreme Court declaring in the case of Waldron v. Waldron, 156 U. S. 361, 378, 15 Sup. Ct. 383, 387 (39 L. Ed. 453):

"The signing of the bill of exceptions after the expiration of the term in which the judgment was rendered, was lawful if done by consent of parties *given during that term.*" (Italics ours.)

Respecting the plaintiff in error Fox—the judgment against whom sentenced him to six months' imprisonment in the county jail of the city and county of San Francisco, almost all of which he served before being admitted to bail pending the determination of his writ of error —it appears that that judgment was rendered June 18, 1919, during the March term of the Southern Division of the court, to which the case against him had been theretofore transferred. No order extending the latter's time within which to prepare or serve a bill of exceptions appears ever to have been made; that of July 18, 1919, having been made in behalf of the defendants in the case remaining pending in the Northern Division of the district, and not embracing the parties as to whom the case had been transferred to the Southern Division of the court. The March term of the latter division expired with the second Monday of July, 1919, and the three months' extension of the term, commencing to run, as it did, the first Tuesday in June of that year, expired September 3, 1919, 20 days previous to the time any bill of exceptions was ever delivered to the attorney for the government.

The judgments are affirmed.

RAMSHORN DITCH CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1920.)

No. 5513.

1. **Waters and water courses ⇐142—Appropriator can conserve appropriated waters, regardless of seepage law.**
   An appropriator of waters for irrigation is entitled to save, and use for the beneficial irrigation of the lands under its canal, water which had escaped therefrom by seepage, independent of the legislation of the state in relation to seepage waters.

2. **Waters and water courses ⇐151—Appropriated water, allowed to return to river, is subject to new appropriation.**
   Where an appropriator of water permits a portion thereof, which had seeped from its canal, to return to and mingle with the waters of a river from which it had been taken, such returned waters are to be considered part of the water of the river, as though never diverted therefrom, and

inures to the benefit of the appropriators on the river in the order of their appropriations.

3. **Waters and water courses ⇐151—Intent is essential to abandonment of appropriated waters.**
Seepage and waste water, allowed to return to its natural channel, with no intention by the appropriator to recapture it, is abandoned; but the intention to abandon is essential, and it must be determined as a question of fact from the evidence in each particular case.

4. **Waters and water courses ⇐151—Abandoned water may be reclaimed, if there are no intervening rights.**
An appropriator, who has abandoned his rights to water, may at any time resume possession and exercise all such rights, if no new rights have intervened.

5. **Waters and water courses ⇐145—Appropriation cannot be transferred to new source with old priority.**
The Nebraska board of irrigation, highways, and drainage had no authority to transfer an appropriation from a natural stream to a channel deriving its waters from seepage from another canal, and to give the appropriation of such seepage waters the priority of the old appropriation from the natural stream.

6. **Waters and water courses ⇐151—Appropriator has reasonable time to reclaim seepage.**
Appropriated water is not deemed abandoned as soon as it seeps from the canal in which it is being conveyed; but the appropriator must be allowed a reasonable time in which to save and use water escaping by seepage and waste from his canal or ditch.

7. **Waters and water courses ⇐133—State statute authorizes reclaiming seepage water without appropriation.**
Rev. St. Neb. 1913, § 3426, authorizing the owner of an irrigation canal to collect seepage water thereunder to apply to the irrigation of land covered by the original appropriation of such canal, gives the right to the use of such water without formal appropriation proceedings, since the objects of the state laws regulating proceedings for appropriation to provide water for as many owners of land as possible, and to decide priority between the different claimants, do not apply to the use of seepage water by the original appropriators.

8. **Waters and water courses ⇐140—Change of appropriation of seepage waters from a canal cannot be given date of original appropriation.**
Even if the seepage waters flowing in the channel not the original and natural stream are public waters, subject to appropriation under Rev. St. Neb. 1913, § 3427, an appropriation of such waters by a former appropriator from the natural stream cannot be given the date of the original appropriation from the stream, so as to take priority over a diversion of the water by the appropriator from whose canal it had escaped, which diversion was made before the change of appropriation.

9. **Waters and water courses ⇐144—Lands irrigated from reclaimed seepage held within original project.**
Where the original application by the United States for appropriation of water stated an intention to irrigate all the lands shown on the accompanying plats, and to irrigate all lands on the north side of the river, supplementing those with an adequate supply, and furnishing full rate to all others, an approval of the application as one for the irrigation of lands described therein, not covered by prior existing rights, did not exclude lands under the other existing canals intended to be covered by the new project, so that the United States could reclaim seepage waters from its canals to irrigate such lands with the provisions of Rev. St. Neb. 1913, § 3426.

10. **Waters and water courses ⊂=222—Warren Act authorized contract between United States and a land company for irrigation by reclaimed seepage waters from canal of reclamation project.**
Under the Warren Act (Comp. St. §§ 4738–4740), and Laws Neb. 1911, c. 151, passed in aid thereof, a contract between the United States and a land company for the delivery to the latter of water which escaped by seepage from the canal of a reclamation project was a valid contract, which gave the United States the right to conserve and deliver water thereunder.

11. **Waters and water courses ⊂=222—Reclamation appropriation having source in another state is valid.**
In view of Reclamation Act (Comp. St. §§ 4700–4708), the Warren Act (Comp. St. §§ 4738–4740), and the legislation of Wyoming and Nebraska, an appropriation by the United States Reclamation Service for the irrigation of lands in Nebraska is valid, though the source of the supply is in Wyoming.

12. **Waters and water courses ⊂=247(2)—Injury to reclamation service, by taking seepage water which United States had a contract to sell, may be enjoined.**
The United States suffers injury, entitling it to an injunction, by the prevention of delivery of water which seeped from an irrigation canal to a corporation with whom it had a contract to deliver the water at a substantial price.

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

Suit by the United States against the Ramshorn Ditch Company and others. Decree for complainant (254 Fed. 842), and defendants appeal. Affirmed.

Thomas M. Morrow, of Scottsbluff, Nev. (Clarence A. Davis, Atty. Gen. of Nebraska, and William Morrow, of Scottsbluff, Neb., on the brief); for appellants.

Ethelbert Ward, Sp. Asst. Atty. Gen., of Denver, Colo., and Henry A. Cox, District Counsel for United States Reclamation Service, of Mitchell, Neb. (Thomas S. Allen, U. S. Atty., of Lincoln, Neb., on the brief), for the United States.

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

CARLAND, Circuit Judge. Appellee brought this action against appellants for the purpose of restraining them from in any way interfering with the waters of Sheep creek, Neb., or the controlling works used by it in diverting said waters. The case was heard on pleadings and proofs, and a decree entered granting the relief prayed for. The appellants, who are the Ramshorn Ditch Company and officers of the state of Nebraska having to do with the distribution of water for irrigation between different claimants, appealed.

The question for decision may be stated as follows: Has the Ramshorn Ditch Company the right to divert and apply for irrigation purposes $45^4/_7$ second feet of water, or any part thereof, flowing in the creek above mentioned or has appellee the right to economically save and to continue to economically use said water for beneficial irrigation? The material facts upon which the decision of the above ques-

tion depends are largely undisputed. The questions involved may be discussed under two heads, viz.: (1) Rights acquired under original appropriations. (2) Rights acquired under the seepage law of Nebraska. The source of the water is the Interstate Canal, which carries water previously impounded by appellee in the Pathfinder Reservoir, located in the state of Wyoming.

Appellee claims that this water thus brought into the state of Nebraska in connection with this North Platte irrigation project, and which by seepage, drainage, and waste has developed into a flowing stream in Sheep creek, it has the right to economically save and continue to economically use for beneficial irrigation. Appellants claim that this water now flowing in Sheep creek, conceding its source to be in the Interstate Canal, is a part of the Platte river, from which it was originally taken, and subject to appropriation for irrigation purposes the same as the water of a natural stream, or if it is seepage water, and not public water of the state of Nebraska, that under the law and the evidence its rights as a prior appropriator of the water in question is superior to those of appellee. A very full and clear statement of the facts and the legislation of Congress and of the state of Nebraska was made by the learned trial judge and will be found in United States v. Ramshorn Ditch Co. et al. (D. C.) 254 Fed. 842. It would serve no useful purpose to again restate those facts, as they are fully sustained by the evidence and are quite voluminous.

[1] The source of the water in controversy being conceded, it follows that it is a portion of the 1,600 second feet of water for which appellee has a valid appropriation, and which it is entitled to save and use for the beneficial irrigation of lands under the Interstate Canal, independent of the legislation of Nebraska in relation to seepage waters. Griffiths v. Cole (D. C.) 264 Fed. 369; McKelvey v. North Sterling Irr. Dist., 179 Pac. 872; Hagerman Irr. Co. v. East Grand Plains Drainage Dist., 25 N. M. 649, 187 Pac. 555; Lambeye v. Garcia, 18 Ariz. 178, 157 Pac. 977.

[2] If appellee permits said water to flow unused back to the North Platte river, it is to be considered a part of the water of said river, as though never diverted, and inures to the benefit of the appropriators on the river in the order of their appropriation, when it becomes mingled with the water of the natural stream. Section 3427, Rev. Stat. Neb. 1913; Water Supply & Storage Co. v. Larimer & Weld Reservoir Co., 25 Colo. 87, 53 Pac. 386; Burkhart v. Meiburg, 37 Colo. 187, 86 Pac. 98, 6 L. R. A. (N. S.) 1104, 119 Am. St. Rep. 279; Lambeye v. Garcia, supra; Hill v. American Land & Live Stock Co., 82 Or. 202, 161 Pac. 403; Comstock v. Ramsay, 55 Colo. 244, 133 Pac. 1107; Durkee Ditch Co. v. Means, 63 Colo. 6, 164 Pac. 503; Trowell L. & I. Co. v. Bijou Irr. District, 65 Colo. 202, 176 Pac. 292. It may be stated here that there is no evidence in the record that any appropriator, including the Ramshorn Ditch Company, does not receive his full appropriation from the Platte river, notwithstanding the use by appellee of the water of Sheep creek.

[3] Seepage and waste water may be said to have been abandoned by the original appropriator when it is returned or allowed to return

to its natural channel, with no intention on the part of the appropriator of recapturing it. To constitute abandonment, however, there must be an intent to abandon (White v. Nuckolls, 49 Colo. 170, 112 Pac. 329; Matter of Daly, 123 App. Div. 709, 108 N. Y. Supp. 635 [affirmed in 192 N. Y. 571, 85 N. E. 1108]; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Edgmont Imp. Co. v. N. S. Tubbs Sheep Co., 22 S. D. 142, 115 N. W. 1130; Lindblom v. Water Co., 178 Cal. 450, 173 Pac. 994; Water Co. v. Kellogg, 31 Idaho, 574, 174 Pac. 602), the existence or nonexistence of which is a question of fact to be determined according to the evidence presented in each particular case, and one whose rights depend on an alleged abandonment must assume the burden of proving such abandonment. 40 Cyc. 727, 728, and cases cited.

[4] The appropriator who has abandoned his rights to water may at any time resume the possession and exercise of them, if no new rights have intervened. Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. 391; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047; Beaver Brook Res., etc., Co. v. St. Vrain Res., etc., Co., 6 Colo. App. 130, 40 Pac. 1066. In this connection it may be stated that appellee, at the cost to it of $1,450, diverted the water from Sheep creek into the Farmers' or Tri-State ditch in June, 1914, and continued to do so during each irrigation season thereafter up to July 21, 1917. The application for an appropriation of those same waters by the Ramshorn Ditch Company was filed on September 13, 1916, and granted September 22, 1916. In this application the water which the ditch company desired to appropriate was described as "seepage water arising in the Sheep creek basin"; said application having been made presumably under the provisions of section 3426, Rev. Stat. Neb. 1913, relating to seepage water. The ditch company had an old appropriation from the North Platte river for $45^5/_7$ second feet dated March 20, 1893. The permit granted simply transferred the headgate of this old appropriation, which was on the North Platte river, to Sheep creek, on the ditch constructed by appellee, and was given priority as of the date of the granting of the original appropriation, although the evidence shows that there was no water running in Sheep creek at the point where the headgate of the new appropriation was located until years after the old appropriation was granted. This new appropriation was granted subject to the condition that—

"The prior rights of all persons who, by compliance with the laws of the state of Nebraska, have acquired a right to the use of the waters of this stream, must not be interfered with by this appropriation. The amount of the appropriation shall not exceed $45^4/_7$ cubic feet per second of time. * * * This appropriation shall be supplementary to and part of the original appropriation covered by docket No. 945, Ramshorn Ditch Company, and shall take the same priority as docket No. 945."

[5] We are of the opinion that, conceding for the present that the appropriation granted to the Ramshorn Ditch Company September 22, 1916, had any validity, it was not within the power of the board of irrigation, highways, and drainage of Nebraska to grant a priority in connection therewith dating back 23 years before the company had

sought to use any of the water of Sheep creek for irrigation and long prior to the time that there was any water flowing in said creek.

[6] It must be conceded, of course, that the water which the evidence shows had been diverted and controlled by appellee by the means of ditches in Sheep Creek valley, and which was allowed to flow in the several drainage ditches back into the Platte river unused, was abandoned; but the seepage water which was still flowing and continued to flow into Sheep creek was subject to be recaptured, and was recaptured by appellee by the construction of its controlling works, by which the water was turned into the Farmers' or Tri-State ditch, in June, 1914, nearly three years before the ditch company attempted to actually take any of the water from Sheep creek, and over two years before September 22, 1916.

Counsel for appellants claim that seepage water is abandoned as soon as it leaves the canal or ditch wherein the original appropriated water is running; but that rule could not prevail in the present case, because it as a year or more before the indication of seepage from the Interstate Canal began to show itself in the Sheep Creek and Dry Sheep Creek valleys. Certainly the appropriator must have a reasonable time in which to save and use water that by seepage and waste has escaped from his canal or ditch. We are therefore of the opinion that, as against the ditch company, appellee had the right in June, 1914, to recapture the seepage water, which had, it is admitted, come from the Interstate Canal, before it reached the Platte river, and that, having done so, its right as an original appropriator of the waters in the Interstate Canal to the seepage water in question is superior to the permit granted the ditch company September 22, 1916, especially in view of the above-quoted limitations upon that appropriation. We now come to consider the rights of the parties under the legislation of Nebraska in regard to seepage waters. Sections 3426 and 3427, Rev. Stats. Neb. 1913, read as follows:

Section 3426: "Any person, persons, district, company or corporation owning, constructing or operating an irrigation canal in this state, are hereby authorized to collect or assist to collect any seepage water thereunder or under any adjacent irrigation canal by the construction of drainage ditches and to apply said waters to irrigate with on the lands covered by the original appropriation of such canal, while said seepage waters are being conducted by said drainage ditches toward the natural streams. Said use to be subject to limitations as follows:

"First—The right of any land owner to raise, pump, develop and use on his own land water percolating thereunder shall not be impaired.

"Second—Seep waters so collected by the canal owner or operator shall be treated as supplemental to and part of the original appropriation of such canal, the total quantity of which shall not be increased nor exceed an aggregate of three acre feet in any calendar year for each actually irrigated acre of land."

Section 3427: "When any seepage or drain water is mingled with that of any natural stream, it shall become part of the public waters of the state, subject to diversion among existing appropriators of the state of Nebraska, in the order of their respective priorities and rights based upon preferential use as defined by the laws of the state of Nebraska."

By section 3426 appellee was clearly authorized to collect any seepage water under its Interstate Canal by the construction of drainage ditches and apply said seepage water to irrigate lands covered by its

original appropriation, while said seepage water was being conducted by said drainage ditches toward the Platte river; this right of collecting seepage water, so far as appellee was concerned, being subject to the conditions specified in subdivisions 1 and 2 of said section. The ditch company claims that the appellee could acquire no right or authority under section 3426, unless it made an application to the board of irrigation, highways, and drainage of Nebraska for a permit, as is required when one desires to appropriate a portion of the public waters or natural streams of Nebraska. The ditch company made its application on September 22, 1916, under this section, and counsel maintain that appellee has no rights thereunder, because it never made an application for a permit under that law.

[7] We are of the opinion that section 3426, of its own force and effect, conferred the right upon any person, district, company, or corporation owning, constructing, or operating an irrigation canal in Nebraska to collect seepage water as therein provided. The principal object that there should be a controlling authority to regulate the use of the public waters of the state was for the purpose of providing water for irrigation purposes to as many owners of land as possible, and to decide between different claimants as to their priority. This work had all been done as to the persons, districts, companies, or corporations mentioned in section 3426, and the object of the section was to give such persons as are mentioned the right to collect seepage water. Each of the above parties was entitled to the seepage water under his or its canal, and there could be no priorities. We are unable to see any reason why an appropriation which has been distinctly granted by the Legislature should be subject to the approval or disapproval of the board of irrigation, highways, and drainage.

Counsel for the ditch company claims that this seepage statute and the laws of Nebraska in regard to obtaining the right to appropriate the public waters of the state running in natural streams relate to kindred subjects, and should be construed together, being in pari materia; but the reason that there should be an application as to the original appropriation of water of natural streams is inapplicable to seepage water, because the latter, subject to certain conditions, is granted by law. The learned District Judge has stated other reasons for reaching the same conclusion, in which we fully concur, and agree with him that the permit of September 22, 1916, by which the ditch company caused the state officials to cut the water of Sheep creek out of the Farmers' or Tri-State ditch, and turn it down the drainage ditch, until it came to where the ditch crossed the Ramshorn ditch, and then turned it into that ditch, conferred no right or authority so to do. In its application of September 22, 1916, the ditch company represented to the board of irrigation, highways, and drainage that the water in question was not public waters of the state of Nebraska, and that Sheep creek was not a natural stream.

[8] It is one of the contentions of the ditch company now that the water flowing in Sheep creek is a natural stream, and that the United States has no right to take said waters for irrigation purposes, the same having been abandoned and on their way to the Platte river;

but the application of the ditch company was not an application for an appropriation of the public waters of the state, but to take seepage water not constituting a natural stream for the purpose of irrigation. It had, of course, the appropriation of March 20, 1893; that appropriation, however, had its headgate on the Platte river, which was so expensive to maintain, on account of the shifting sands, that the whole object of the application of September 22, 1916, seems to have been to get rid of the expense of maintaining the headgate on the Platte river after appellee had spent $45,000 constructing ditches in which these seepage waters could flow to the river or be used for the purpose of irrigation.

Section 3427, above quoted, is a declaration by the state of Nebraska that seepage water does not become public waters of said state until it mingles with that of a natural stream. Conceding, however, for the sake of argument, that the water in controversy might, in any view of the case, be called public waters of the state, and that the same cannot be used by any person for the irrigation of lands, unless a permit is granted by the board of irrigation, highways, and drainage, how does the ditch company stand on that proposition. It has no such appropriation. Its rights depend on an appropriation from the Platte river, changed to seepage water in Sheep creek. Certainly its rights so far as this case is concerned are not superior to those of the United States.

[9] It is next contended that the lands under the Farmers' or Tri-State ditch are not lands under the Interstate Canal, and therefore the United States is not in the position to seek the benefits of section 3426, supra. The following language is found in the application of the United States for its original application:

"It is the intention to irrigate all lands shown on the accompanying plats, whether under existing canals or under projected canals or extensions."

This language would include all lands in the Farmers' or Tri-State Canal, as shown by the "accompanying plats." The following language is also found in the application:

"Interstate Canal.—This canal contemplates the enlargement of the Whalen Falls Canal and continued easterly to the limit of irrigable land, and a right to irrigate all the irrigable lands on the north side of the North Platte river, supplementing those with an inadequate supply at any season and furnishing a full right to all others."

The application was approved, and the following language is found in the approval:

"The lands to be irrigated under this permit being all lands described in said application, which lie within the state of Nebraska, and are not covered by prior existing rights."

In view of the fact that it was the object of the irrigation project of which the Interstate Canal was a part to irrigate all lands, whether in existing canals or in projected canals or extensions, the words "and not covered by prior existing rights" do not refer to lands under other canals for the irrigation of which the Pathfinder project was constructed.

[10] We are also of the opinion that by virtue of the so-called Warren Act, approved February 21, 1911 (36 Stat. 925 [Comp. St. §§ 4738–4740]), and the Nebraska act of April 10, 1911 (Laws 1911, c. 151), apparently passed in aid of the Warren Act, that the contract between appellee and the Tri-State Land Company for the delivery of the water in controversy after the completion of the necessary ditches and controlling works was a valid contract, and gave appellant the right to furnish water for the irrigation of lands under the Farmers' or Tri-State ditch. The date of the contract August 20, 1912, and the furnishing of water thereunder July, 1914, are all prior to September 22, 1916, the date of the permit to the Ramshorn Ditch Company.

[11] Counsel further argue that appellee has not a valid legal appropriation for land in Nebraska under the Interstate Canal, because the canal has its headgate in Wyoming and carries water from that state to irrigate lands in Nebraska. The theory of counsel is that, as neither Wyoming nor Nebraska has jurisdiction of the entire works of the Pathfinder project, both states exceeded their jurisdiction when they issued permits to the appellee for the reclamation project. Lamson v. Vailes, 27 Colo. 201, 61 Pac. 231, and Turley v. Furman, 16 N. M. 253, 114 Pac. 278, are cited in support of this contention. It is doubtful as to whether these cases support the contention; but, conceding that they do, they have no application as to the Interstate Canal between Wyoming and Nebraska, especially in view of the fact that this question has been passed upon directly by both the Supreme Court of Wyoming and the United States Circuit Court of Appeals for the Eighth Circuit in a Nebraska case. Willey v. Decker, 11 Wyo. 496, 73 Pac. 210, 100 Am. St. Rep. 939; Perkins County, Neb., v. Graff, 114 Fed. 441, 52 C. C. A. 243. The rights of appellee in connection with the reclamation project must be considered in view of the Reclamation Act (32 Stat. 388 [Comp. St. §§ 4700–4708]), the Warren Act (36 Stat. 925), and the legislation of Wyoming and Nebraska; and, when thus considered, we see no objection to the right of the United States to appropriate and use for irrigation purposes, in either Wyoming or Nebraska, the waters diverted by it from the North Platte river in Wyoming and flowing in the Interstate Canal through Wyoming and Nebraska.

[12] It is further insisted that the appellee will not be injured by allowing the ditch company to take the water granted by the permit of September 22, 1916, from Sheep creek. Appellee expended about $50,000 in the drainage ditches that collect and carry the water, and $1,450 on the controlling and diversion works which enable it to deliver the water to the Farmers' or Tri-State Canal. The contract between appellee to furnish water to the Farmers' or Tri-State Canal provides for a price of $5 per acre foot, which appears by the evidence to be about $1,000 per second foot, or over $45,000, which water the ditch company seeks to compel appellee to deliver to it free of charge.

We are satisfied that the conclusion reached by the trial court and the reasons upon which such conclusion was reached are sound, and that the decree entered below should be affirmed; and it is so ordered.

UNITED STATES v. BOSTON & M. R. R.*

(Circuit Court of Appeals, First Circuit. November 24, 1920.)

No. 1470.

1. **Master and servant ⇐13—Stations "continuously operated night and day," within Hours of Service Act, defined.**
In Hours of Service Act, § 2 (Comp. St. § 8678), the language of the proviso, that no operator or train dispatcher shall be required or permitted to remain on duty for a longer period than 9 hours in any 24 hour period in offices or stations "continuously operated night and day," does not mean stations continuously operated during the 24 hours, but includes stations operated at night and by day during the period of service of an operator, which may include a part of the day and a part of the night.

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

2. **Master and servant ⇐13—Railroad telegraph offices held "operated" within Hours of Service Act.**
Railroad telegraph offices, kept open with operators at the post of duty, are being "operated," within Hours of Service Act, § 2 (Comp. St. § 8678).

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

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Action by the United States against the Boston & Maine Railroad. Judgment for defendant, and the United States brings error. Reversed.

For opinion below, see 265 Fed. 800.

Alonzo H. Garcelon, of Boston, Mass. (Daniel J. Gallagher, U. S. Atty., of Boston, Mass., and Stacy H. Myers, of Washington, D. C., on the brief), for the United States.

George E. Kimball, of Boston, Mass., for defendant in error.

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

ALDRICH, District Judge. We have here to deal with an action at law to recover penalties sought to be imposed upon a railroad for alleged violations of a federal statute known as the Hours of Service Act—a statute which was enacted with the idea of vouchsafing to employees and to the traveling public a greater measure of protection and security.

The act in question is that of March 4, 1907 (34 Stat. 1415 [Comp. St. §§ 8677–8680]), and the security to the public, and to employees, is supposed to come through an express limitation of maximum hours of service. The idea of a maximum limitation upon hours in which telegraph and telephone operators shall be allowed to serve, in connection with train movements in any 24-hour period, we think was the paramount and leading thought of Congress.

The proviso to section 2 of the act has reference solely to the use

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 448, 65 L. Ed. —.

of the telegraph or telephone in connection with train movements, and it is declared that no operator in connection with such service shall be required, or permitted, to be or remain on duty for a longer period than 9 hours in any 24-hour period, in stations continuously operated night and day, nor for a longer period than 13 hours in stations operated only during the daytime, except in cases of emergency. There is no question of emergency here.

While the leading idea of the statute is the limitation of hours, Congress sought to make its purpose operative by a classification based upon night and day service. This statute provides penalties, and therefore is, perhaps, within the rule as to strict construction in respect to its interpretation; yet, it being one based upon public policy and in the interest of greater public safety, its provisions will not be so technically and narrowly defined as to destroy the leading and manifest purpose of Congress.

[1] The words "night" and "day" were apparently used in a general sense, and not in the sense that, in and of themselves, the words were to be accepted as arbitrarily decisive of a classification based strictly upon a division between night and day. This seems obvious, because the word "night," in its common acceptation, means the dark half of the day; that part of the complete day during which the sun is below the horizon; the time from sunset to sunrise; while "day" means the period during which the sun is above the horizon; the interval of light, in contradistinction to that of darkness, or to night. Century Dictionary. Neither party contends for an interpretation of the statute on lines so strict and so arbitrary as this.

The offices, or stations, in question, were Amherst and Arlington, in Massachusetts, and, according to the agreed statement of facts, the station at Arlington remained open from 5:45 in the morning to 9 in the evening, and was closed for all business from that time until 5:45 in the morning. The Amherst station was open from 6 in the morning to 9:06 in the evening, and was closed as to the other hours during the 24. There were telegraphic instruments in the stations, used for sending and receiving orders pertaining to train movements, and the employees in the office used the telegraph or telephone to that end.

[2] The District Court seems to have taken the view that it was incumbent upon the government to furnish further facts in respect to the purpose for which the stations were kept open during the evening; but we think the fact that the offices were kept open into the evening or night, and that the operators were at the post of duty, means that the offices were being operated within the sense of the term "operated" as used in this statute.

The chief difficulty under the statute results from the expression "stations continuously operated night and day"; but this again should not be taken in the strict sense, because no one contends that the expression "continuously operated" should be accepted as meaning every moment of the time, either of the night or of the day.

Contrary to the view of the District Court, we cannot accept the word "night" as the most significant word of the act. Nor can we

accept the view that the division between day and night which the statute contemplates has reference to the business day established by railroads, based upon shifts in respect to day watchman and night watchman, and similar rules and regulations of railroads.

We think the significant idea and the real purpose of Congress was to declare that telegraph and telephone operators should not be kept at the post of duty more than 9 hours out of the 24 in night and day service, and, that being the public policy sought to be enforced, that the purpose should become operative, unless the terms of the statute are so indefinite and uncertain as to defeat it.

According to the agreed statement in the case before us, the operators were relieved from duty for certain periods. But still the hours of service during the 24 exceeded 9 hours, and we think the reliefs under a description so general as that of the agreed facts should be viewed as negligible intermissions (United States v. Grand Rapids & I. R. Co., 224 Fed. 667, 140 C. C. A. 177) or as said in United States v. Atchison, T. & S. F. R. Co., 220 U. S. 37, 44, 31 Sup. Ct. 362, 55 L. 361, "trifling interruptions," not to be considered, and not as such rest from the strain of excessive hours of duty as to defeat the operation of the statute, which declares that no operator shall be permitted to remain on duty for a longer period than 9 hours in any 24.

While the act in question provides for suits by the United States for recovery of the penalties provided, its enforcement is largely committed to the Interstate Commerce Commission, because it is expressly provided that such commission shall execute and enforce its provisions, and all powers are extended to such commission, together with the power to extend the period within which common carriers shall comply with its provisions, and therefore, while interpretations and regulations of the Interstate Commerce Commission are not conclusive upon courts, in view of the concurrent power and responsibility contemplated by the statute, due weight should be given to the interpretations of its terms by that tribunal. Upon conference, that commission has interpreted the phrase "continuously operated night and day" as applying to all offices, places, and stations operated during a portion of the day and a portion of the night.

The offices in question were operated, in one instance, a part of the daytime and until 9:06 p. m., and the other a part of the daytime and until 9 p. m. (at one station in March and at the other in May), and therefore must be viewed as stations operated at least into a portion of the night.

In United States v. Atchison, T. & S. F. R. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361, the Corwith station, in the outer limits of Chicago, was shut from 10 to 3 by day and by night, but open the rest of the time.

Mr. Justice Holmes, who writes the opinion, suggestively observes:

"* * * If it be conceded that Corwith was a place continuously operated night and day, as there are strong reasons for admitting."

And again:

"The antithesis is between places continuously operated night and day and places operated only during the daytime. * * * We think that the

government is right in saying that the proviso is meant to deal with all offices, and if so, we should go farther than otherwise we might in holding offices not operated only during the daytime as falling under the other head * * * and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent."

As already observed, in effect, we do not accept the expression "stations continuously operated night and day" as meaning stations operated continuously throughout 24 hours, but as stations continuously operated night and day during the period at which the operator is at his post. And in this view, if the period covered by the service is continuous, and is part of the time by night, and part by day, it would be service within the meaning of the statute, as we think, at a station continuously operated night and day.

The 13-hour provision relates to situations where the place of duty is operated only during the daytime. The service at Amherst and Arlington was not within the terms of the 13-hour provision, because manifestly the stations were operated, during the period of service in question, partly by day, and, as the time was March and May, something like 3 hours into the night as night is viewed under the standard division of time as between day and night, and by the commonly accepted understanding as to what the words "night" and "day" mean. Therefore, not being within the terms in respect to stations operated only during the daytime, the service in question would fall into the 9-hour prohibited class, or that part of the statute fails in its purpose.

This provision as to continuous operation night and day has been well reasoned about in two of the Circuit Courts of Appeals—first, in the Fourth Circuit, in United States v. Atlantic Coast Line R. Co., 211 Fed. 897, 128 C. C. A. 275, and again, in the Sixth Circuit, in United States v. Grand Rapids & I. Ry. Co., 224 Fed. 667, 140 C. C. A. 177 In both of these cases the view which we hold is fully sustained.

The substance and sum of the cases in the Fourth and Sixth Circuits is clearly and pointedly set forth in a brief concurring opinion by Judge Woods in the case in the Fourth Circuit, where he says:

"The defendant contends that 'continuously' means without cessation, and that the offices, etc., 'continuously operated night and day,' can only include places operated without cessation through the night and day. The context and the purpose of the statute shows that this is not the sense in which the words were used. * * * If the defendant's construction were adopted, it would cover only day offices and offices operated throughout the day and night, leaving out the offices operated during the day and into the night. * * * The statute assumes that all offices will be operated during the daytime, and for those operated during the daytime only it makes the 13-hour requirement; for those which are operated during the daytime with a continuance of operation into the night it makes the 9-hour requirement. The office at Bennettsville was in operation during the daytime, with continuance into the night, and therefore falls under the 9-hour class."

Our conclusion, in this case, is that, as the day and night service exceeded 9 hours, it was service prohibited by this public safety statute.

The judgment of the District Court must therefore be vacated, for further proceedings not inconsistent with this conclusion.

Judgment of the District Court reversed, with costs to the plaintiff in error.

STATE LIFE INS. CO. v. ALLISON.

(Circuit Court of Appeals, Fifth Circuit. November 30, 1920.)

No. 3585.

1. **Insurance ⟸455—Death in army from exploding shell held from accidental means; "bodily injury through external, violent, and accidental means."**
The death of an insured, caused by his being struck by a piece of shrapnel from an exploded shell while engaged in battle as a soldier in the United States army, *held* to have resulted "from bodily injury sustained and effected directly through external, violent, and accidental means," within the terms of the policy.

2. **Insurance ⟸455—Death by chance from hazard of occupation "accidental."**
If an accident policy contains no provision excepting such hazards, and by chance, without the design, consent, or co-operation of the insured, he is injured or killed as a result of a hazard incident to his occupation, his injury or death properly may be said to have been caused by accidental means.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.]

3. **Insurance ⟸455—Death "accidental" where chance determines the person killed.**
Though the means whereby a personal injury or death is caused were put into operation with the design or intention of injuring or killing one or more persons, if chance determines what particular person or persons are injured or killed in consequence of the use of those means, as to a person so injured or killed, without his fault, consent, or co-operation such means are to be regarded as accidental.

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

Action at law by Mrs. Carrie Daily Allison against the State Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. T. Stokely and Frank Dominick, both of Birmingham, Ala. (Stokely, Scrivner & Dominick, of Birmingham, Ala., and Chas. F. Coffin, of Indianapolis, Ind., on the brief), for plaintiff in error.

Erle Pettus, of Birmingham, Ala., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was an action by the defendant in error, the beneficiary named in a policy issued January 3, 1916, whereby the plaintiff in error (herein referred to as the insurer) insured the life of Jack Stewart Allison in the sum of $5,000, and further obligated itself as shown by the following provision contained in the policy:

"Double Indemnity.

"During the premium-paying period of this policy and excluding any time while the same may be in force as extended insurance, all premiums having been duly paid, and this policy being then in force, in the event of the death of the insured resulting from bodily injury, sustained and effected directly through external, violent, and accidental means (murder or suicide, sane or insane, not included), exclusively and independently of all other causes,

provided such death shall occur within ninety (90) days from the date of the accident, the company will pay to the beneficiary or beneficiaries hereunder, in addition to the amount otherwise due, under this policy, the sum of five thousand dollars."

The death of the insured having occurred, the insurer, after receipt by it of the prescribed notice of the death, paid $5,000, which was accepted by the beneficiary without prejudice to her claim, asserted by the suit, of the right to recover an additional $5,000 under the above-quoted "double indemnity" provision of the policy.

[1] The claim asserted by the suit was duly resisted. In the trial uncontroverted evidence was adduced to the following effect: The insured entered the United States army in the summer of 1917. He then was within the draft age and was subject to draft, but volunteered before he was called. His name was among those first drawn. He went to France with his command in the spring of 1918. He was killed in the Argonne-Meuse battle in France on October 14, 1918, the first day of that battle. He was first lieutenant of his company and was leader of a platoon engaged in that battle. In pursuance of orders he led his platoon in an advance against the Germans, who were retreating; his company being part of a force, consisting of several regiments, which was engaged in that advance. When that advance movement had been in progress about 30 minutes, the force engaged in it was held up by a German machine gun barrage. At the place where the troops of which the platoon led by Lieut. Allison was a part were so held up, German shells were being thrown over, and Allied shells, fired from a point several miles in the rear, were falling short and exploding. At that time and place, and just after Lieut. Allison had got down in a little shell hole, a piece of shrapnel from an exploded shell struck him just back of the top of his head, went through the steel helmet he had on and into his brain, killing him instantly. There was no way of determining whether it was an Allied shell or a German shell that caused his death. The policy was in force when the insured's death so occurred, all premiums having been duly paid.

The insurer excepted to the action of the court in directing a verdict in favor of the plaintiff, and to the refusal to give requested written charges, among them the following:

"Unless the jury are reasonably satisfied from the evidence that Lieut. Allison was killed by a shell fired by the American forces, you cannot find for the plaintiff."

"The court charges the jury that, even though the plaintiff's son may have been killed by an American shell, yet if he met his death while engaged in battle with the Germans, the defendant company would not be liable."

The policy contains no provision whereby the liability incurred by the insurer is affected as a result of the insured becoming a soldier or engaging in an occupation more hazardous than the one in which he was engaged at the time the policy was issued. The only exception stated in the double indemnity provision is expressed by the words, "murder or suicide, sane or insane, not included." A death of the insured, not due to murder or suicide, is covered by that provision, if it resulted from bodily injury, sustained and effected directly through external, violent, and accidental means, exclusively and independently

of all other causes, and occurred within 90 days from the date of the accident. It is not open to question that the bodily injury which resulted in the insured's death was sustained directly through external and violent means, exclusively and independently of all other causes. If those means were accidental within the meaning of that provision, the death of the insured so occurred as to be within the terms of the policy upon which the claim asserted by the suit is based.

If it was by chance, without his design, consent, or co-operation, that the insured in the policy sued on was the victim of the external and violent means whereby his death was caused, those means are to be regarded as accidental, so far as he was concerned. United States Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; Equitable Accident Ins. Co. v. Osborn, 90 Ala. 201, 9 South. 869, 13 L. R. A. 267; Campbell v. Fidelity & Casualty Co., 109 Ky. 661, 60 S. W. 492; Western Commercial Travelers Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653; Standard Life & Accident Ins. Co. v. Schmaltz, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112. Such means are none the less accidental, so far as the insured is concerned, because they were put into operation by the voluntary act of another. 4 Cooley's Briefs on Insurance, 3159. Nor are such means made other than accidental by the circumstance that one or more persons engaged or employed as the insured was when he was killed were likely to be injured or killed by such means.

[2] Experience convincingly teaches that the hazards incident to many lawful employments other than war are such that it is to be expected that some of those engaged therein will be injured or killed. If an accident policy contains no provision excepting such hazards, and by chance, without the insured's design, consent, or co-operation, he is injured or killed as a result of a hazard incident to his occupation, his injury or death properly may be said to have been caused by accidental means. While it was to be expected that some of the soldiers engaged in the military operation in which the insured was engaged when he was killed would be injured or killed, it is not to be denied that it was by chance that Lieut. Allison's person was in the path of the piece of shrapnel which caused his death. He would not have been injured or killed by that missile, but for the accidental or fortuitous circumstance that his person happened to be in its path. It was chance which determined that he was the soldier who was the victim of that stray missile.

[3] Though the means whereby a personal injury or death is caused were put into operation with the design or intention of killing or injuring one or more persons, if chance determines what particular person or persons are injured or killed in consequence of the use of those means, as to a person so injured or killed, without his fault, consent, or co-operation, such means are to be regarded as accidental within the meaning of the provision in question. Of the millions of Americans who served as soldiers in the war with Germany, comparatively few were wounded or killed in battle. Battle casualty lists, in great measure at least, disclosed results of the chances of war. Whether the injury or death of a particular soldier is a consequence of

his participation in a battle ordinarily depends on his happening to be or not to be in the path of a missile of war. It cannot well be said that the wounding or killing of any particular soldier belonging to a force going into battle is so far a natural and to be expected consequence of his so being exposed to danger as to prevent a casualty happening to him properly being regarded as within the category of accidents.

We are of the opinion that the evidence adduced required the conclusion that the death of Lieut. Allison was a consequence of an unforeseen and unforeseeable combination of fortuitous circumstances, and that the means whereby his death was effected were accidental within the meaning of the above set out provision of the policy. This conclusion is supported by the decision rendered in the case of Interstate Business Men's Accident Association v. Lester, 257 Fed. 225, 168 C. C. A. 309. Whether it was an American or a German shell which exploded near where Lieut. Allison happened then to be, it was a matter of chance or accident that it was he who was struck by a piece of it, or that any one would be struck by it. In our opinion the court did not err in ruling as it did.

The judgment is affirmed.

HOLMES v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 2, 1920.)

No. 3513.

1. **Courts ⇐337—Federal procedure follows common law.**
   In the absence of statute, courts of the United States will observe the common-law procedure in criminal cases, as modified by the law of the state in which the trial is held at the time that state was admitted into the Union.

2. **Perjury ⇐6—May be predicated on false oath to application for continuance.**
   By the common law and the law of Texas when it was admitted as a state, applications for continuance in criminal cases were required to be supported by oath, and a prosecution for perjury under Rev. St. § 5392 (Comp. St. § 10295), may be based on a false oath to such an application in a federal court in Texas, which follows that procedure.

3. **Conspiracy ⇐45—Testimony showing nonparticipation of defendant held admissible.**
   Testimony *held* material in a prosecution for conspiracy which would tend to impeach a witness for the government and to show that a defendant was not in the conspiracy.

4. **Perjury ⇐32(2)—Evidence admissible to show that defendant knew that statement would not be true.**
   In a prosecution for perjury in making false oath to an application for continuances containing statements of what would be testified to by an absent witness, evidence tending to show that defendant knew that such testimony, if given, would not be the truth, *held* admissible on the issue as to whether defendant believed his statement to be true.

5. Criminal law ⊂=1044—Admission of evidence not objected to not error, in absence of motion to strike out.

Admission without objection of evidence which was subject to be stricken out, if not subsequently connected with defendant, *held* not reversible error, where no motion to strike it out was made.

6. Criminal law ⊂=878(2)—General verdict, under indictment containing two counts, good.

Under an indictment for perjury containing two counts, both good, the verdict may be general.

In Error to the District Court of the United States for the El Paso Division of the Western District of Texas; W. R. Smith, Judge.

Criminal prosecution by the United States against George Holmes. Judgment of conviction, and defendant brings error. Affirmed.

Frank G. Morris, of El Paso, Tex., for plaintiff in error.

E. B. Elfers, Sp. Asst. U. S. Atty., of El Paso, Tex.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Plaintiff in error was convicted of perjury in making a false affidavit in support of a motion for continuance in another prosecution, reported in 267 Fed. 529, pending against himself and others, for conspiracy to steal certain arms and ammunition from the United States and to export the same without license. This affidavit contained two statements which the indictment charges were false. These statements are as follows:

(1) "That on the 2d day of February, A. D. 1919, he, the said Amado Carmono, was at the house of one Francisco Lopez, and that on said day Francisco Lopez told Amado Carmono, the said Amado Carmono being then and there about to go to San Ignacio, in Mexico, to notify for him, said Francisco Lopez, the commander of the Carranza troops or the Carranza river guards, that he, the said Lopez, had obtained for them the guns mentioned that he, said Lopez, had been asked to get, and to request said commander to send for said guns and ammunition as soon as possible, or to tell him to take said property, and that said witness, Amado Carmono, would further testify that the said Lopez told him, the said Carmono, at the said time and place, that he had obtained said guns and ammunitions for one Dick Harrell and two soldiers of the United States army, and that he had them there in his possession, since he obtained them from said parties, and that said property had been in his possession for some 10 or 12 days, and that he had held said property so long that he was getting uneasy."

(2) "That one Salvador Cano, a witness for the government, just before leaving the premises of the said George Holmes with one Dick Harrell, a codefendant of said Holmes in said cause, on the night of January 22, 1919, the said Cano admonished the said Francisco Trujillo that under no circumstances should he let the defendant Holmes know that said Dick Harrell had been at the premises of the said Holmes that night, and should not let Holmes know that he, the said Cano, had gone out with the said Harrell, and further that the said witness Francisco Trujillo would testify that he told the defendant Holmes of the fact that Cano, who was a chauffeur for the defendant Holmes, had left the premises on said night with said Harrell, and further that said witness Cano would testify that thereupon said Holmes called the said Cano into his presence and rebuked him for having people call at the house in the nighttime, and threatened to discharge said Cano if his conduct was repeated."

The affidavit also alleged that Lopez and Cano would appear as witnesses for the government.

The first count of the indictment alleges that the first of the above statements was material, in that it would discredit the testimony of Lopez, and operate to procure a continuance of the conspiracy case. It was further alleged that the second statement above quoted was material, in that Cano would testify to the commission of certain overt acts by plaintiff in error in furtherance of the conspiracy, and would deny he had been rebuked or admonished by plaintiff in error.

There is practically no difference in substance between the two counts of the indictment. The matters set up in the first count were pleaded in the second count by reference, and their materiality was alleged to lie in the fact that plaintiff in error would thereby be enabled to procure a continuance of the prosecution pending against him. Carmono and Trujillo were present at the trial of plaintiff in error and his codefendants upon the charge of conspiracy, but were not called upon to testify.

It is not contended here that the evidence was insufficient to sustain the indictment, and therefore it becomes unnecessary to state what it was. The assignments relate wholly to the sufficiency of the indictment, and to the admissibility of certain evidence admitted over the objection of plaintiff in error.

[1] 1. It is contended that the indictment charges no offense against the laws of the United States. The basis of this contention is that an oath or affidavit in support of an application for continuance is not required by any law of the United States in a criminal case, and therefore that the fact that such application was sworn to is immaterial. It is true, of course, that section 914 of the Revised Statutes (Comp. St. § 1537), which conforms the federal practice to that of the state in which the trial is held, has no reference to criminal cases. Perjury must be based upon a law of the United States authorizing an oath to be administered. Revised Statutes, § 5392 (Comp. St. § 10295). There is no statute of the United States requiring that a motion for continuance be supported by oath or affidavit. However, it by no means follows that federal courts are without authority of law to require an oath or affidavit in support of a motion for continuance. In the absence of statute, the courts of the United States will observe the common-law procedure in criminal cases, as modified by the state in which the trial is held, and as of the date that state was admitted into the Union. U. S. v. Reid, 12 How. 361, 13 L. Ed. 1023; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429.

[2] It is conceded that, at the time Texas became one of the states of the Union, its laws required applications for continuance to be supported by oath. And it was so at common law. Reg. v. Savage, 1 C. & K. 75. Smith v. Barker, Fed. Cas. No. 13,010. This rule was adopted by this court, with reference to the competency of evidence, in the case of McCoy v. United States, 247 Fed. 861, 160 C. C. A. 83, and is clearly applicable to motions for continuance. The demurrer to the indictment and the motion in arrest of judgment were therefore properly overruled and denied.

[3] 2. Plaintiff in error next insists that the testimony of the absent witnesses, Carmono and Trujillo, were immaterial to the issue in-

volved in the prosecution for conspiracy. In conspiracy cases, testimony usually takes a wide range, and may be material, although it is not directed to the main issue. Tested by this rule, the testimony, which plaintiff in error stated he expected Carmono to give, would be material, not only because it would impeach Lopez, but also for the reason that it would tend to exculpate plaintiff in error. The purported testimony of the absent witness Trujillo would have been material, in view of the fact that it would tend to show that plaintiff in error was not in the conspiracy to steal or export arms and ammunition, and that Cano was acting in furtherance of the conspiracy without the knowledge or consent of plaintiff in error.

[4] 3. At the trial of the case at bar, Francisco Lopez testified that plaintiff in error told him to hide the arms and ammunition and some clothing which had been stolen from the government. This testimony was objected to on the ground that original evidence was inadmissible, and that the evidence should have been limited to a denial of the conversation set forth in the affidavit for continuance. It must be remembered that plaintiff in error's belief in the truth of the statement contained in the affidavit was one of the issues involved. The testimony was admissible, because it tended to show that the statement contained in the affidavit was false, and that consequently plaintiff in error had no reason to believe, and therefore did not believe, it was true, or that Carmono would testify that it was. Lopez's testimony was limited, by the court in its charge to the jury, to the question of whether plaintiff in error believed that statements contained in the affidavit were true.

[5] 4. Testimony was admitted to the effect that plaintiff in error's wife furnished the witness Trujillo with money to go to Mexico. Plaintiff in error did not immediately object to the question eliciting this testimony. It was properly admitted, but was subject to be stricken upon failure to show, by other evidence, either that plaintiff furnished the money, or knew that it had been furnished. Whether this evidence was afterwards connected up is not made to appear, because the bill of exceptions does not purport to bring up the entire evidence. Neither would error be made to appear if the entire evidence were before us, in the absence of a further showing that a motion was made to strike out this objectionable testimony at the close of the evidence.

5. It is assigned as error that the district attorney asked the plaintiff in error, on cross-examination, whether he testified in the conspiracy case. The question should not have been asked, in view of the fact that the court had ruled out a similar question twice before. It was highly improper for the district attorney to continue to ask questions which, in the view of the court, were objectionable. However, the objection to the question was sustained, plaintiff in error did not make any motion, or apply to the court to do anything more, and therefore there is nothing in the record upon which an assignment of error can be based.

[6] 6. The verdict of the jury did not specify either count of the indictment, but was general; and this is the final assignment of error.

The prosecution was for the one offense of perjury, and the law applicable to general verdicts upon indictments charging several offenses is not in point, where there is one good count and the offense is single. In such a case a general verdict would be referred to the good count. C. J. 1106; Johnson v. United States, 215 Fed. 679, 131 C. C. A. 613, L. R. A. 1915A, 862. And where both counts are good, and the charge is single, the verdict may be general.

Reversible error is not made to appear by any of the assignments of error, and the judgment is therefore affirmed.

BETHLEHEM SHIPBUILDING CORPORATION, Limited, v. WEST & DODGE CO.

(Circuit Court of Appeals, First Circuit. December 1, 1920.)

No. 1467.

1. **United States ⇐73—Provision of Naval Appropriation Act as to prices to be paid for material held not to relate to prices to be paid by a contractor.**
The provision of Naval Appropriation Act March 4, 1917, authorizing the Navy Department to build or contract for the building of vessels, that "no purchase of structural steel, ship plates, or machinery shall be made at a price in excess of a reasonable profit above the actual cost of manufacture," applies only to purchases made by the government, and has no relation to prices to be paid by a contractor with whom the department has contracted for the construction of vessels.

2. **Statutes ⇐219—Construction by executive department followed.**
The courts will follow the construction placed upon a doubtful act of Congress by the departments charged with its execution.

3. **United States ⇐70(1)—Contract for building of naval vessels construed.**
Under a contract with the Navy Department for the construction of 40 destroyers on a cost plus profit basis, providing that prices paid by the contractor for materials, machinery, and equipment should be subject to approval of the Compensation Board created by the department, where the contractor contracted for oil burners for the 40 vessels at a price approved by such board, and the oil burners had been made and delivered, and most of them paid for, the contractor *held* not relieved from liability for the remainder of the contract price, in the absence of fraud, because the Compensation Board, a year after its approval of the price to be paid, withdrew such approval and fixed a substantially lower price.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Action at law by the West & Dodge Company against the Bethlehem Shipbuilding Corporation, Limited. Judgment for plaintiff, and defendant brings error. Affirmed, subject to right of defendant to amend answer.

For opinion below, see 266 Fed. 557.

Frederic B. Greenhalge, of Boston, Mass. (William J. Nolan and Currier & Young, all of Boston, Mass., on the brief), for plaintiff in error.

Ralph M. Smith and Charles F. Choate, Jr., both of Boston, Mass.

(Charles P. Curtis, Jr., of Boston, Mass., on the brief), for defendant in error.

Pickens Neagle, of Washington, D. C., Acting Sol. of Navy Department, amicus curiæ.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. Judgment was rendered against the plaintiff in error, hereinafter called the defendant, in the District Court of the United States for the District of Massachusetts, in an action brought against it by the defendant in error, hereinafter called the plaintiff, to recover the price which had been fixed by the Compensation Board of the Navy Department for oil burners, oil burner cones, and oil burner holders for five torpedo boat destroyers which had been delivered in accordance with the defendant's order. The plaintiff filed a demurrer to the defendant's answer, which was sustained by the District Court, and this is assigned as error.

The following facts are admitted by the answer:

The defendant, on the 6th day of December, A. D. 1917, entered into a written contract with the United States to construct for it 40 torpedo boat destroyers at San Francisco and Alameda, Cal.

The contract was authorized by the Naval Appropriation Act of March 4, 1917 (39 Stat. 1195), and by the Urgent Deficiency Act of October 6, 1917 (40 Stat. 345). The former act contains the following provision:

"No purchase of structural steel, ship plates, or machinery shall be made at a price in excess of a reasonable profit above the actual cost of manufacture."

The contract provided that the government should pay for the vessels upon a cost plus profit basis, but that the total profit to be paid to the defendant for each boat was not to exceed $135,000, if its actual cost should equal or exceed the estimated cost of $1,500,000, and should the actual cost be less than the estimated cost the defendant was to be allowed as his profit, in addition to $135,000 on each boat, one-half the amount by which the actual cost of each fell short of the estimated cost.

It also provided that a compensation board, created by the Navy Department, should ascertain, estimate, and determine the actual cost of each boat, and that it should also approve orders, prices, and awards made by the defendant for materials, machinery, and equipment under the following provision:

"The contractor shall use every endeavor to obtain the materials, machinery, equipment, appurtenances, supplies, etc., under this contract at the lowest possible prices, and shall in no case knowingly pay higher prices than required by the existing market conditions nor higher prices than are or would be paid for similar materials, etc., purchased at the same time and under like circumstances and conditions for other work in progress in the yard. Specifications and guaranties of all materials, machinery and equipment, and the agreements under which such are purchased shall be subject to the approval of the department, and orders, prices, and awards shall be subject to the approval of the Compensation Board."

Another provision authorized the contractor to place special contracts for any parts or materials on a cost plus profit basis.

The defendant ordered from the plaintiff oil burners, oil burner air cones, and oil burner holders at the price of $3,350 per boat, "subject to the approval of the Compensation Board."

The Compensation Board took up with the plaintiff the matter of price, and procured a reduction from $3,350 to $3,223 per boat, and upon April 13, 1918, sent the following communication to the defendant:

"April 13, 1918.

"To Bethlehem Shipbuilding Corporation, Fore River Plant, Quincy, Mass.
"Subject: Purchase Order F-1211-17 on West & Dodge for Oil Burners.
"1. It being understood that the subcontractor is willing to accept a price of $3,223 per boat for oil burners covered by the above order, this office herewith gives formal approval of the above order at that price, $3,223 per boat.
"W. R. Main, by direction."

On April 16, 1918, the defendant sent the following communication to the plaintiff:

"April 16, 1918.

"West & Dodge Company, 167 Oliver Street, Boston, Mass.—Gentlemen: We are pleased to advise you that we are authorized to make final award of Union Plant's purchase order F-1211-17 by the Compensation Board, Navy Department, Washington, D. C., and that you may proceed with this order at $3,223.00 per boat.
"Very truly yours, Bethlehem Shipbuilding Corp'n, Ltd.
"By H. P. Readmon, Acting Purchasing Agent."

The plaintiff delivered to the defendant the oil burners, oil burner cones, and oil burner holders called for by the above order for 40 destroyers, and was paid by the defendant for all that it furnished for 35 at the price which had been approved by the Compensation Board.

On or about March 1, 1919, subsequent to the delivery by the plaintiff of the oil burner equipment for all the destroyers, and the payment by the defendant for all that had been furnished for 35, the defendant was notified by the Navy Department that it had investigated the plaintiff's cost of manufacturing this oil equipment, and that the price of $3,223 per boat was in excess of a reasonable profit above its cost, and that it rescinded its approval of this price, and gave its approval for the price of $1,915 per boat, plus the sum of $267.95, the cost of certain bronze castings for each.

In substance the answer sets up as a defense that, because the government's contract with the defendant was made under the act of Congress of March 4, 1917, the subcontract made by the defendant with the plaintiff is subject to the provision in that act which has been quoted; and, although the subcontract was not expressly made upon a cost plus profit basis, as the defendant had a right to make it, if authorized by the department under the terms of the defendant's contract, yet it was impliedly made upon this basis, and it alleges upon information and belief, afforded by the notice of the department, that the price of $3,223 per boat was in excess of a reasonable profit above the actual cost to the plaintiff for the manufacture of said oil burner equipment and that the price of $1,915 per boat, plus $267.95, the cost of bronze

castings per boat, would yield at least a reasonable profit above the cost to plaintiff for the manufacture and delivery thereof; that the alleged contract is illegal and of no force and effect; that, as it has already paid the plaintiff the sum of $112,805, and the whole cost for the oil burner equipment for the 40 torpedo boats, plus $267.95, the cost of bronze castings per boat, was only $87,318, on the basis of $1,915 for the oil equipment per boat, as fixed in the order of the Compensation Board rescinding its former approval, it owes the plaintiff nothing.

[1] The questions raised and which have been argued are: First, whether, because of the provision in the act of Congress of March 4, 1917, the contract between the plaintiff and the defendant was impliedly upon a cost plus profit basis, or a contract between the defendant and plaintiff under the quoted provision of the defendant's contract, which contemplates the purchase of material, subject to approval as to terms and specifications by the department and as to prices and awards by the Compensation Board. Second, whether, after the price at which the plaintiff should furnish the oil burner equipment for the 40 torpedo boat destroyers had been approved by the Compensation Board, and the plaintiff had furnished all the contract called for, this board could reconsider its former approval and fix a lower price, which would be binding upon the plaintiff, in the absence of any allegation of fraud or false representation on its part.

The Naval Appropriation Act of March 4, 1911 (36 Stat. 1289), contained the same provision as that found in the act of March 4, 1917, and in reply to a letter from the Secretary of the Navy asking for a confirmation of his impression that this provision in the act of 1911 did not apply to the purchase of structural steel, etc., which was made by a contractor, the Attorney General of the United States stated:

"The provision of the statute in question only applies to 'the purchase of structural steel, ship plates, armor, armament or machinery from any persons, firms or corporations,' etc. The subject being dealt with is the purchase by the government of structural steel, etc., from persons, firms, or corporations, and, of course, the purchase pursuant to the provision of law. The statute does not concern itself with the purchase of materials, etc., by those persons, firms, or corporations referred to in the statute from others with whom they may deal. I therefore confirm your impression that it is only purchases made directly by the department itself which are comprehended within this provision." 29 Opinions of Attorneys General, 44.

The Navy Department accepted this construction of this provision of the act and has acted in accordance with it.

[2] It has been repeatedly held that the courts will follow the construction placed upon a doubtful act of Congress by the departments charged with its execution. See Brown v. United States, 113 U. S. 568, 5 Sup. Ct. 648, 28 L. Ed. 1079; United States v. Alabama, etc., R. R. Co., 142 U. S. 615, 621, 12 Sup. Ct. 306, 35 L. Ed. 1134; United States v. Moore, 95 U. S. 760, 24 L. Ed. 588; Hahn v. United States, 107 U. S. 402, 2 Sup. Ct. 494, 27 L. Ed. 527. We think this construction is right, and that this provision of the act cannot be read into the contract between the plaintiff and the defendant.

The defendant in its brief does not seriously contest this construction, but claims that, in the matter of the purchase from the plaintiff,

the defendant acted as the agent of the United States. We cannot accept this view.

[3] The contract in terms provides that the defendant shall act as agent for the department in the making of improvements and providing additional facilities at the Risdon Iron Works and also that it should act as the agent of the United States in purchasing steel castings from the Columbia Steel Company, and also in contracting with the Worthington Pump & Machinery Corporation for pumps needed for the vessels; but it does not provide that the defendant shall act as the agent of the government in the purchase of other materials, machinery, and equipment.

As to these, the contract provides that the defendant may make subcontracts for their purchase upon a cost plus profit basis, with the approval of the department, or that they may be purchased subject to the approval of the department as to specifications and guaranties and as to price by the Compensation Board.

With the approval of the Navy Department the defendant ordered the oil burners and equipment of the plaintiff and submitted the order, together with the price to be paid, for the approval of the Compensation Board, as required by its contract. This board took up the matter of price with the plaintiff and secured a reduction in the price quoted by the plaintiff from $3,350 to $3,223 per boat, and the Compensation Board thereafterward gave its formal approval of that price and of the order, of which the plaintiff was notified by the defendant.

There is no allegation in the answer that there was any fraud practiced by the plaintiff or any false representations made by it which induced the Compensation Board to give its formal approval of the price of $3,223 per boat. The plaintiff had a right to rely upon the price which was approved by the board and to undertake the fulfillment of the contract with the understanding that the price which had been approved should be paid to it. The oil burners and the oil burner equipment had been delivered by the plaintiff for all the 40 torpedo boat destroyers, and nearly a year had elapsed since the Compensation Board had approved the price fixed in that contract before the plaintiff was notified that the department had rescinded its formal approval and fixed a largely reduced price from that on which the plaintiff had a right to rely when it furnished the equipment; but the obligation of the defendant had become fixed, and, in the absence of any allegation of fraud or false representation, we see no reason why it should not be bound by it; nor do we think such action of the department can change its obligation.

While the United States is not a party to this action, the Navy Department, through its solicitor, was heard by us in argument and has filed a brief. The substance of the contentions made is that the United States is interested in this controversy, because of the possible bearing of the judgment against this defendant upon claims presumably to be made by the defendant against the government for reimbursement in full. Among other statements made in the brief is the following:

"If the government is denied the right of inquiry and revision, if necessary, on the ground that it has once approved the price, we would be led to the in-

admissible proposition that a wily, unprincipled contractor, that could once get a dishonest price approved on any sort of false representation, would be immune, and his robbery would have the sanction of law."

It is hardly necessary to observe that, if the department is correct in its contention that the approval of the Compensation Board was grounded upon misrepresentations erroneously or fraudulently made by the plaintiff, and the defendant has failed to set up in its answer all defenses fairly open to it, a judgment against it cannot be the ground of any valid and enforceable claim by it against the government. We think, therefore, that leave should be given to the defendant, if it so elects, to amend its answer. Without such amendment, the judgment below must be affirmed.

The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the defendant in error.

HINES, Director General of Railroads, v. LOGAN.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1920.)

No. 3507.

1. **Commerce ⟸27(8)—Inspector and repairer of cars held employed in "interstate commerce."**
   A railroad employee, who, when injured, was engaged in inspecting and repairing cars in a yard, some of which cars were being prepared for use in interstate and some in intrastate commerce, *held* employed in "interstate commerce," within the meaning of Employers' Liability Act, § 1 (Comp. St. § 8657).
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. **Master and servant ⟸286(32)—Railroad's negligence as to car repairer held question for jury.**
   Evidence that an employee engaged in inspecting and repairing cars in a railroad yard was killed while passing through an opening of 3 or 4 feet left between two cars standing on a track for the convenient passage of employees, which opening was closed by the striking against one of the cars of moving cars, and that no warning of the approach of the moving cars was given as required by custom, *held* to warrant submission to the jury of the question of the employer's negligence.

3. **Master and servant ⟸226(1)—Risk of employer's negligence not assumed.**
   An employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work, and does not assume a risk attributable to the employer's negligence until he becomes aware of it.

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

Action at law by Martha L. Logan, administratrix of the Estate of John R. Logan, deceased, against Walker D. Hines, Director General of Railroads, operating the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. G. Smith, of Birmingham, Ala., for plaintiff in error.
George P. Bondurant, of Birmingham, Ala., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This is a suit, under the Federal Employers' Liability Act (Comp. St. §§ 8657–8665), to recover damages for the death of an employee of the Alabama Great Southern Railway Company, brought by the administratrix of the decedent against the Director General of Railroads. The decedent, John R. Logan, was an employee of the defendant, engaged in inspecting and repairing cars in a railroad yard, adjacent to the terminal station in Birmingham, Ala. Cars used in both intrastate and interstate commerce were in the yard at the time of Logan's death, awaiting his attention. Some of them were being made ready for journeys into several adjoining and nearby states. Logan was on duty, and, as he was in the act of passing through an open space, of 3 or 4 feet, between two cars on one of the railroad tracks, was killed by one of these cars being forced against the other by the impact from a third car, which, though not coupled up to the car next to it, was being switched and placed upon the same track. There was a verdict for plaintiff, and defendant sued out writ of error.

Defendant assigns error upon portions of the trial court's charge to the jury. Exceptions do not appear to have been noted to any charge, and therefore the assignments based thereupon are not open for consideration.

Error was, no doubt inadvertently, assigned upon the denial of defendant's motion for a new trial. Henderson v. Moore, 5 Cranch, 11, 3 L. Ed. 22.

The remaining assignments of error raise the questions: (1) Whether plaintiff's decedent was engaged in interstate commerce; (2) whether there was sufficient proof of negligence; and (3) whether plaintiff's decedent assumed the risk of the accident which resulted in his death.

[1] 1. We quote from Pedersen v. Railroad Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153:

"Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference, so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"

In the later case of Kinzell v. Chicago, etc., Railway Co., 250 U. S. 130, 39 Sup. Ct. 412, 63 L. Ed. 893, the Supreme Court said:

"It is also settled that the doing of work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the act."

At the time of his death Logan was on his way either to inspect or repairs cars, some of which were admittedly being used in interstate commerce, and he was therefore engaged in the performance of a duty that was required of defendant. He was inspecting, and, wherever necessary, repairing, cars which were being made ready for departure to several states, and was none the less engaged in interstate

commerce, although it was also his duty to inspect and repair cars which were being used wholly within the state of Alabama.

[2] 2. Defendant moved for a peremptory instruction in his favor upon the ground that there was insufficient evidence of negligence to warrant the submission of the case to the jury. The trial court would have committed plain error if it had refused to submit that issue. There was evidence to show that a custom existed to give warning, either by ringing the bell or blowing the whistle, of the approach of the train of cars to the point on the track where Logan was killed. Several witnesses testified they heard no warning, and no witness testified that any was given. There was also evidence that the space or opening, the closing of which resulted in Logan's death, was left there for the convenience of employees such as he was, and that there was a custom never to close it without warning. All the witnesses agreed that another custom in vogue at this particular place was that a lookout should be on the car nearest this space or opening, for the purpose of warning employees in case of danger. The trial court very ably and exhaustively charged the jury upon the facts, and left to them the questions of whether such customs as those mentioned were in existence, and whether defendant failed in its duty to observe them, and fully protected every right of the defendant by further charging the jury that plaintiff, notwithstanding evidence as to customs and failure to give warnings or provide a lookout, was guilty of contributory negligence in not being sufficiently alert to provide against the accident which ensued. In addition to the acts of negligence above set forth, it was shown, without conflict, that the opening left for employees to pass through was closed, and Logan was killed by the impact from the car which was being switched in, and that it was uncoupled from the train of cars of which it formed a part. The jury was amply justified in finding for plaintiff from this circumstance, taken in connection with the admitted knowledge of the switching crew that the opening existed for the purpose already stated. C. & O. Ry. Co. v. De Atley, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016; C. & O. Ry. Co. v. Proffitt, 241 U. S. 462, 36 Sup. Ct. 620, 60 L. Ed. 1102.

[3] 3. The court refused to give a peremptory instruction in favor of defendant, based upon the ground that plaintiff's intestate assumed the risk of being injured or killed. There was no error in this ruling. In C. & O. Ry. Co. v. De Atley, supra, it was said:

"According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

From C. & O. Ry. Co., v. Proffitt, supra, we also quote the following:

"And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to

the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work), and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it. The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment but which result from the employer's negligence."

At defendant's request the court charged the jury:

"The court charges the jury that an employee of a railroad assumes the risk of the ordinary dangers of his occupation, as well as those that were known to him, or so clearly observable that he would be presumed to know them, and there can be no recovery for injuries resulting from such dangers as naturally arise from the ordinary duties of his occupation.

"The court charges the jury that if plaintiff's intestate knew, or by the use of ordinary care should have known, of the risks and hazards that resulted in his injury or death, or if his injury and death were caused by the ordinary dangers of his occupation, there can be no recovery in this action, as plaintiff's intestate assumed such risk, although he did not assume any peril due to the negligence or carelessness of the defendant, of which he could not learn by the use of ordinary care."

These charges sufficiently protected the defendant's rights upon the question of assumption of risk. The additional charges requested upon that subject were in conflict with the foregoing quotations from the Supreme Court.

Error is not made to appear by any of the assignments, and the judgment is affirmed.

LIBERTY BANK & TRUST CO. et al. v. MARSHALL et al.

(Circuit Court of Appeals, Fifth Circuit. December 4, 1920.)

No. 3573.

Wills ⇐731—Lien for debt of legatee lost by transfer of legacy to trustee.

The transfer by executors, under an order of the probate court, of a legacy to themselves as testamentary trustees for the legatee, *held* to extinguish any right they may have had as executors to a lien on such legacy, by way of retainer or set-off, on account of a debt due from the legatee to the estate.

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

In the matter of A. M. Marshall, bankrupt. The Liberty Bank & Trust Company and another, executors of the will of A. M. Martin, deceased, appeal from an order of the District Court. Affirmed.

E. S. Elliott and Geo. W. Owens, both of Savannah, Ga., for appellants.

John G. Kennedy, of Savannah, Ga., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Alfred M. Martin, of Hampton county, S. C., died on May 13, 1910, testate; his will being admitted to probate

in Hampton county on July 11, 1910. The Oglethorpe Savings & Trust Company and the Germania Bank (now Liberty Bank & Trust Company) were named therein as executors and duly qualified as such. After certain specific bequests, he provided for the division of the residue of his estate into six equal parts, one of which he devised to the said Germania Bank (now Liberty Bank & Trust Company) and Oglethorpe Savings & Trust Company, as trustees, for his grandchildren, Alfred Martin Marshall and Sam Fair Marshall, to apply as much of the income from the same as may be necessary for their education and maintenance until they attained majority, and thenceforth to pay each of them one half of said income for life, or on the death of either without issue to pay the whole of the income to the survivor, and on the death of either with issue to pay his respective share to such surviving child or children who shall have attained the age of 21 years, or should have married and left issue.

Alfred Martin Marshall was of age and doing business at Savannah, Ga. On January 5, 1911, he executed to the Germania Bank, to secure an indebtedness then owing to it, and any further advances which it might make to him, an assignment of all his right, title, and interest as legatee and distributee under the will and codicils of said Martin. Martin had indorsed a number of notes made by Marshall. After his death the executors of Martin paid to the Germania Bank three of these notes, aggregating, with interest and protest fees, $55,-107.59, and also a balance of $5,534.38 upon a note of Marshall then held by the Oglethorpe Savings & Trust Company, which was secured by a collateral note indorsed by Martin.

During 1912 the executors demanded from Marshall a transfer of his interest in the estate, in order to secure these debts so paid by them. The testimony was in conflict as to whether any actual agreement to make an assignment was made. As a matter of fact, no assignment was ever executed. On June 23, 1913, the executors filed suit on these demands against Marshall in the city court at Savannah. On petition of the executors, a division of the estate of Martin, except a very small part, which was not ripe for division, was, on November 3, 1913, ordered by the probate court of Hampton county, and the executors were ordered and directed to transfer to themselves, as trustees for the various beneficiaries under said will and codicils, the shares of said stocks and bonds allotted by said division to each of the said beneficiaries, and it is agreed in this case that all stocks so assigned to said executors, as trustees, under the bequest under which Marshall was interested, have been transferred to said Liberty Bank & Trust Company and the Oglethorpe Savings & Trust Company as testamentary trustees, except some stock in the People's Savings & Loan Company, still in the name of A. M. Martin, and that the bonds were payable to bearer.

On March 25, 1914, said Marshall filed a petition in bankruptcy in the United States District Court for the Southern District of Georgia at Savannah, Ga. The executors filed a proof of debt for $60,641.97, besides interest, founded on the notes of Marshall paid by them as aforesaid, and claimed a priority lien and a right to apply the income

due and to become due to said Marshall from said estate to said debt, subject to the assignment previously made by said Marshall to said Germania Bank. The claim of priority, set up in said proof, was resisted by the trustee in bankruptcy.

The entire interest of Marshall in said legacy had been sold as a part of the assets of the bankrupt estate, and the contest was over the application of the proceeds of said sale. The matter was heard before the referee, who found the facts aforesaid, and who found that after November 3, 1913, pursuant to the order of said probate court of Hampton county, the Germania Bank (now Liberty Bank & Trust Company) and the Oglethorpe Savings & Trust Company held and managed the stocks and bonds as testamentary trustees, collecting the income, rendering statements and accounts every six months to A. M. Marshall for his share, charging him up with their commissions as trustees, but applying the net income to payments from time to time on the personal debt of Marshall to the Germania Bank for the loans made to him in its capacity as a bank, and he held, in accordance with the findings of fact, that the said executors of Martin were not—

"possessed of any lien, legal or equitable, on the equity of the bankrupt's estate arising from the legacy to the said A. M. Marshall, which was transferred to the testamentry trustees under the order of the probate court of Hampton county, S. C., of November, 1913, nor any legal or equitable lien in the proceeds of the sale of the same as an asset of this bankrupt's estate and now in court for distribution. The claim of the said executors is adjudged to rank only as a common claim without priority."

The District Court, on exceptions thereto, sustained the finding of the referee, holding that in this case the right of retainer or set-off in the executors was lost by the assent of the executors to the legacy and its formal delivery into the possession of the trustees as legatees. As to the claim that the bankrupt had promised to assign to them his legacy as security for the debt, the court held that the executors had accepted the debtor's promises to pay certain sums at stated times, instead of insisting on the assignment, and had actually sued Marshall on the debt prior to the division of the estate and the delivery of the legacy to themselves as trustees; that the bankruptcy did not occur until after an accounting by the trustees to Marshall of the income in their hands as trustees.

The evidence as to the alleged promise by Marshall to execute a transfer was conflicting, and, considering the entire evidence, we think there is sufficient to sustain the findings of the District Court. Indeed, the brief of appellants states as the issue in question on this appeal:

"Whether, by virtue of the executors having transferred to themselves as trustees the property in question, they lost the right of lien and set-off, which they, as executors, were entitled to as against the legatee."

That the right of the executors to set-off against a legacy a debt due by a legatee to the testator is not strictly a right of set-off, but a right of retainer of the legacy, is settled by the decisions of the state of South Carolina, where this estate was being administered. Sartor v. Beaty, 25 S. C. 293. The payment by order of court of the legacy by

the executors to themselves, as trustees of the beneficiaries, vests the legacy in possession of the legatees, and terminates the possession of the executors. Henry, Executor, etc., v. United States, 251 U. S. 393, 395, 40 Sup. Ct. 185, 64 L. Ed. 322.

When, therefore, in November, 1913, the securities representing the corpus of this legacy and the income derived therefrom was by order of the probate court delivered upon a division of the testator's estate to the trustees, to whom this share was bequeathed in trust, the possession of the executors was gone, and the right of retainer or set-off terminated. Indeed, the claim here made is not one of set-off against a demand due from the executors. As such executors they have accounted for and administered this portion of their testator's estate. They, as executors, are seeking now to assert a lien against funds derived from the sale of the interest of this bankrupt in a trust estate then in the hands of the trustees, to whom it had been previously fully delivered by the executors.

That this extinguishment of their possession as executors was understood by them is evidenced by their recognition of the assignment made by Marshall to the Germania Bank and the payment of the income of Marshall by the trustees to the Germania Bank as his assignee. If the executors still had a right of set-off or retainer, it would have been superior to the rights of any assignee of the legatee. Sartor v. Beaty, 25 S. C. 293.

The judgment of the District Court is therefore affirmed.

PENNSYLVANIA R. CO. v. WEBER.

(Circuit Court of Appeals, Third Circuit. December 10, 1920.)

No. 2568.

Commerce ⇐98—On second trial after reversal of decree in suit to enforce award of Interstate Commerce Commission, evidence not presented to the commission may be considered.

Where a judgment against a railroad company in a suit to enforce an award of damages by the Interstate Commerce Commission for discrimination was reversed by the Supreme Court on the ground of the insufficiency of the evidence to sustain the award of the commission, and the case remanded for a new trial, the court on the second trial may properly admit additional evidence, not only such as was taken before the commission, but the testimony of new witnesses.

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

Action by Isaac C. Weber, surviving partner of W. F. Jacoby and Isaac C. Weber, trading under the firm name of W. F. Jacoby & Co., against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 263 Fed. 945. See, also, 242 U. S. 99, 37 Sup. Ct. 49, 61 L. Ed. 165.

Francis I. Gowen, of Philadelphia, Pa., for plaintiff in error.
William A. Glasgow, Jr., of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. This writ of error involves the correctness of the rulings and charge of the court below on a second trial of the cause. We have had the benefit of full arguments by the able counsel concerned and after due consideration, we have reached the conclusion the court below committed no error and its judgment should be affirmed. As all questions involved are stated and disposed of by the court below in its opinion printed in full in 263 Fed. 945, refusing a new trial, and as it fully sets forth the facts and questions involved, and sufficiently states reasons justifying the court's action, we restrict ourselves to affirming the case on such opinion, simply noting these facts.

The suit was to recover an award of $21,094.39, being damages awarded the plaintiff by the Interstate Commerce Commission for alleged unlawful discrimination in car shipments. On the former trial a verdict was rendered against the defendant for such award and interest. On entry of judgment thereon, a writ of error was sued out by the defendant to this court. Thereupon it, being in doubt as to certain questions, certified the same to the Supreme Court for its opinion. That court issued a certiorari to this court, which brought up the entire record, where the judgment of the court below was finally reversed in an opinion reported at 242 U. S. 99, 37 Sup. Ct. 49, 61 L. Ed. 165. In its opinion, the Supreme Court said:

"It is urged that the testimony before the commission is not all in the record, and that, for aught that appears, the commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the commission. But it is difficult to reach the conclusion that the commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentages shown in the tables except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The commission might have approximated the same result by using other and legal means to ascertain the damages sustained; but, when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the company was entitled to the specific request upon this subject submitting the matter to the jury. For error in refusing to give this request in the charge, the judgment of the District Court must be reversed, and the case remanded to that court for a new trial."

It will be noted that on this former trial the only evidence before the court to support the award of the commission was a certain car distribution sheet known as Exhibit 10, which the Supreme Court, as stated in the extract quoted, held did not justify the award.

But on the present trial the plaintiff produced certain testimony which, while it had been given before the commission in its proceeding, had not been offered or considered by the court in the former trial. He also furnished the testimony of witnesses on the stand whose tes-

timony had likewise not been given in the former case. All this additional proof, the court, on such second trial, submitted to the jury, with instructions as to it, and also to the insufficiency of Exhibit 10, standing alone, to support the award, as follows:

"The report of the commission has been offered in evidence before you, gentlemen, and the law makes it prima facie evidence of the fact that the plaintiff has been damaged and the amount of damages which the commission awards. 'Prima facie evidence' means that if it is offered in evidence, and there is no testimony to contradict it, the jury are satisfied in taking it as sufficient evidence of the facts therein stated. I am speaking now of the report awarding damages. But the fact that it is prima facie evidence does not preclude it from attack, and the defendant has offered its evidence, and has argued to you, and you are instructed as a matter of law, that if the finding of the commission was based on that percentage derived from those tabulations, and there is no other sufficient evidence before the commission to establish these amounts, that the finding of the commission was an erroneous one, and the jury are justified in disregarding the report of the commission as evidence. It is a question for you gentlemen, therefore, to determine. There is other evidence before the commission which you have a right to take into consideration. There is evidence to the effect that some of the mines in that district, which were not operating at certain times, were nevertheless receiving cars. There is evidence to the effect that operators who were not demanding cars were receiving cars, having cars allotted to them. There is evidence to the effect, and it is so stated in the commission's report, that the defendant's employees were instructed to make a distribution of at least 500 cars daily to the Berwind-White Coal Company. There is evidence based on the testimony of Mr. Hutchinson, general manager of the Pennsylvania Railroad Company, to the effect that these 500 cars were distributed to other regions, and that additional cars were sold to the Berwind-White Company, amounting to 1,000, and to another company amounting to 700, and to another company amounting to 500, aggregating 2,200 which were distributed to another region.

"Under this state of facts the plaintiff contends, and has offered evidence to show, that if those coal cars had been distributed properly it would have made a difference of 640 cars distributable to that Tyrone region, and they have offered evidence to show that it would have made a difference in distribution of 640 coal cars over the whole Pennsylvania system per day, which consists of, I think, 9 or 10 regions, and that the quota distributable to the Tyrone region would thereby have been increased 67 cars daily, or about that. In determining whether the commission had before it evidence upon which it could base a finding of damages of $21,094.39 against the defendant and in favor of the plaintiff you will take into consideration all of the testimony that was offered before the commission, and you will also take into consideration in connection with the commission's report in case you find it is sustained by any evidence on which the commission could have found such a finding, or in which in your opinion such a conclusion would be reached, as a matter of fact, and you will take into consideration the other testimony which has been offered by the plaintiff in this case.

"The plaintiff contends that the 67 additional daily cars would have been sufficient to have given the region cars to the full extent of their rated capacity, and the plaintiff would have gotten theirs. The plaintiff, however, is suing on the award of the commission, and you would not be justified in the case in finding any damages in favor of the plaintiff in any greater amount than the commission has awarded and if you find that the evidence before the commission is not sufficient on which to justify the finding which the commission has made, then it would be for you to consider whether there is sufficient other evidence in the case which you independently can consider to sustain this award. The court, as a matter of law, instructs you that inasmuch as the basis of the plaintiff's suit is the award of the commission, that if you find from the evidence that the amount of damages awarded by the commission is not justified under the instructions I have given you, your verdict should be for the defendant. So that, if you find for the plaintiff, it must be

because you find that there was sufficient evidence before the commission on which to base its finding, and that finding was not based on the fact that the other shippers were getting during the first period 59.9 per cent. of the rated capacity and during the second period 59.6 per cent. of their rated capacity. It is for you to determine whether there is other evidence in the case which would justify the finding of the commission of the amount which they have found in this case."

Was the court in error in receiving such additional evidence on the second trial which the Supreme Court, be it observed, awarded? We see no other reason for which a new trial would have been so ordered than to afford an opportunity to the plaintiff to furnish additional testimony. Of this testimony the trial court said, in disposing of the motion for a new trial:

"In the present trial, other evidence was introduced, embodying not only the testimony taken before the commission, but the testimony of witnesses to establish the preferential and discriminatory practices in relation to the special allotments of cars and the diversion to other divisions of the defendant's fuel cars sold to shippers. Under these circumstances, it was the duty of the court to allow all competent evidence to go to the jury and to have them determine the questions of fact, including the question as to whether there was any other evidence before the commission to sustain an amount of damages coinciding with the amount which it would have awarded if Exhibit No. 10 had been the basis of their award."

On a review of the whole case, we are of opinion that on the second trial the court charged as a matter of law, and gave full effect to what had been decided by the Supreme Court in reviewing the first trial, and that upon the changed situation which arose in the second trial it committed no error in receiving the new additional testimony and submitting it to the jury as it did.

The judgment below will therefore, as we have said, be affirmed.

TRAMMELL v. TRAMMELL.

(Circuit Court of Appeals, Fifth Circuit. December 16, 1920.)

No. 3489.

1. **Husband and wife ⟸255—Real estate bought with funds of wife her separate property.**
   Evidence *held* to support a finding that real estate, although title was taken in the name of the community, was paid for from separate funds of the wife, and thus, under the law of Texas, became her separate property.

2. **Husband and wife ⟸265—Effect of mingling community funds and separate funds of wife stated.**
   Under the law of Texas the fact that community funds are deposited with separate funds of the wife does not preclude the wife from making payments therefrom on her separate account, where sufficient of the fund is hers.

3. **Husband and wife ⟸255—Wife may claim as separate property land purchased with her property and note.**
   Where title to real estate bought was taken in the name of the community, but the purchase price was paid from separate funds of the wife, it

is immaterial to her right to claim it as her separate property that only part of the price was paid before the conveyance, and the remainder secured by her note and reservation of a lien.

Appeal from the District Court of the United States for the Northern District of Texas, at Abilene; James C. Wilson, Judge.

Suit in equity by Mrs. J. E. Trammell against Charlie Trammell. Decree for complainant, and defendant appeals. Affirmed.

J. M. Wagstaff, of Abilene, Tex., and Tarlton Morrow, of Wichita Falls, Tex., for appellant.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Appellee filed a bill to remove cloud from title to a 640-acre tract of land. From a decree in her favor, defendant appeals.

It stands admitted by the pleadings that appellee was married to W. F. Trammell, appellant's father, in 1897; that the land in controversy was conveyed to appellee and her husband jointly. The deed recited a consideration of $1,280, of which the payment of $160 is acknowledged, as is also the delivery of four promissory notes, one for $160, due November 1, 1900, and the other three, for $320 each, due November 1, 1901, 1902, and 1903, respectively. The notes were executed by both appellee and her husband, and reserved a vendor's lien, and so also did the deed, in the following language:

"But it is expressly agreed and stipulated that the vendor's lien is retained against the above-described property and premises and improvements, until the above-described notes and all interest thereon are fully paid according to its or their face, tenor, effect, and reading, when this deed shall become absolute."

Appellant is appellee's stepson, and, as heir of his deceased father, is the apparent holder of a fourth undivided interest in the legal title. The question in dispute between the parties is whether the land was the separate property of appellee, as contended by her, or whether it was community property of herself and husband, as claimed by appellant.

Upon this disputed question, appellee testified that she had the land in controversy leased and partly fenced, and was negotiating for its purchase, before her marriage to appellant's father; that at the time of her marriage she had on deposit in the bank about $800, and was the owner of $2,000 in notes, 124 cattle, 20 horses, and about 500 acres of land. She produced her bank statements, showing a balance of $879.22 in her favor on March 1, 1897, and a balance of $2,578 in her favor on February 1, 1901, and testified that the second statement included the proceeds of the notes, which had been paid at that time. Appellee further testified that before the execution of the deed she made the cash payment of $160 to apply on the purchase price; that on November 1, 1900, she paid the note of $160 then due, and that she paid the remaining notes above recited, given to secure the purchase price, in February, 1901; that she did not know that the title was conveyed to herself and husband jointly until shortly after his death in 1916; that at

the time the land was purchased she thought the title was put in her name, and that it was her intention that it should be; that at the time of her marriage her husband had only three mares and a buggy, worth altogether about $150; that he gave two of the mares to appellant, and that there was never any increase from the one he kept; that her husband did not contribute any property to the community estate, except as above stated; that his salary and increase in the cattle and the increase in the land were used up in living expenses; and that her bank account was kept for her separate funds. It was undisputed that appellee's husband was a Baptist minister of excellent character, and that his salary as such was about $50 per month.

Appellant offered no testimony, except the deed already in evidence. Appellant insists by his assignments of error that the evidence fails to show (1) that appellee paid the purchase price of the land out of her separate funds; or (2) before the execution of the deed; and (3) that the court erred in permitting appellee to testify that she thought the title was put in her name, and that it was her intention that it should be.

[1] 1. In Texas, property, whether real or personal, owned before marriage, remains the separate property of the husband or wife; whereas, the presumption is that property acquired during marriage is the common or community property of the husband and wife, until the contrary is satisfactorily proved. Revised Statutes of Texas 1911, §§ 4621, 4622, 4623. Real estate, though taken in the name of the community, becomes the separate property of the wife, if the purchase price is paid out of her separate funds at the time of purchase. If she contributes only a part of the purchase price, she has separate property in the proportion her partial payment bears to the entire purchase price.

Appellant does not dispute these propositions, but, on the contrary, relies upon them. He concedes that appellee would have an undivided one-eighth separate estate in the land, if she paid $160 out of her separate funds at or before the execution of the deed. The contention on this point is that the initial payment of $160 was not shown to have been made out of appellee's separate funds. The only basis for this contention is that appellee's separate funds were mingled with other moneys deposited after marriage, and which were therefore, in the absence of proof to the contrary, presumed to be community funds.

[2] It seems to be beyond dispute from the testimony that appellee had at all times sufficient money in the bank, derived from or a part of her separate property, to make this initial payment. It would be a very strained construction to hold that there were no separate funds, simply because some deposits had been made out of community funds, and the contrary has been held in Texas. Amend v. Jahns (Tex. Civ. App.) 184 S. W. 729. Only by the same method of reasoning could it be argued that the subsequent payments of the balance of the purchase price, represented by the lien notes, were not made out of appellee's separate funds. Even if commingled funds become wholly community property, the trial court would have been warranted from the testimony of appellee in holding that her individual funds were kept in the bank separate from community funds.

[3] 2. It is further contended that the testimony is inadequate to sustain the decree to the effect that the land in litigation was separate property, except as to the one-eighth undivided interest, although all the payments were made out of appellee's separate funds. The basis of this contention is that, in the absence of agreement, it is essential that the entire purchase price be paid at or before the purchase is made and the deed delivered. The result would be that appellee would be entitled to a separate estate in only that portion of the land represented by the initial payment of $160. There does not appear to be any peculiar rule in Texas upon this subject. By the weight of authority it is held to be sufficient to establish equitable title to property when only a part of the purchase price is paid, if the balance thereof is secured to be paid at the time of the purchase. Ducie v. Ford, 138 U. S. 587, 11 Sup. Ct. 417, 34 L. Ed. 1091; McGovern v. Knox, 21 Ohio St. 547, 8 Am. Rep. 80; 3 Pomeroy's Equity Jurisprudence, § 1037. This rule seems to be recognized in Texas. Kingman-Texas Implement Co. v. Herring National Bank (Tex. Civ. App.) 153 S. W. 394.

3. If section 3690, R. S. Tex. 1911, is broad enough to prohibit the admission of appellee's testimony as to her intention and belief with respect to the title, on the ground that such testimony constituted a transaction with her deceased husband, the error assigned was harmless, in view of the fact that manifestly the trial court did not proceed upon the theory that there was an agreement between appellee and her husband, because no evidence of any agreement was offered or admitted. The decree can be sustained, and was doubtless based, upon the principle that it was not essential that the whole of the purchase price should be paid at the time title was taken, if appellee was obligated to pay the balance of the purchase money, and if it was secured to be paid by her note and the reservation of a vendor's lien.

Prejudicial error is not made to appear by any of the assignments, and the decree is therefore affirmed.

THE DOON.

PETIT v. TURNER.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1920.)

No. 3515.

Shipping ⟸37—Ratification of change in charter party.

Where a charter party, after being signed by the charterer, was changed before it was signed by the owner, so as to provide that charterer should pay freight on a stated tonnage, whether loaded to full capacity or not, but charterer's attention was called to the change while the vessel was loading, and notified that loading would stop unless it was agreed to, his permitting the loading to proceed without objection *held* a ratification of the change, and to estop him from denying liability thereunder.

Appeal from the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Suit in admiralty by Horace Turner, managing owner of the American bark Doon, against Ferdinand Petit. Decree for libelant, and respondent appeals. Affirmed.

Gregory L. Smith, of Mobile, Ala., for appellant.
Wm. B. Inge, of Mobile, Ala., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The appellant, the charterer of the bark Doon, paid freight at the charter rate on 1,264.6 tons of staves loaded on the vessel, agreeing at the time that the acceptance of that amount by the appellee, the managing owner of the vessel, should be without prejudice to the claim of the latter that he was entitled under the charter to freight on an additional 85.4 tons. This claim, which was asserted by the libel, was based on the following provision in the charter party:

"Charterers to load vessel to her full dead weight, but guarantee to pay freight upon 1,350 tons."

The appellant's resistance to the claim is based upon the circumstance that, when his representative signed a charter party for the vessel and handed it to an agent of the brokers, who were to procure the signing of it by the appellee, the instrument contained the following provision:

"Charterers guarantee to load vessel to her full dead weight carrying capacity of thirteen hundred and fifty (1,350) tons or pay the difference"

—and that prior to signing the instrument the appellee so changed its terms as to substitute the first-quoted provision for the last-quoted one. Evidence adduced was to the following effect:

The chartering of the vessel was the result of negotiations between the appellee and the representative of shipbrokers who acted at the instance of the appellant, their commission, however, being paid by the appellee, the shipowner, as was customary in such case. The instrument signed by the appellant was handed to a New Orleans representative of the brokers, with the request that appellant be furnished with a certified copy of the instrument after it had been signed by the appellee. When the Mobile representative of the brokers presented to the appellee the instrument which had been signed by the appellant's agent, the appellee objected to the last above quoted clause of it, and, in the presence and with the knowledge of the Mobile representative of the brokers, made the above-mentioned change in the instrument. Certified copies of the instrument as it was when it was signed by the appellee were sent by the Mobile representative of the brokers to their New Orleans representative, and the latter sent one of those copies to the appellant. The change made by the appellee was not at the time the copies were sent called to the attention of the appellant or of the New Orleans representative of the brokers, and neither the appellant nor the New Orleans representative of the brokers knew of the change until after part of the cargo had been loaded on the vessel.

By the terms of the charter party the vessel was chartered to carry

"a full and complete cargo of oak staves, under and on deck." from the port of Mobile, Ala., to Cette, France, or Bordeaux, France, at charterer's option. After the vessel had been about one-third loaded with dry, light-weight staves, the appellee went to New Orleans and had an interview with the appellant's representative. In that interview the appellee called attention to the fact that the staves being put on the vessel were so light that, if the cargo were made up of such staves, the vessel would not be loaded to her dead weight capacity, suggested that if heavier staves were furnished the vessel would have her dead weight of 1,350 tons, called attention to the above-quoted provision in the charter as it was when signed by the appellee, and explicitly stated that payment of freight on 1,350 tons would be insisted on, saying that, if they were going to have any trouble about the charter party, he wanted to have it then, and stop loading the boat and have it out. The appellant's representative, after examining the copy of the instrument handed to him by the appellee, said:

"Looks like we will have to pay you on this dead weight. However, I will consult my attorney about it. Now, you go on back to Mobile, and you and I are not going to fall out about this."

It was not intimated on that occasion that the paper made use of as a copy of the contract between the parties did not correctly disclose what they had agreed to. Later during the day of that interview the appellant's representative learned of the above-mentioned change made in the instrument after he signed it. The loading of the vessel was proceeded with for about two weeks after that day, and until the loading was practically completed, without the appellee being informed that the appellant did not acquiesce in the former's claim to freight at the charter rate on 1,350 tons, whether the staves loaded on the vessel should or should not weigh that much.

Counsel for the appellee contends that the change made in the charter party by the appellee after it had been signed by the appellant's agent did not amount to a material alteration, and that both the original and the substituted provision required payment of freight on 1,350 tons, whether the cargo loaded on the vessel did or did not weigh that much. In support of the opposing contention that the change was a material one, it was urged that the word "load," used in both the original and the substituted provision, was shown by other provisions of the instrument to mean delivery alongside the vessel. These opposing contentions need not be passed on. It may be assumed that, if the above-mentioned interview had not occurred, the claim asserted by the libel could not be sustained, because the appellant was not bound by the instrument, which was changed after he signed it. The appellant, after being informed that the loading of the vessel would be stopped if he disputed appellee's claim that he would be entitled to freight on 1,350 tons, whether the staves constituting the cargo should or should not weigh that much, and after learning of the change made in the instrument after he signed it, allowed the loading of the vessel to be proceeded with without controverting the appellee's claim as to the tonnage on which payment of freight would have to be made. By that conduct the appellant estopped himself from claiming, in the

contingency which arose, that he was liable only for freight on the amount of staves actually loaded on the vessel.

After being explicitly informed that the payment of freight on 1,350 tons would be insisted on, and that if there were any dispute on that score the loading of the boat would be stopped, the appellant, having knowledge of the change in the terms of the charter party, could not remain silent, thereby inducing the appellee to change his position by permitting the loading of the vessel to be proceeded with, and at the same time retain the right of resisting the claim asserted by the libel on the ground that the terms of the instrument he signed do not support that claim. His conduct amounted to an acquiescence in the appellee's statement that he was to be paid freight at the charter rate on 1,350 tons, and precluded the making of the defense based on the above-mentioned change in the terms of the charter party. Under the circumstances the continued silence of the appellant's representative after learning of the change made in the instrument after he signed it had the effect of a ratification of the change. The appellant could not procure the further acceptance of cargo by the appellee and remain free to repudiate the terms on which such acceptance was expressly conditioned.

There was no evidence to indicate that the ignorance of the appellant's representative, prior to the day of the above-mentioned interview, of the change made in the instrument after he signed it, was due to any fault of the appellee. In no way did the latter agree to the use of his vessel, except on the terms stated in the instrument he signed.

It is suggested that the vessel could have taken on more light-weight staves, if it had been ballasted differently. It was not made to appear that, in the absence of information as to the kind of staves that would be delivered for shipment, the appellee was at fault in the matter of ballasting the vessel. It might have been otherwise if the appellant had given timely notice that only dry, light-weight staves were intended to be shipped.

The decree is affirmed.

KILGORE v. SKINNER.*

(Circuit Court of Appeals, Fifth Circuit. December 14, 1920.)

No. 3497.

Sales ⇐391(7)—Contract for sale of cattle required refund for cattle paid for not delivered.

A contract for the sale of cattle, which were cut out and paid for by the buyer in the fall, required the seller to keep and care for the cattle on terms stipulated until spring, and deliver them, or the hides of any not delivered alive, f. o. b. cars at the railroad by April 25th "or pay for said cattle at the purchase price." *Held*, that the sale was not completed by final delivery until the cattle were delivered f. o. b. the cars, and that the provision requiring seller to pay for those not accounted for was not for a penalty, but merely a requirement that he refund the purchase price paid for them, and valid and enforceable.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 376, 65 L. Ed. —.

In Error to the District Court of the United States for the Amarillo Division of the Northern District of Texas; James C. Wilson, Judge.

Action at law by H. W. Skinner against C. L. Kilgore. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Kimbrough and M. J. R. Jackson, both of Amarillo, Tex., for plaintiff in error.

John W. Veale, of Amarillo, Tex., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. This case arose out of an alleged breach of a contract between C. L. Kilgore and H. W. Skinner, by which, in consideration of $10,000 paid and the further payments to be made and the agreements therein, Kilgore (first party)—

"hereby bargains and agrees to sell and deliver to said second party [Skinner] f. o. b. cars at Channing, Tex., on or before the 25th day of April, 1919, next, or as soon as cars can be obtained the following described cattle now grazing in the county of Moore, each free from disease, malformation, or blemish of any and every kind, to wit:

"First party agrees to dehorn said cattle, if desired by second party. First party agrees to deliver said cattle, or the hides of all cattle not delivered alive, or pay for said cattle at purchase price, on or before the 25th day of April, 1919. Said first party agrees to haul the cotton seed cake from Channing, Tex., to feed said cattle for not to exceed $4 per ton, and is to furnish storage for cake, and agrees to feed said cake to cattle according to directions of the second party. First party is to furnish all necessary horses in handling of said cattle. Second party agrees to pay two men's wages from time they commence to cake the cattle on the grass. Wages not to exceed average wages paid for said help. First party is to furnish two pastures, of 38 sections, where cattle are now grazing, and a 7-section pasture adjoining on southwest, for grazing of said cattle from now until April 25, 1919, at 50 cents per month. No other stock is to be allowed to pasture in said pasture. Second party agrees to take his cut on or before the 15th day of November, 1918. In the event second party wishes to ship cattle on or before November 10, 1918, first party agrees to load them f. o. b. cars this fall; this canceling any pasture bill on cattle. But if not shipped on or before November 10, 1918, or as soon as cars can be obtained thereafter, pasture bill is to commence on said cattle at 50 cents per month November 1, 1918. Cattle branded 'O' on right side.

"And the said second party, in consideration thereof, agrees to pay to the said first party the sum of $60 per head for the said 2,200 head, reserving the right to cut out and reject 10 per cent. of above-described cattle and all the black cattle, subject to the deduction of the aforesaid payment of $10,000 herein acknowledged, which is part payment of said purchase price for the cattle, immediately upon the completion of the delivery and acceptance of said cattle at the place herein designated. The balance of said purchase price to be paid on or before November 15, 1918."

Skinner selected 1,917 cattle and paid for them at $60 per head, as provided in the contract. A very severe winter ensued, and not exceeding 1,376 head of cattle were delivered at Channing. No hides of the missing cattle were tendered. Skinner sued Kilgore for a breach of said contract, alleging: (a) A failure to deliver 545 head of said cattle, or the hides thereof, which renders the defendant liable for the price paid for such cattle of $60 per head, an aggregate of $32,700. (b) A failure to properly care for and feed the cattle delivered, to their damage $10 per head, or $13,720. (c) A conversion by Kilgore

to his own use of hay and other feed, the property of plaintiff, of the value of $1,000. Wherefore he sues for $47,420 damages.

The defendant's answer denied liability and pleaded a set-off. It attacked so much of said contract as specified that defendant should pay for all cattle not delivered at Channing, unless the hides were delivered, as a provision for a penalty. He denied all charges of negligence, and alleged that the cattle died by reason of the very cold weather, and also from the failure of the plaintiff to provide roughness for the cattle. He also pleaded a set-off, for the value of 57 head of other cattle alleged to have been converted, worth $3,420; for feed alleged to have been furnished by him, amounting to $482.56; for pasturage at the rate of 50 cents per head per month from November 1, 1918, to April 25, 1919, or $6,000; and for the hire of two hands paid by defendant, amounting to $200, which hire plaintiff was obligated to pay by said contract.

The court construed the contract as not binding the defendant to pay for cattle not delivered at Channing, except where they were lost by his negligence, but held that he was only liable for the value of the hides of those not so lost. The case was submitted to the jury on the issues: (1) Of the alleged set-off of defendant. (2) Of the alleged failure of the defendant to properly feed said cattle and to care for them. (3) Upon the number of the cattle actually lost by the negligence, if any, of the defendant. (4) Upon the value of such hides as were not delivered. This item called for the finding of the number of such hides at the agreed price of $3.50 per hide. The jury found a verdict for the plaintiff of $21,001.04.

The court directed the jury to find a verdict on the plea of set-off, and also a verdict on the plaintiff's claim. The jury found a single verdict, but it was received without objection made at the time, or any request for a resubmission to the jury for any correction, or any other motion.

The case is here on a number of exceptions to the charge of the court, and on alleged error in the failure of the jury to find a separate verdict on the plea of set-off.

As we read this contract, the sale of these cattle was not completed by final delivery until they were delivered f. o. b. cars at Channing. Until that time they remained in the custody and charge of Kilgore. He had been paid $60 per head, and was to deliver the number so paid for at Channing, and the hides of any which died before delivery, or was to refund the price of those not so accounted for. If the cattle were not so delivered, plaintiff had paid $60 per head for each one missing. If the defendant is held to refund the $60 received by him for each head not so delivered, the result is to enforce a provision by the contract of purchase determining on whom the loss of the actual price paid shall fall, where the final delivery contemplated does not take place. This is in no sense a penalty.

There is no legal reason why the cattle should not, by the contract of sale, be at Kilgore's risk of loss pending the final delivery at Channing, nor why he should not bind himself to refund the price received for those which died or were lost while in his hands, if he did not

finally deliver them. There was no reason why the production of the hides of those which were not delivered should not be made the necessary evidence of their death, or loss, under circumstances which would relieve him from the necessity of delivery alive, or of refunding the price he had received for these not so delivered in advance of this delivery. Teal v. Bilby, 123 U. S. 572, 580, 8 Sup. Ct. 239, 31 L. Ed. 263.

Taking the claim that he had delivered 1,376 head of cattle, and had failed to deliver or produce the hides of 541, this would entitle the plaintiff to have Kilgore repay to him $32,460. If the entire claim of set-off was allowed, to wit, $10,102.56, it would leave a balance due to the plaintiff of $22,357.44, which is more than the verdict of the jury.

Therefore, if there was any error in the charge of the court, or irregularity in form of the verdict, it did not injure the plaintiff in error, and the judgment of the District Court is affirmed.

STALICK v. SLACK.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1920.)

No. 5527.

Bankruptcy ⟸318(1), 320—Claimant may waive tort and file claim on implied contract.

If a bankrupt has become unjustly enriched by his embezzlement, larceny, or conversion of the goods of another, the owner may waive any action of tort and prove a claim against the bankrupt's estate on the implied contractual obligation of bankrupt to pay for the goods; but, if he elects to disavow any contract, as he may do, and claim damages for the tort, his claim is not a provable debt, under Bankruptcy Act, § 63a (4) (Comp. St. § 9647a [4]).

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

John Stalick appeals from a decree of the District Court, affirming an order of the referee disallowing, on the objection of Harry Slack, trustee in bankruptcy, appellant's claim. Affirmed.

A. M. Edwards, of Santa Fé, N. M., for appellant.

A. T. Hannett, of Gallup, N. M., for appellee.

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

MUNGER, District Judge. The appellant, Stalick, filed a claim against the estate of the bankrupt, which was disallowed by the referee in bankruptcy. He petitioned the District Court to review that order. The District Court affirmed the order of the referee, and from that order this appeal is prosecuted. The appellant's contention is that his claim is for the value of a large amount of whisky which was stolen from him by the bankrupt, and that he is entitled to have his claim allowed, notwithstanding the provisions of the Constitution of New Mexico forbidding the sale or barter of alcoholic beverages.

An examination of the record discloses the fact that no copy of appellant's claim is set forth. The case was heard before the District Court upon a certificate and order of the referee. The referee endeavored to follow the directions of General Order in Bankruptcy No. 27, by certifying to the judge the question presented, and the finding and order of the referee thereon. His certificate shows that Stalick began an action at law in the state court of New Mexico against the bankrupt, alleging that the bankrupt had stolen the whisky and thereby caused him damages; that under the laws of New Mexico attachments may be issued against the defendant's property in actions for torts; that Stalick procured an attachment to be issued in his action, and to be levied on the bankrupt's property, but that there was an adjudication in bankruptcy before a trial of his case could be had in the state court; and that this adjudication vacated the attachment.

On this statement of facts the referee found as a conclusion of law that claims founded solely in tort, and not reduced to judgment before the adjudication in bankruptcy, are not provable claims against the bankrupt's estate, and disallowed Stalick's claim. The appellant's petition for review of the order was submitted to the District Court solely on the referee's certificate and the argument of counsel, and the District Court made an order finding that, under the facts as disclosed by the referee's certificate, the cause of action of appellant was in tort, and, if on an express or implied contract, such contract was unenforceable at law, and approved the referee's order.

Among the debts which may be approved and allowed against the estate of a bankrupt by the provisions of section 63 of the Bankruptcy Act (Comp. St. § 9647a [4]) are those which are "founded upon an open account, or upon a contract, express or implied." The appellant contends that his claim was provable under this portion of the statute.

It is an established rule in the national courts that if a bankrupt has become unjustly enriched by his embezzlement, larceny, or conversion of the goods of another, the owner may, if he chooses to do so, waive any action of tort that he might have against the bankrupt for such acts, and prove a claim against the bankrupt's estate for the value of the goods, because the law implies a contractual obligation by the bankrupt to pay the owner therefor. Crawford v. Burke, 195 U. S. 176, 194, 25 Sup. Ct. 9, 49 L. Ed. 147; Tindle v. Birkett, 205 U. S. 183, 186, 27 Sup. Ct. 493, 51 L. Ed. 762; Clarke v. Rogers, 228 U. S. 534, 543, 33 Sup. Ct. 587, 57 L. Ed. 953; Schall v. Camors, 251 U. S. 239, 251, 40 Sup. Ct. 135, 64 L. Ed. 247; Clarke v. Rogers, 183 Fed. 518, 521, 106 C. C. A. 64; Reynolds v. New York Trust Co., 188 Fed. 611, 615, 110 C. C. A. 409, 39 L. R. A. (N. S.) 391; Phelps v. Church of Our Lady Help of Christians, 99 Fed. 683, 684, 40 C. C. A. 72.

But it is also established that a claim for unliquidated damages is not a provable debt, when it arises out of a pure tort, and when there is no breach of an express contract, nor such enrichment of the wrongdoer as may form a basis for an implied contract. Schall v. Camors, supra, 251 U. S. 239, 248, 251, 254, 40 Sup. Ct. 135, 64 L. Ed. 247.

In the case now under review the record shows that the appellant filed a claim of some kind for allowance against the bankrupt's estate, and the referee and the District Court each decided that the claim was for an action in tort. On this record we must accept this conclusion. The Bankruptcy Act provides for the allowance of a claim only in case the debt is "founded upon an open account, or upon a contract, express or implied." The owner of goods which have been taken from his possession in larceny or conversion has an election between inconsistent remedies. He may assert title in himself, disaffirm the act of the wrongdoer and sue in tort for the conversion, or he may affirm the passing of title to the wrongdoer, treat the transaction as a sale, and sue him upon the implied contract to make compensation for the value of the goods. In the former case he denies the existence of any contract, but in the latter case his suit expresses his acceptance of an implied promise of the wrongdoer to pay him for his goods. Robb v. Vos, 155 U. S. 13, 41, 43, 15 Sup. Ct. 4, 39 L. Ed. 52; In re Jacob Berry & Co., 174 Fed. 409, 410, 98 C. C. A. 360; In re Hirschman (D. C.) 104 Fed. 69, 71; In re United Button Co. (D. C.) 140 Fed. 495, 500; Terry v. Munger, 121 N. Y. 161, 166, 24 N. E. 272, 8 L. R. A. 216 18 Am. St. Rep. 803; Carroll v. Fethers, 102 Wis. 436, 443, 78 N. W. 604; Nield v. Burton, 49 Mich. 53, 54, 12 N. W. 906; Pom. Rem. & Rem. Rights, §§ 568, 569; 7 Encycl. Pl. & Pr. 370.

When the appellant alleged a claim in tort, he necessarily denied a contractual relationship between himself and the bankrupt, and the claim was therefore not provable against the bankrupt's estate. This conclusion is strengthened by the fact that the appellant as a claimant under a contract would be allowed the reasonable value of his goods, while as a claimant in tort he might demand and recover an additional amount as exemplary damages, if the tortious act was wanton, malicious, or oppressive, and the allowance of such enhanced damages would not tend to that equal distribution of the bankrupt's estate among his creditors which it is the policy of the Bankruptcy Act to attain.

The result we have reached makes it unnecessary to discuss other questions which are presented in the briefs.

The judgment of the District Court will be affirmed.

BAILEY v. MISSISSIPPI HOME TELEPHONE CO.

(Circuit Court of Appeals, Third Circuit. December 15, 1920.)

No. 2560.

Brokers ⊂=60—Broker held not entitled to commission when sale was prevented by bankruptcy.

A broker, employed to sell the property of a telephone company, who negotiated a sale, which could not be carried through because of legal obstacles, *held* not entitled to a commission because, after the bankruptcy of the company and a sale of the property by the trustee, the

proposed buyer secured it from the purchasers, who were officers of the company, where it appeared that the bankruptcy and sale were bona fide, and not a subterfuge to avoid paying the commission.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Hugh M. Morris, Judge, specially assigned.

Action at law by John R. Bailey against the Mississippi Home Telephone Company. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 254 Fed. 358.

John J. Reardon, T. M. B. Hicks, and Henry C. Hicks, all of Williamsport, Pa., for plaintiff in error.

J. Fred Schaffer, of Sunbury, Pa., and W. W. Ryon, of Shamokin, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In an opinion of this court reported at 252 Fed. 581, 164 C. C. A. 497, this case was reversed and sent back for a new trial. We there said:

"In a general way we have outlined the situation, and further evidence may throw a good deal of light on the dispute."

We also said that—

"No question concerning the effect of the bankruptcy proceedings was raised below, either by the pleadings or during the trial, and none is now considered."

As to the bankruptcy proceedings, we stated:

"The defendant's property was afterward sold in bankruptcy to certain of its own officers, who immediately conveyed it to a subsidiary of the proposed corporate buyer, thus accomplishing the result for which the plaintiff's services had been engaged. This might have presented another question. If the sale was a subterfuge to avoid paying the plaintiff's compensation, it would not prevent recovery; but if the sale were bona fide, without such a purpose, the plaintiff would have to bear his own loss."

On the retrial, full proofs were heard, and at their conclusion the trial judge gave binding instructions for defendant. This writ of error raises the question whether such action was error.

An examination of the proofs and a study of the course of trial and the charge satisfy us that the trial judge carefully followed the course pointed out in our former opinion, and gave the parties the opportunity to furnish the pertinent proofs and to try the issue which underlay the case as indicated in our opinion, namely, whether "the [bankruptcy] sale was a subterfuge to avoid paying the plaintiff's compensation," in which event such sale would not prevent the plaintiff's recovery, or whether "the [bankruptcy] sale was bona fide, without such purpose," in which event, the plaintiff could not recover.

As bearing on the underlying question of the bona fides of the bankruptcy sale and its divesting the title of the Mississippi Home Telephone Company, the proofs show that the proposed sale by the latter company to the Southern Bell Company, which the plaintiff is alleged to have brought about, and for which he claims commission, encoun-

tered legal obstacles which forbade the purchase of a competing line. Later the company went into bankruptcy, and the proofs show, as the sequel proved, its insolvency. Its telephone plant, which was to have been sold to the Southern Bell Company, was sold to several individuals, who, while they were officers of the company, were also, as individuals, indorsers on its notes to the extent of $110,000. These indorsements they were individually forced to pay to the extent of $40,000 over and above the amount ($67,000) which they realized as individuals on a sale of the purchased plant which they subsequently made to a subsidiary company of the Southern Bell Company. Both these sums, viz. the $67,000 received from a resale of the property bought at the bankruptcy sale, and $40,000 they personally raised, were applied to the payment of the debts of the insolvent company.

In view of these proofs, and of the stipulation of record that "both parties, therefore, stand for the affirmance of the proceedings in bankruptcy," it is clear that there was no ground for submitting to the jury an issue on the bona fides of the bankruptcy, and its consequent effect of divesting the bankrupt company's ownership of the plant and vesting it in the individuals who bought it and paid the purchase money, which went to its creditors; and it is also clear that the proofs are equally barren of any ground on which to submit to a jury the question whether the sale was a subterfuge to defeat the plaintiff's claim to commission. In the absence of proof on such issues, the record disclosed that the sale of the plant later made was not a sale either by the Mississippi Home Telephone Company or a sale of its plant. The mere fact that this purchaser at such subsequent sale insisted that the deed from the individual purchasers should be accompanied by a ratification of the judicial sale by the corporate action of stockholders of the bankrupt company was a customary safeguarding of the title actually conveyed by the deed of the individuals who had bought the plant against any subsequent claim based on the theory that the sellers, and therefore the purchasers, were accountable in any way, to the stockholders.

Such being the effect of the proofs, the court below was right in giving binding instructions for the defendant, for by the proofs, a situation had arisen which this court provided for when, in its opinion, it said:

"If the sale were bona fide, without such a purpose, the plaintiff would have to bear his own loss."

Reaffirming, therefore, our previous opinion, the judgment below is affirmed.

WALTON LAND & TIMBER CO. v. RUNYAN.

In re HOLTON & STRICKLAND et al.

(Circuit Court of Appeals, Fifth Circuit. December 4, 1920.)

No. 3496.

Bankruptcy ⊂=188(3)—Contract gave equitable lien.

A contract under which bankrupts cut timber from claimant's land and manufactured it into lumber, and which required bankrupts, on sale of the lumber, to pay claimant $3 per 1,000 feet from the proceeds as stumpage, *held* to give claimant an equitable lien on the lumber or its proceeds in the hands of the trustee.

Appeal from the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

In the matter of Holton & Strickland and others, bankrupts. The Walton Land & Timber Company appeals from an order denying its claim to a lien, on objections filed by William B. Runyan, trustee in bankruptcy. Reversed.

See, also, 269 Fed. 130.

Walter Kehoe and Phillip D. Beall, both of Pensacola, Fla., for appellant.

W. H. Watson and S. Pasco, Jr., both of Pensacola, Fla., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. February 4, 1919, C. E. Holton and John Strickland, individually and as partners under the firm name of Holton & Strickland, were adjudged bankrupts upon their voluntary petition.

February 18, 1919, appellant filed its claim, alleging that the bankrupts were indebted to it in the sum of $2,339.14, for 779,714 feet of manufactured lumber then at the mill theretofore operated by the bankrupts; that appellant had furnished the logs out of which the lumber was manufactured, and was entitled to be paid at the rate of $3 per thousand feet of said lumber. Appellant attached to and made a part of its claim a contract dated July 28, 1917, and recorded September 21, 1917, by which appellant conferred upon J. H. Long & Son the right to cut and manufacture into lumber the pine timber upon a tract of land owned by appellant. This contract requires payments in installments and provides:

"That from the manufactured product of said timber the said parties of the second part shall pay to the party of the first part the sum of $3 per 1,000 stumpage, promptly when such manufactured product is shipped," etc.

Forfeiture, upon default in any payment, was at appellant's option. March 12, 1918, J. H. Long & Son assigned this contract to Holton & Strickland, but with a reservation of—

"$5 per 1,000 feet of the manufactured product of said mill, as the same is shipped, $3 of which shall be paid to the said Walton Land & Timber Com-

pany to apply on the indebtedness due and to become due to the said company under the terms of the said contract," etc.

The District Court affirmed an order of the referee sustaining objections filed by the trustee in bankruptcy to appellant's claim.

The question presented is whether the trustee in bankruptcy takes the lumber manufactured out of timber cut from appellant's land subject to appellant's claim. Appellee takes the position that this is not a priority claim under section 64b (5) of the Bankruptcy Act (Comp. St. § 9648), for the reason that the contract released the lumber from any lien under the laws of Florida. Let it be conceded that appellant has no statutory lien, because it intrusted to the bankrupts the shipment, and consequently the sale, of the lumber. Undoubtedly the provision of the contract above quoted contemplates that a purchaser of lumber would take the title thereto, freed from any claim of appellant. Nevertheless, in the event of a sale of lumber, Holton & Strickland even then would have held that portion of the cash proceeds specified in the contract in trust for appellant. Pending sale, appellant had an interest in the title to the lumber which it could assert as against Holton & Strickland, and all other persons, except purchasers or creditors without notice. If we put the bankrupt proceedings out of view for the moment, the case would stand as if this were a suit by appellant against Holton & Strickland to collect the amount due for stumpage after a sale of lumber had been made. The fact that the lumber was not sold was probably due to the bankruptcy proceedings. That circumstance cannot affect the principle involved, and the case should be considered as if it were between the original parties unaffected by the rights of innocent third parties, because the trustee in bankruptcy only gets the title the bankrupt had before bankruptcy.

If the trustee had sold the lumber before appellant's claim was filed, the proceeds would have been charged with the interest of appellant therein, and the trustee would have been compelled to pay appellant at the rate of $3 per 1,000 feet for all lumber furnished under the contract. The case might as well be treated as if the lumber had been sold, because, of course, the cash value of the lumber, and not the lumber itself, is what the trustee is seeking to hold for the benefit of creditors.

The contract pleaded as a part of the claim created an equitable lien upon both the lumber and the proceeds of a sale thereof. Ketchum v. St. Louis, 101 U. S. 306, 25 L. Ed. 999; Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075; Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865.

Appellant's claim, though the manner of pleading it is justly criticized, is a meritorious one. Opportunity to prove it should be permitted, and, if established, it should be allowed as a secured claim.

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

WALTON LAND & TIMBER CO. v. RUNYAN.

In re HOLTON & STRICKLAND et al.

(Circuit Court of Appeals, Fifth Circuit. December 4, 1920.)

No. 3583.

Bankruptcy ⇐143(11)—Contract requiring insurance of property construed.

Bankrupts acquired a sawmill under a contract requiring the buyer to maintain insurance, in not less than $4,000, on the mill, loss, if any, payable to the seller as its interest might appear. Bankrupts obtained $7,000 of insurance, sending the policies to seller, which agreed that in case of loss it should receive $4,000, as its share of the insurance. Afterward bankrupts secured $2,000 additional insurance under similar policies. *Held*, the mill having been burned, that bankrupts, or their trustee, were entitled to all the insurance above $4,000.

Appeal from the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

In the matter of Holton & Strickland and others, bankrupts. The Walton Land and Timber Company appeals from an order of the District Court giving William B. Runyan, trustee in bankruptcy, the right to the fund paid into court. Affirmed.

See, also, 269 Fed. 128.

William W. Flournoy, of De Funiak Springs, Fla., for appellant.

William H. Watson and S. Pasco, Jr., both of Pensacola, Fla., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. In March, 1918, the bankrupts, Holton & Strickland (herein referred to as the buyers), by contract with J. H. Long & Son acquired the rights of the latter and assumed their liabilities under a contract between them and the Walton Land & Timber Company (herein referred to as the seller), whereby the seller sold to J. H. Long & Son a sawmill plant, planing mill, and dry kiln, and certain timber, for $40,000, $5,000 of which was required to be paid before the cutting of the timber sold should be begun; the balance being payable in six installments, falling due at successive intervals of six months, and $3 per M. stumpage being required to be paid at the time of shipment of manufactured products of timber cut. That contract contained a provision requiring J. H. Long & Son "to procure and maintain insurance upon said sawmill plant, planing mill, and dry kiln, in some first-class insurance company or companies, in a sum not less than $4,000, payable to" the seller "as its interest may appear." Prior to May 25, 1918, the buyers procured the issuance of seven fire insurance policies, each for $1,000, on the sawmill plant, etc., and each made to Walton Land & Timber Company, owners, and Holton & Strickland, purchasers under contract, as their interest may appear." Each of those policies had the following indorsement thereon: "Loss, if any, payable to the Walton Land & Timber Company, as their interest may appear." After the issuance of those policies the

following instrument was addressed and executed as indicated by its terms:

"De Funiak Springs, Fla., May 25, 1918.

"Holton & Strickland, Deerland, Fla.—Dear Sirs: We acknowledge receipt of seven fire insurance policies through your Mr. Strickland, the policies being for the sum of $1,000 each, and payable to ourselves and your company jointly, and covering the mill plant at Claroy.

"It is understood and agreed between us that, in case the mill plant should be destroyed by fire, we will receive the sum of $4,000 as our part of the settlement, and your company the balance.

"Yours very truly, Walton Land & Timber Company,
"By E. W. Thorpe, President."

After the date of that instrument the buyers procured $2,000 additional insurance, evidenced by policies the terms of which were similar to those above mentioned. Prior to the institution of bankruptcy proceedings against the buyers the property covered by the policies mentioned was destroyed by fire. The whole amount called for by the policies was collected, and the seller received $4,000 thereof. The balance, $5,000, was paid into court, and was claimed by the seller and by the trustee in bankruptcy of the buyers. The court decided in favor of the claim asserted by the trustee.

The buyers were under no obligation to procure more than $4,000 insurance on the sawmill plant, etc., for the benefit of the seller. After the seller was informed that more than that amount of insurance had been procured on that property, payable to it and the buyers jointly, it signed the instrument, dated May 25, 1918, acknowledging receipt of the policies already procured by the buyers, and containing the following provision:

"It is understood and agreed to between us that, in case the mill plant should be destroyed by fire, we will receive the sum of $4,000 as our part of the settlement, and your company the balance."

The just-quoted stipulation, considered in the light of the fact that the buyers were under no obligation to procure more than $4,000 insurance on the mill plant in favor of the seller, we think plainly shows that the seller disclaimed any right to receive more than $4,000 of the insurance money payable in case the mill plant should be destroyed by fire, though more than that amount should be payable and paid under policies procured by the buyers, and by their terms made payable to the seller and the buyers jointly. That instrument plainly shows that the seller agreed that the act of the buyers in obtaining more than $4,000 insurance on the mill plant was not, in the event of the destruction of that plant by fire, to have the effect of entitling the seller to more than $4,000 of whatever amount of insurance money might be payable and paid under policies procured by the buyers. The agreement between the insured fixed the amount to which one of them, the seller, was to be entitled in that event. The seller having been paid its full agreed share of the insurance money, it cannot sustain a complaint against the action of the court in adjudging that the remainder of the sum collected on the policies be paid to the trustee in bankruptcy of the buyers.

The decree is affirmed.

AL. G. BARNES SHOW CO. et al. v. EICHELBARGER et al.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920.)

No. 3521.

1. **Appeal and error ⟸231(9)—Charge not reviewable on general objection.**
Assignments of error to a charge may be disregarded, where a part of the charge was not subject to objection and the attention of the trial court was not called to any particular feature as erroneous.

2. **Theaters and shows ⟸6—Negligence as to circus patron held question for jury.**
Evidence showing, among other facts, that a painted board used for a seat in a circus broke diagonally across with the grain of the wood when stepped on by plaintiff *held* sufficient to warrant submission to the jury of the question of negligence in using the board.

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action at law by Etta Eichelbarger and Stanley Eichelbarger, her husband, against the Al. G. Barnes Show Company and Al. G. Barnes. Judgment for plaintiffs, and defendants bring error. Affirmed.

Tucker & Hyland, of Seattle, Wash., and Rigg & Venables, of Yakima, Wash., for plaintiffs in error.

Chas. H. Hartge and Preston, Thorgrimson & Turner, all of Seattle, Wash., for defendants in error.

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

GILBERT, Circuit Judge. Judgment was rendered in the court below against the plaintiffs in error for damages for injuries sustained by the defendant in error Etta Eichelbarger, caused by the breaking of a board in the plaintiff in error's circus. The complaint alleged that Mrs. Eichelbarger was directed by an attendant to take a seat in a certain row of seats accessible only by walking from the lower seat and across tiers of seats to the row to which she was assigned; that she stepped upon one of the seats when near the top of the row, when the seat broke and precipitated her to the ground beneath; that the seat was weak and defective, and the accident was caused "solely by the negligence of the defendants in placing in the said row or bank of seats the said defective and weak seat," and in directing the said plaintiff to step thereon.

[1] Error is assigned to a certain instruction to the jury, in which the court, after saying, "It is not enought for you to find that the seat broke and precipitated the plaintiff, Mrs. Eichelbarger, to the ground below, thereby causing her injury," thereafter went on to say, "But the facts and circumstances under which the board broke may be taken into consideration by you in determining whether or not the ordinarily careful inspection of the board would have disclosed some defect in its weakness." It is urged that there were no facts and

circumstances which in any manner would throw light on the question whether a careful inspection of the board would have disclosed such defects. We might properly disregard this assignment, for it challenges a charge, portions of which were not open to objection, and the attention of the court below was not directed to any particular feature in which the instruction was thought to be erroneous. But we find no error in any portion of the instruction. There were "facts and circumstances" which might properly have been considered in determining the question whether careful inspection of the board would have disclosed its defect or its weakness. The board was 12 feet in length, about 10 inches in width, and more than an inch in thickness, and it was painted, so that defects which otherwise might be visible were concealed. But the evidence is undisputed that it broke in twain with a diagonal fracture, leaving the two ends sharply pointed, and that in falling the sharp end of one the boards sank into the ground a distance of a foot. This evidence tended strongly to show that even a casual inspection of the board before it was painted would have revealed the fact that the grain ran diagonally across it, and that it was unfit for the purpose for which it was used. The plaintiff in error introduced no evidence, and made no attempt to show that the board had been tested or inspected, or indeed that it had ever been used before the accident, and the inference that it had never been used before might properly have been drawn from the fact that it broke under the weight of a single person whose weight was from 190 to 195 pounds.

[2] The plaintiffs in error assign error to the denial of their motion for an instructed verdict, and contend that the maxim "res ipsa loquitur" does not apply to the case. The court, in denying the motion, said that it would appear that the very fact that the board broke while the plaintiff was walking thereon in the ordinary way might be sufficient to indicate that no test had been made of the board, but observed that it was "not absolutely necessary to invoke the doctrine of res ipsa loquitur," for the evidence was that the board broke with the grain, and it was not unreasonable to conclude that it was a cross-grained board, which fact could have been discovered at the time when it was painted. Error is not assignable to the reasons given by the court for denying the motion for an instructed verdict. It appears from what was said by the court that the motion was denied, not on the ground of res ipsa loquitur, but on the ground that there was sufficient evidence to go to the jury on the question of the negligence charged. In charging the jury, the rule of res ipsa loquitur was not applied, or even referred to. The court instructed the jury: "The burden of showing by a fair preponderance of the evidence negligence on the part of the defendants rests upon the plaintiffs"—and that unless such negligence was shown by the evidence the plaintiffs could not recover. We agree with the court below that there was evidence of negligence sufficient to go to the jury.

The judgment is affirmed.

HARDY et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 14, 1920.)

No. 3391.

Conspiracy ⇐47—Evidence of conspiracy to bribe officer.

Evidence *held* insufficient to connect one of the defendants with the conspiracy charged to bribe an officer of the United States to permit the illegal transportation of liquor into Indian country, but to sustain a conviction of the other defendants.

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

Criminal prosecution by the United States against D. M. Hardy and others. Judgment of conviction, and defendants bring error. Reversed as to Hardy, and affirmed as to remaining defendants.

J. H. Barwise, Jr., of Ft. Worth, Tex., W. F. Weeks, of Wichita Falls, Tex., and William H. Atwell, of Dallas, Tex., for plaintiffs in error.

R. E. Taylor, U. S. Atty., and Will C. Austin, Asst. U. S. Atty., both of Ft. Worth, Tex.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The indictment in this case contained two counts. The first count charged D. M. Hardy, H. M. Splawn, Jack Lankford, and Eugene Flowers with conspiring to bribe J. B. Dowell, an acting officer of the United States charged with the duty of assisting in enforcing laws of the United States regarding the sale of intoxicating liquors to Indians and the transportation of such liquor into Indian country, to permit, in violation of the laws of the United States, the carrying into effect of an alleged conspiracy to transmit intoxicating liquors from Wichita Falls, Tex., into that part of Oklahoma which was formerly known as Indian Territory and into the Indian country. The second count charged the commission of the offense a conspiracy to commit which was charged in the first count. There was a verdict finding the defendants guilty as charged in the indictment, and each of them was sentenced to imprisonment in a penitentiary for a term of two years and to pay a fine of $500. Exceptions were reserved to the court's refusal to give requested instructions to the jury to return a verdict for the defendant Hardy on each of the counts of the indictment. Exceptions were also reserved to rulings of the court adverse to the other defendants, plaintiffs in error here.

Evidence adduced showed that during the time covered by the allegations of the indictment Hardy was a wholesale and retail liquor dealer at Wichita Falls, Tex.; that during that time Splawn was what was known as a posse man commissioned by the United States to arrest persons illegally transporting liquor from Wichita Falls into Oklahoma; that during that time Lankford and Flowers were in-

formers stationed at Wichita Falls, and engaged, in co-operation with Splawn, in watching and detecting persons transporting liquor into Oklahoma, receiving compensation for such services; and that during that time Dowell was an officer of the United States known as a deputy special officer for the suppression of the liquor traffic among Indians, and having authority to assist in the enforcement of laws of the United States on the subject of the sale or furnishing of intoxicating liquors to Indians and the introduction of such liquors into Indian country. During the time mentioned Dowell lived at McAlester, Okl. In the performance of his official duties he made three trips to Wichita Falls. While he was there on his last trip he got into communication with Splawn, Lankford, and Flowers, and made known to them his name and his official position.

The charges made in the indictment were sought to be supported by evidence as to occurrences at Wichita Falls while Dowell was there on his third trip. That evidence tended to prove that Hardy bribed Splawn, Lankford, and Flowers to permit the carrying out of a conspiracy between Hardy and others to effect the illegal transportation of intoxicating liquor from Wichita Falls into Oklahoma, and that Splawn, Lankford, and Flowers conspired to bribe Dowell to permit such illegal transportation, and delivered to him $500 of the $2,000 paid to them by Hardy. There was no evidence tending to prove that at the time of those occurrences Hardy knew or was informed that Dowell was an official, or had any connection with the enforcement of laws of the United States in the Wichita Falls territory, or that Hardy then knew or was informed that the money he paid as above stated was to be shared or participated in by any one other than Splawn, Lankford, and Flowers. So far as the evidence indicated, Hardy was in entire ignorance of the fact that Dowell, under his own or another name, had any connection with the enforcement of laws relating to the sale or transportation of intoxicating liquor, and of the fact that such an official as Dowell was shown to be was located where he might be instrumental in interfering with the illegal transportation of liquor from Wichita Falls. There was an absence of evidence tending to prove that in any transaction of Hardy which was testified about he had Dowell in mind, or contemplated the bribing of any one other than Splawn, Lankford, and Flowers. This being true, it was error to refuse the above-mentioned requests for instructions made in behalf of Hardy.

As to Splawn, Lankford, and Flowers, no reversible error is shown by the record. In so far as the judgment of conviction was against Hardy, it is reversed. So far as Splawn, Lankford, and Flowers are concerned, it is affirmed.

PHŒNIX PORTLAND CEMENT CO. v. BALTIMORE & OHIO R. CO.*

(Circuit Court of Appeals, Third Circuit. December 13, 1920.)

No. 2561.

Carriers ⇐41—Delivery of coal to carrier with order to consign to customer not delivery to carrier for customer, where taken under priority contract.

Loading coal on cars of defendant railroad company by a coal company at its mine and giving the conductor shipping orders directing that the cars be taken to the scale station, to which point only cars were moved on the shipping orders, and where they were consigned and waybills issued, and that they be there consigned to plaintiff, a contract customer, *held* not a delivery of the coal to defendant as carrier for plaintiff, which was not present and had no part in the transaction, where defendant had a contract with the coal company for fuel coal, giving it the right of priority over all other orders, and under which, pursuant to its terms, defendant took the coal for its own use and notified the coal company of its action.

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

Action at law by the Phœnix Portland Cement Company against the Baltimore and Ohio Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 263 Fed. 230.

Paul C. Hamlin, Samuel D. Matlack, and William Jay Turner, all of Philadelphia, Pa., for plaintiff in error.

H. B. Gill, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, the Phœnix Portland Cement Company, a corporation of Pennsylvania, brought suit against the Baltimore & Ohio Railroad Company, a corporation of Maryland, to recover some $9,000, the market price of coal, alleged to have been the property of the plaintiff, delivered to the defendant for transportation, but which the latter failed to deliver. At the conclusion of the proofs, the trial judge gave peremptory instructions for the defendant, saying:

"After a very careful consideration of the evidence in this case I have come to the conclusion that the plaintiff has not made out a case to go to the jury. In my opinion, under the law, the title to the property in question never passed to the plaintiff."

On entry of judgment on such verdict, this writ of error was taken, and the sole question before us is whether the case was one which should have been submitted to the jury. On this question, the court, in an opinion printed in 263 Fed. 230, refusing a new trial, gave a history of the case and the reasons which led it to take the action complained of.

We have carefully considered the case and the opinion in question. We agree with the conclusion reached and with the reasons and reasoning on which the judge relied. Such being the fact, the question

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

*Certiorari denied 254 U. S. —. 41 Sup. Ct. 376, 65 L. Ed. —.

being one of proof of title and no principle of law being involved, we are satisfied to adopt the opinion of the trial court as the opinion of this court, for manifestly the effort of this court could only be to state in other words what has been by the trial judge well and sufficiently stated in the opinion quoted, only noting that, while the delivery of the cars to the conductor with the "car conductor's cards," without further explanation, would possibly, in the absence of countervailing proof, have been evidential of title; but, when the further and uncontradicted proofs of the real situation were shown, there existed no ground on which the jury could have found that title to this coal ever passed to the plaintiff.

The plaintiff, the cement company, was not a participant or present when the acts which it alleged vested title in it to the coal were done. Any title, therefore, it was to acquire, had to be acquired solely by reason of the acts and dealings of the railroad and the coal company. Manifestly the coal company, in view of its own contract giving the railroad prior fuel rights, rights which the railroad was continuously insisting upon, and to enforce which it was continuously appropriating commercial coal, and at the same time giving notice that it would continue such course until such contract priority rights were met—manifestly, we say, the coal company could not, in the teeth of such a situation, change the contract created and the then working situation of buyer and seller between it and the railroad to one of common carrier and shipper, by handing these customary "car conductor's cards" to a conductor gathering cars on a spur coal road, the duty of which conductor was simply to haul coal cars to a contract-designated routing station on the main line, where alone bills of lading could be issued.

Where, as in this case, the court below looked at substance and the real situation of the parties and the gist of the proofs, the contention of the plaintiff that it acquired title to this coal carried no weight, and the conclusion of the trial judge in that regard has our concurrence.

The judgment below is affirmed.

AMERICAN SURETY CO. OF NEW YORK v. RINER, District Judge.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1920.)

No. 208.

Appeal and error ⊂=1194(1)—Mandate held to direct inclusion of interest only to date of original decree.

A mandate issued by an appellate court, directing the modification of the decree appealed from, by including therein interest on the sum recovered by complainant from the time it became entitled thereto, *held* to require the allowance of such interest only to the date of the original decree, which, as so modified, was affirmed, and not to the date of the mandate.

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

Petition for Writ of Mandamus by the American Surety Company of New York against John A. Riner, Judge of the District Court for the District of Wyoming. Denied.

W. E. Clark, of Denver, Colo., for petitioner.

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

MUNGER, District Judge. This is an application for a writ of mandamus requiring the trial court to enter a decree in conformity with the mandate of this court, issued in the case of Carbon Timber Co. v. American Surety Co. (C. C. A.) 263 Fed. 295. It appears from the petition and return that the original decree awarded recovery of the sum of $4,880.45 to the complainant from the defendant in that suit, and further decreed that the complainant should not recover interest upon that sum prior to the date of the decree. The complainant appealed from that decree.

The defendants, within 5 days after the entry of the decree, deposited in the registry of the court the amount awarded against them, but subsequently, and 89 days after the date of the decree, the defendants prayed a cross-appeal and filed their assignment of errors. Their cross-appeal was allowed, and they gave a bond, which was approved by the trial court. The bond was conditioned that the defendants should prosecute their appeal to effect and answer all damages and costs, if they failed to make their plea good. When the appeal and cross-appeal were heard by this court, it was held that the trial court erred in denying the appellant interest upon the amounts it had paid, and a mandate was issued directing the District Court to modify its decree by adding the amount of such interest.

The court modified the decree by allowing interest in favor of the plaintiff upon the amounts it had paid from the date of such payments to the time of the entry of the former decree. The plaintiff requested the court to enter a decree allowing interest on the amounts paid until the date of the modification of the decree; but the court refused to do so, saying that he refused because the defendants had paid into court for the benefit of the plaintiff the amount of $4,880.45 and costs within 5 days after the entry of the original decree.

The petitioner claims that the mandate required the entry of a decree allowing it interest on the amounts it had paid, and that the payment into court by the defendants was not effective to stop the running of interest, and that this right is one enforceable by mandamus. There was no disobedience of the mandate. Interest was allowed from the date of the payments made by plaintiff, and the decree, as modified, included the interest to the date of the original decree. The mandate did not require the entry of a new decree for the sum due at its date, but directed a modification of the former decree to include the interest to that date, and affirmed that decree, as so modified.

The petitioner's grievance is not that the court failed to follow the mandate, but seems to be addressed to remarks of the trial court, indicating its view that the payment into court by the defendants, after

the entry of the former decree, stopped the running of interest on a like portion of the amount due under the decree. The petitioner might have asked for the issuance of an execution to recover the balance it claimed to be due, or otherwise have tested the proper amount due it under the modified decree; but it can have no just complaint against the decree itself, as it was modified.

The writ will be denied.

CHARLES H. BROWN PAINT CO. v. ROCKHOLD.

In re CURTIS-CLARK CO.

(Circuit Court of Appeals, Fifth Circuit. November 26, 1920.)

No. 3574.

1. **Bankruptcy ⟸439—Summary order reviewable by petition to revise.**
   A summary order adjudicating an adverse claim of which the court was without jurisdiction in such proceeding is reviewable by petition to revise.

2. **Bankruptcy ⟸224—Referee without summary jurisdiction to adjudicate adverse claim.**
   A referee is without jurisdiction by a summary order to require the return of property by an adverse claimant, to whom it was transferred by bankrupt more than four months prior to bankruptcy.

Petition to Superintend and Revise from the District Court of the United States for the Northern District of Texas; James C. Wilson, Judge.

In the matter of the Curtis-Clark Company, bankrupt; George F. Rockhold, trustee. Petition by the Charles H. Brown Paint Company to revise order of District Court. Reversed.

Charles P. Thompson, of Dallas, Tex., for petitioner.

Lewis M. Dabney and Robert Allan Ritchie, both of Dallas, Tex., for respondent.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. June 10, 1918, the Curtis-Clark Company was adjudged a bankrupt, and thereafter D. F. Rockhold, trustee, filed an application before the referee to compel the return by petitioner of certain merchandise, which petitioner was alleged to have acquired without complying with the laws of Texas relating to sale of merchandise in bulk, more than four months prior to the bankruptcy proceedings. In a summary proceeding the referee entered an order requiring petitioner to pay over to the trustee the sum of $2,938.43, which he found to be the value of the merchandise, together with interest thereon, and also expunging the petitioner's claim as creditor against the bankrupt estate. Upon a certificate for review, this order of the referee was affirmed by the District Judge.

[1] The matter is here on petition to superintend and revise. The

trustee moves to dismiss the petition on the ground that a review of this order can only be had on appeal. In view of the fact that this is a summary order and the merits of an adverse claim are sought to be summarily adjudicated, the order complained of may be reviewed on petition. In re Abraham, 93 Fed. 767, 35 C. C. A. 592; Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537.

[2] The assignment of error to the effect that the referee was without jurisdiction is, we think, sustained on principle and by the authority of In re Abraham, supra. Ample remedy is available to the trustee in a plenary suit, and it was not seriously contended that the referee had jurisdiction.

The order of the referee, complained of, is vacated and set aside, without prejudice to the right of the trustee to pursue such remedy in a plenary suit as he may be advised.

COPLEY PLAZA OPERATING CO. v. SCHAUM & UHLINGER, Inc.

(Circuit Court of Appeals, First Circuit. November 29, 1920.)

No. 1459.

Patents ⇐328—For process for polishing silverware valid and infringed.

The Uebersax patent, No. 1,063,478, for a process for polishing silver utensils by subjecting them to rotation, while suspended in an approximately central position within a polishing mass, *held* valid and infringed.

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

Suit in equity by Schaum & Uhlinger, Incorporated, against Copley Plaza Operating Company. Decree for complainant and defendant appeals. Affirmed.

For opinion below, see 260 Fed. 197.

Oliver Mitchell, of Boston, Mass. (Edwin F. Thayer, of Attleboro, Mass., and Joseph T. Brennan, of Boston, Mass., on the brief), for appellant.

Alfred W. Kiddle and Henry T. Hornidge, both of New York City (Wylie C. Margeson, of New York City, and Van Everen, Fish & Hildreth, of Boston, Mass., on the brief), for appellee.

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

JOHNSON, Circuit Judge. This is an appeal in a patent infringement case. The appellee is the owner of patent No. 1,063,478, issued on June 3, 1913, to Jean Uebersax, of Switzerland, for a "process for polishing silver utensils."

The defenses were invalidity and noninfringement, and upon both the District Court found in favor of the appellee.

The process of the patent may be briefly described as one for polishing silver utensils by subjecting them to rotation while suspended in an approximately central position within a polishing mass, and is thus described by the inventor in his application:

"This invention relates to a process for polishing silver utensils; that is to say, for rendering silver plates and other silver utensils for table and culinary purposes brilliant by polishing. This process consists in placing those silver utensils to be polished which are very liable to get out of shape, such, for example, as teapots, plates, coffeepots, sauceboats, etc., with an aqueous soap solution of 2 to 4 per thousand, for example and with small steel balls and small steel pins, in a rotary drum, and in causing the drum, thus charged and closed as hermetically as possible, to revolve for a certain time in order that, under the combined action of the steel balls and pins and the soapy water upon the silver utensils the latter may become polished, the steel balls and pins being employed in such quantities that they always completely cover the silver utensils during the rotation of the drum, for the purpose of avoiding almost the radial displacement of the said articles, and consequently of preventing them from getting out of shape. Consequently the position of each utensil to be polished relatively to the longitudinal axis of the drum is not changed during the rotation of this latter; the steel balls and pins effecting only a restrained and slow displacement along the surfaces of the utensils to be polished."

He then describes the apparatus by which the process may be carried out, which consists of a rotary drum formed of two parts of equal length removably fitting one upon the other, which by means of an electric motor is made to revolve within a trough designed to receive the contents of the drum after an operation. The necessity of selecting articles to be polished by the process whose specific gravity is greater than that of the polishing mass, and of regulating the speed of the rotation of the drum in accordance with the shape of the articles so that they may be kept from striking the sides of the drum and thereby deformed, is pointed out as follows:

"During the rotation of the drum the silver utensils, which are liable easily to get out of shape, will remain always fully enveloped by the steel balls and pins, and, as these balls and pins are much more mobile than the said utensils, the latter will never become much displaced in the radial direction within the drum during the rotation of the latter, and will consequently not be subjected to deformation.

"The utensils have such relation to the polishing mass in specific gravity as to be kept approximately central of the drum in its rotation, and will neither fall to the bottom nor rise to the top in the rotation of the drum, and hence are kept from contact with the walls of the drum, and prevented from being deformed in any way. The speed of rotation varies according to the character of the article; that is, a perfectly round article would still remain central, whether the speed be high or low, but an article having projections, such as a water pitcher or the like, would be dislodged from an absolutely central position, due to the irregular action upon the projecting parts; and hence the rotation is adjusted to a comparatively low speed."

He then makes the following claim:

"The method herein described of polishing articles consisting in subjecting the articles to rotation while suspended within a polishing mass, the relative specific gravity of the articles and polishing mass being such as to maintain the articles approximately central of the polishing medium during rotation, substantially as described."

The prior art disclosed that rotary drums or tumbling barrels had long been in use for polishing small articles, chiefly of cheap jewelry; but the method of operation in these cases had been, as pointed out in the opinion of the learned judge who sat in the District Court, "a method of mass polishing by using tumbling barrels or revolving or oscillating drums."

In his opinion, which appears in 260 Fed. 197, he has considered the prior art in such detail that a discussion here is unnecessary, and we think his description of the earlier processes as a "churning process" very aptly describes them. In none of the prior uses were the articles to be polished suspended within the polishing mass, so that they would be maintained "approximately central of it during rotation," and in all of them the speed of rotation of the drum was so rapid that it would have been impossible to hold the articles to be polished so suspended; but in the rotation of the barrel they passed in and out of the polishing mass, coming in contact with each other and the sides of the drum or tumbling barrel, as well as in contact with the steel balls or other polishing material.

Uebersax points out three elements upon which the successful performance of his process depends and which are not made necessary to the performance of any process disclosed by the prior art:

(1) The specific gravity of the article to be polished must be greater than that of the polishing mass.

(2) Regulation of the speed of rotation of the drum must be made in accordance with the shape of the article to be polished, so that it may remain approximately central of the polishing mass.

(3) The polishing mass must substantially cover the article to be polished during rotation.

We are satisfied with the conclusion reached by the District Court, that the method of the patent in suit was not anticipated by any prior use that was shown, or prior knowledge contained in publications relating to burnishing by old processes, and that the amendments which were allowed by the Patent Office were within the scope of the original specifications, and that, upon the authority of Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034, and Minerals Separation Co. v. Hyde, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286, the patent is valid.

The appellant clearly employs the method of the patent in suit for polishing silver utensils. For this purpose it uses one of the old tumbling barrels manufactured by the Smith-Richardson Company, which has manufactured barrels of that type since 1906. The record discloses that the Smith-Richardson Company, at the suggestion of a salesman formerly in the employ of the company which owned the appellee's patent, made necessary changes in the tumbling barrel which they had manufactured, so that it could be used to perform the work of polishing silver utensils according to the method of the patent in suit, and that it had made arrangements with this salesman for placing its modified tumbling barrel in hotels and restaurants as a competitor of the appellee's patent.

While the Smith-Richardson barrel, as modified, performs the process of the patent in suit, it was not originally designed to perform such process, nor was it, without modification, adapted to such use, nor could it, without change, have been actually used to perform the work, and its use, in its changed condition, was a substantially different one.

The appellant alleges as error that the District Court "erred in making a formal finding of facts not relating to any issue raised by the pleadings."

The finding of which the appellant complains is:

"That Young became familiar with its process while with the Tahara Company, and later undertook to exploit it for the benefit of his new employer and himself as exclusive agent in the hotel and restaurant trade."

This finding was only incidental to the main finding that the appellant was infringing the patent of the appellee, and pointed out that the copying of the appellee's method was successful, because of the fact that Young, as a salesman, had become familiar with the process of the Uebersax patent, and knew what changes it was necessary to make in the old tumbling barrel manufactured by the Smith-Richardson Company to enable it to do the work of polishing silverware according to the method of the Uebersax patent.

After a careful study of the voluminous record in the case and the briefs of counsel, we think the District Court in its reasoning and conclusions was right, and it seems unnecessary to go more fully into the case than we have in this opinion.

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

WENBORNE-KARPEN DRYER CO. v. ROCKFORD BOOKCASE CO.

(District Court, N. D. Illinois, W. D. January 18, 1921.)

1. **Patents ⟸328—1,186,477, claims 2 and 4, for process for drying and hardening siccative coatings, held to disclose invention.**
The William M. Grosvenor patent, No. 1,186,477, claims 2 and 4, for a process for drying and hardening siccative coatings, *held* to disclose invention, though it only applied to the oxidization of such coatings a process similar to that applied to the drying of lumber.

2. **Patents ⟸18—Simplicity of process does not defeat patentability.**
That a patented process was simple and apparently easily obtained does not militate against its patentability.

3. **Patents ⟸328—1,186,477, for process for drying and hardening siccative coatings, held not anticipated.**
The William M. Grosvenor patent, No. 1,186,477, for a process for drying and hardening siccative coatings, *held* not anticipated by an article on drying paints, by prior patents for drying lumber or other materials containing moisture, or by a somewhat similar prior use introduced for a different purpose and thereafter abandoned.

4. **Patents ⟸328—1,186,477, claims 2 and 4, for process for drying and hardening siccative coatings, held infringed.**
The William M. Grosvenor patent, No. 1,186,477, claims 2 and 4, for a process for drying and hardening siccative coatings, *held* infringed by a process which, like the patented process, used steam and circulating air, though the thermometer and hygrometer were not consulted, as in the patented process.

In Equity. Suit by the Wenborne-Karpen Dryer Company against the Rockford Bookcase Company for infringement of a patent. Decree rendered finding patent valid and infringed, with reference for an accounting.

William R. Rummler, of Chicago, Ill., and Cyrus W. Rice, of Grand Rapids, Mich., for plaintiff.

J. William Ellis, of Buffalo, N. Y., and Rector, Hibben, Davis & Macauley, of Chicago, Ill., for defendant.

CARPENTER, District Judge. Suit is brought for the infringement of claims 2, 3, and 4 of patent No. 1,186,477, issued June 16, 1916, on application filed November 20, 1908, by William M. Grosvenor. The patent covers a "process for drying and hardening siccative coatings."

Siccative coatings are such as varnish, oil paints, and oil containing fillers, which harden by oxidization. It is common to refer to fresh paint as wet paint, but as a matter of fact it is not wet, in the sense that it contains water that disappears by evaporation. The hardening of paint is a chemical action—an oxidization. The evaporation of water is a physical process.

The object of Grosvenor's patent was twofold: First, to harden the coatings rapidly; and, second, to produce coatings superior to those treated by other processes.

The Grosvenor process, so far as indicated in claims 2 and 4 of the patent, is not new in other arts. In its simplest form it consists of simultaneously adding heat and moisture to the air surrounding the siccative coatings. Substantially the same process has been used for

years for the purpose of drying lumber. It was learned early that if lumber were subjected to artificial heat it would dry rapidly, but the outside would become case-hardened. Steam vapor was therefore introduced into the drying chamber simultaneously with the heat circulation procured by fans, etc., and in that way the outside drying retarded until the inside drying caught up, and the whole dried thoroughly and evenly.

The only question in this case is whether the application of the old lumber dry-kiln methods, to harden siccative coatings, is patentable. It is unnecessary to collect the cases on the general subject of applying an old device to the same or an analogous art, or those holding that making use of the old device to produce a new result is invention within the meaning of the statute.

[1, 2] The record discloses that for many years prior to the introduction of the Grosvenor process it required from 18 to 48 hours to harden thick varnish, whereas under the new process the same result was reached in from 6 to 8 hours. Considering that in the piano trade and automobile trade several coats of varnish are necessary, the saving in time brought about by this process was a very material thing. That the Grosvenor process was simple and apparently easily obtained does not militate against its patentability. The simpler a device or process is, the more astonishing the fact that others in the same art did not appreciate its practical use. It is my opinion that Grosvenor marked a distinct advance in the hardening of siccative coatings.

The so-called dryng of paints and varnishes is not the same as evaporating moisture from wood or other products, nor does the use of the earlier lumber dry-kiln process even suggest that it might be used to dry paints. For years it was supposed that the introduction of moisture would delay the hardening, and it is a matter of common knowledge that efforts were made generally to keep water away from fresh paint. It seems to me that for a man to comprehend the idea that a process used in one art may be of equal value in another is as much a matter of invention as the creation and working out of the original process.

As to the Defenses.

"The defense mainly relied on in this case is that the alleged invention of the patent in suit (so far as covered by the claims in issue) consisted in the mere application of an old and well-known process to a new object." This I have disposed of, being of the opinion that the old and well-known process referred to was not only applied in a different art, but with a new and different result.

It required genius to discover, by experimentation or otherwise, that the old process was suitable for the new use, and would produce a beneficial result theretofore unforeseen. It is perfectly apparent that the suitable hardening of substances like a siccative film, which were primarily hardened by oxidization, was not suggested by the drying of substances like a porous block of wood, which were primarily dried by evaporation, because before the appearance of the Grosvenor process no one apparently thought of so treating varnished articles. As a matter of fact, it was the consensus of opinion that

moisture was one of the greatest obstacles to the rapid drying of varnish.

[3] The second defense is anticipation. The patents in the prior art relied upon by the defendant are Schultze, No. 519,352; Victorson, No. 507,512; Gathmann, Nos. 763,387 and 763,388. Great stress was also placed upon an article entitled "Pigments, Paints, and Painting," written by George Terry in 1893, where the author said:

"The drying of paint being a process of oxidization, and not evaporation, it is essential that a good supply of fresh air should be provided,"

—adding that the presence of moisture in the air was beneficial, and tends to counteract the tendency of the paint to crack or shrink.

The patent examiner had the Terry article before him when the patent in suit was allowed. Terry adds nothing to the prior art—describes nothing more than the reaction which takes place when paints are dried in the open atmosphere. If Grosvenor claimed a process for rapid drying of varnish by exposing it before open windows in a drying room, Terry might be a legitimate anticipation. Terry not only fails to indicate that moisture increases the rate of drying, but he makes no suggestion of any advantage to be secured by the rapid circulation of currents of air or other oxidizing agents across the surface of the material. Terry suggests no particular quantity of moisture, the farthest he goes being the suggestion that the ideal drying condition would be a hot, humid day in an open loft. These seem to be precisely the conditions to which manufacturers now object. He says that the presence of moisture is beneficial rather than otherwise, but the only benefit indicated is to counteract a tendency to crack or shrink. Terry at best can only anticipate the drying of paint under the action of heat, fresh air, and whatever moisture nature happens to give in the air. With only that information, it is difficult to see how the time for drying a varnish could be reduced from 36 hours to 12 or 8.

Grosvenor took a decided and important step in advance. His process cuts down the time of drying one-half, and in that way saves thousands of dollars worth of investment tied up in time and space in the manufacture of articles which are provided with such coatings. Grosvenor is the first to take this step and reach the desired result. No prior reference points out that the use of moisture in excess of natural humidity would be of any value. Indeed, for all that is said in the prior art, an excess of moisture might be a disadvantage.

Schultze's patent covers an apparatus for drying green lumber; no other material being mentioned or suggested. There is nothing in that patent to suggest the use of the apparatus for the drying of siccative coatings.

Victorson nowhere suggests the introduction of moisture in the operation of his process; he employed only heat and the circulation of air.

The two Gathmann patents are substantially the same, and it is evident that the inventor had in mind the drying (by evaporation) of water-containing substances only, whether such substances be "vegetable, mineral, animal, or compound substances." He nowhere refers

to siccative coatings nor to hardening the same by oxidization. "The various modes of procedure described will depend upon the substance or material to be dried, as, for instance, upon the percentage of moisture contained in such substance or material, or the bulk thereof, or both, and also upon the physical character of the substance or material." It is true that in his 1904 patent he said that, instead of producing saturation of the air by circulation, he might effect it in the drying chamber by means of vapor evolved from the substance or material to be dried, or might produce the initial vapor-laden atmosphere by admitting vapor, as steam, to the drying chamber, then heat the vapor-laden atmosphere to a vaporizing temperature, establish the circulation, and proceed with the condensation as above set forth; but there is nothing in the Gathmann patents to suggest that the introduction of moisture—for 25 years the bugaboo of users of siccative coatings—would accelerate their hardening.

The Heath & Milligan Prior Use.

I am not at all impressed with this defense. It seems that some years ago a fresh-air device was introduced into the Heath & Milligan paint shop, primarily to purify the atmosphere. The same device had been installed in the Public Library in Chicago. There is some evidence that the conduit was turned into a room where sample panels had been painted and set up for drying. This use was discontinued, and so far as the record shows no one else ever adopted it until after the publication of the Grosvenor patent.

The patent is held valid.

Infringement.

[4] The testimony of Anderson, the general manager of defendant's factory, leaves no doubt in my mind but that the general principles of the Grosvenor patent were infringed. The kiln room was equipped with steam radiators, a pet cock in the steam pipe, "serving to let live steam into the atmosphere of the kiln," and an electric fan for the purpose of circulating the air. The claim that the thermometer and hygrometer were not consulted by the defendant does not relieve the infringement.

A decree may be prepared, finding the patent valid, claims 2 and 4 infringed, and the usual reference for an accounting.

PALMER et al. v. JOHN K. STEWART & SONS, Inc.

(District Court, N. D. New York. February 13, 1920.)

No. 259.

Patents ⇐328—878,995, claim 1, for apparatus for inverting tubular fabrics, held infringed, resiliency of material being equivalent of spring.

The Palmer patent, No. 878,995, claim 1, for apparatus for inverting tubular fabrics, consisting of a combination with a fabric-supporting tube, of a pair of feed rolls adapted to engage the opposite sides of said tube "and yielding means for forcing said feed rolls against said tube," the yielding means shown being a spring connecting the rolls, allowing them to give to accommodate themselves to irregularities in the fabric, *held* infringed by a machine having no spring connection between the rolls, but in which the same result was accomplished through the inherent resiliency of the materials of the frame and shafts.

In Equity. Suit by William B. Palmer and Jesse V. Palmer against John K. Stewart & Sons, Incorporated. Decree for complainants.

James L. Norris and C. A. Bateman, both of Washington, D. C., for plaintiffs.

Walter E. Ward, of Albany, N. Y., for defendant.

LEARNED HAND, District Judge. This case comes up on the question of the infringement of the plaintiffs' patent 878,995. Only one claim is at issue. This same claim has been adjudicated twice before in the Second circuit (Palmer v. Jordan Mach. Co. [C. C.] 186 Fed. 496; Id., 192 Fed. 42, 112 C. C. A. 454), and I will state it for the purpose of discussing it here. It is as follows:

"1. In an apparatus of the class described, the combination, with the fabric-supporting tube, of a pair of feed rolls adapted to engage the opposite sides of said tube, and yielding means for forcing said feed rolls against said tube."

These machines are for the purpose of running onto a tube a hollow web of fabric, with speed and without injury. They are extremely simple in design, consisting of nothing but what I may call a stovepipe, horizontally fixed, near the free end of which are two substantially vertical spools, which can be rotated in opposite directions. These spools must have a motion of translation to and from the tube.

The patent is an old one, and has been in litigation twice before. At its outset it was copied by one Jordan, and his imitation is conceded to have been an infringement and was never contested in any court. The first litigation arose over a combination in general appearance the same as that of the disclosure, but differing in the means by which the rollers were made to approach the tube. Palmer had frames, upon which the rollers were mounted, hinged at the bottom, and in order to cause them to approach he put between them a strong spring, which was always in tension and held by a toggle joint from forcing the spools against the tube. When Jordan attempted first to evade the patent, he dispensed with the spring which Palmer had disclosed, and substituted a shaft with a thread forcing the frames together or apart

by the rotation of a wheel. Nevertheless, apparently, he supposed, just as had Palmer, that he must have some yielding means at the rolls, which he accomplished by having the bottom of the rolls movable up and down on the shaft under the tension of a spring, and as the frames were forced against the tube this spring took up the pressure so developed. The Circuit Court of Appeals (Palmer v. Jordan Mach. Co., 192 Fed. 42, 112 C. C. A. 454) decided that the machine was an infringement, whether the element which forced the feed rolls against the tube was itself yielding, or whether it was in the feed rolls themselves.

But if we read literally the last element of the claim, which is now in dispute, Jordan was right. He had in fact no yielding means for forcing his feed rolls against the tube. His means were positively driven by the rotation of a wheel. Having been defeated upon that device, Jordan tried again, and I think in that effort clearly demonstrated that he had recourse to the only prior patent in the art; i. e., Gove's. Now, Gove had two rollers unyieldingly mounted in a frame; but Gove apparently also thought that he needed a yielding contact between the fixed rollers and other rollers, which were to carry off the web onto the tube, and such rollers he disclosed as d^2–d^3. They were mounted substantially on the tube, but so as to have a yielding contact by springs with the larger rollers *F* and *G*.

It is quite clear that in Jordan's second infringement (which I suppose he thought would escape on account of its being so nearly copied after the prior art), the feed rollers were forced against the tube by precisely similar mechanism that is now used, but when they got up to the tube they encountered a yielding means, consisting of what I think it fair to call the surface of the tube itself, because I regard the small rollers which Jordan inserted in the tube as equivalent to the surface. This is particularly shown in Gove's own invention, because in his illustrative disclosure, shown in Fig. 4, he shows the sides of the tube as acting like springs. In other words he made a certain portion of his tube resilient, and allowed it to accommodate itself to differences in pressure. The decision of the Circuit Court of Appeals on this second Jordan infringement may be, therefore, with entire justice, held to be this: That if you find in any co-operating parts of the two opposing factors elements which will yield to allow for irregularities of the fabric as it passes over the point of contact, you have got the invention in suit. It is therefore quite clear that the courts have refused to take literally the last element of the claim in any sense whatever.

Now, taking this as law for this patent, the question here is whether this defendant has escaped? As I said, his means of making the rollers approach is precisely like both the earlier machines held to be infringements. But in this case he found he could altogether dispose of any spring-opposing elements whose compression establishes a pressure which carries the web forward. That being so, what shall we say of the meaning of the phrase "yielding means"? "Yielding means," taken in a practical sense, is a means which yields, and in this case any means yields which will give sufficiently to accommodate the machine to ir-

regularities in the fabric. The test is entirely what the machine will do when you operate it, and there is undisputed proof in this case that the rollers in contact with the tube, as actually used, will yield. They yield to fabric, because the plaintiff has put through fabric of varying thicknesses, and they accommodated themselves to them. Indeed, they yield to solid material, like rubber, wood, or leather, if that be important. This they do only by the inherent resiliency of the materials of the frame and shafts.

It so happens that there is a decision in the Circuit Court of Appeals, which Mr. Norris has called to my attention, and which is very unusually in point—in point in a sense I had hardly expected two patent cases could ever be in point. Manton-Goulin Mfg. Co. v. Dairy Machinery & Construction Company, 247 Fed. 317, 159 C. C. A. 411. In that case the patent had disclosed a pressure device, which operated by a very heavy spring pushing a plunger into an orifice, and under the enormous pressure which the machine established the spring was overcome. The defendant attempted to evade infringement by a machine which had no spring whatever, but a very strong steel plug, which could be screwed down with enormous pressure on some steel discs. Under the pressures which the machine set up, this shaft was elongated and acted as a spring. It was very strenuously argued in that case that there was no spring pressure, but the court said no; that there was spring pressure wherever there was resiliency in the material sufficient in practice to accomplish the same result as a spring, and so the defendant was held guilty of an infringement.

Now, I can see really no distinction between that case and this. The presence of the equivalent of a spring in this machine depends on whether the inherent resiliency of its materials operates as the spring disclosed operates. I think it does.

A decree for plaintiffs for an injunction, with costs, and an accounting will be entered.

In re HIGDON et al.

(District Court, E. D. Missouri, E. D. November 1, 1920.)

No. 5485.

1. **Constitutional law ⟸29—Provision as to jurisdiction of inferior federal courts not self-executing.**

   Const. art. 3, § 2, extending the judicial power to all cases in law and equity arising under the Constitution and laws of the United States, is not self-executing as to the courts inferior to the Supreme Court; but those courts can exercise only so much of that jurisdiction as is conferred upon them by Congress.

2. **Courts ⟸265—General jurisdiction of District Court does not include original mandamus proceedings.**

   The general jurisdiction conferred on District Courts over all suits of a civil nature at law or in equity arising under the Constitution and laws of the United States does not confer on those courts jurisdiction over applications for mandamus, where that relief is the object of the suit, but only authorizes such writs as auxiliary to a jurisdiction already existing and being exercised.

3. Courts ⊜265—**Corrupt Practices Act does not authorize mandamus by United States District Courts.**

The federal Corrupt Practices Acts (Act Aug. 19, 1911 [Comp. St. § 192 et seq.]; Act Oct. 16, 1918 [Comp. St. Ann. Supp. 1919, § 10251a]), requiring certain things in elections for Senators and members of Congress, and forbidding others, and prescribing punishment for violations, do not confer on the federal District Courts power to enforce the rights thereby given by mandamus.

Application by John C. Higdon and another for a writ of mandamus, commanding the Board of Election Commissioners in the city of St. Louis, Mo., to recount the ballots at a primary election. On petition for rehearing after denial of the application. Petition for rehearing denied.

John C. Higdon, of St. Louis, Mo., and G. H. Foree, for petitioners.

HOOK, Circuit Judge. John C. Higdon, Esq., and G. H. Foree, Esq., candidates on the Democratic ticket for nomination to the positions of United States Senator from Missouri and Representative in Congress from the Tenth congressional district of that state, respectively, at the primary election August 3, 1920, applied to the judge of the United States District Court for the Eastern District of Missouri for a writ of mandamus commanding the board of election commissioners in the city of St. Louis, Mo., to reopen the ballot boxes, recount the ballots, and make a true and lawful return thereof to the court. Various frauds and irregularities were alleged. The application was denied by Hon. Charles B. Faris, United States District Judge, for want of jurisdiction. A petition for rehearing was presented to William C. Hook, United States Circuit Judge, at the instance of the petitioners and with the consent of the District Judge.

Two grounds for the existence of jurisdiction are asserted: First, the provision of the Constitution which extends the judicial power "to all cases in law and equity" arising under the Constitution and laws of the United States (article 3, § 2); second, the federal Corrupt Practices Acts (37 Stat. 29 [Comp. St. § 192 et seq.]; 40 Stats. 1013 [Comp. St. Ann. Supp. 1919, § 10251a]), relating to primary, general, and special elections.

[1] The relation of the Supreme Court to the judicial power of the United States need not be considered. As to the inferior federal courts, the provision of the Constitution is not self-executing or automatically operative. It was left to Congress to distribute the judicial power among them and to prescribe the extent and the means of its exercise.

[2] The original Judiciary Act of 1789 (1 Stat. 78) conferred upon the Circuit Courts original cognizance of all suits of a civil nature at common law or in equity, where the matter in dispute exceeded a specified value; but it was held more than a century ago that this did not cover the whole ground of the Constitution, and that those courts had no jurisdiction of mandamus as an original plenary action. McIntire v. Wood, 7 Cranch, 504, 3 L. Ed. 420. In federal jurisprudence mandamus is not available to establish or complete an individual

right, even though the right may arise under the Constitution and laws of the United States. It is regarded as auxiliary or assistant to a jurisdiction already existing; not a jurisdiction in the general sense, but one that is actually afoot and is being exercised. Hence it is that, unless specifically authorized by Congress, a right under the Constitution or laws of the United States may not be enforced by an original action in mandamus. The general conferring of jurisdiction of cases arising under such Constitution and laws is not of itself sufficient.

In Knapp v. Railway Co., 197 U. S. 536, 25 Sup. Ct. 538, 49 L. Ed. 870, the Interstate Commerce Commission sought by an original petition for mandamus in a Circuit Court of the United States to compel the railway company to make certain reports which an act of Congress authorized the Commission to require. The Supreme Court held that the jurisdiction of the Circuit Courts under the Judiciary Act of 1789 had not been enlarged by subsequent statutes; also that the court had no power to enforce performance by the railway company of its duty by an original proceeding in mandamus. In Covington Bridge Co. v. Hager, 203 U. S. 109, 111, 27 Sup. Ct. 24, 25 (51 L. Ed. 111), the court said:

"We deem it settled beyond controversy, until Congress shall otherwise provide, that Circuit Courts of the United States have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ, and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States."

The District Courts of the United States have no more power in this particular than had the Circuit Courts, to whose jurisdiction they succeeded.

[3] The Corrupt Practices Acts add nothing to the above. They require certain things to be done, prohibit the doing of others, and prescribe punishment for violations. Enforcement is by indictment and trial in the customary way. No remedy by original action in mandamus is given those injured. The proceeding here is neither an inquiry by a grand jury nor the trial of a criminal case under those acts. Though Congress might provide for federal supervision of all elections, primary, general, and special, relating to nomination and election to office under the Constitution and laws of the United States, and provide for enforcement thereof by mandamus, or any other suitable remedy, it has not done so.

The petition for rehearing is denied.

KETTERER v. LEDERER, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. October 13, 1920.)

No. 2071.

1. **Internal revenue ⊂=2—Additional tax in case of violation of Liquor Law valid.**
   Congress may impose a tax in one sum on one dealing in intoxicating liquors, through sales for limited purposes, and another additional tax on him if he exceeds such limit.
2. **Constitutional law ⊂=38—"Unconstitutional" defined.**
   The word "unconstitutional," as understood by the courts, means that the act assailed is in conflict with some provision of the Constitution; not that it is contrary to sound principles of legislation.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unconstitutional.]
3. **Constitutional law ⊂=286—Special tax in addition to criminal punishment not denial of due process.**
   The act of Congress enforcing the Eighteenth Amendment, in making it a criminal offense to violate the terms of the act, and in addition subjecting the offender to the payment of a special tax, collectible by the ordinary processes, is not a denial of due process of law.
4. **Internal revenue ⊂=28—Injunction not granted to restrain enforcement of internal revenue tax.**
   A federal court will not grant an injunction to restrain collection of an internal revenue tax (Comp. St. § 5947); Congress having provided a different and not inadequate remedy.

In Equity. Suit by Frederick Ketterer against Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania. On motion for preliminary injunction. Denied.

Lincoln L. Eyre and J. Washington Logue, both of Philadelphia, Pa., for plaintiff.

Webster S. Achey, Special Asst. U. S. Atty., and Chas. D. McAvoy, U. S. Atty., both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The real question involved in this case is that of the power of the court to restrain by injunction process the collection of an internal revenue tax, and the propriety of the exercise of the power, if possessed. The averments of the bill are undenied, and we have been asked to allow or disallow the issuance of a preliminary injunction upon the averments as the proofs in the case.

The amount involved is not large, and because of this the suggestion was made that the execution process, which the defendant is proposing to put in force, be not executed until the case could be fully heard, and the important questions of the rights of the plaintiff in the bill involved in the motion fully considered. Acquiescence in this suggestion as first made has been since withdrawn, and we are asked to decide the question raised on the motion.

The plaintiff is a dealer in intoxicating liquors, and paid a revenue license as such. Before the enactment of the Eighteenth Amendment

to the Constitution and the passage of the laws made in the enforcement thereof, no more would have been asked of him. By this legislation the right of sale, which the plaintiff would otherwise have had, has been much curtailed.

The act of Congress enforcing the Eighteenth Amendment has several objectives. One is to make it a criminal offense to do what the plaintiff is charged with having done, and another is to subject such persons to the payment of a special tax to which they would not be otherwise subject, and to subject them to all the ordinary processes for the collection of this special tax.

The power of the court to restrain the defendant from distressing the plaintiff by the collection of this tax is asserted, and the exercise of the power invoked on the two broad grounds: First, that the defendant is attempting to impose and collect a fine for supposed criminal acts, and that it is no less the infliction of punishment because it is called a tax, and second, that the National Prohibition Act (Act Oct. 28, 1919, c. 85, 41 Stat. 305), at least as to this provision of it, is unconstitutional, for the reasons that its language is "vague and indefinite," and "it authorizes the punishment of a supposed criminal offender without due process of law."

[1] With respect to the first ground, we are (at least for the purposes of this motion) unconvinced that a tax in one sum may not be imposed upon one dealing in intoxicating liquors through sales for limited purposes, and another additional tax be imposed upon him if he exceeds such limit.

[2] In respect to the second ground of the unconstitutionality of the act, it may be first observed that the term "unconstitutional" is often used to express a thought far different from that of its real meaning as used in our system of jurisprudence. It is not infrequently used in the sense of conveying a condemnation of a law which has been made in violation of sound principles of legislation. It has, however, with us a very restricted meaning, which is substantially this: That when an act of Congress says one thing, and the Constitution of the United States says another thing, the courts are called upon to construe the meaning of both enactments in very much the same way in which they would be called upon to do the same thing if one act of Congress was passed, followed by another act on the same subject, negativing the provisions of the first act. If the Constitution thus negatives the provisions of an act of Congress, the provisions of the act are of no avail, precisely as the provisions of an earlier act have neither force nor validity, if negatived by a later act.

[3] Applying this test, we have no applicability to the present contention of any provision of the Constitution other than the "due process" amendment. To allow an injunction on this ground, we must hold either that the exaction of the payment of a tax is depriving the taxpayer of his property without due process of law, or that, although Congress has declared it was levying a tax, it was in fact doing something else. The first ground on which to base this ruling is clearly untenable, and the latter finding we decline to make on this motion.

[4] Congress has clearly declared its purpose that the collection of excise taxes shall not be hampered or delayed by resort to injunction process, and has provided a different and not inadequate remedy.

The motion is denied.

WEEKS v. SIBLEY.

(District Court, N. D. Texas, at Amarillo. October 22, 1920.)

No. 79.

1. **Trusts ⊜247—Beneficiary may sue to enjoin trustee from paying tax on trust property.**
   A suit in equity may be maintained by a beneficiary of a trust to enjoin the trustee from making return and paying a tax on the trust property alleged to be illegal.
2. **Internal revenue ⊜7—Creation of trust to lessen tax liability held legal.**
   The dissolution of a joint-stock company and the transfer of its property to a trustee on a trust such as designated in Revenue Act, § 219 (Comp. St. Ann. Supp. 1919, § 6336⅛ii), *held* valid, where the transfer was permanent and made in good faith, although its purpose was to avoid or lessen future tax liability under the statute.

In Equity. Suit by Harry C. Weeks against S. W. Sibley, trustee. Decree for complainant.

Weeks, Morrow, Francis & King, of Wichita Falls, Tex., for complainant.

Rasbury, Adams, Stennis & Harrell, of Dallas, Tex., for defendant.

WILSON, District Judge. This is an equitable proceeding, brought by the complainant, as beneficiary of Thrift Trust No. 4, a trust estate, for himself and others having like interest. It appears from the bill and the evidence introduced that there was organized in 1918 an unincorporated joint-stock company or association, known as Thrift Oil & Gas Company No. 4, for the purpose of developing an oil and gas lease in Wichita county, Tex.; that the complainant, defendant, and numerous others acquired stock in said company early in 1919; that the operations of the company were successful; that oil was encountered in paying quantities upon the land, and the property became proportionately very valuable; that on August 19, 1919, said company was, by a vote of its shareholders, dissolved, and its assets conveyed to the defendant herein, as trustee of a trust estate, under a trust agreement which gave him, for practical purposes, absolute control of the property; that on September 3, 1919, he sold the trust property for $475,000 in cash and $593,750 to be paid from a certain percentage of the oil to be produced from said property; that the trust agreement provided for the periodical distribution of the income of the trust; that the question of how this transaction was to be handled for income tax purposes was submitted to the Bureau of Internal Revenue in December, 1919, but no ruling was made until May 29, 1920; that in due course the trustee made a fiduciary income

tax return, reporting this transaction substantially in accord with the foregoing, and showing the names and addresses and distributive shares of the gain derived from this transaction by each beneficiary; that thereafter the Bureau of Internal Revenue ruled that the dissolution of Thrift Oil & Gas Company No. 4 was a device to escape taxation, and ineffective as such, and that the tax should be paid in the same way as if the dissolution had not occurred and said sale had been made by the original company; that the complainant was the owner of 15 shares of stock in said Thrift Oil & Gas Company No. 4 at the time of its dissolution, and continued to own his pro rata interest as a beneficiary of the trust; that when informed of said ruling he protested against a voluntary compliance therewith by the trustee, but was informed by the trustee, because of penalties attached to failure to make a return or to pay a tax in accordance with the mandate of the Bureau of Internal Revenue, that he proposed to comply therewith voluntarily.

Thereupon this suit was brought for the purpose of restraining such voluntary compliance, and a temporary restraining order was issued. The Bureau of Internal Revenue and the district attorney of the United States for this district were notified of the pendency of the suit and the subject-matter thereof, and invited to appear as interveners or as amicus curiæ, which they failed to do.

It appears from the evidence that the principal motive of those in charge of the affairs of Thrift Oil & Gas Company No. 4 and its shareholders in dissolving the company and in creating the trust was to avoid or lessen tax liability in the future under the Revenue Act of 1918, and for the purpose of this opinion it may be taken that that was the sole and compelling motive. It also conclusively appears that the sale thereafter made was not in contemplation of the parties at the time of the dissolution; that there were no agreements or understandings, enforceable or otherwise, regarding the sale subsequently made, and in fact that the purchasers of the property were at the time of the dissolution of Thrift Oil & Gas Company No. 4, unknown to any of the shareholders, trustees, officers, or attorneys of said company. Jurisdiction of this court is invoked on the ground of multiplicity of suits and the absence of all legal means of redress for the wrongs which would result, if the trustee paid the tax and complied with the ruling without protest.

It is the complainant's contention, first that Thrift Oil & Gas Company No. 4 had no income subject to tax, and could have no income after it had transferred all of its assets to defendant and had dissolved, and that any profit or income accruing by virtue of a sale subsequently made, accrued to the trust estate, and was subject to taxation under section 219 of the Revenue Act; second, that the gain or enhancement of property realized by the sale is not income within the purview of the Sixteenth Amendment, but that it is enhancement in capital, and not subject to tax without apportionment among the states upon the basis of population, and that any attempt to reach such gain or enhancement by tax upon income is unconstitutional and void.

[1] It seems clear, in view of the decisions in Pollock v. Farmers'

Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, Brushaber v. U. P. R. R. Co., 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, L. R. 1917D, 414, Ann. Cas. 1917B, 713, and Stanton v. Baltic Mining Co., 240 U. S. 103, 36 Sup. Ct. 278, 60 L. Ed. 546, that under averments similar to those made in complainant's bill this court has jurisdiction to grant the relief sought, there being no reason for a different rule applying as between a beneficiary and a trustee and that applied in the cases above cited as between stockholder and a corporation, although it must be admitted that in view of section 3224, R. S. (Comp. St. § 5947), no member or agent of the Bureau of Internal Revenue can be made a party or in the strict sense precluded by the decision of this court herein.

[2] The evidence establishes that the trust formed as above set forth is such a trust as is provided for in section 219 of the Revenue Act of 1918, it being the character of trust mentioned in section 219 (a) (4), where the income of same "is to be distributed to the beneficiaries periodically whether or not at regular intervals." The same section provides that in cases coming under paragraph (4) of subdivision (a):

"The tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year."

The trust is substantially identical with the one under consideration by our Supreme Court in the case of Crocker v. Malley, 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601, and the distinction for purposes of taxation between trusts of this character and associations is recognized by the Bureau of Internal Revenue in Solicitor's Memorandum No. 1068, as well as other rulings. It therefore appears that, if the purpose and the motive which prompted the dissolution of Thrift Oil & Gas Company No. 4 is not illegal, nor a fraud upon the revenue, the complainant's contention in this respect is correct, and no income accrued to Thrift Oil & Gas Company No. 4 by virtue of the transaction.

It is insisted in the opinion of the solicitor for the Bureau of Internal Revenue that this change is a sham and a subterfuge and is ineffective. This same opinion admits the right of an individual or corporation to regulate or change its business, with a view of reducing or avoiding taxation in the future, but in contradiction with this admission holds that the parties involved in this transaction could not do so. Supporting this view there are several cited cases, most of them by state courts. The case of Pollard v. Bank, 47 Kan. 406, 28 Pac. 202, cited by the solicitor, is directly opposed to his contention. The basis of the decision in the case of Ransom v. City of Burlington, 111 Iowa, 77, 82 N. W. 427, is not that an owner of property may not transfer his property or any part thereof for the purpose of avoiding any sort of tax, but the case holds that the purported transfer in the case of a strip from the front of a city lot, made for the purpose of avoiding a paving assessment, did not in fact pass title, and for

that reason the property was subject to taxation in the hands of purported transferor. The same case held:

"While one may lawfully dispose of his property to escape taxation, even taxation of a general character, the law will not uphold any mere manipulation under the guise of disposition, the only effect of which is to defeat a tax."

Other cases are cited involving the purchase of tax-exempt government securities at the beginning of a taxable year and the conversion of a cash deposit in a bank into greenbacks at a similar time, the holding of such tax-exempt property for a few days, and the immediate reconversion of same into taxable property for the purpose of escaping the burden of state taxation; the theory of those carrying on these manipulations being that, when they could strictly say that on the day tax liability was fixed they had no such taxable property, they could then immediately reconvert into property subject to taxation, and thus enjoy the benefits of the property subject to tax, and escape the burden of the tax.

These cases are easily distinguished from the case at bar. There is nothing in the record in this case remotely indicating that the dissolution of the Thrift Oil & Gas Company No. 4 was not permanent, and that the shareholders by said dissolution did not permanently and finally abandon and relinquish all of the benefits which might thereafter have arisen on account of their organization as an association. To bring the character of cases above cited in line with the instant case, it would have to be held in the bond and currency cases that, if the individual making the change had continued to hold the tax-exempt property, he would nevertheless, on account of his intention of escaping taxation, be liable therefor, and thus we would have the strange spectacle of constitutional provision overridden, because a citizen intended to avail himself of all of the advantages guaranteed to him by the Constitution.

Bearing in mind the rule of construction which the Supreme Court announced in the case of Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211, and numerous other cases, to the effect that the provisions of the taxing statutes are not to be extended by implication beyond the clear import of the language used, and that they are to be construed most strongly against the government and in favor of the taxpayer, it is the opinion of this court that the right to change the status of an organization, or to dissolve an organization in any legal manner, is not made ineffectual because the motive impelling the change is to reduce or avoid taxation in the future. The right so to do is an incidental right, inseparably connected with an individual's right to own and control his property. It is practically identical with the sale by a citizen of tax-burdened securities and the investment of the proceeds thereof in tax-exempt ones, for the purpose of reducing or avoiding taxation.

It is not unnatural that any thoughtful business man take such steps. It is altogether different from tax dodging, the hiding of taxable property, or the doing of some unlawful or illegal thing in order to avoid taxation. In view of the above holding, it is not necessary, and the

question raised, as to whether or not the gain or enhancement in the value of property realized by its sale is income, and taxable as such, is not here passed upon.

Judgment therefore will be entered, granting the complainant the relief prayed for.

PAYETTE-BOISE WATER USERS' ASS'N, Limited, v. BOND et al. (PIPHER et al., Interveners).

(District Court, D. Idaho, S. D. September 18, 1920.)

No. 640.

1. **Waters and water courses ⟸222—Items entering into cost of government project.**
   While administrative expenses of the reclamation service, such as salaries of the administrative officers and of those who assisted them in the performance of administrative duties, are not chargeable as part of the cost of a project, the cost of services rendered to that particular project, such as the keeping of its accounts, preparation of engineering specifications, or purchasing and forwarding supplies, whether such services are rendered at the place of the project or elsewhere, or for such project alone or in connection with others, in such case prorative, is properly chargeable as a part of its cost.
2. **Waters and water courses ⟸222—Contested claim of contractor not chargeable to settlers in cost of government project.**
   The amount of the claim of a contractor on an irrigation project, which is being contested by the government in the Court of Claims, cannot properly be charged to the settlers as a part of the cost of the project.
3. **Waters and water courses ⟸222—Computation of acreage chargeable with cost of irrigation project.**
   In computing the acreage on which the cost of an irrigation project was to be charged, a general deduction from the lands within the limits of the project of 10,000 acres, because it was "estimated" that such quantity would prove incapable of irrigation, because rough or sandy or from seepage, *held* not justified, where no land was described and excluded, and all lands within the project were equally entitled to water if demanded, and where specific tracts had already been excluded as nonirrigable.
4. **Waters and water courses ⟸222—Rights of settlers within irrigation project may be judicially determined.**
   Settlers on lands within an irrigation project, with the understanding that water shall be supplied to their lands and that the cost of the works will be assessed against them, are not concluded by the decision of the Secretary of the Interior as to what their interest in the works shall be, nor as to what sum shall be assessed against their lands for cost of construction, but have rights which may be judicially determined.

In Equity. Suit by the Payette-Boise Water Users' Association, Limited, against J. S. Bond and others. John Pipher and others intervened. On final hearing.

For prior opinion, see Payette-Boise Water Users' Ass'n v. Cole, 263 Fed. 734.

J. B. Eldridge, of Boise, Idaho, and H. A. Griffiths, of Caldwell, Idaho, for plaintiff.

J. L. McClear, of Boise, Idaho, Will R. King, of Washington, D. C., and B. E. Stoutemyer, of Boise, Idaho, for defendants Bond, Fisher, and Weinkauf.

Thompson & Bicknell, of Caldwell, Idaho, for defendants Riverside Irr. Dist. and Pioneer Irr. Dist.

Hugh E. McElroy, of Boise, Idaho, for defendant Nampa & Meridian Irr. Dist.

E. G. Davis, of Boise, Idaho, for interveners.

DIETRICH, District Judge. In the decision filed on July 21, 1919 (263 Fed. 734), certain conclusions were stated, but entry of decree in accordance therewith was deferred until the September term, in the thought that possibly the Reclamation Service might see fit in the meantime to obviate some of the objections held to be valid, and that progress could thus be made toward a solution of the controversy, without substantial delay or expense.

It will be remembered that the principal question in issue was the propriety of the demand of $80 per acre made against the settlers on certain of the project lands as a construction charge, and inasmuch as the Secretary of the Interior, the officer vested with final authority to speak for and bind the government, has failed to make findings, and, as a witness, was unable or unwilling explicitly to disclose the factors which he had used in his computation, the basis of the charge was in some respects left to conjecture. By all considerations of common fairness, it was thought the settlers were so clearly entitled to be advised from an authorized source, and in sufficient detail to enable them intelligently and fully to consider the correctness of the charge, that the absence of findings was assumed to have been the result of an oversight, rather than of design, and it was believed that, attention having been called to it, an appropriate record would be promptly supplied.

However that may be, of date October 24, 1919, the director and chief engineer of the service signed, and the Secretary approved, an instrument entitled "Statement of Cost and Conditional Dedication of Irrigation Works, Boise Irrigation Project, Idaho." And upon October 31st a certified copy thereof was, by leave of court, filed as an exhibit in the cause, and served upon counsel for the plaintiffs. (For convenience the instrument will be referred to as the statement.) Subsequently additional pleadings were filed, and certain settlers with interests in harmony with those of the plaintiff were permitted to intervene; and, further proofs having been taken, the cause is again submitted.

No direct issue was made in the original pleadings touching the interest which the settlers were to have in the system. In the statement, for the first time, the Secretary disclosed his position and informed them that upon the payment of the announced acreage charge of $80 for lands outside of, and $70 for lands within, an irrigation district, they would be recognized as being the owners of a one-half interest in the Arrowrock reservoir, 98 per cent. of the Deer Flat reservoir, and 99 per cent. of the diversion works and main canal, with a reservation, also, of the power plant at the diversion dam. In its supple-

mental complaint the plaintiff asserts the need for the entire capacity of the system, and challenges the Secretary's right to withhold any part of it, and thus we have substantially a new issue. For convenience we will first consider the propriety of the acreage charge, upon the assumption that the settlers are to have only such portions of the system as are so dedicated to their use.

In view of the conclusion heretofore reached, that the settlers must pay the actual cost of what they get, two prime factors enter into the computation of the proper acreage charge: (1) The cost of works of which the settlers are to be the beneficiaries; and (2) the acreage to be served thereby.

Cost.

First, as to the cost of the project. By the statement it is shown that the net cost of the portions of the system (other than the Arrowrock storage) dedicated to the "project lands" (defined to be lands "under the constructed unit of the project and having no water right from private canals") is $6,788,233.18, and of one-half of Arrowrock, so dedicated, $2,300,591.91, or a total of $9,088,825.09. It is stated that this amount includes nothing on account of surveys and investigation for other projects, nothing for drainage expenditures, except for such drainage as serves the project lands, nothing for the Notus extension, and that it is net, after making deductions for the reserved features, namely, $195,305.27 for power plant, $20,000 for 2 per cent. of Deer Flat storage, and $20,000 for 1 per cent. of main canal, which delivers the water from the river into the Deer Flat reservoir; the explanation being that this canal cost $2,000,000 and Deer Flat $1,000,000.

Plaintiff, stating the account by a different method, reaches a different conclusion; but upon analysis it is found that the difference in result is due to a comparatively few controverted factors, and in the interest of clearness and brevity these will be referred to, without any attempt to set forth in detail the account as stated by either side.

Notus Extension.

One disturbing factor is the Notus extension; it having been excluded by the Secretary and taken into account by the plaintiff. It is not completed, and of course we cannot anticipate at this time precisely what the actual cost will be, and the acreage charge having been fixed by contract, the ultimate result may be a small profit or a small loss; neither is likely to be great. For such interests in the main canal and Deer Flat reservoir as are set apart for it, it is charged. True, no credit is given for the water developed by the drainage systems, which is its chief water resource, but only in part does such water come from project drainage systems, and besides, taking the equitable view, the plaintiff's shareholders and other settlers on the south side are charged nothing for the mere right to appropriate water. Accordingly it is thought that there was no impropriety in excluding from consideration both the cost of this extension and the acreage to be irrigated therefrom. Were the profit or loss likely to be very considerable, a different view might very well be taken.

Power Plant.

So with the power plant at the diversion dam. The installation was primarily for construction purposes, and it now has no utility, so far as concerns the maintenance and operation of the constructed units. If retained, it will be of value only for such revenues as may be realized from its rental or from the commercial sale of electric current. Credit is given for its cost, and apparently some allowance also for the privilege of using the waterfall; the evidence is meager upon the subject, and insufficient it is thought to warrant relief.

Operation and Maintenance Charge.

Prior to July 2, 1917, the date of the "public notice," all expenses for operation and maintenance were charged to construction, and accordingly receipts arising from water rentals or operation charges were applied in reduction of construction cost. An item of $208,827.54, since collected on account of operation and maintenance, appears to be now carried as a reserve for the payment of expenses of operation and maintenance, rather than cost of construction. As I understand, it is not contended by the plaintiff that the settlers will fail to receive the benefit of the item, and it is only a question whether it shall be applied to the reduction of construction cost or in the payment of current and future operation and maintenance expenses, and hence it is a matter of little moment one way or the other. The disposition of it made by the Secretary is not thought to have been unwarranted.

General Expense.

[1] The plaintiff vigorously assails an aggregate charge of $426,673.56, made up of a large number of items of a general or miscellaneous character, segregated and classified by the plaintiff's accountant as follows:

General expense, Washington office	$223,425.48
General expense, Chicago office	19,482.86
General expense, Denver office	52,337.14
Engineering (Washington)	8,997.18
Office chief electrical engineer (Washington)	16,889.77
Consulting engineer (Washington)	1,955.60
Board of army engineers (Washington)	1,632.67
Inspection of accounts (Washington)	2,090.66
Central board of review (1915)	127.23
Congressional investigation party	2,529.43
Washington office: Supplies, telegraph, drafting, work, cement inspections, photographic and miscellaneous	97,205.54
	$426,673.56

There is no contention that any one of these items is erroneous in fact, but only that as a matter of law they are not chargeable as a part of the cost of construction. In the main, reliance is had upon certain expressions of the Supreme Court in Swigart v. Baker, 229 U. S. 187, 33 Sup. Ct. 645, 57 L. Ed. 1143. The precise question involved in that case was the right of the Secretary to charge and collect the necessary expenses of operation and maintenance so long as he had the management and control of the project system. In discussing it, the

court observed that "the cost of surveying those projects which were not developed and the administrative expenses not chargeable to any particular project might not be repaid, but these sums were so small as to be negligible, as against the fundamental idea of the bill, that the proceeds of public land as a trust fund should be kept intact," and, further, that it was the intent of Congress that the fund is to remain "undiminished by local expenses."

Even if these expressions be regarded as other than dicta, it is difficult to draw the line of demarcation between chargeable and non-chargeable expenses. It could hardly have been intended that the place where the service is rendered, or the obligation incurred, is a controlling consideration. If the accounts of the project are kept in Washington, or if supplies are purchased by an agent in New York, or if specifications are gotten up in Denver, the contribution to the project may be quite as direct and beneficial as it would be, were such services rendered in the immediate vicinity. Neither could it have been intended to decide that to be chargeable the service must be rendered by one who is employed exclusively upon a single project. Upon the other hand, general expense of a strictly administrative character, such as the salaries of the administrative officers and of those who assist them in performing their administrative duties, and all expenses strictly incidental to such performance, would seem to be excluded. In an explanatory note incorporated in the statement, reference is made for details to a statement (Defendant's Exhibit No. 55) gotten out by the project bookkeeper, covering "general expenses (percentage computed on cost)." This shows an aggregate general expense charged against the project of $795,321.16, but such total includes a subtotal for the project office of $483,320.04, the chargeability of which the plaintiff does not question. It will be seen that the remainder does not correspond to the item which the plaintiff assails, but I do not attempt to reconcile the statements of the two accountants. Neither exhibit is sufficiently explicit, nor is the record as a whole definite enough, to enable me intelligently to apply any principle of classification.

The plaintiff offers no serious criticism of the method which was employed in prorating the expenses incurred at other offices to the several projects, in proportion to expenditures thereon, instead of keeping account of and charging specifically for the actual time spent by employees, now upon one project interest and now upon another, and it is assumed that by either method substantially the same end will be reached. That being the case, if in carrying on construction work in different sections of the West the administration at Washington deems it advisable to establish at Chicago a purchasing and transportation agency, the function of which is not administrative, but is to buy and cause to be forwarded necessary equipment, supplies, and materials, I am unable to see why such service for the Boise project should not be charged against construction quite the same as a similar service rendered in the immediate vicinity. So, if the engineering is concentrated at Denver, and at that point necessary engineering work is done for a given project, why should not the expense of such service be considered a part of the construction cost?

But the record fails to furnish sufficient data to enable me to segregate items of this character from items of purely general administration. Of the $426,673.50, testified to by the plaintiff's accountant, $320,631.02 is made up of transfers from the Washington offices. In the statement it is explained that no administration expenses incurred in the office of the Secretary of the Interior were ever charged, and hence there is an implied admission that all expenses of the Reclamation Service offices, whether of a general administrative character or otherwise, were distributed in the manner already explained. But of the $223,425.40, what part was on account of general administration, and what part more directly for project construction? And of the item of $97,205.54, for supplies, drafting, etc., what part contributed directly to the construction of the Boise project, and what part was for general administrative purposes? In short, this issue seems to have been submitted upon the theory that no expense of any character incurred at an office other than the project office is chargeable to project construction, and no attempt has been made to classify the expenditures, or to furnish the data by which they could be classified, upon any other theory. From the record as it stands, therefore, I am unable to see how I can grant relief upon this account.

Paige & Brinton Claim.

[2] In the statement the following charge is made against the construction cost of the distributive system:

"Contingent liability in suit of contractor in Court of Claims, Paige & Brinton v. United States, $325,931.97."

Paige & Brinton were contractors on the main canal under contract of May 19, 1906, and performed construction work thereunder apparently until 1908. On July 5, 1913, they commenced suit in the Court of Claims, claiming that there was still due under their contract and for damages numerous items aggregating $325,931.97. The case has not been disposed of. Upon no theory am I able to see how this charge can be justified as a whole. I have heretofore found that the understanding was that the Secretary would cause to be constructed and the settlers would pay the actual cost of an irrigation system. But, even if the other view should be taken, namely, that it is the estimated cost, and not the actual cost, and that the Secretary is to make such estimate, I am still unable to see how the charge can be justified. To say that a contingent claim may be estimated at its full value involves a contradiction of terms; such a claim is not contingent. Presumably it is the opinion of the reclamation officials that the claim is invalid, or they would have recognized it and caused it to be paid. If it is invalid, the settlers ought not to be charged with it. If it is valid, the contractors ought to be paid. If its status is uncertain, the settlers ought not to be charged with the full amount thereof. It is a matter of common knowledge that such claims are usually susceptible to compromise and adjustment, and if the settlers are to be charged with a specific amount, the best settlement possible should have been made. Why not give them an opportunity to adjust it, if they are to be held responsible for it?

The government should be fully protected, but not to the unnecessary hurt of the settler. As the case stands, it holds a chance to win one-third of a million of dollars and no chance to lose, and the farmer to lose that amount and to gain nothing. The item alone is a burden upon every acre of land of over $2, or approximately $200 for every farmer with 80 acres. It is not without significance that, while the claim grows out of the construction of the main canal, it was excluded from consideration in making the computation of the amount chargeable to the Notus extension as its part of the construction cost of this feature in which it is to have a share. If the reclamation officials and the plaintiff cannot agree as to the proper amount to be charged on account of the contingent liability, or if a settlement agreeable to all parties cannot be made with the claimants, the full claim should be permitted to stand as a charge only upon condition and with the understanding that, in case the government is successful in defeating it, appropriate credit be given the settlers.

Acreage.

If, then, the cost is $9,088,825.09 (subject to a possible deduction of $325,931.97 on account of the contingent claim), what is the area to be charged with the repayment thereof? The question has two aspects, and relates as well to the sufficiency of the dedicated capacity of the system as to the propriety of the demanded construction charge. If the acreage is small, the charge must be proportionately large, and the service will be correspondingly good; but if the charge is based upon a small area, and it turns out that a given quantity of water must be distributed over a larger area, the settler will get a poor water right at an excessive cost. The pertinency of these propositions will presently appear. In the public notice of July 2, 1917, all persons interested were advised that under the project water would be furnished for all the irrigable land shown on the "farm unit plats" approved by the Secretary January 26, 1917, and filed in the local land office; such lands being parts of 25 designated townships. At the former hearing it did not become necessary to compute the precise number of acres that were to be irrigated, but all through the trial it was assumed to be between 143,000 and 144,000 acres. The Director of the Reclamation Service and the project manager spoke of the area as being in round numbers 143,000 acres, and it was so stated in the brief of project counsel. And in the Sixteenth Annual Report (1916–17) it was stated that the system was prepared to supply water for 143,856 acres, besides lands which already had a partial vested right.

While a small part of this area was not covered by the public notice, it is doubtless true that at the time it was promulgated the system was in condition to supply 143,856 acres of land, all of which was entitled to purchase water rights, and it was understood by all that such was the area of the project under the constructed unit, exclusive of lands privately owned, having partial water rights. But by the statement it is now sought to reduce the amount as a basis for computing the acreage charge, and also as a basis for the consideration of the sufficiency of the dedicated capacity, to 130,000 acres, without excluding or cutting off certain portions of the residue of the tract from

the right at any time to demand and receive water. As already noted, what factors were considered or by what method of computation the acreage charge called for by the public notice was reached is in a large measure left to conjecture, and hence, while the plaintiff argues with much show of reason that in the statement some of the factors have been altered to meet the necessity of making a concrete showing of the propriety of the acreage charge, necessarily the considerations advanced are inconclusive. However that may be, the question is only of incidental importance, for the ultimate inquiry relates to the facts as they are, rather than to what they were assumed to be, in preparing either the public notice or the statement.

Under the heading "Irrigable Area," the statement advises us that the "maximum possible irrigable area of new or project lands under the constructed unit [is] about 140,000 acres." How this conclusion is arrived at is not stated, nor is there any explanation of the disappearance of the 3,856 acres constituting the difference between the 140,000 acres and the 143,856 acres announced in the Sixteenth Annual Report. The further estimate is made that, of the 140,000 acres, 40,000 are in the Nampa & Meridian irrigation district and 400 in the Settlers' irrigation district; the residue being in unorganized territory. But formerly the Nampa & Meridian irrigation district had 44,060 acres, instead of 40,000. This appears from the contract of June 1, 1915, between the government and the district, where a total charge was made against the district lands of $3,304,500, which, it is explained, is at the rate of $75 per acre. By virtue of some agreement, or under the terms of the public notice, it seems to be assumed in all quarters that the acreage charge is scaled down to $70, thus reducing the aggregate obligation to $3,084,200. In the statement no reason is assigned for cutting out 4,060 acres of this area, thus reducing the amount to 40,000 acres.

The record being almost silent upon the question, additional testimony was recently taken, for the purpose of clearing up the discrepancy. From this it appears that in accordance with a general practice, prevailing on the project and acquiesced in by all parties, deductions have been made from the acreage provided for in the contract, on account of rights of way for roads, railroads, canals, and drainage ditches, and for irregular pieces lying too high to be reached with water, amounting to approximately 4,500 acres. So that, taking into consideration certain slight additions and changes, it turns out that the estimate in the statement is approximately correct of the district lands. Based largely upon the project manager's testimony, the following analysis of the project acreage is thought to be substantially accurate: Net amount chargeable with water under contract in the Nampa & Meridian irrigation district, 40,346 acres; net amount in the Settlers' irrigation district, 420 acres; lands shown on farm unit plats, under public notice and actually under application or individual contract, 94,624 acres; lands on farm unit plats and under public notice, but not yet covered by water right contracts, 1,323 acres; lands shown upon farm unit plats, but not under public notice, and hence not subject to application, 6,183 acres; total, 142,896 acres.

At this point, as well as any other, it may be explained that the 6,183 acres are as fully project lands and entitled to water as any others, and 60 per cent. thereof is actually under cultivation and is receiving water. It seems that these lands are more sandy and uneven than the average, and as a concession to the owners public notice is temporarily withheld, in order to defer payment of the annual cost installments, which, under the law, begin to accrue as soon as public notice is given. In the meantime water is furnished on the basis of an annual rental charge, but formal applications for permanent rights are not received until public notice is given.

It is further to be added that there are from time to time small increments to the total acreage of the project, due to the fact that there is included in the area of "project lands" only such parts of legal subdivisions as upon survey were found to be susceptible to irrigation by gravity from the ditches as constructed; but from time to time, through changes in laterals or by the use of pumps, farmers are able to reach small additional areas. For example, we are informed by the project manager that between November 1, 1919, and July 31, 1920, from these sources, the area of irrigable and chargeable land on the project was increased in the aggregate amount of 218 acres.

Plaintiff urges that about 584 acres of land in what is called the Walters Butte district, for the irrigation of which the project manager has been leasing waste water, and 1,835 acres of "Bird Reserve" lands, which also receive water under leases from year to year, should be added. But so far as appears there is no purpose to sell permanent water rights to these lands, and such temporary privileges as they enjoy are in subordination to the rights of the settlers upon lands for which the rights are permanent. The revenues derived from the leases are applied in reduction of operation and maintenance expense, and hence the settlers get the full benefit of it.

From the foregoing analysis, which is based upon the records of the project office, as reported by the project manager, one of the defendants, and therefore not questioned by them, it appears that, instead of the "maximum possible irrigable area of new or project lands under the constructed unit [being] about 140,000," it is almost 3,000 acres more, or, accurately speaking, 142,896 acres, net, after making deductions for rights of way of all kinds and high spots. As we have seen, the Reclamation Service is demanding from the project lands generally payment at the rate of $80 an acre on account of construction. Apparently it is intended to charge lands in irrigation districts at the rate of only $70 an acre; but the reasons assigned for making the distinction are not material at the present juncture, and will have later consideration. The theory of the defendants is that, were there no irrigation districts, it would be necessary to charge all lands at the $80 rate, if the government is to be fully reimbursed. But at the $80 rate 113,610 acres, out of the 142,896 acres of irrigable lands, would fully cover the entire cost of the dedicated portions of the system, including $325,931.97 contingent claim which has never been paid. What reasons, then, are put forward for assuming a shrinkage of approximately 29,000 acres, or over 20 per cent. of the entire area?

Rough and Sandy Lands and Seepage.

[3] In the statement the only explanation applicable to the project as a whole is as follows:

"Estimated area which will ultimately be found unsuitable for irrigation on account of the sandy and rough condition of certain lands and the seepage of other lands, 10,000 acres."

No reason is perceived why there should be any considerable contingent factor on account of rough or sandy lands. Seepage deductions are in a measure dependent upon changing conditions, but of course lands are as rough and sandy now as they will ever be, and if there are to be any deductions they can as well be and should be made now, and in such a binding way that settlers upon other lands, who are called upon to pay, and do pay, the entire cost of construction, will not later have to share the water to which they thus become entitled with "estimated" sandy lands, which contribute nothing to the cost, but, remaining in the project, and being unidentified, have the same legal footing as all other lands, and may at any time demand their pro rata share of water. If the settlers, who are compelled to pay a proportionately higher charge because of this estimated reduction, later find that the water supply they fully pay for is being distributed to more than the estimated acreage of 130,000 acres, what remedy will they have? They cannot object to delivery to any particular tract, however sandy and rough it may be, for neither in the public notice, nor in the statement, nor in any other record is there any description, particular or general, by which the "estimated" sandy or rough lands, which, for the purpose of fixing the acreage charge it is now assumed will not receive water, can be identified. Such lands, if any there be, can as intelligently be acted upon at the present time as at a later date; and such seems to be the view of the government officers, for by an order dated November 9, 1918, made upon the recommendation of the acting director, the Acting Secretary formally excluded from the project specifically described tracts aggregating 2,039.49 acres.

We have seen that care has been taken to trim the area carried as project lands down to a net irrigable area. High spots have been cut out, and rights of way of all kinds have been eliminated, aggregating a large area, and sandy and rough lands amounting to 2,039.49 acres have been excluded, leaving a net irrigable area of 142,896 acres. Under such conditions it is difficult to believe that there is left any considerable acreage so rough or sandy that it cannot be irrigated, and, it being as easy to determine now as later the extent and description of such lands, if any there are, it would not be just to the paying settlers to subject them to the peril of an "estimate" so indefinite and unnecessary. Accordingly it is thought that an addition to the acreage charge on this account is unwarranted.

We are not advised what part of the 10,000 acres it is estimated will be seeped, and what part is too sandy or rough. Touching the subject of seepage, it seems to be the rule that, where the ground water rises so high in any particular place that it seriously impairs the utility of the land for agricultural purposes, there is a suspension of payments which would otherwise be due on account of the cost charge,

until, by drainage or other means, the condition can be remedied, whereupon the entire charge is collected in due course. Only in cases where the land is permanently swamped, in whole or in part, is there an absolute cancellation or reduction of the charge; but even in such cases apparently payments already made are retained by the government. The rule or practice is general, and applies the same to lands in the irrigation districts as to those outside.

The right of the government to be reasonably protected in some suitable manner against loss from this contingency is, of course, to be conceded. The only question is as to the reasonableness of the estimate or the necessity of imposing upon the settlers so heavy an absolute burden—the actual payment of over $500,000—to meet a mere contingency which may or may not ever happen. Clearly an estimate for permanent seepage of 10,000 acres, or any substantial part thereof, finds no basis in the record. The director, testifying approximately two years ago, referred in an indefinite way, and admittedly without dependable data before him, to the seepage problems upon several other distant projects. It is doubtless true that, with irrigation, not infrequently drainage becomes a necessity, depending very largely upon the geology of the region. That great areas have been irrigated for a generation in this state without the necessity of extensive drainage is a matter of public history; but, be that as it may, the testimony of Mr. Davis, Mr. Hanna, and Mr. Steward is only to the effect that some of the lands are likely to be affected by the rise of ground water, and that a small acreage is already so affected. But no one ventures to assert that any considerable acreage will be permanently seeped or lost to the chargeable acreage. Director Davis was willing to say only that with greater care in the application of water and with drains "there will be some that will still have high ground water." Mr. Hanna, another officer of the service, concludes his discussion by saying:

"As a general rule the major portion of the lands, however, would be reclaimed; but there is no certainty that all of the lands would be reclaimed."

Mr. Steward testified only that the lands in the lower section would become seeped unless they were drained. The channel of the Snake river is in close proximity on one side, and the Boise river on the other, and no geological difficulties are anywhere suggested. The record shows conclusively that drainage systems are both effective and economically feasible. Drains of considerable extent have been constructed by the Reclamation Service, in the main for the older lands having vested water rights, lying between the Boise river and the project lands, but in part for the project lands, and there is no intimation that they are wanting in efficiency. A part of this drainage is for a portion of the project lands embraced in the Nampa & Meridian irrigation district, and though presumably the work was undertaken because the lands were at the time being swamped, now, after the lapse of five years, there are, according to the testimony of the project manager, only 91 acres of seeped lands in the entire area of 40,000 acres, or less than one-fourth of 1 per cent.

It may be that in the voluminous record made up at different hear-

ings, widely separated in time, I have overlooked testimony upon the subject; but outside of a very general statement of Mr. Davis nothing has been called to my attention suggesting the probability of any serious seepage problems in the upper section, and it is quite apparent that it is only upon the lands lying under Deer Flat that drainage to any great extent is likely to become necessary. It was of this tract that Mr. Steward testified, and, as shown on the map identified by him (Exhibit 31), with the exception of a few scattering pieces, all the lands seeped up to the present time, namely, 1,532 acres, are below Deer Flat. The project manager testified that of the aggregate amount 90 per cent. are in that region. While Mr. Steward speaks of the lower half of the project, it is plain that he means the section under Deer Flat, which is only a little more than one-third of the entire area, namely, 51,162 acres. The other lands lie up on benches or mesas, at considerable elevations above the river, whereas the Deer Flat section is more sandy and uneven, and lies closer to the banks of the Boise and Snake rivers. Though apparently having intimate knowledge of all the conditions there, it is significant that Mr. Steward does not intimate a doubt as to the feasibility of effective drainage.

While, as already stated, the government should have adequate protection, the method here employed should be adopted only as a last resort, for admittedly it rests upon a guess. There is no pretension that the "estimate" has any scientific basis or is logically deducible from the facts of experience. What can be said in its support that cannot be said for an "estimate" twice or half as large? To a considerable extent it is necessarily arbitrary, and may result in great injustice. If, as is doubtless the case, it is entirely feasible to prevent the permanent seepage of any considerable area, by the construction of suitable drains, what would be the nature and probable result of this "estimate," if it stands? The settlers would, in the first place, be required to pay the proportionately higher construction charge made necessary by excluding 10,000 acres from the chargeable area, and yet, when drainage is undertaken, as no one can doubt will sooner or later be the case, they must pay their share of the cost thereof; the net result being that they will have paid the full cost of construction and drainage for the water rights they get, plus the cost of an equal water right for 10,000 acres from which they derive no benefit.

Seepage is one of the natural incidents of operating the system, and it would seem to be plain that the necessary expense of providing drainage to prevent damage therefrom is quite as naturally to be covered by revenues collected for operation and maintenance as any other expense to prevent damage from operation. The state law also establishes a legal system for the distribution and collection of the necessary cost of drainage. If there be any doubt as to the practicability of either of these methods of securing such funds as may from time to time be needed, I see no reason why the settlers could not be required, at the time they apply for water rights, expressly to consent to such assessments as may become necessary for the purpose. The plaintiff was organized by the government for the very purpose of

providing a centralized agency to represent the settlers. Under its articles of incorporation and by-laws it was to perform important functions, and by its contract it assumed large obligations. In the earlier history of the project it was recognized and frequently dealt with as such representative and responsible agency. If, when it came to fixing the acreage charge and providing protection to the government to cover the contingency under consideration, it had been consulted, and had declined to give assistance, or to assent to a more equitable method, or were now unwilling to co-operate in providing such protection, perhaps a court should give its objections little consideration. But so far as appears, it was not consulted, and has been and is willing to co-operate and lend its assistance.

It is possible that, before it becomes necessary to enter a formal decree, a plan may be suggested, agreeable to both sides, by which the government can be protected against the contingency of permanent seepage, without the necessity of attempting to find in advance the precise acreage which will be so lost. No reason is perceived why a provision in the water application or contracts obligating the settlers to submit to pro rata assessments from time to time as the need arises, to cover not only necessary drainage, but the unpaid installments of construction cost on the small areas, the reclamation of which is found to be economically impracticable, would not be adequate fully to insure the government against loss, and at the same time be equitable to the settlers. This thought was apparently in the mind of the Secretary when he issued the public notice, for, referring to drainage and distributing works, he therein said:

"The expense of any further work of this kind which may in the future be necessary must be met by the landowners, through an increase of the construction charge herein announced, or otherwise."

Acreage Charge in Districts and Unorganized Territory.

By section 9 of the public notice of July 2, 1917, the following announcement was made:

"If, within one year from the date of this notice, all of the irrigable lands of the Boise project shown on said farm unit plats are duly pledged in accordance with law and the regulations of the Secretary of the Interior to return the payment of the construction and operation and maintenance charges, either through individual contracts, water users' association contracts, or through irrigation districts duly organized and confirmed by judicial decree, then the said construction charge of $80 per acre will be reduced to $70 per irrigable acre."

While upon analysis it will be observed that this language announces a reduction only in one contingency, that is, that in one way or another all of the lands of the project be brought under water contracts, it seems to have been assumed that, where an irrigation district has been formed and the necessary steps taken under the state law to apportion the benefits to all irrigable land, the land within such district is entitled to the $70 rate. In practice both the officials at Washington and the local project officials have acted upon such assumption relative to the Nampa & Meridian irrigation district, although, as we are now ad-

vised by project counsel, the Secretary has not signed an agreement formally covering the subject, and expressly modifying the original contract stipulation for a $75 rate. But whether this district is or is not entitled to the lower rate is not of present importance. Our concern is with the question whether lands in unorganized territory can be charged an $80 rate.

In view of the provision quoted from the public notice, it must be assumed that the Secretary was of the opinion that, if all of the lands upon the project paid, a rate of $70 an acre would fully reimburse the government; for it will be presumed that he did not knowingly agree to fix an inadequate charge, and the question therefore really is whether he was warranted in adding $10 to cover a possible shrinkage in the paying area because of the failure of some of the lands to apply for water right. Certain aspects of the question were discussed in the original opinion (Payette-Boise Water Users' Ass'n v. Cole, 263 Fed. 734), filed July 21, 1919, but it was left open for further consideration. The following explanation is found in the statement:

"Unless irrigation districts, or some form of organization capable of binding all the lands, should be formed, it will be necessary to depend upon individual applications or contracts, the making of which is largely optional with the individual landowners. Without district organizations binding all lands, it is estimated that a considerable percentage of the landowners will avoid paying the government for a water right by picking up waste water, or securing water in some other way, or holding the land for speculation without irrigation. Consequently it is estimated that a charge of approximately $70 per acre will be necessary if districts are organized and contracts made, binding all irrigable project lands to pay for a water right, and a charge of $80 per acre without such organization; that is, it is estimated that a payment of $70 per acre from all project lands guaranteed by an irrigation district having the taxing power enabling it to assess all the lands would bring in a total revenue or payment equal to the amount which would be collected by a charge of $80 per acre upon such of the project lands as the owners thereof may elect to purchase water rights for."

It is well to recall in this connection that generally there is no distinction between lands in the Nampa & Meridian irrigation district and those upon the outside. In both cases nonirrigable land is excluded from the computation of the irrigable and chargeable area. In the district there is no assessment of benefits upon or charge against rights of way, or high spots, or tracts which for other reasons are not irrigable, and in case of seepage there is a suspension or exclusion, the same as in unorganized territory. The estimate we are considering, therefore, is of a shrinkage in the net area of irrigable land, exclusive of rights of way, high spots, and rough and excessively sandy and seeped areas, and it rests upon the assumption that for one-eighth, or one farm out of every eight, of such net land, no water right applications will be made. Admittedly the land is arid, and without water is of little value, and that for it there is no other legitimate source of water supply. In the statement, as we have seen, it is suggested that some owners would pick up waste water; but the government strenuously asserts its superior right to this water, and not wholly without success. Besides, if valid and sufficient rights can be so acquired by landowners out of the district, similar rights may be acquired within

the district, and lands having valid and sufficient water rights in the district cannot be charged with the cost of an additional right for which they have no need.

It is further suggested that some land may be held for speculation without applying for a water right. It is true there might be unreasonable delay in some instances if the government were without remedy and were bound to hold water rights indefinitely for possible purchase of landowners. But if, exercising its right, the Reclamation Service were to announce that applications would be received only up to a specified date, and that thereafter such rights as remained unsold would be diverted to other purposes, or would be disposed of only at a greatly advanced charge, can anyone believe that a considerable number of holders of arid lands, practically worthless without water, and with no other available source, would fail to make application within the required time? To ask the question is to answer it. And what are the facts of actual experience? According to a statement prepared by the project manager, as of date November 1, 1919, seven days after the statement was signed, there were, exclusive of district lands, 101,912 acres of project lands shown on the farm unit plats. For reasons already explained, 6,183 acres of this amount was temporarily withheld from public notice, and hence from water right applications, leaving 95,729 acres, for which the government is willing to accept applications. Subjecting this amount to the standard of shrinkage relied upon to justify the additional charge of $10 per acre for lands in unorganized territory, only 84,138 acres could be expected ever to apply for a water right; whereas, at the very time it was made, 92,472 acres were actually under applications, and this in face of the fact that controversies had arisen over the terms imposed by the government, and that this suit was pending. In other words, when the statement was made, there were unapplied for only 3,257 acres for which it was possible to make application; and now upon July 31, 1920, 1,934 acres more have come under application, leaving unapplied for only 1,323 acres. And 218 acres of new lands have been added to the irrigable and chargeable area, so that, if no further applications ever came in, the actual net shrinkage is about 1,100 acres, as against an "estimated" shrinkage of approximately 11,000 acres.

It is suggested that, while this is true, it was the right of the director or the Secretary to make an estimate at the time of the public notice, and the mere fact that the estimate turns out to be erroneous is immaterial. But to this there are several answers. In the first place, we have no means of knowing on what considerations the charge fixed in the public notice was based; they have never been disclosed. The statement does not purport to reflect such basis. The estimates therein made appear to be of the date it bears, and, indeed, it expressly modifies the only factor entering into the problem of acreage charge upon which there was any definite commitment in the public notice, namely, the construction cost of Arrowrock. If such an estimate was made at the time of the original notice, it is thought to have been highly excessive in the light of the facts then known, and the actual experience of three years is competent to corroborate that view,

for conditions upon the project during that period have been normal, and such in general as were to be anticipated.

But, aside from these considerations, the public notice is not to be deemed to have such sanctity that it cannot be modified in the interest of justice. Plainly the Secretary does not feel bound by it, for in the statement he has transferred credits approximating $100,000 from the general canal system to Arrowrock, thus reducing the construction cost of that unit, and increasing the construction cost of the balance of the system, to the extent of $100,000, whereby there is imposed upon the settlers on the project lands, if, according to the dedication, they get but one-half of Arrowrock, a net additional burden of $50,000. No criticism of the transfer is intended, for it is apparently just. So a correction of the highly excessive and unjust estimate under consideration should be made. If the public notice is not an insurmountable obstacle in the one case, unfavorable to the settlers, neither should it be in the other, favorable to them.

It is urged that the settlers in the unorganized territory impliedly admit the fairness of the additional charge by failing to form irrigation districts and take advantage of the lower rate. But such an argument is specious. The undertaking of an irrigation district involves many considerations other than the difference in water charge. Some of the settlers might be willing to pay a difference of even more than $10 rather than be subject to some of the burdens which are incident to an irrigation district, but have no relation to the interests of the government. And besides it requires a two-thirds vote of the landowners to form the irrigation district. A majority of the landowners in any given section of unorganized territory may prefer to have an irrigation district, but are powerless to comply with the conditions which the public notice imposes, because they constitute less than two-thirds. It actually turns out that in some cases the owner's holdings are cut in two by the boundary lines of the Nampa & Meridian irrigation district, with the result that for some of his tract he pays $70 and for some of it he must pay $80.

Here, as in the case of the other item of estimated shrinkage, one of two courses may be adopted: Another "estimate" may be made, which in no reasonable view of the facts could exceed 2,500 acres, or the charge could be based upon the acreage actually under contract, with the provision that pro rata credit will be given for such additional contracts as shall be taken within a specified time, which, as to the 6,183 acres, should of course be long enough to give reasonable opportunity to landowners to make application after it is publicly announced that applications will be received. The latter course would seem to be the safer and more equitable, and I am advised of no reason why it should not be followed. It is in principle indistinguishable from the plan of the public notice, for there it was in substance announced that only applications upon the $80 basis would be received, but, if within a year all the lands were pledged, credit would be given at the rate of $10 per acre on all contracts. The details of such a course are left to be worked out in such a way as to entail the least possible inconvenience to either side.

Has the Plaintiff Any Rights in the One-Half of Arrowrock Storage Withheld from Dedication?

[4] As already indicated, this issue is a new one, for until the statement was filed there was no assurance what parts of the system the Reclamation Service would contend were covered by the cost charge prescribed in the public notice. Notwithstanding an express disavowal from the bench of any intention so to hold, it seems still to be urged for the defendants that in the original opinion it was decided that the Secretary had absolute authority, and that therefore the statement is conclusive, not only upon the government, but upon the settlers and the courts as well. True, it was said in summing up the discussion that—

> "The settlers are entitled to have from an authoritative source and of record a declaration of the cost of the project as a whole, and of the portion of which it is intended they shall ultimately become the beneficial owners," and an "authoritative description of said property."

But, when read in its proper relations, there is no ground for construing this language as a concession of the power of the Secretary to bind the settlers and foreclose inquiry in the courts. To the contrary, both in the discussion and in the recapitulation such authority was expressly denied. By authoritative source reference was had to some one acting with authority to speak for the government, as distinguished from subordinate officials or agencies of the Reclamation Service, to whose acts and words the defendants had repeatedly objected during the course of the trial, as not being binding upon the Secretary or the government. If the settlers accepted and paid the acreage charge fixed by the secretary, upon representations made, not by him, but by the director, or project manager, or some subordinate officer, that they were to have the entire system, they might later be met with the contention that the Secretary always intended to reserve a portion, and that representations to the contrary were without binding authority. As indicated in another part of the opinion, by authoritative source was meant one having authority "to conclude the government and give reliable and permanent assurance to the settlers."

An irrigation project is not an autocracy. True, in cases where the procedure contemplated by the statute is followed, wide discretion is vested in the Secretary touching the preliminary steps; but even there, when rights have once been regularly initiated, they are protected by law to the same extent as any other rights. Here, as pointed out in the original opinion, the procedural requirements of the act were waived, and the works were constructed upon an understanding, express or implied, that water would be supplied to the project lands, and that those who received water would pay its actual rather than its "estimated" cost. Acting upon such an understanding, the lands were settled upon and improved. If the Secretary has the absolute and unqualified authority now to say what interests such lands shall have in the constructed works, he may deny them any rights whatsoever. Though counsel for the defendants not unnaturally hesitate to recognize such a result, it is necessarily implied from the position taken, and

logically cannot be avoided. Fundamentally, therefore, the question raised by the defendants is whether the settlers have any rights at all which a court can protect and enforce.

First—The 58,000 Acre Feet Heretofore Sold.

Distinctive considerations apply to the 58,000 acre feet, in the aggregate, of Arrowrock water, which has been sold to 2 canal companies and 7 irrigation districts, only 2 of which, the Pioneer and the Nampa & Meridian irrigation districts, are defendants in this case. It is of course conceded that, in the absence of the 2 companies and the other 5 districts, we can make no decree touching the validity of their contracts. The lands in the 2 defendant districts had such a right as the natural flow of the river affords, and the interests purchased are intended to furnish a supplemental supply for use during the latter part of the season. At first these lands were included in the general scheme of the project, but because of certain developments, explained in the original opinion, later contracts were entered into between the districts, the government, and the plaintiff, by the terms of which they were released from the obligations originally assumed, certain drainage work was to be done, and the districts were to acquire the several interests in Arrowrock now in controversy. By these contracts the plaintiff assented to the arrangements made, and neither it nor its stockholders can now be heard to complain.

It is suggested that because these contracts make reference to the Warren Act, and that act provides for the sale, away from project lands, of only surplus waters, they are to be construed as relating to only such waters as are not needed upon the project lands, and that therefore the rights acquired by the districts are in subordination to the rights of the settlers. But the other terms of the instruments are too explicit and clear in expressing a contrary intent to admit of such an interpretation; and it is to be added that by all parties concerned it was originally understood that these district lands were to receive water. The fact that there was a later modification of the conditions and terms on which it was to be delivered does not materially alter the case so far as the present question is concerned. It still remains true that by the understanding had when the project was undertaken the lands were to be irrigated and were to be on the same footing with those held by the plaintiff's present stockholders. When they were released from the original agreement it was still with the understanding that the system would be called upon for water, and that water would be furnished. If we use the term "project lands" as embracing only government lands enterable under the provisions of the Reclamation Act (Comp. St. §§ 4700–4708), of course these lands are not within the "project"; nor in that sense were they ever project lands. But we are not presently concerned with technical definitions. The uncontroverted fact is that from the inception of the project it has always been understood by all parties that these lands were to receive water, and there is no contention that an undue proportion of the supply has been awarded to them. It is therefore thought that the Secretary has authority under the Reclamation Act to furnish the water, and no right

of the plaintiff is infringed, because it has always had such understanding and expressly assented to the existing agreements under which the water is to be furnished.

Second—The 76,000 Acre Feet Still Held.

If, without deciding, we assume that the sales to the other 5 districts and the 2 canal companies are upon the same footing as those to the Pioneer and the Nampa & Meridian districts, and that therefore the amounts so disposed of are no longer available for the project lands, it is still conceded that no outside interests have vested in the reserved 76,000 acre feet, and we are asked to determine the rights of the plaintiff in relation thereto. Manifestly such rights as there are must have their source in some promise or representation made by the Secretary, or result from the facts by operation of law.

While the earlier history of the project—the dealings of the parties with each other, and their agreements, express or implied—discloses a general understanding that the settlers should have substantial rights, and clearly negatives the power of the Secretary to deny them water altogether, it does not expressly or by clear implication precisely define the amount. As before pointed out, the project (using the term in a general sense) has been the subject of growth and transformation. It was originally expected to reclaim a much greater area, and at the outset the water rights were perhaps to a large extent expected to be such as could be supplied by the flood waters of the river, which were thought to be sufficient for crops maturing before the middle of July. Changes were made in the projected system from time to time, and the purpose to irrigate certain lands was abandoned, and as to still others it was at least indefinitely postponed. If read with regard to known conditions existing at the time it was executed, the contract of February 13, 1906, may very properly be construed as evidencing an understanding that water rights should be reasonably adequate. Section 10 of article 2 of the plaintiff's by-laws, which are referred to and made a part of the contract, clearly implies such an understanding. But of course it was not understood that a full seasonal adequacy was guaranteed, for, though storage was even at that time contemplated, there was as yet no definite plan for storage facilities. The discovery of the Arrowrock site and the undertaking at that point gave assurance of a reasonably adequate seasonal supply.

While the Arrowrock reservoir was decided upon after the contract of 1906 was entered into, and in relation to it there is no special supplemental agreement, the record leaves little room for doubt that upon both sides, at all times after it was undertaken, it was understood to be an integral part of the system, and was to be regarded as falling within the general terms of the contract, the same as any other unit of the system. That such was its status seems always to have been assumed, at least until after the public notice was given and this controversy arose. The settlers expected to have the benefit of the stored waters, and the reclamation officials expected to charge them with their proper share of the cost of constructing the dam, the same as in the case of any other feature. In fixing the acreage charge and making up the public notice it was included as a matter of course, and in all respects

treated the same as if it had been in contemplation when the original contract was executed. In his original brief project counsel argued strenuously for such an understanding, and urged that in the light of the circumstances it would be a fraud upon the government to relieve the settlers from the obligation to pay for that which they had encouraged the Reclamation Service to build, with the implied promise upon their part that they would reimburse the government for its necessary outlay.

It seems now to be the position of counsel that the plaintiff's stockholders and other settlers have no right to demand any stored water, and that whatever the Secretary apportions to them is a matter of grace, and that any action he may take in the premises is not subject to review in the courts. Suppose that the situation here presented were reversed, and that the plaintiff and the settlers, content with the natural flow of the river, were declining to take any of the Arrowrock water, or to pay any part of the cost of constructing the dam, and in support of such position were contending, as the defendants now contend, that the expenditures were not contemplated when the 1906 contract was executed, and that therefore they are under no obligation in the premises; and suppose, further, that a considerable portion of the reservoir capacity could not be utilized for any other irrigable lands, and that therefore there would be no source from which the government could get back a large part of its expenditures—can it be imagined that the Secretary would for a moment acquiesce in such view? Would he not rather say, as was urged by the defendants in their original brief, that by reason of what has occurred, and the conditions under which the dam has been constructed, and the dealings between the parties, and the common understanding which has prevailed, the obligation to take stored water and to pay for its cost is upon precisely the same footing as the obligation touching the river flow and the cost of constructing the distributing system? In the light of all of the circumstances, it is thought that this is the only reasonable view that can be taken.

Is One-Half of Arrowrock Storage Reasonably Sufficient for the Project Lands?

If, then, having in mind the limitations of the system, the understanding has been that the settlers would receive water rights reasonably sufficient for the proper irrigation of their lands, will those portions of the system set apart and dedicated by the Secretary supply the requisite amount of water? The lands naturally fall into two general sections, the upper and the lower. In the upper, embracing about two-thirds of the entire area, or, accurately speaking, 91,734 acres, the texture of the soil ranges from fine to medium, and in the lower section, comprising the other one-third, or 51,162 acres, from medium to extremely coarse and sandy. In ordinary years the natural flow of the river is ample until the early part of July, gradually declines until the latter part of July, and from that time on storage water is the only resource of the system. Deer Flat reservoir is available to the lower, and only the lower, section, and Arrowrock reservoir exclusively for

the upper. The effective storage capacity of Arrowrock is 268,000 acre feet, one-half of which amount is, under the statement, dedicated to the project lands, and hence the specific question is whether 134,000 acre feet, measured at the dam, is sufficient, after deducting transmission losses, to irrigate the upper section, or 91,734 acres, during the latter part of the irrigation season, from some time in July until October.

The question involves the consideration, not only of the reasonable duty of water at the land for that period, but also necessary transmission losses. What duty the Secretary adopted in making up the statement is not clearly disclosed. As has been observed, the language employed in the contract of 1906 is of a very general character, and furnishes no definite measure, for "proper duty," "beneficial use," and "sufficient to properly irrigate" are terms of relative import, and convey no fixed or specific meaning. The general language, it is contended by both sides, has been measurably defined by the statements and admissions of the parties and by established practice, expressing or implying an understanding, or at least a concession, as to the specific amount of water to be supplied. But in one point only can it be said the record is entirely clear: The defendants plead and show that in the Annual Reports for 1907 and 1908 the duty of water was announced as 4 acre feet, measured at the canal headgate, and that in the reports from 1912 to 1915, inclusive, and also in a circular of information, all put out after the Arrowrock reservoir was undertaken, as 2½ acre feet "at the farm." In their answer, after pleading that the duty of water was so "determined, announced, and established" by the Secretary, they allege that—

"Throughout the entire time that the Boise project was under construction the plaintiff and its shareholders acquiesced and concurred in and agreed to the said established duty of water of 2½ acre feet at the land, or 4 acre feet at the head of the canal, and never offered any objection thereto until the filing of this cause of action, but allowed the United States to proceed with the construction of the said project, and to spend over $12,000,000 thereon in reliance upon the said established duty of water, and plaintiff is estopped thereby."

The pleading is thus a plain concession that the Secretary has held out and given the settlers to understand that the water available for them will be at the rate of 2½ acre feet at the land, or, its equivalent, 4 acre feet measured at the head of the canal. Whether the plaintiff or the settlers have assented to such a duty, or by their silence and nonaction are estopped, is not so clear. Upon that point the defendants further allege and show that during the years 1913, 1914, and 1915 about 400 applications for stock in the plaintiff company were made to and accepted by it, upon forms provided by the Reclamation Service, in which the duty of water was defined to be 2½ acre feet per acre, measured at the land, subject, of course, to the limitation of maximum need for beneficial use. By themselves these facts strongly imply a mutual understanding that this was to be the measure of the right.

In rebuttal, however, the plaintiff shows that the later applications, of which there were approximately 1200, were on a form, also prescribed by the Reclamation Service, in which there was no provision for a specific amount of water. It also points out that in actual prac-

tice throughout the period during which the Arrowrock reservoir has been in service the delivery has greatly exceeded 2½ acre feet, and, further, that in certain computations made by project officers and probably considered by the Secretary before the public notice was given, a much larger duty was assumed for all except a small percentage of the acreage, and that in the defendants' answer, prepared and verified by project counsel, who apparently participated in the preparation of the statement, if not the public notice, there are averments to the effect that under the dedication as defined in the statement 3½ acre feet will be available at the land (including, of course, the natural flow as well as storage), from which it is argued the inference must be drawn that the Secretary considered that quantity to be reasonably necessary, for, otherwise, presumably he would not have made the dedication. Admittedly 2½ acre feet is entirely inadequate for what might be classified as "sandy" lands; those which are extremely sandy will apparently require at least twice that quantity, and it was for that reason, as we have seen, the Secretary has actually excluded about 2,000 acres from the original tract. However, most of the "sandy" lands are in the lower section, and hence are not directly involved in the question.

If, in harmony with defendants' pleading, we assume, without deciding, that the duty of 4 acre feet at the intake, or 2½ acre feet at the land, has been mutually agreed upon, is one-half of the Arrowrock storage sufficient to meet the requirement? It will, of course, be assumed that the intention was to deliver the water at such times during the season as there should be need. The right cannot be satisfied by the delivery of an excessive quantity during the early part of the season and little or none during the latter part. Surely the officers of the Reclamation Service never thought that 2½ acre feet would be required during the high-water season alone, or that that amount could be beneficially applied during such period. While specifically the reservoir at Arrowrock was a later development, storage facilities were contemplated at least as early as 1906. In the Fifth Annual Report of the Reclamation Service (1906) it is said:

"The water supply for this [Boise] project will be obtained from Payette and Boise rivers, the natural discharge of both streams to be regulated by reservoirs. * * * Storage will be developed at two points on the Boise river; one on the North fork; the other on the Middle fork. The flood discharge of these streams occurs during May and June, and furnishes an adequate supply of water for all grain crops. It is believed that sufficient storage can be developed to provide enough water for the acreage that will require late irrigation."

That was apparently the understanding of the parties when the original contract was entered into, and accordingly it contains this recital:

"Whereas, the lands embraced in the area proposed to be irrigated * * * are naturally desert, * * * and will to a greater or less extent remain unreclaimed * * * unless the waters of Boise and Payette rivers * * * be impounded," etc.

In the Twelfth Annual Report (selected at random), published after the Arrowrock dam had been undertaken, these statements are found (page 85):

"Length of irrigation season: From April 1 to October 31—214 days."
"Duty of water, 2½ acre feet per acre per annum at the farm."

But the point does not require extended consideration. It is too clear for discussion that in fixing the duty of water at 2½ acre feet it was understood that the delivery would be throughout the irrigation season, at such times as there was need. Expressions relied upon by the defendants to the effect that flood waters would be substantially the only resource for the system are found mainly in the preliminary or very early reports.

Apparently prior to the commencement of this suit, at least, it was the opinion of the reclamation officials that the natural flow of the stream is ordinarily sufficient only up to the 1st of July. Quotations have already been made from the Fifth Annual Report expressing such a view, and in the public notice of July 2, 1917 (section 10) the "flood season" is defined as ending June 30th, and the "storage season" as commencing July 1st, for the New York Canal lands, which have a "natural flow" right superior to that of the project lands. Under the evidence, however, I am inclined to think that upon the average the high water holds up a little longer. For four years (1916–1919) water was first drawn from the Arrowrock reservoir about July 14, 1916, July 12, 1917, June 27, 1918, and June 12, 1919. Admittedly 1919 was an abnormal year. According to the testimony of Mr. Hanna, the project records show that upon the average, during the period from 1896 to 1919, the river discharge was sufficient to cover all rights, including those of the project, up to July 2d, and ceased to be available in any amount for the project on July 28th. Assuming that the fall from July 2d to July 28th is practically uniform, it may be said that the natural flow is adequate until July 15th, and thereafter dependence is exclusively on the storage water, or for one-half of the 214 days, which, as we have seen, the Reclamation Service recognized as the irrigation season, extending from April 1st to October 31st. Where there is a considerable acreage of grains, the irrigated area during this part of the season will not average as high as that for the earlier period; but, upon the other hand, the precipitation is less and the temperature higher. There were put in evidence some estimates of the monthly requirements, one of which is based upon the actual experience of the project, and this is as follows:

"For April, 8 per cent. of the season's supply; May, 16 per cent.; June, 19 per cent.; July, 23 per cent.; August, 20 per cent.; September, 12 per cent.; and October, 2 per cent."

This finds substantial confirmation in the testimony of Mr. Tallman, who has had wide experience in the use of water in the valley, and in the light of common knowledge, the estimate appearing to be reasonable, it may be accepted as approximately correct. Accordingly it is held that, under a seasonal duty of 2½ acre feet, there should be a delivery of approximately 1.14 acre feet of storage water, measured at the lands.

The Reclamation Service has apparently estimated the transmission loss to be 37.5 per cent., for in some of the annual reports the duty is stated to be 2½ acre feet at the land, and in others 4 acre feet at the

head of the main canal; and, as we have seen, in their answer the defendants impliedly concede that the one measure is equivalent to the other I find in the record no estimate of the river loss, in transmission from the reservoir to the head of the canal; but, taking into consideration the fact that the canal beds are saturated before delivery of storage water begins, and making a small allowance for river loss, 37.5 per cent. may be taken as a fair estimate of the entire transmission loss. It follows that, of the 134,000 acre feet which under the statement is available at the reservoir, only 62.5 per cent., or 83,750 acre feet, can be delivered at the lands, or enough at the rate of 1.14 acre feet per acre for approximately 73,500 acres, whereas the actual acreage requiring water will, as we have seen, be approximately 91,734 acres. If we allow a shrinkage in this acreage of 734 acres, which is probably in excess of the amount at the present time not under actual contract, and make provision for only 91,000 acres, under the duty of 2½ acre feet at the land for which defendants contend, the required amount at Arrowrock dam would be approximately 166,000 acre feet, or 32,000 feet more than is provided for in the dedication. It would therefore seem to be clear that upon the defendants' theory the settlers are entitled to this additional capacity in the reservoir.

Unless we accept this theory, it must be held that no specific amount has been agreed upon, and any adjudication of the issues will involve a finding as to the duty of water; for if the plaintiff rests upon the general understanding that its members should have a reasonably adequate supply it will be necessary to determine what is such a supply, and, upon the other hand, if it relies upon the legal theory that the Secretary has the authority to sell or otherwise dispose of only "surplus" water—such as is not required for the project lands—the question is substantially the same. But the courts ought not to be called upon to make such determination until there is a clear necessity therefor; and such necessity does not presently exist. In the statement the Secretary makes the following announcement:

"If the members of the Payette-Boise Water Users' Association desire a larger proportion of the Arrowrock reservoir and are willing to pay for the same, an application to purchase a right to the use of additional capacity out of the reservoir will be considered, if an acceptable application for the same is made prior to the sale or dedication of the water to other lands."

While it may be thought that, in harmony with the earlier practice touching matters of interest to the settlers, the plaintiff should have been consulted before definite action was taken, either in announcing the acreage charge or making the "dedication," the order or mode of procedure is not to be regarded as a substantive right. The Secretary's offer is conditional, it is true; but it may be that, upon proper representations from the plaintiff, he will concede to it substantially what it here seeks. Nor by making such application or claim need it waive any right. If it feels that it has not received all that justly belongs to it, no reason is perceived why it may not, without prejudice, seek to have the mistake corrected. Were its rights in the premises specifically defined, perhaps a different view might be taken. But it is to be borne in mind that within a certain range intelligent men may differ as to the proper duty of water, and had the Secretary dedicated to the project

lands the whole of Arrowrock, and hence charged against them its entire cost, it is possible that some of the plaintiff's members would have complained that both the right and the incident burden were excessive.

It may be conceded that by standards which have heretofore been generally recognized in the state 2½ acre feet represents an extremely high duty, and that with that amount the settlers cannot take full advantage of the long growing season prevailing in the Boise Valley, but must be content with the production of such crops upon a large proportion of the acreage as may be grown with equal success under the less favorable conditions prevailing in the higher altitudes. Upon the other hand, it is also to be admitted that, while not abundant or fully adequate, 2½ acre feet is a substantial supply, and will insure against the tragedies which are altogether too common upon projects where there is no reasonable relation between the water supply and the acreage to be irrigated. Numerous factors are involved in the problem of the duty of water, including considerations of economic policy as well as the requirements of plant growth and unavoidable percolation losses, necessarily great even under the most favorable conditions. Where, therefore, by virtue of an agreement or under the law there is on the one hand the obligation to supply and upon the other the reciprocal right to receive such amount of water as is reasonably necessary, the question between the parties is peculiarly one for fair consideration and discussion, with a view to an amicable agreement as to the specific amount to be furnished, and while the courts will not decline a real controversy, neither will they anticipate one before it actually arises.

To summarize upon this branch of the case, the parties have, in general terms, at least, agreed upon the amount of water to be supplied and received, and that agreement the courts may, and when there is need should, interpret and enforce, but such need has not yet arisen.

HILDICK APPLE JUICE CO., Inc., v. WILLIAMS, Commissioner of Internal Revenue, et al.

DUFFY-MOTT CO., Inc., v. SAME.

(District Court, S. D. New York. August 17, 1920.)

No. 603.

Intoxicating liquors ⇐134—"Preserved sweet cider" not within National Prohibition Act.

The unadulterated juice of apples, preserved by the addition of one-tenth of 1 per cent. of benzoate of soda, known and dealt in generally as "preserved sweet cider," and made by the only known practicable process, and which is not and cannot become intoxicating while it remains fit for beverage purposes, *held* within National Prohibition Act Oct. 28, 1919, tit. 2, § 4, providing that "the articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this act if they correspond with the following descriptions and limitations, namely: * * * (f) Vinegar and preserved sweet cider," and its manufacture and sale *held* not a violation of the act.

In Equity. Suit by the Hildick Apple Juice Company, Incorporated, and by the Duffy-Mott Company, Incorporated, against William M. Williams, Commissioner of Internal Revenue, and others. On motions to dismiss bills. Denied.

Both of the foregoing causes come before me on motions by the defendants to dismiss the bills of complaint.

Section 1 of title 2 (41 Stat. 305) of the so-called Volstead Act provides that:

"When used in title II and title III of this act (1) the word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes. * * *"

Section 3 of title 2 provides that:

"No person shall on or after the date when the eighteenth amendment of the Constitution of the United States goes into effect manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

Section 4 of title 2 provides that:

"The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this act if they correspond with the following descriptions and limitations, namely:

"(a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.

"(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.

"(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

"(d) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.

"(e) Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes.

"(f) Vinegar and preserved sweet cider.

"A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this act and as directed by the commissioner. No such manufacturer shall sell, use, or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, sirup, or the articles named in paragraphs (b), (c), and (d) of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article. * * *"

The complainants seek to review the decision of the Commissioner of Internal Revenue on the ground that the latter has wrongfully refused to grant them permits for the manufacture of "preserved sweet cider," as required by section 4 of title 2, supra. Section 6 of that title provides that:

"* * * In the event of the refusal by the Commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof."

Accordingly complainants have filed their bills in this court, substantially identical in form, with the exception that the Hildick bill alleges that their application for a permit stated that the article proposed to be manufactured "will contain when manufactured and prepared for the market *more or less* than one-half of 1 per centum of alcohol by volume, depending upon the alcoholic content in the pure juice of the apple, * * * but not due in any manner to the addition to the juice of any substance whatsoever," while the Duffy-Mott bill alleges that its application for a permit stated that the article proposed to be manufactured "will contain when manufactured and prepared for the market *less* than one-half of 1 per centum of alcohol by volume."

Each bill alleges that the complainant has for many years, and long prior to the passage of the National Prohibition Act, manufactured preserved sweet cider in the usual course of its business in the following manner: "Fresh apples are delivered to the plants of the complainant by the growers or dealers therein, from which the juice is extracted by passing the apples through grinders and pressers, expressing the juice into receiving tanks. As the juice is being extracted, benzoate of soda in an amount not exceeding one-tenth of 1 per cent. is added thereto, and no other ingredient whatever is added to said juice, nor is any ingredient taken therefrom. The product thus obtained is placed in kegs, barrels, and casks ready for shipment, and at that time," the Hildick bill reads, "may contain more than one-half of 1 per cent. of alcohol by volume," and the Duffy-Mott bill reads, "contains less than one-half of 1 per cent. of alcohol by volume." "It is then transported to various parts of the country and ultimately reaches the retail distributor who breaks the bung of the container and taps it from time to time for sale to his customers, who are the actual consumers."

The bills go on to state that the foregoing process has been for a great many years, and now is generally, in use by manufacturers of preserved sweet cider throughout the United States, is the best and most approved method known, and that the amount of benzoate used in the process is not only the amount used as a preservative to retard fermentation by substantially all other manufacturers, but is the maximum amount allowed by the Department of Agriculture under the federal Food and Drug Act (Comp. St. §§ 8717-8728), and the maximum that can be used without destroying the product as a beverage.

The bills also allege that the product is, and for many years has been, known as "preserved sweet cider," and that "preserved sweet cider is the unadulterated juice of apples, commercially pressed in large quantities, containing approximately one-tenth of 1 per cent. of benzoate of soda, which is added to the juice during or immediately following the process of pressing."

The bills further allege that preserved sweet cider is sweet, and contains more or less than one-half of 1 per cent. of alcohol by volume when pressed because of fermentation that has already occurred in the apple, and that when the preservative is added it does not ferment further in an appre-

ciable degree while in the cask, but under certain atmospheric conditions it ferments slowly upon the admission of air into the cask, when the retail distributor breaks the bung; that preserved sweet cider becomes valueless as a beverage, or for any purpose, on account of acetous fermentation (as unpreserved sweet cider does not) long before the sugar content has been converted into alcohol; that preserved sweet cider is not intoxicating in fact, and cannot become intoxicating in fact, and fit for use for beverage purposes; that preserved sweet cider, which will contain less than one-half of 1 per cent. of alcohol by volume at all times after it is manufactured and prepared for the market, and at the time it is consumed, is impracticable and beyond the power of present invention.

The bills set forth section 36 of regulation 60 of the Bureau of Internal Revenue, which reads as follows: "Sweet cider containing less than one-half of 1 per cent. of alcohol by volume may be manufactured and sold without the necessity of obtaining permit, provided such product is put up and marketed in sterile closed containers, or is treated by the addition of benzoate of soda, or other substance which will prevent fermentation, in such proportion as to insure the alcoholic content remaining below one-half of 1 per cent. of alcohol by volume. The responsibility for keeping the alcoholic content remaining below such percentage rests upon the manufacturer, and in any case where cider is found upon the market containing alcohol in excess of the allowed percentage the manufacturer will be presumed to have manufactured and sold an intoxicating liquor."

The bills then allege that complainants filed applications for permits to manufacture preserved sweet cider in the manner above described, together with the prescribed bonds, that the applications were rejected and the permits refused. The application of the Duffy-Mott Company contained the statement that "the applicant does not insure that the alcoholic content of the preserved sweet cider above described will remain below one-half of 1 per centum by volume, but due entirely to natural causes such as atmospheric conditions, handling, transportation and the like, said preserved sweet cider will, after having been manufactured and prepared for the market, but before being sold to the consumer or consumed, have an alcoholic content in excess of one-half of 1 per centum by volume." The Hildick application having stated, as I have already said, that the article "will contain when manufactured and prepared for the market more or less than ½ of 1 per centum of alcohol by volume depending upon the alcoholic content in the pure juice of the apple just before it is pressed," contained no reservation refusing to insure that the alcoholic content will remain below one-half of 1 per centum by volume.

Each application stated that the liquor would be made from the sweet juice of the apple preserved by the addition of 1 per centum of benzoate of soda; that it is known and dealt in generally as "preserved sweet cider," and would be placed and sealed in casks, barrels, and kegs. The bills pray that the regulations of the Department requiring the manufacturer to insure the maintenance of an alcoholic content below one-half of 1 per centum by volume be declared illegal and void, that the decision refusing to issue permits be reversed, and that the permits be directed to issue. The defendants move to dismiss the bills of complaint on various grounds, which are in substance because no cause of action is stated.

Gilbert & Gilbert, of New York City (Abraham S. Gilbert, of New York City, W. W. Chamberlain, of Buffalo, N. Y., and Jerome E. Malino, of New York City, of counsel), for complainants.

Francis G. Caffey, U. S. Atty., of New York City (Alfred D. Van Buren, of Kingston, N. Y., of counsel), for defendants.

AUGUSTUS N. HAND, District Judge (after stating the facts as above). Although the reason for the decision of the Commissioner in rejecting the applications and refusing the permits does not appear, it would seem to be due to the fact that neither applicant was willing to

insure the permanent alcoholic content of his product, and the Hildick Company would not state that the juice of the apples, when first pressed, contained less than one-half of 1 per centum of alcohol by volume.

The defendants insist that section 1 of title 2 of the Volstead Act governs the case, and that no product of any kind can be manufactured which contains or may contain more than one-half of 1 per centum of alcohol by volume. In this connection they particularly insist upon the provisions of section 3 of title 2, which forbid the manufacture or sale of any intoxicating liquor after the Eighteenth Amendment to the Constitution became effective, and refer to the fact that "intoxicating liquor," as defined by section 1, includes all liquors "containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes." It is important to note, however, that section 3, supra, in spite of the prohibition clause, and the clause providing for a liberal construction of all the provisions of the act, in order to prevent the use of intoxicating liquor as a beverage, contains a careful limitation of its sweeping prohibitions in the words, "except as authorized in this act."

If defendants are sound in their position, what becomes of the broad exception of section 4 of title 2 that:

"The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this act if they correspond with the following descriptions and limitations, namely: * * *

"(f) Vinegar and preserved sweet cider."

Both parties seem to rely on what I think is the inconclusive effect upon the construction of the act of the discussions and proceedings when it was before Congress. Such sources of interpretation ought only to be resorted to where the act itself is not clear, and the words of title 2, section 4, of the statute seem to me to bear but one meaning. If the article manufactured corresponds with the description of "preserved sweet cider," it is ex vi termini not subject to the provisions of the act.

The statute very necessarily requires a permit in order to manufacture a liquor which is subject to fermentation, so that no manufacturer shall put out an article which does not correspond with the description of section 4, supra. It may well be that the Commissioner, in issuing permits to manufacture, has the right in a reasonable way to direct the mode of preserving the apple juice, and as part of the regulation of manufacture intrusted to his care to specify the kind of containers which shall be used to prevent fermentation of the cider, and the way in which they shall be sealed. It may be that preserved cider, made out of apples the juice of which has so fermented in the apples that it contains more than one-half of 1 per centum of alcohol by volume, is not preserved sweet cider within the meaning of the statute, because other apple juice as a practical matter can be obtained. These, however, are in my opinion matters of fact, of which this court cannot take judicial notice.

The bills allege that the complainants' products are made from the unadulterated juice of apples, are preserved in the usual way, are in

fact and within the general acceptation of the term "preserved sweet cider," and are at no time intoxicating. They further allege that it is impossible to manufacture a preserved sweet cider that will at all times contain less than one-half of 1 per centum of alcohol by volume. They thus bring the case fully within the permissive clause of section 4 of title 2 of the Volstead Act, are consequently within the exception contained in section 3 of title 2 of the Volstead Act and do not offend the Eighteenth Amendment of the Constitution.

Defendants argue that, though all the allegations of the complaints be true, though the liquor sought to be manufactured is to be manufactured in the only known way, though it is in fact "preserved sweet cider" of the only known kind, and though it can never be intoxicating in fact, it is yet lawful for them to exclude it. Such a position is in the very face of the provisions of section 4, supra, and leaves nothing for subdivision (f) of that section to operate upon. It is clearly untenable.

The regulation of the Department seems to have been complied with by the applicants in all respects except those in which they say compliance is impossible. The requirement that an applicant can use only juice from apples that contain a liquid having less than one-half of 1 per cent. of alcohol by volume, that he so preserve, encase and seal the juice that it never can have a higher percentage of alcohol, may or may not, after the facts are known, be a valid regulation. What in truth is the natural alcoholic content of the juice of the apple when first extracted, what is the best practical mode of preserving the juice, in order so far as possible to prevent fermentation, may be doubtful questions of fact, the investigation of which will show that the regulation is valid. If the defendants can disprove the facts alleged, they can do so after answer. The complainants, however, say in their bills of complaint that their products are made from unadulterated juice of apples, and that they are preserved in the best way practicable, and that their product is "preserved sweet cider." These allegations, admitted by the motions to dismiss, show an unreasonable and unwarranted refusal by the defendants to grant permits.

The decision of Houston v. St. Louis Packing Co., 249 U. S. 479, 39 Sup. Ct. 332, 63 L. Ed. 717, is not in point, for there the action of the department was held by that court, after a trial, to be justifiable. In the present case, which arises on demurrer, there appears no ground for defendants' position, except their legal theory that section 4 (f), supra, is limited by the preceding section 1. With that theory I wholly differ. If preserved sweet cider was to be subject to the limitations of sections 1 and 3 of title 2, there was no reason for inserting it in section 4, where it is in express terms taken out of the provisions of the Volstead Act. To place it in section 4, and then by the provisions of section 1 prohibit its manufacture in the only practicable way would be an almost incredible species of self-repugnant and nugatory legislation.

The motions to dismiss are denied, and leave is granted to answer within 20 days.

In re GNADT.

(District Court, E. D. Missouri, E. D. December 17, 1920.)

No. 6994.

Aliens ⊂=62—Deserter from United States army will not be admitted to citizenship.

An alien who deserted from the military service of the United States, and was convicted and sentenced therefor by a court-martial, will not be admitted to citizenship.

Application of Albert Ernest Julius Gnadt for naturalization. Denied.

M. R. Bevington, of St. Louis, Mo., Chief Naturalization Examiner, for the United States.

DYER, District Judge. Under the provisions of the act of June 29, 1906 (34 Stat. pt. 1, p. 596), the petitioner declared his intention on September 14, 1915. On May 25, 1918, he filed his petition for naturalization, which is now under consideration. The evidence discloses that this candidate enlisted in the United States army; that he later deserted therefrom; that he was subsequently taken into custody, tried by a general court-martial upon the charge of desertion, in violation of the forty-seventh Article of War, found guilty of such charge, and sentenced, among other punishments, to be dishonorably discharged the service and to be confined at hard labor for one year.

Upon his conviction of the charge of desertion he forfeited his right to become a citizen of the United States under sections 1996 and 1998 of the Revised Statutes (3952, 3954), which provide that all persons who deserted the military or naval service are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens. Section 1998 was amended by Act Aug. 22, 1912 (37 Stat. 356), which provides, among other things, that the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President, where the offense was committed in time of peace, and where the exercise of such clemency will not be prejudicial to the public interests.

It is sufficient, in a case of this character, to establish the fact that the candidate concerned deserted the military service of the United States. Such a deserter will not be naturalized. His application will be denied, with prejudice to his right to renew the same.

COLUMBIA GRAPHOPHONE CO. v. 330 WEST NINETY-FIFTH ST. CORPORATION.

(District Court, S. D. New York. June 11, 1920.)

1. **Liens ⇐7—Equitable lien for breach of contract.**
   Where defendant, holding a contract for the purchase of real property, contracted to assign such contract to complainant, but failed to do so, and afterward acquired title under its contract, complainant *held* entitled to an equitable lien on the property for the advance payment made under its contract, which it was agreed should be returned if the contract was not carried out.
2. **Liens ⇐16—Acceptance of other security only prima facie evidence of waiver.**
   While an equitable lien may be waived by the acceptance of independent security, such acceptance is only prima facie evidence of waiver, and merely casts the burden of proof on the party asserting the lien.
3. **Equity ⇐152—Contract attached to bill may be considered on motion to dismiss.**
   A contract attached to a bill may be considered on motion to dismiss, to determine the intent of the parties and whether complainant has a cause of action.

In Equity. Suit by the Columbia Graphophone Company against the 330 West Ninety-Fifth Street Corporation. On motion to dismiss bill. Overruled.

McAdoo, Cotton & Franklin, of New York City (George H. Savage, of New York City, of counsel), for plaintiff.

I. Maurice Wormser, of New York City, for defendant.

KNOX, District Judge. By this suit plaintiff seeks to impress a lien to the extent of $72,818.19 upon premises situate at the northwest corner of Fifth avenue and Thirty-Fourth street, in this city. The claim of right by the plaintiff to assert a lien, and the denial of such right by the defendant, grow out of the following state of facts:

Upon November 29, 1919, the defendant agreed to purchase the above-mentioned property from its then owner, Columbia Trust Company, and to pay therefor the sum of $1,800,000. Upon January 20, 1920, defendant entered into a contract with the plaintiff whereby, in consideration of $50,000 then paid, and $300,000 to be thereafter paid, the defendant covenanted to assign all of its right, title, and interest in and to the contract with the Trust Company, and to direct the latter to convey the premises in question direct to the plaintiff. The contract between the parties to this litigation provided in paragraph 9 thereof as follows:

"The obligation of the seller to repay to the purchaser the sum of $50,000 in case the purchaser shall not accept title hereunder, pursuant to the terms of this agreement, shall be guaranteed by Max N. Natanson, Esq."

In pursuance of this provision of the contract a guaranty in terms as follows was executed by Natanson:

"In consideration of the execution of the foregoing agreement by Columbia Graphophone Company, I hereby guarantee to Columbia Graphophone Com-

pany the performance of the obligation of the seller as provided in paragraph (9) hereof."

Natanson is the vice president of the defendant corporation. The agreement between the parties hereto contained numerous other provisions, some of which are alleged to have been breached by the defendant, with the result that title to the property did not vest in the plaintiff. In addition to this, the defendant retains the sum of $50,000 paid on the contract, and for this sum, together with architects' fees and other expenses, in the aggregate of $22,818.19, the plaintiff seeks relief by way of lien; the defendant in the meanwhile having completed its contract with the trust company and acquired legal title to the property.

A demurrer having been interposed to the complaint, I must, for present purposes, accept the allegations of plaintiff's pleading as true. The demurrer is based upon two propositions advanced by the defendant, as follows: (1) That there can be no equitable lien in the case of a mere contract to buy a contract of sale from one who has not the land; and (2) that, even assuming that a lien in favor of plaintiff might have arisen, such lien was waived by the agreement for and acceptance by the plaintiff of Natanson's personal guaranty for the performance by the defendant of its contractual obligation with the plaintiff.

[1] Since the decision in Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937, 127 Am. St. Rep. 862, 15 Ann. Cas. 819, there can be no doubt that a vendee under a contract for the purchase of real estate has a lien on such property in the hands of the vendor for the amount of the purchase price paid on account thereof. And I take it that, had the original contract between the present defendant and the Trust Company been assigned to the plaintiff herein, the latter would have succeeded to such lien as then existed in favor of the defendant.

Instead, however, of assigning the original contract of purchase, the defendant agreed that it would assign, transfer, and set over to the plaintiff all of its right, title, and interest in and to said contract, and the plaintiff agreed to carry out and perform the covenants made by the defendant in the said original contract in the same manner and with like effect as though the plaintiff had been named as vendee therein. True, the plaintiff agreed to be bound by such additional covenants as were made by it in its contract with the defendant; but I fail to see how the plaintiff, subject to the performance by it of the additional covenants, had anything less than an equitable title to the equitable title which the defendant had acquired from the trust company. It may be that prior to the acquisition by the defendant of the legal title there was nothing as against which the lien might be asserted; nevertheless such title as was possessed by the defendant was held in trust for the plaintiff, and when the legal title came into the hands of the defendant there was in existence a tangible res into which the equitable title merged, and to which the plaintiff's lien could attach.

It was held in Barnes v. Alexander, 232 U. S. 117, 34 Sup. Ct.

276, 58 L. Ed. 530, that in equity a contract to convey a specific object, even before it is acquired, will make a contractor a trustee as soon as he gets title thereto. See, also, Valdes v. Larrinaga, 233 U. S. 705, 34 Sup. Ct. 759, 58 L. Ed. 1163. What the defendant in effect here agreed to was that it would procure to be delivered to the plaintiff the title to the trust company property. This it has not done, and equity will intervene to see to it that such sum as was paid by the plaintiff to bring this result about is protected.

I reach the conclusion that the first proposition advanced in support of the defendant's demurrer is untenable.

[2] There is much authority to the effect that an equitable lien may be waived by the acceptance of independent security; but the acceptance of such security is, I think, only prima facie evidence of such waiver, and casts the burden of proof upon him who asserts the lien. Griffin v. Smith, 143 Fed. 865, 75 C. C. A. 73.

[3] The Supreme Court, in Cordova v. Hood, 17 Wall. 1, 21 L. Ed. 587, has said that the presumption of waiver of lien may be rebutted by evidence that such was not the intention of the parties. This intent may be somewhat inquired into upon this demurrer, inasmuch as the contract of the parties is annexed to the complaint and may be considered in determining if plaintiff has a cause of action. Kienle v. Gretsch Realty Co., 133 App. Div. 391, 117 N. Y. Supp. 500; Winch v. Farmers' Loan & Trust Co., 12 Misc. Rep. 291, 33 N. Y. Supp. 279; Oppenheimer v. Seligman, 164 App. Div. 744, 150 N. Y. Supp. 156.

By paragraph 4 it is agreed that—

"* * * In case the purchaser should not accept title hereunder, *pursuant to the terms of this agreement*, then and in that event the purchaser, at its option, shall be relieved of its obligations hereunder, and the seller shall thereupon forthwith repay to the purchaser the sum of $50,000 received by it hereunder, and the seller will assign to the purchaser, as collateral security for the repayment by the seller of such $50,000 as aforesaid, all of its right, title, and interest in said contract embodied in Schedule A [the contract with the trust company] and in and to the above-mentioned sum of $50,000 paid by the seller to Columbia Trust Company on account of the purchase price of said premises, and to the repayment of such sum, and the purchaser shall be subrogated to all the rights of the seller [defendant] under said contract. Such contract shall be reassigned by the purchaser to the seller upon payment to the purchaser of said sum of $50,000."

Now, paragraph 9 of the contract, hereinbefore quoted, was inserted for the benefit of the purchaser. If the purchaser was satisfied with Natanson's guaranty of performance by the defendant, it is improbable that the foregoing provisions for subrogation and the assignment and reassignment of the contract would have come into existence. The impression I receive is that the purchaser demanded and had accorded it the Natanson guaranty in addition to, and not in derogation of, the lien to which the purchaser was entitled, and which by the agreement itself is all but specifically reserved.

I therefore hold against the defendant upon its second ground of demurrer.

In view of the conclusions I have reached, the demurrer must

fail, and I therefore do not now determine if a valid lien may be claimed by the plaintiff with respect to architects' fees and expenses.

If I be correct in the views herein expressed, this suit is not contradictory in theory to the maintenance of an action at law against Natanson.

In re ALDANI.

(District Court, E. D. Missouri, E. D. December 17, 1920.)

No. 8595.

Aliens ⇐68—Obtaining passport as subject of native country nullifies prior declaration of intention.

Where an alien, after having declared his intention to become a citizen of the United States, applied for and obtained a passport from the consular representative of his native country as a subject of such country, to return thereto, his action nullified his declaration, and a petition for naturalization cannot thereafter be based thereon.

On petition of Francesco Aldani for naturalization. Denied.

M. R. Bevington, Chief Naturalization Examiner, of St. Louis, Mo.

DYER, District Judge. The petitioner in this cause filed his application for citizenship February 11, 1920. This was based upon declaration of intention executed by him August 22, 1917.

Some three months after filing the petition for naturalization in question, the candidate, on his own testimony, returned to Italy, the country of his nativity. He was unable to procure a passport from the American authorities. He accordingly presented himself before the diplomatic officer of his native land, stationed here in St. Louis, and procured a passport as an Italian subject. Therein he renewed his oath of allegiance to the monarch governing that country.

Such action is inconsistent with the avowal contained in the declaration of intention of the candidate. His petition for naturalization will accordingly have to be denied for the reason that the declaration of intention has been nullified. A petition for naturalization not predicated on a valid declaration of intention, is void. United States v. Mueller, 246 Fed. 679, 158 C. C. A. 635; and United States v. Vogel (C. C. A.) 262 Fed. 262.

Petition denied.

MICKADIET et al. v. PAYNE, Secretary of the Interior.

(Court of Appeals of District of Columbia. Submitted October 6, 1920. Decided November 8, 1920.)

No. 3418.

1. **Certiorari ⟸24—Does not lie to review administrative order.**
   A writ of certiorari, which lies to inferior courts and to special tribunals exercising judicial or quasi judicial functions, cannot be issued to review an administrative order by an executive officer of the United States government.
2. **Certiorari ⟸24—Orders determining inheritance of Indian lands administrative.**
   An order of the Secretary of the Interior under the authority of Act May 8, 1906 (Comp. St. §§ 3951, 4203), and Act June 25, 1910, determining the right to inheritance of Indian lands, is an administrative order, and a subsequent setting aside of the order is likewise administrative.
3. **Indians ⟸27(2)—Court can determine inheritance of Indian lands after department decision.**
   After the Department of the Interior has rendered a decision awarding Indian land to certain claimants as heirs, the land becomes private property, subject to the jurisdiction of the courts, to determine conflicting claims thereto, and to render complete justice to all parties concerned.
4. **Certiorari ⟸24—Lack of other remedy does not authorize certiorari to review administrative order.**
   Even if there was no other remedy by which an administrative order might be reviewed by the courts, that fact would not warrant the issuance of certiorari to review such order.

Appeal from the Supreme Court of the District of Columbia.

Certiorari by Julia Lamere Mickadiet and another against John Barton Payne, Secretary of the Interior. Petition dismissed, and petitioners appeal. Affirmed.

E. F. Colladay and P. H. Marshall, both of Washington, D. C., for appellants.

C. E. Wright and C. D. Mahaffie, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. The appellants here, as petitioners below, applied to the Supreme Court of the District for a writ of certiorari directed to the Secretary of the Interior, commanding him to certify to the court the records in a proceeding pending before him, to the end that the findings and conclusions which had been reached by him in that proceeding should upon review by the court be set aside as null and void. A rule to show cause was issued, and the Secretary made his return thereto, setting forth the reasons which in his judgment justified his prayer that the rule be discharged and the petition dismissed. His prayer was granted, and the appellants appealed.

My Soul Tiebault, a Winnebago Indian, commenced proceedings in 1896 in the county court of Thurston county, Neb., for the adoption of the appellants as his children "to all legal intents and purposes."

The petition was sustained and a decree of adoption entered in accordance with its prayer. About 10 years thereafter Tiebault died intestate, unmarried, and without issue, leaving surviving him the two appellants, who claim that, by virtue of their adoption, they are his only heirs at law. At the time of his death Tiebault was seized of certain real estate situated within the Winnebago reservation, Thurston county, Neb., and valued at about $10,000. The appellants in 1908 commenced a suit in the United States Circuit Court for the District of Nebraska against the relatives of Tiebault who claimed to be his heirs and as such entitled to the land. The suit was brought under the provisions of the act of Congress of February 6, 1901 (31 Stat. 760 [Comp. St. §§ 4214, 4215]), which conferred upon the court jurisdiction to determine the claims of persons of Indian blood with respect to Indian lands. While the cause was pending the act was repealed by the act of June 25, 1910 (36 Stat. 855), and thereby the court lost jurisdiction of the cause. Soon afterwards the theater of the controversy was transferred, by stipulation of the parties, to the Department of the Interior. The department decided in favor of appellants, permitted them to take possession of the land, and instructed the Indian agent at Winnebago, Neb., to pay to them the accumulated rents, etc., derived from the land. Three disbursements were made under this order, the last in September, 1913. A few days after this payment was made the Secretary of the Interior instructed the superintendent of disbursements at the Indian agency to withhold further payments from the appellants and to deny them all beneficial interest therein. Thereafter one of the nephews of Tiebault made application to the department to reopen the decision of January 11, 1913, in favor of the appellants, basing the application upon the ground of newly discovered evidence tending to show that the decree of adoption passed by the county court of Thurston county, Neb., was secured by fraud and was therefore void. The Secretary granted the application and ordered the issues thereon to stand for future consideration. At this point the appellants applied to the Supreme Court of this District for a mandamus to compel the Secretary to adhere to the decision rendered on January 11. The writ was denied, and an appeal taken to this court, which reversed the action of the lower court. The case was then removed to the Supreme Court of the United States (Lane v. Mickadiet, 241 U. S. 201, 36 Sup. Ct. 599, 60 L. Ed. 956), which held that the application for a writ of mandamus was premature, that a court would not undertake to control a matter which was in fieri in one of the executive departments, and remitted the controversy back to the Secretary for his final disposition. In due course the Secretary annulled the decision of January 11, 1913, in favor of the appellants, and declared certain parties other than the appellants to be the lawful heirs of Tiebault. It is this action of the Secretary which the appellants now seek to have reviewed by a writ of certiorari.

We have been favored by the appellants with a carefully prepared brief, which discusses many points; but we think it is necessary to consider only one, namely: Is certiorari a proper remedy for the

correction of the errors which the appellants claim were committed by the Secretary? If not, that of course ends the discussion.

This court said in Degge v. Hitchcock, 35 App. D. C. 218, 226, which was an application for a writ of certiorari to review an action of the Postmaster General, that the writ—

"lies to inferior courts and to special tribunals exercising judicial or quasi judicial functions, to bring their proceedings into the superior court, where they may be reviewed and quashed, if it be made plainly to appear that such inferior court or special tribunal had no jurisdiction of the subject-matter, or had exceeded its jurisdiction, or had deprived a party of a right or imposed a burden upon him or his property, without due process of law. * * * To the extent indicated the writ of certiorari is in the nature of a writ of error; but it does not, like the latter, go to errors of judgment that may have been committed in the process of the exercise of an existent jurisdiction." (For this view several authorities are cited.)

Appellants do not deny that the Secretary was acting within his jurisdiction when he rendered the decision of which they complain. The question of jurisdiction is foreclosed by what is ruled by the court in the Mickadiet Case. It was there held that "exclusive jurisdiction over the subject" was "conferred by the acts in question [those of May 8, 1906 (Comp. St. §§ 3951, 4203), and June 25, 1910 (36 Stat. 855)] upon the Secretary of the Interior."

[1] In considering our decision in the Degge Case, supra, the Supreme Court said:

"This case is the first instance, so far as we can find, in which a federal court has been asked to issue a writ of certiorari to review a ruling by an executive officer of the United States government. That at once suggests that the failure to make such application has been due to the conceded want of power to issue the writ to such officers. For, since the adoption of the Constitution, there have been countless rulings by heads of departments that directly affected personal and property rights, and where the writ of certiorari, if available, would have furnished an effective method by which to test the validity of quasi judicial orders under attack."

The opinion concludes in these words:

"The writ of certiorari is one of the extraordinary remedies, and being such it is impossible to anticipate what exceptional facts may arise to call for its use; but the present case is not of that character, but rather an instance of an attempt to use the writ for the purpose of reviewing an administrative order. Public Clearing House v. Coyne, 194 U. S. 497. This cannot be done." Degge v. Hitchcock, 229 U. S. 162, 172, 33 Sup. Ct. 639, 57 L. Ed. 1135.

In the Mickadiet Case the Chief Justice, speaking for the court, said that there was no dispute, "and could be none, concerning the general rule that courts have no power to interfere with the performance by the Land Department of the administrative duties devolving upon it. * * *"

[2] Thus it is clearly established that if the action of the Secretary is administrative in its character, the writ will not lie. That it is administrative is made manifest by what was said in the Mickadiet Case. That case, as we have shown, was instituted by the appellants herein to prevent the Secretary from setting aside his previous decision that they were the legal heirs of Tiebault. The court held that his deci-

sion was administrative. This was asserted several times. In one place the court said:

"It is equally undoubted under these conditions that the land was under the control in an administrative sense of the Land Department for the purpose of carrying out the act of Congress."

In several other places it speaks of the decision as an "order"—an "administrative order." If the action of the Secretary in holding appellants to be the legal heirs of Tiebault was administrative, as the court decided, we cannot perceive how it can be correctly said that his action in setting aside that holding, and deciding that they were not, is not also administrative.

[3] The burden of appellants' argument seems to rest on the assumption that, unless the writ is issued, the action of the Secretary is beyond review; but there is no warrant for this. The learned Chief Justice, in the Mickadiet Case, said that upon the completion of the administrative duties devolving upon the Secretary the courts may "correct as between proper parties errors at law committed in the administration of the land laws." In this pronouncement there is nothing new. As far back as Litchfield v. Register, 9 Wall. 575, 19 L. Ed. 681, the court denied an application for an injunction to restrain the officers of the land department from taking action with respect to a dispute as to whether or not a certain piece of land was subject to entry, saying:

"After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. * * * If they give patents to the applicants for pre-emption, the courts can then in the appropriate proceeding determine who has the better title or right."

See, also, Minnesota v. Lane, 247 U. S. 243, 250, 38 Sup. Ct. 508, 62 L. Ed. 1098, Lane v. Darlington, 249 U. S. 331, 39 Sup. Ct. 299, 63 L. Ed. 629, and United States ex rel. Hall v. Lane, 48 App. D. C. 279, 284. The moment that the property, whether it be the rents or the corpus of the estate, passes out from under the administrative control of the Secretary, it becomes subject to the action of the courts, where complete justice may be done to all parties concerned.

[4] Even if this were not so, the appellants would not be entitled to the writ of certiorari, since the Supreme Court has said so unmistakably that the writ will not issue to review an administrative order made by an executive officer of the government. To this rule there are no exceptions.

The judgment of the lower court must be and is affirmed, at the cost of the appellants.

Affirmed.

PAYNE, Secretary of the Interior, v. UNITED STATES ex rel. OLSON.

(Court of Appeals of District of Columbia. Submitted October 5, 1920. Decided November 8, 1920.)

No. 3376.

1. **Public lands ⇐98—Secretary has legal discretion as to approval of entries.**
   Under the statute requiring the Secretary of the Interior to approve public land entries before patent, the approval of the secretary is not a mere form; but he has a legal discretion to withhold such approval to prevent injustice under the particular circumstances of the case.
2. **Public lands ⇐108—Decision land was not vacant held within Secretary's discretion.**
   Where a coal company, under authority from the state, which it believed with good reason had title to the land, erected valuable improvements thereon and was operating its mine on such land when the title of the state thereto was *held* invalid, a decision by the Secretary of the Interior that the land was not vacant land, within Rev. St. § 2347 (Comp. St. § 4659), authorizing entry on vacant coal lands, was within his discretion and not subject to control by the courts.
3. **Mandamus ⇐15—Not issued to work injustice.**
   Though mandamus is classed as a legal remedy, its issuance is largely controlled by equitable principles, and it is granted as a matter of grace, not of right, and therefore is never issued, where it would further a wrong or cause an injustice.

Appeal from the Supreme Court of the District of Columbia.

Mandamus by the United States, on relation of William F. Olson, against John Barton Payne, Secretary of the Interior. Judgment for relator, and respondent appeals. Reversed and remanded.

C. E. Wright and C. D. Mahaffie, both of Washington, D. C., for appellant.

Samuel Herrick, of Washington, D. C. (Culbert L. Olson, of Salt Lake City, Utah, on the brief), for appellee.

SMYTH, Chief Justice. The Secretary of the Interior appeals from a judgment of the Supreme Court of the District awarding the relator a mandamus commanding the Secretary to allow the entry of the relator of certain coal land and to give to him in due course a patent for the land. A rule to show cause was issued. To this the Secretary filed a return and answer. A demurrer by the relator was sustained, and judgment followed.

According to the record the following are admitted facts: The state of Utah, under its school land grant of July 16, 1894 (28 Stat. 107), apparently became the owner of a certain section 16 of which the land in controversy is a part. This section has a coal deposit, but the act contained no inhibition against passage of title to mineral lands. Up to January 28, 1918, Utah, taking the language of the act literally, claimed that it was entitled to the land, irrespective of whether or not it contained coal. On that date, however, the Supreme Court of the United States decided that this grant did not give title to coal land.

Some time prior to December 8, 1913, but while the state was asserting its right to the land, Spring Canyon Coal Company, owner and operator of coal mines adjacent to section 16, erected on the southwest part of the N. W.¼ N. E.¼ of the section, pursuant to authority procured from the state, certain improvements embracing a power house, tipple, tramway, and other structures, valued at about $90,000. After their erection, and with full knowledge of their existence and location, the relator, on December 8, 1913, applied to the proper United States land officer to enter and purchase, under the coal land laws of the United States, the quarter section on which the improvements stood and paid to the receiver the appraised value, to wit, $45 the acre. No certificate, as provided by the regulations governing the disposition of coal lands, has ever been issued to him. In due time Utah filed a protest against his application, alleging that title to the land had vested in it absolutely under its grant, and that the Commissioner of the General Land Office in another proceeding involving a coal land filing had decided that the state under its grant took title to coal lands. The local land officials rejected the state's theory and held its protest for dismissal. From this action the state appealed to the Commissioner of the General Land Office.

At this time the case of United States v. Sweet, involving a similar question, was pending in court. The lower court held against the state in that case, but the Circuit Court of Appeals for the Eighth Circuit (228 Fed. 421, 143 C. C. A. 3), in an opinion by Judge Sanborn, reversed the decision and held that the state's title to the land was valid. This decision was in turn reversed by the Supreme Court of the United States. United States v. Sweet, 245 U. S. 563, 38 Sup. Ct. 193, 62 L. Ed. 473. Thereupon the state's appeal to the Commissioner of the General Land Office, which had been permitted to rest pending the decision in the Sweet Case, was taken up and disposed of in accordance with that decision. But the Commissioner further held that, inasmuch as the coal content of section 16 was confined to a tract of about 5 acres in the northeast corner of the quarter section entered by the relator, and the coal company, under color of title from the state and in good faith, had made valuable improvements on a part of the quarter section which contained no coal, the last-named part should be segregated from the other, and the relator permitted to perfect entry for the residue. Upon appeal to the Secretary this decision was affirmed, except the part providing for segregation. The Secretary held that, instead of segregation, the state, if it chose, might, under the act of Congress approved April 30, 1912 (37 Stat. 105 [Comp. St. § 4669]), select the surface of the land, with reservation to the United States of coal deposits, in harmony with the act of June 22, 1910 (36 Stat. 583 [Comp. St. §§ 4666–4668]), and that the coal deposits and mining rights should go to the relator, if he desired to accept them.

Summarized, the facts show that the state believed that it had title to the land in controversy. That this belief was not entirely baseless is evidenced, first, by the holding of the Commissioner of the General Land Office; and, second, by the decision of the Circuit Court

of Appeals for the Eighth Circuit in the Sweet Case. The coal company procured from the state the right to use a part of the land, and, relying on the state's title and acting in good faith, erected on the land extensive structures at a cost of about $90,000. If the relator's contentions are sustained, he will acquire title to those structures without paying a penny therefor, or else they must be removed. He, with the full knowledge of the state's claim, of the coal company's reliance on it, of the improvements made by the company, and their value, entered the land. By the Secretary's decision he is given an opportunity to secure all the land containing coal, as well as every facility for its removal. Thus the substantial rights of the relator, together with those of the coal company, are preserved. Was it within the Secretary's discretion to do this, or was he without choice in the situation, and compelled, no matter how unjust the consequence might be, to approve relator's entry and pass it for patent?

[1] It seems to us that the solution of the problem is not difficult. The statute requires the Secretary to approve the entry before a patent can emerge. His approval is not a mere idle ceremony. True, the statute does not give to him arbitrary discretion; but it does give him power to prevent such an injustice as is sought to be accomplished by the relator in this proceeding. Speaking of a like situation the Supreme Court of the United States said:

"We would not be misunderstood in respect to this matter. We do not mean to imply that any arbitrary discretion is vested in the Secretary; but we hold that the statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force. It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and therefore that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice." Williams v. United States, 138 U. S. 514, 524, 11 Sup. Ct. 457, 461 (34 L. Ed. 1026).

To the same purport is the language of Mr. Justice Van Devanter in the recent case of Northern Pacific Railroad Co. v. McComas, 250 U. S. 387, 393, 39 Sup. Ct. 546, 548 (63 L. Ed. 1049). He said:

"The approval or disapproval by the Secretary of the Interior of such lieu selections is not merely a formal act. It involves an exercise of sound, but not arbitrary, discretion, and makes it admissible for him, where a selection is proffered for land which a bona fide occupant, misinformed and misunderstanding his rights, has reclaimed and improved at large cost, to reject the selection and hold the title in the United States until, as this court has said 'within the limits of existing law or by special act of Congress,' the occupant may be enabled to obtain title from the United States."

The Williams Case is cited by him and approved. Does not that language fit this case? Did not the coal company, acting in good faith, but misinformed and misunderstanding its rights, improve a portion of the land in question at large cost? And if in the McComas Case the Secretary was justified in treating the matter from an equitable standpoint, why was there not authority for his doing the same

thing in the case we are considering? He may have made a mistake in his solution of the problem, but that he acted within the radius of a sound discretion, not arbitrarily, is, in our judgment, beyond doubt. We have no power to direct the course of that discretion.

[2] Moreover, he was called upon to determine whether or not the land was open to entry at the time the relator entered it. Section 2347 of the Revised Statutes (Comp. St. § 4659) provides:

"Every person above the age of twenty-one years" shall "have the right to enter, * * * any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority," etc.

Was this land vacant at the time the relator entered it? We have seen that the coal company had its structures on it under a claim of right. What is meant by vacant lands is construed in Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 13, 50 C. C. A. 79, 89 (61 L. R. A. 230) where it is ruled that "vacant lands are such as are absolutely free, unclaimed, and unoccupied." While we do not decide the land was vacant within the meaning of the statute, because it is not our province to do so in this proceeding, we are firmly of the opinion that a decision by the Secretary that it was not would be entirely within his discretion and not subject to our control. If not vacant, then the relator had no right to enter it.

[3] Besides, the Secretary held, and there is reason for his holding, that to grant what relator demanded would work an injustice. It is well settled that mandamus is never issued where it would be likely to further a wrong or cause an injustice. Courts grant it as a matter of grace, not of right.

"It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles." Duncan Townsite Co. v. Lane, 245 U. S. 308, 311, 38 Sup. Ct. 99, 101 (62 L. Ed. 309); United States ex rel. Stevens v. Richards, 33 App. D. C. 410; United States ex rel. Laws v. Davenport, 34 App. D. C. 502; United States ex rel. McManus v. Fisher, 39 App. D. C. 176; United States ex rel. Prettybull v. Lane, 47 App. D. C. 134.

We are satisfied that the Secretary was not acting arbitrarily, but was exerting a sound discretion—was proceeding in the light of equitable considerations—in the action he took, and therefore that the court below fell into error in directing the issuance of the writ.

The judgment is reversed, at the cost of the appellee, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

UNITED STATES ex rel. McCULLOUGH et al. v. LANE, Secretary of the Interior.

(Court of Appeals of District of Columbia. Submitted October 5, 1920. Decided November 8, 1920.)

No. 3391.

1. **Appeal and error ⊜917(1)—Demurrer admits all facts well pleaded.**
On appeal from a judgment entered after a demurrer to the answer was overruled, all matters well pleaded in the answer must be taken as true.

2. **Public lands ⊜108—Courts will not review administrative action within jurisdiction, unless arbitrary.**
The action of the Secretary of the Interior in deciding a question relative to public lands, which was within his jurisdiction, cannot be reviewed by the courts, even if erroneous, unless the Secretary acted arbitrarily.

3. **Mandamus ⊜85—Secretary's ruling that relinquishment by purchaser of public land canceled rights held not arbitrary.**
Where a purchaser of public lands had relinquished his rights thereto because of a claimed shortage in the acreage, knowing of a ruling that such relinquishment became effective immediately without action by the office, a ruling by the Secretary of the Interior that such relinquishment terminated all the purchaser's rights, and that the application could not be renewed after the land was entered by another, was not so unreasonable as to be arbitrary, and cannot be reviewed by the courts in mandamus proceedings.

4. **Public lands ⊜125—After patent is issued equity can protect rights of parties.**
If the Secretary of the Interior has erred in his rulings relating to an application for public lands, a court of equity can, after patent is issued to the successful applicant, vindicate whatever rights the unsuccessful applicants may have.

Appeal from the Supreme Court of the District of Columbia.

Petition for mandamus by the United States, on the relation of Stephen E. McCullough and another, against Franklin K. Lane, as Secretary of the Interior. Judgment for respondent, and petitioners appeal. Affirmed.

Samuel Herrick, of Washington, D. C. (Everest, Vaught & Brewer, of Oklahoma City, Okl., on the brief), for appellants.

C. E. Wright and C. D. Mahaffie, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. [1] The appellants filed their petition in the lower court and asked for a mandamus directing the Secretary of the Interior to reinstate on the records of the local land office at Guthrie, Okl., McCullough's entry for certain land which he had purchased under the act of June 30, 1913 (38 Stat. 92), and to issue to him a patent for the land. In due time the Secretary answered. A demurrer to the answer was overruled, and, the appellants electing to stand on their demurrer, judgment was entered for the Secretary. We must therefore take as true all matters well pleaded in the answer. Garfield v. United States ex rel. Turner, 31 App. D. C. 332, 335;

Boyd v. Nebraska ex rel. Thayer, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103.

The Secretary of the Interior, pursuant to the act of Congress just mentioned, adopted regulations governing the sale of the lands, which provided that they should be sold at public sale to the highest bidder, that he should pay one-fourth at the time of purchase and the balance in four equal installments, with interest; also that failure to make the annual payments would be a sufficient cause for cancellation of the sale or entry.

In December, 1913, McCullough bid $7.75 an acre for 162.80 acres, and his bid was accepted. He made the initial payment, $319.49, and received a certificate of sale, No. 08311, upon which were printed the regulations just mentioned. A short time after his purchase another regulation was made by the Secretary, to the effect that upon default in payments by any purchaser the land would become subject to purchase at private sale for a sum equal to the bid made by the defaulting purchaser at the public sale.

Some four days before the first annual payment by McCullough became due, in December, 1914, he addressed a letter to the receiver of the local land office, in which he claimed that there were not as many acres in the tract as he had purchased, and asked for an adjustment. In answer the receiver inquired how he wished the matter adjusted, and added that it was the practice in such cases to relinquish the whole tract and make application for the return of the amount paid. He also requested McCullough to indicate at his earliest convenience what course he desired to pursue. To this McCullough replied:

"I wish to relinquish the land, as it is not there, and desire my money refunded."

Thereupon the local land officials sent to him two blank forms upon which he might express what he wanted. He returned both properly filled out and sworn to. In one he said:

"I hereby make application for the return of the purchase money paid on cash purchase, entry No. 08311, * * * and on oath declare that I have not sold, assigned, nor in any manner encumbered, the title to the land described. * * *"

And in the other:

"I hereby relinquish to the United States all my right, title, and claim in and to the land described in receipt No. 08311."

Prior to this time the Secretary had directed that local land officers should be instructed to notify all persons concerned that—

"the filing of a relinquishment of any entry or claim under the public land laws within their jurisdiction will be treated as absolute, the cancellation thereof at once noted of record, and the tract embraced therein will be held open to settlement and entry without further action."

This was in force when he relinquished. It means that the moment a relinquishment is filed it is to be treated as accepted by the government without further action on the part of any official. In January, 1915, the receiver reported to the General Land Office the action which McCullough had taken, also that his relinquishment had been

noted upon the records of the office and would be sent on with his return for the month of January.

McCullough made none of the annual payments required by his contract. From the time when he filed his relinquishment, in January, 1915, until September 5, 1918, about 3 years and 8 months, the land was open for sale. On the last-named date one Capshaw purchased it in accordance with the regulations of the Secretary and a a receipt and certificate of sale were issued to him. Some 8 days thereafter, it having become known that the land probably contained oil deposits of great value, a person claiming to represent McCullough wrote to the General Land Office stating that McCullough had never knowingly relinquished the land and that he desired to know whether he had lost his rights therein. The Commissioner, not being advised of the sale to Capshaw, answered that, for reasons stated in his letter, the officers of the local land office were instructed to reinstate McCullough's purchase. Upon receiving the instructions the officers reported to the Commissioner that the land had been sold, and requested further instruction. Within a few days thereafter McCullough asked permission to withdraw his relinquishment, claiming that it was made under a mistake of fact, and offering to abide by his purchase and pay such sums as might be due. About 3 months afterwards he tendered the entire balance of the purchase price, waiving any claim on the basis that the tract did not contain the number of acres which he had purchased. The tender was refused. Subsequently he denied his signature to the relinquishment papers, but he makes no claim of that character now.

On appeal from the refusal of the local land office to take McCullough's money, the Commissioner held that his action directing the reinstatement of his purchase was subject to the qualification that there had been no intervening adverse claim, but that as Capshaw's entry had intervened the fulfillment of the direction was impossible, and he therefore set it aside and directed that the McCullough relinquishment should be noted on the records of the General Land Office and the purchase by Capshaw should be permitted to stand. The First Assistant Secretary of the Interior on appeal affirmed the action of the Commissioner, and later denied a motion for rehearing.

McCullough now asserts, notwithstanding the statement in his affidavit already referred to, that shortly after his purchase he sold 40 acres of the tract in question to Owen, his coappellant, who on that account claims an interest in the action.

[2] The Secretary's jurisdiction is not denied. Whether or not there is error in his ruling is immaterial, unless he acted arbitrarily. This has been decided so often by this court and the Supreme Court of the United States that it is unnecessary to do more than cite a few of the cases. Decatur v. Paulding, 14 Pet. 497, 599, 10 L. Ed. 559, 609; Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698; 47 L. Ed. 1074; Lane v. Hoglund, 244 U. S. 174, 37 Sup. Ct. 558, 61 L. Ed. 1066; Ness v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610; Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800; Handel v. Lane, 45 App. D. C. 389; United States v. Roper, 48

App. D. C. 69, 75; United States ex rel. Red River Lumber Co. v. Fisher, 39 App. D. C. 181; Payne v. Olson, —— App. D. C. ——, 269 Fed. 198.

[3] It is conceded that McCullough filed the relinquishment papers referred to and demanded the return of what he had paid. He knew that according to the regulations of the Secretary his failure to pay the installments when they became due resulted in a forfeiture of his title to the land. Yet for more than 3 years after he had relinquished he gave no sign that he was not satisfied with what had been done. Not until after he had supposed that the land had become very valuable by reason of the discovery of oil in its vicinity did he make any complaint. At that time Capshaw had acquired in due form title to the land.

It is urged by the appellants that the relinquishment was conditioned upon return of the first payment, but it does not say so. It and the request for repayment are separate papers, and there is no condition expressed in either. Appellants also contend that they have a vested right in the land. This is upon the theory that the filing of the relinquishment was only an offer which was withdrawn before it had been accepted; but this is a misconception, for, as we have shown, it was accepted as soon as it was filed.

Argument is made on the assumption that the local land office officials gave McCullough bad advice. We find nothing in the record to support it. They told him what the practice was concerning relinquishments and asked him to select the course which he desired to pursue. In this we see nothing wrong.

[4] Cases are cited to the effect that the government could not disregard its contract of sale to McCullough, that appellants should be protected from mistakes and bad advice of the land officials, and that they have a vested right in the land. But, obviously, these cases are not pertinent, for, as we have disclosed, the contract was canceled, no mistake was made or bad advice given, and all rights to the land were voluntarily surrendered back to the government by McCullough. In saying this we do not mean to be understood as deciding the ultimate rights of the parties. We have no power to do that in this action. All we rule is that, even if the Secretary erred, he did not act arbitrarily; there was much reason for what he did. And where this is so, as the decisions we have referred to above demonstrate, we have no power through means of a mandamus to revise his decision. If the Secretary has erred, a court of equity, after patent is issued to Capshaw, will, with all the parties interested before it, vindicate whatever rights the appellants may have. Payne v. Olson, —— App. D. C. ——, 269 Fed. 198, and cases there cited.

The decision of the lower court is right, and is affirmed, with costs.

Affirmed.

SHANKS v. LANE, Secretary of the Interior.

(Court of Appeals of District of Columbia Submitted October 14, 1920. Decided November 8, 1920.)

No. 3385.

1. **Public lands ⇐108—Construction of statutes regulating soldiers' additional rights held not unreasonable.**
   A construction of Rev. St. § 2309 (Comp. St. § 4605), authorizing a soldier's entry by agent, but requiring actual entry in person thereafter for the homestead given by section 2304 (section 4592), as not showing a homestead entered, which could be the basis of an additional homestead claim under section 2306 (Comp. St. § 4594), where an agent had filed, but the soldier had not taken possession within the required time, is not so unreasonable as to authorize revision of the Secretary's action by the courts, even though the sections may be open to another construction.
2. **Public lands ⇐108—Reasonable construction by Secretary not reviewable by courts.**
   Where there was more than one reasonable construction of a public land statute open to the Secretary of the Interior, his action in adopting a particular construction is not subject to review by the courts until the matter has passed beyond his administrative sphere.
3. **Public lands ⇐102—Failure of soldier to enter within time fixed after filing terminates rights without further action.**
   The failure of a soldier to make actual entry and improvements on his land within 6 months after his declaratory statement is filed by an agent forfeits his entry, under Rev. St. § 2309 (Comp. St. § 4605), without any affirmative action by the Land Office.

Appeal from the Supreme Court of the District of Columbia.

Suit by William L. Shanks against Franklin K. Lane as Secretary of the Interior, to restrain defendant from carrying into effect a decision adverse to plaintiff. Judgment for defendant, and plaintiff appeals. Affirmed.

H. A. Hegarty, of Washington, D. C., for appellant.

C. E. Wright and C. D. Mahaffie, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. Appellant, claiming certain public lands by virtue of a soldier's additional right, to be explained in a moment, commenced a suit to restrain the Secretary of the Interior from carrying into effect a decision adverse to him, and for certain affirmative relief. Judgment went against him, and he brings it here for review.

Under section 2304, R. S. (Comp. St. § 4592), a soldier is entitled to receive from the government a homestead of 160 acres of land under certain conditions. He is given—

"six months after locating his homestead and filing his declaratory statement within which to make his entry and commence his settlement and improvement."

Section 2309, Id. (Comp. St. § 4605), says that—

"Every soldier * * * coming within the provisions of section twenty-three hundred and four [Id.], may, as well by an agent as in person, enter

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

upon such homestead by filing a declaratory statement, as in pre-emption cases; but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law."

By section 2306, Id. (Comp. St. § 4594), it is provided:

"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."

[1] This is called the "soldier's additional right."

Appellant is the assignee, through mesne conveyances, of one Rogers, who was a soldier of the Civil War. Rogers, in November, 1873, filed his declaratory statement under section 2304, as it appears, but did nothing more until 13 months later when he made actual entry of the land. Two years thereafter a patent was issued to him, which covered less than 160 acres. It is admitted that his assignee is entitled to the benefit of the soldier's additional right under section 2306, if it can be said that before June 22, 1874, the date of the adoption of the Revised Statutes, Rogers had "entered" the land within the meaning of that section. Appellant contends that the filing of the declaratory statement constituted an entry because the section says that the soldier "may enter by filing," etc. The Secretary rejects this interpretation and urges that if Congress meant that the filing should be an entry such as is contemplated by section 2306, why did it provide in the next sentence that—

"The claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same," etc.

Surely it was not the purpose to require two entries. The "time prescribed" is fixed by section 2304 as 6 months after the filing. The Secretary also points to the decision of the Supreme Court of the United States in United States v. Morehead, 243 U. S. 611, 37 Sup. Ct. 459, 61 L. Ed. 926, which says:

"The filing of a declaratory statement is not a necessary step in acquiring title to land." It secures only "a preferential right to acquire, under the homestead law, the particular tract located on."

If this is all that it does, then it is not such an entry as is contemplated by section 2306.

But, however that may be, the purpose of the latter section, urges the Secretary, is to give to the soldier something in addition to what he has. It assumes that he has already at least initiated a right to some land under the homestead law which will eventually ripen into a perfect title and that he needs more to fill out the 160 acres to which he is entitled. The entry of November, 1873, cannot be taken, he says, as the thing to which the addition is to be made, because, not having been followed up by actual settlement within 6 months, it ceased to have any vitality long before the application for the additional right was made. United States v. Morehead, supra. Being

dead in the eyes of the law, it could not form the basis for an addition of any kind.

[2] This, we think, is not an unreasonable view, although the sections may be subject to another construction. If there was more than one reasonable construction open to the Secretary when he came to study them, he was free to take the one that appealed most strongly to him, and his action in that regard is not subject to the review of the courts until the matter has passed beyond his administrative sphere. Payne v. Olson, —— App. D. C. ——, 269 Fed. 198; McCullough et al. v. Lane, —— App. D. C. ——, 269 Fed. 202; Mickadiet v. Payne, —— App. D. C. ——, 269 Fed. 194; Wattis v. Lane, 49 App. D. C. 385, 266 Fed. 1005, and cases cited in these decisions.

[3] Counsel for the appellant urges that the failure of Rogers to actually enter the land within the 6 months was not enough to forfeit the rights acquired by him under the entry of November, 1873, without some action looking to forfeiture by officials of the Land Department; but this is directly in the face of the Morehead Case, which holds that the privilege secured by the settlement "lapses unless, within six months thereafter, the soldier makes entry and actually commences settlement and improvement," and cites Charles Hotaling, 3 Land Dec. 17, 20, and Stephens v. Ray, 5 Land Dec. 133, 134.

Stress is laid by the appellant on that part of section 2309 which says that the soldier may file the declaration "as in pre-emption cases." From this he argues that it has the same effect as in such cases. In support of his position he calls attention to the decision in Whitney v. Taylor, 158 U. S. 85, 95, 15 Sup. Ct. 796, 800 (39 L. Ed. 906), wherein it is said that the—

"declaratory statement bears substantially the same relation to a purchase under the pre-emption law that the original entry in a homestead case does to the final acquisition of title."

This does not help him. There is little, if any, analogy between a declaratory statement under the pre-emption law and the one in the case before us. "The pre-emptioner must personally before 'filing' have actually entered upon the land, must have commenced settlement and improvement." United States v. Morehead, supra, 243 U. S. 615, 37 Sup. Ct. 461, 61 L. Ed. 926. Nothing of that nature is demanded here. May it not be said with reason that the provision relied on deals only with the manner of filing, not with its effect?

Believing that the construction placed upon the sections by the Secretary is not unreasonable, and hence that he did not act arbitrarily, we are constrained, in the light of the aforementioned decisions, to affirm the judgment of the lower court, at the cost of the appellant.

Affirmed.

UPJOHN CO. v. WM. S. MERRELL CHEMICAL CO.

(Circuit Court of Appeals, Sixth Circuit. December 15, 1920.)

No. 3295.

1. **Trade-marks and trade-names ⊂=68—Only attempt to sell goods as plaintiff's is unfair competition.**
   A plaintiff is entitled to relief against unfair competition only where defendant attempts to palm off on the purchasing public his goods as the goods of plaintiff.
2. **Trade-marks and trade-names ⊂=28—Imitation unfair only if appearance has public recognition.**
   Where the imitation of plaintiff's goods relates only to matters as to which defendant has prima facie a right equal to plaintiff's, there must have been a public acquiescence in plaintiff's appropriaton of those things for his product, whereby they have become indicia of origin, to make the imitation unfair competition.
3. **Trade-marks and trade-names ⊂=28—Descriptive identification must have existed long enough to acquire public sanction.**
   While title to identification words or marks that are arbitrary, so as to be proper trade-marks, is at least initiated by appropriation, no title or quasi exclusive right exists to means of identification which are merely descriptive, or which for any reason are known and open to all, unless there has been public sanction of the appropriation by acquiescence continued long enough and under circumstances suitable to raise a presumption that the public concedes the right.
4. **Trade-marks and trade-names ⊂=69—Intention to receive benefits of publicity not enough to establish unfair competition.**
   Where plaintiff had begun advertising and marketing a product under a distinctive arbitrary name, the mere fact that defendant copied the size, color, and shape of plaintiff's product, which were all matters equally open to the public before plaintiff adopted them, to obtain the benefit of plaintiff's publicity does not in itself establish unfair competition, when plaintiff's product had not been on the market long enough for its appearance to have acquired public recognition, as indicating origin, and where the arbitrary trade-mark was not infringed.
5. **Trade-marks and trade-names ⊂=28—Few months' use does not give public sanction to appearance.**
   In a suit for unfair competition by copying plaintiff's product, the situation must be judged as it existed when defendant introduced his copy of the product, and the fact that at that time plaintiff's product, which was a medical preparation, whose composition and appearance were alike open to everybody, had been in the hands of retailers and advertised to physicians for a few months, does not establish a sanction of plaintiff's appropriation of that composition and appearance by the consuming public, sufficient to prevent its subsequent appropriation by defendant.
6. **Trade-marks and trade-names ⊂=28—Unnecessary that plaintiff's product be known by his name.**
   To establish unfair competition by copying the appearance of plaintiff's product, it is not necessary that the appearance has received a public sanction connected with plaintiff's name, if it has received such sanction as to identify the article sold under plaintiff's trade-mark or trade-name.

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

Suit by the Upjohn Company against the Wm. S. Merrell Chemical Company. Decree for defendant, and plaintiff appeals. Affirmed.

The plaintiff below, appellant here, is a well-known manufacturer of pharmaceutical preparations. In the spring of 1908 it became convinced that there was a large field for the marketing of phenolphthalein, a laxative or cathartic drug, and determined to select the most desirable tablet form in which to put the same on the market. Tablets of this class were usually composed of the drug, an excipient or carrier (commonly cane sugar), a flavor, and a color. Several colors were in common use and regarded as more or less suitable—among them, pink. A great variety of shapes had been employed; among them, a thin, oblong, rectangular form, properly called a wafer, had been used. Wintergreen and other flavors or mixtures of flavors, to cover and disguise the taste of the drug and make the tablet acceptable, were in common use. The size could be as desired; but, if the tablet was to contain one grain of the drug and sugar enough for most efficient mixing, a particular size would result. If it was thought that one-half the dose given by the complete tablet might be sufficient in some cases, it was known that the tablet could be scored across the center, so that it would easily break into two equal parts. With this situation before it, plaintiff made a thin, oblong, rectangular wafer, colored pink, with a specially compounded flavor, of a size appropriate to one grain of the drug, and scored across the center. While all these various elements were old, no one had ever put upon the market a tablet having this combination of size, shape, and color or any one near enough thereto so as to make confusion.

For this article plaintiff adopted the arbitrary trade-name "Phenolax" or "Phenolax Wafer" and during the spring and early summer advertised it extensively in the medical and trade journals, and sent circulars and samples generally to the druggists, physicians, dentists, and nurses throughout the United States. The extent of this advertising is indicated by the cost, which (perhaps including the whole year) was $30,000. A force of salesmen at once began making sales and was successful on a large scale. Reduced to terms of single wafers (though the sales were in packages) more than a million had been sold by July 1st, and 18 million by the end of the year. It may fairly be assumed that by October the sales had been 6 or 8 million. So far as appears, these sales were to druggists and pharmacists, wholesale and retail. The advertising sent to physicians had been intended to bring about purchases by them from the druggists, or prescriptions by them to be filled by druggists.

Defendant was also an established manufacturing chemist or pharmacist. The fair inference from the testimony is that, in the summer or early fall of 1908, the salesmen of the defendant found the phenolax wafers on the market, sent them to defendant, and defendant determined to make the same thing, in the same form, with the expectation that it would thereby be able to fill with something "equally as good" a part of the demand for a phenolphthalein tablet which plaintiff was creating. To this end defendant put out a tablet, which was indistinguishable from plaintiff's, and was of the same shape, size, color, and flavor. It did not, however, use in any form the name "phenolax," and it put its product up in bottles or packages of standard form, bearing prominently its own name as manufacturer, and marked "phenolphthalein wafers." It is not claimed that in the bottles or cartons, or anything except the wafer itself, there was fraudulent imitation or unfair competition.

F. L. Chappell, of Kalamazoo, Mich. (Chappell & Earl, of Kalamazoo, Mich., on the brief), for appellant.

Walter F. Murray, of Cincinnati, Ohio, for appellee.

Before DENISON, DONAHUE, and WARRINGTON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1-3] The plaintiff filed its bill in the court below, based upon the theory of unfair competition; but it is not denied that defendant had, inherently and originally, the same right plaintiff had to select from the common

stock this particular size, shape, and color. The opinions of this court, within recent years, have discussed many aspects, if not all, that arise in unfair competition.[1] It would be useless to repeat what has been there said, or to refer again to the decisions of the Supreme Court and other courts there cited. They affirm or lead to the conclusions that plaintiff can have relief only against an attempt to palm off on the purchasing public the goods of defendant as the goods of plaintiff; that where the imitation relates only to matters as to which the defendant has, prima facie, a right equal to plaintiff, there must have been a public acquiescence in plaintiff's appropriation of these things for his product—a public sanction of the taking—sufficient to have created that secondary meaning whereby they have become, to the public, indicia of origin; and that while, when the plaintiff has selected as his means of identification words or marks that are arbitrary, and hence proper trade-marks, his title is at least initiated by the appropriation, yet as to those means of identification, which are descriptive, or which, for any reason, are known and open to all, there is no basis, in principle or in authority, for the creating of a title or quasi exclusive right in plaintiff, except the theory that there has been this public sanction of plaintiff's appropriation, by acquiescence which has continued long enough and under circumstances suitable to raise a presumption that the public concedes the right and to make it inequitable thereafter to dispute it.[2]

We have not cited the equally well-known cases involving technical trade-marks, because though there is at least analogy as to the basis of the right, there is claimed to be substantial distinction. In Rectanus v. United Co., 226 Fed. 545, 141 C. C. A. 301, this court considered a case where the plaintiff attempted to assert strictly trade-mark rights in advance of his trade; when the Supreme Court reviewed the same case (United Co. v. Rectanus, 248 U. S. 90, 39 Sup. Ct. 48, 63 L. Ed. 141), it seemed to plant the trade-mark rights (248 U. S. 100, 39 Sup. Ct. 51, 63 L. Ed. 141) upon the established results of trade—that is, upon the secondary meaning acquired by public sanction—and to hold that the mark could not go beyond the trade. It may be the essential theory of that opinion that there is no difference, as to the basis of the right to exclude others, between the case of the arbitrary

[1] Merriam v. Saalfield, 198 Fed. 369, 117 C. C. A. 245; Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164; Samson Co. v. Puritan Co., 211 Fed. 603, 128 C. C. A. 203, L. R. A. 1915F, 1107; Knabe Co. v. American Co., 229 Fed. 23, 143 C. C. A. 325; Meccano Co. v. Wagner (D. C.) 234 Fed. 912; Kellogg Co. v. Quaker Co., 235 Fed. 657, 149 C. C. A. 77; Saalfield v. Merriam, 238 Fed. 1, 151 C. C. A. 77; Thum v. Dickinson, 245 Fed. 609, 158 C. C. A. 37; Helmet Co. v. Wrigley Co., 245 Fed. 824, 158 C. C. A. 164; Peninsular Co. v. Levinson, 247 Fed. 658, 159 C. C. A. 560; Werk Co. v. Grosberg, 250 Fed. 968, 163 C. C. A. 218.

[2] It is not material to the present case whether that public acquiescence must involve the refraining from lawful competition and so would not reach a case where and while a patent gave a monopoly (Merriam v. Saalfield, supra, 198 Fed. at page 374, 117 C. C. A. 245), or is sufficient if it involves only the public education to the point where it thinks of the original when it sees the copy (Shredded Co. v. Humphrey Co. [C. C. A. 2] 250 Fed. 960, 963, 163 C. C. A. 210).

trade-mark and the case of the descriptive word. Yet that court had recently held (Hamilton Co. v. Wolf, 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629) that the trade-mark owner could recover all the profits realized by the infringer. The opinion of Judge Hook (206 Fed. 611, 619, 124 C. C. A. 409) sufficiently indicates that the award which the Supreme Court affirmed included all the infringer's profits, without regard to whether plaintiff's trade had ever reached the locality of the infringing sale. It may be thought that the complete affirmance of the entire award can rest only on the theory (stated by Judge Hook, 206 Fed. 619, 620, 124 C. C. A. 409) that a technical trade-mark, adopted and used, gives an exclusive right projected into territory which plaintiff's trade has not yet entered. Of course, no inconsistency between the Hamilton and the Rectanus Cases can have been intended. It is immaterial, in the present case, whether the basis of right is or is not just the same with the arbitrary mark as with the descriptive word; if there is any difference, it is narrower in the case of the nonarbitrary mark. In that case—and the present case is of that type—certain it is that there is no recognized basis of any right to exclude others, save that extent and kind of public sanction which has induced a common identification of maker by product, and that only in this way can a plaintiff claim to have any property rights to be protected. Equally certain it is that the existence of such public sanction and identification has never been inferred from facts so ambiguous and indefinite as we find here.

[4] This record does not justify a conclusion that defendant adopted and has sold its form of tablets with the intent that it should be substituted for "phenolax wafers" with purchasers who wanted phenolax and supposed that was what they were getting; though it must be conceded that the case, on its facts and with reference to this inference of fact, is close to the line. It would not be credible that defendant adopted this combination of characteristics merely because it thought them suitable; there were plenty of other sizes, shapes, and colors it might have adopted; it must have copied plaintiff's complete combination because it expected to get commercial benefit from the copying. This is not enough; to be condemned, it must have expected to practice a fraud or contribute to the practicing of it. There was room for it to get legitimate benefit from the copying through use by those (physicians or patients) who were attracted by the selected characteristics and who had no concern as to the maker or as to "phenolax."

[5] The situation must be judged as it was about October, 1908, when defendant came on the market. The classes of purchasers who could then be thought of as perhaps to be defrauded were the direct purchasers, being the druggists and perhaps doctors, and the indirect, the ultimate user, being either the patient with the prescription or the buyer for his own use. There is no room to think there was intent to defraud the direct purchaser, because what was done was not appropriate for that purpose. All such sales were made in defendant's own packages, marked with its own name and label. Plaintiff and defendant were known as competitive manufacturers, and no druggist who bought defendant's goods from defendant could have

supposed he was getting plaintiff's goods. When we come to the other class, the ultimate user, we have a very peculiar situation. If the plaintiff's goods had established themselves with this class of purchaser, so that they were known as plaintiff's goods (not necessarily by plaintiff's own name; it might as well be by a trade-name), we would be driven to the conclusion that defendant intended to take advantage of the confusion and substitution which would result.

The trouble is that there was, in October, 1908, no such reputation established with this class of purchasers. There is no direct evidence on this subject, and we must draw the natural inferences. The article had just been introduced to the trade that summer; only by the filling of prescriptions and by sales induced by the druggists had the article become known to the consumer; and the best that can be said is that the stage was set for the formation of the phenolax habit—not that any appreciable fraction of the community had acquired it. Such a secondary meaning as is here involved comes gradually. We do not think it can be manufactured overnight by intensive advertising. There is, to our minds, no satisfactory basis for finding that about October, 1908, the consuming public had come to the belief that tablets of this appearance were "phenolax"; and short of such rather general belief, plaintiff could have no quasi exclusive right which was then infringed by defendant.

[6] We do not place dependence upon the fact that the purchasing public would not be familiar with plaintiff's name; for the existence of a secondary meaning or an identification coming from appearance is sufficient, if it brings deceit as to identity of the article sold under plaintiff's trade-mark or trade-name. Saalfield v. Merriam, 238 Fed. 1, 8, 151 C. C. A. 77; Shredded Co. v. Humphrey Co., supra. Nor do we overlook the fact that similarity in appearance would be more significant with a medicinal tablet than with a piece of furniture. In the latter case the question of origin is important only as to materials and workmanship, and of these the purchaser can largely judge for himself, while in the former case the efficiency of the drug must depend upon the skill and honesty of the maker, and so the purchaser cares more about getting the original whose merits he knows; but neither of these considerations can compensate for the lack of that established reputation among purchasers whereby, and only whereby, the trade dress can indicate origin.

Since defendant entered the field, it has continued without interruption, and of late years other imitators have also appeared. If plaintiff's rights were not sufficiently exclusive in October, 1908, to justify injunction, they have not since become so. Nor, if the tablet then adopted did not then carry deception to the public, for lack of a public so educated as to be likely to be deceived, does it help plaintiff to say that the drug was the article sold, and the tablet was the container or package.

Each case depends so absolutely upon its own circumstances that a controlling precedent is not to be expected. Each of the cited cases upon which plaintiff specifically relies depends upon the finding that the consuming public had come to regard the trade dress as indicating

that the thing was the article which it was in the habit of buying and wanted to get. Schlitz Co. v. Houston Co., 250 U. S. 28, 39 Sup. Ct. 401, 63 L. Ed. 822; New England Co. v. Marlborough Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; Thum Co. v. Dickinson, supra; Samson v. Puritan, supra; Elgin Co. v. Illinois Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; Capewell Co. v. Mooney (C. C. A. 2) 172 Fed. 826, 97 C. C. A. 248; Sterling Co. v. Spermine (C. C. A. 7) 112 Fed. 1000, 50 C. C. A. 657. On the other hand, the relief has been denied in many cases with facts more or less analogous to those here. See American v. Saginaw (C. C. A. 6) 103 Fed. 284, 43 C. C. A. 233, 50 L. R. A. 609; Diamond Co. v. Saginaw Match Co. (C. C. A. 6) 142 Fed. 727, 74 C. C. A. 59; Globe Wernicke Co. v. Macey (C. C. A. 6) 119 Fed. 696, 56 C. C. A. 304; Keystone Co. v. Portland Co. (C. C. A. 1) 186 Fed. 690, 108 C. C. A. 508. The rule in the Second Circuit finds its last construction in Shredded Co v. Humphrey Co., 250 Fed. 960, 163 C. C. A. 210.

Perhaps the result which we reach in this case, rested as it is upon the fact that defendant copied the product and began its competition before there was time for plaintiff to get the indicative effect of its trade dress sufficiently established, is most severely tested by saying that this would make the diligent thief immune, while the one who might hesitate and delay must give up his plunder. The answer is that there can be no larceny, unless the title or possessory right of the first holder is better than that of the second taker, and that in this case, until the general public belief among users that tablets of this appearance were phenolax wafers had come into existence, plaintiff's title to this combination of characteristics was no better than defendant's.

If it is said that there is injustice in a state of the law which denies protection to a plaintiff who has expended $30,000 in introducing his peculiar tablet, it must be remembered that in this case the expense indivisibly inured to the advantage of the trade-mark "phenolax," which is now fully respected; and in any such case it may be a lesser evil that plaintiff must fail of full protection than that free choice of common form should be denied to competitors.

The court below dismissed the bill, and its decree is affirmed.

GOWLING v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920.)

No. 3540.

1. **Prostitution ⊂=1—Under White Slave Traffic Act, transportation need not be by common carrier.**
   To constitute the offense of transporting a woman in interstate commerce for immoral purposes, under White Slave Traffic Act, § 2 (Comp. St. § 8813), it is not essential that the transportation be by a common carrier.
2. **Criminal law ⊂=1166½(12)—Question by court, at once withdrawn, not prejudicial.**
   A question and remark addressed by the court to a witness *held* not prejudicial to defendant, where, on attention being called to it, the court stated that it misunderstood the witness, withdrew the remark, and ordered the question stricken out.
3. **Prostitution ⊂=4—Evidence admissible in prosecution for violation of White Slave Traffic Act.**
   In a prosecution for violation of the White Slave Traffic Act (Comp. St. §§ 8812–8819), by transporting a woman from one state into another for the purpose of illicit intercourse, evidence is admissible which tends to show that defendant is the father of a child of the woman.
4. **Criminal law ⊂=1171(1)—Remarks of counsel not prejudicial.**
   Remarks made by the district attorney in argument cannot be held to have prejudiced the jury against defendant, where his counsel, while objecting generally, stated that he did not know to what they referred.
5. **Criminal law ⊂=778(4)—Instruction as to presumption of innocence.**
   A correct instruction respecting the presumption of innocence *held* not rendered erroneous because it stated that the law "in its charity" raised such presumption.

In Error to the District Court of the United States for the Northern Division of the Northern District of California; William C. Van Fleet, Judge.

Criminal prosecution by the United States against William E. Gowling. Judgment of conviction, and defendant brings error. Affirmed.

Frank A. Duryea, of San Francisco, Cal., for plaintiff in error.

Frank M. Silva, U. S. Atty., and Wilford H. Tully, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Gowling was convicted under an indictment of five counts, the first of which charged that he willfully and feloniously transported and aided and assisted in transporting in interstate commerce from Reno, Nev., to Sloat, Cal., by means of an automobile running over the public highways of the United States, the automobile being driven and controlled by Gowling, Mrs. M. Northcutt, otherwise known as Mrs. W. E. Gowling, for a certain immoral purpose, debauchery. The counts vary only in the allegation of the purpose of the alleged transportation.

[1] A general and special demurrer was overruled, and the action of the court is assigned as error. The argument is that the indict-

ment fails to allege that the alleged transportation was in interstate commerce, within the meaning and intent of the act of Congress of June 25, 1910 (Comp. St. §§ 8812–8819), for the prevention of white slave traffic. But as the indictment charges that the defendant transported and aided and assisted in transporting the woman in interstate commerce in and by means of a certain automobile running over the public highways of the United States, the automobile then and there being in such transportation, and operated and controlled by the defendant, it is sufficient. In Wilson v. United States, 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728, the Supreme Court held that it is not essential in order to constitute the offense that the transportation be by common carrier; the court saying:

"The prohibition is not in terms confined to transportation by common carrier, nor need such limitation be implied * * * to sustain the constitutionality of the enactment. As has already been decided, it has the quality of a police regulation, although enacted in the exercise of the power to regulate interstate commerce (Hoke v. United States, 227 U. S. 308, 323; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215); and since this power is complete in itself, it was discretionary with Congress whether the prohibition should be extended to transportation by others than common carriers."

We think the allegations of the indictment are too plain to call for further discussion. 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.

Passing to the other more important assignments, we will take them up in the order in which they are presented by the brief of plaintiff in error.

[2] A witness, in testifying for the defendant, said that he knew the reputation of defendant in the place in which he had lived. The court asked whether defendant had lived there long enough to acquire a general reputation in the neighborhood. Witness replied: "Yes, sir; it was a small place." The court then said: "A small reputation or a small place?" The witness replied, "A small place, Mr. Duryea." Counsel for defendant objected and noted an exception. The court then said:

"Let that question be stricken out. I misunderstood the witness. The remark will be withdrawn."

The prompt statement by the judge that he had misunderstood the witness, and the direction that the question and remark were withdrawn, removed any possible prejudice to the rights of the defendant on trial.

[3] It appears that C. A. Northcutt, husband of the Mrs. Northcutt named in the indictment, testified that he had two children, while Mrs. Northcutt testified that she and Northcutt were married April 12, 1911, and had three children; the youngest born April 6, 1918. She said that she and her husband lived together for about 3 weeks immediately prior to July 28, 1917, when he went abroad. Northcutt testified that he had been away for about 20 months at war, and that he had last seen his wife July 28, 1917, and that the last child was

born April 6, 1918; that he had not seen his wife from July 28, 1917, to January 25, 1919. These dates presented a question of the legitimacy of the infant. The court declined to permit the child to be brought into the presence of the jury, and overruled the motion of the defendant to strike out the testimony bearing upon the legitimacy of the last child. The court stated that there was nothing to strike out, that the testimony had gone in without objection by the defendant, and that there was no legal objection to evidence tending to show that Northcutt was not the father of the child. We think that the court was right, for, as said by the judge, while the legitimacy of the child was not the issue involved, the case being one between the government and the defendant, it was competent for the prosecution to prove, if it could, that the defendant was the father of the infant. Melvin v. Melvin, 58 N. H. 569, 42 Am. Rep. 605; Greenleaf on Evidence, § 28.

[4] In his argument to the jury the district attorney referred to a matter which had occurred on the trial as one of the cleverest things done by the defendant during the trial, "except one that the law forbids me to mention, gentlemen of the jury." Counsel for defendant at once excepted to the remark of counsel for the government. Thereupon the following colloquy occurred:

"The Court: What remark?
"Mr. Duryea: Referring to the matter he was forbidden to mention before the jury.
"The Court: What does he refer to?
"Mr. Duryea: I do not know, but I think it is a remark that is detrimental to the defendant in this case.
"The Court: You must explain it yourself, so that I can understand you.
"Mr. Duryea: If counsel knows of something he does not dare refer to—
"The Court: I do not understand your reasoning myself.
"Mr. Duryea: I don't know what he means myself."

Thereupon counsel for the government proceeded and commented upon the attitude of the defendant "in hiding behind the skirts" of Mrs. Northcutt, and leaving her "alone to bear the brunt of this whole proposition on the witness stand alone." Again counsel for defendant objected, "as subversive of the interests of the defendant." The court stated that counsel for the prosecution had a reasonable limit of comment and asked what the objection was. Counsel replied: "The statement that the defendant left her to bear the brunt alone." The court then said: "If you will suggest what it refers to, I will be able to rule on it"—and referred to the facts that Mrs. Northcutt was put upon the stand in behalf of defendant and that there were other witnesses in the case. The court then said: "There were other witnesses, Mr. Johnson. You do not mean that she was left as the sole witness." Mr. Johnson: "Not as the sole witness in the case; no." Thereupon the court told the jury that the matter was argument by counsel, and that no unfavorable deductions could be drawn from anything that counsel said, which would in any way reflect upon the case of the defendant. Thereupon the argument was proceeded with.

We do not see how error can be predicated upon the remark of the district attorney. Counsel now argues that it is apparent that the prosecuting attorney referred to the fact that the defendant did not testify and that the jury could have understood nothing else; but, as the quotation from the record discloses that counsel for defendant stated he did not know what counsel for the government meant by the remark objected to, and as he did not suggest to the court that it was evident counsel meant to comment upon the failure of the defendant to testify, counsel should not now be heard to say that the language had a meaning which counsel for defendant was not able to give to it at the time of the trial. In Wilson v. United States, 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650, the district attorney, in summing up the case, commented upon the failure of the defendant to testify by stating that if he were charged with a crime he would not stop by putting witnesses on the stand to testify to his good character, but would go upon the stand and hold up his hand before high Heaven and testify to his innocence of the crime. The court's attention was called to the language of the district attorney, exception was preserved, and the court said that "he supposed counsel should not comment upon the defendant not taking the stand." The Supreme Court reversed the conviction upon the ground that the district attorney had intimated to the jury, as plainly as if he had said in so many words, that the circumstance referred to operated against the innocence of the defendant, and that the remark of the court to the effect that he supposed counsel should not comment upon the defendant not taking the stand conveyed the impression to the minds of the jury that, if defendant were an innocent man, he would have gone on the stand as the district attorney stated he himself would have done. There was no room for doubt of the meaning of counsel or court in that case, but here counsel for the defendant stated that he did not know what the language of the district attorney meant.

It is said that the court erred, in that it charged the jury to the effect that the defendant could be convicted if it were found that he had committed the offense of persuading, inducing, or enticing the woman to be transported, and that conviction could be had if defendant had committed the acts denounced in sections 3 and 4 of the act of Congress referred to. Of course, if the jury were instructed that conviction could be had under sections of the act not involved in the indictment under which defendant was tried, the conviction would be illegal; but a reading of the whole charge makes it clear that the court limited the statement of the offense with which defendant was charged to the allegations made under section 2 of the statute. In general explanation of the purpose of Congress in the enactment of the whole legislation upon the white slave traffic, the court referred to the several sections as evidence of the comprehensive nature of the statute, but specifically limited the jury to the consideration of the question of guilt or innocence of the crime charged, which was violation of section 2.

It is said that the court in its instructions assumed that the evidence showed that immoral relations had existed between the defend-

ant and Mrs. Northcutt after the alleged transportation from Nevada to California, if not before. When the instructions are considered as a whole, we do not find the argument to be well grounded. Whether there were immoral relations between defendant and Mrs. Northcutt was necessarily a part of the case, and it was entirely proper for the court to state to the jury what rules of law were pertinent, in the event that it was proven to their satisfaction that illicit relations had existed..

[5] The court stated the principle of the presumption of innocence, by saying that the law "in its charity" presumes the innocence of the defendant, and that such presumption abides with him throughout the trial and until his guilt is established by the evidence. There was an exception to the statement that the law "in its charity" presumed the defendant to be innocent. We cannot perceive that the force of the principle was lessened by the observation that the law "in its charity" established the maxim. The humane fundamental rule was in itself clearly stated.

Plaintiff in error objects to the refusal of the court to give instructions to the effect that Mrs. Northcutt had a right to establish a home in California or elsewhere, and that the jury should consider such circumstances in connection with all the evidence in the case. The charge of the court fully covered the duty of the jury in the consideration of all the testimony introduced before them, and it was not error to refuse to point out a single circumstance.

Other assignments have been carefully examined, and are not of substantial merit.

We find no ground for reversal, and affirm the judgment.

COLLINS et al. v. CITY OF PHŒNIX.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920.)

No. 3525.

1. Dedication ⇐44—Evidence held to establish dedication of street.

The making of a plat of an addition to a city by the proprietor, showing a full-width street, one-half of which was on his land, which plat was adopted by city ordinance and filed as the official plat of the addition, together with evidence of the continuous use of the street by the public for more than 20 years, *held* to establish a dedication.

2. Dedication ⇐1—No particular form essential.

All that is required to constitute a dedication of land for a street is the assent of the owner of the land and the fact that it has been used for the public purpose intended.

Appeal from the District Court of the United States for the District of Arizona; David P. Dyer, Judge.

Suit in equity by Julia Mosher Collins and others against the City of Phœnix. Decree for defendant, and complainants appeal. Affirmed.

This litigation involves the title to a strip of land within the boundaries of the city of Phœnix, Ariz. The strip is 33 feet wide, and extends from the

east side of Center street also called Central avenue running east 704 feet along the north side of the section line between sections 8 and 5, township 1 N., range 3 E., Gila and Salt River base and meridian, Maricopa county, Ariz., to a point; thence north 33 feet to a point; thence west 704 feet to a point; thence south 33 feet to the place of beginning.

The appellants, Collins and others, assert ownership in fee, and allege that they and their predecessors in interest have been in undisturbed possession for 48 years and upwards; that there never has been a dedication to the public of any part of the tract; and that, while appellants, for the convenience of their employés and tenants, heretofore left an open space and driveways through certain parts of the strip, and permitted the public to travel over the strip, no right has ever been recognized as possessed by the city of Phœnix.

The plea of the city is that, from the time the title to the strip was acquired from the United States by the predecessors in interest of the appellants, the public has used and occupied the same with the full knowledge and consent of the plaintiffs and their predecessors in interest as a public highway or street, and that the city has been in open, notorious, adverse, and exclusive possession and control of the strip as a part of the street devoted and dedicated to public uses.

Upon trial to the court it was found that the city had been in exclusive and notorious and peaceable possession and control of the strip for more than 20 years, and had used and occupied the same as a public highway and street; that the strip, more than 20 years before the commencement of the suit, had been dedicated by the plaintiffs and their predecessors in interest to the public as a public highway and street of the city of Phœnix, and that such dedication was duly accepted by the public and the city, and that since the acceptance the strip had been part of Van Buren street in the city of Phœnix; that neither plaintiffs nor their predecessors in interest were the owners or had been in possession of the strip at any time during the period of at least 20 years before the commencement of the suit.

The legal conclusion was that the city was in lawful possession and control, with authority to improve and to control the strip as a public highway and street of the city; that plaintiffs had no right, title, or interest in the land or any part thereof; and that judgment should be entered in favor of the city and against the plaintiffs.

J. B. Woodward, of Phœnix, Ariz., for appellants.

Richard E. Sloan and James E. Nelson, both of Phœnix, Ariz., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The plaintiffs' contention is that the findings are against the weight of evidence; that the evidence fails to show that there was any dedication of the strip in issue; that the right to travel over the strip had been merely a permissive one; that the ownership in fee of the strip was in plaintiffs since 1881; and that no adverse right by use for 20 years had been acquired by the city.

[1] The evidence was that the board of supervisors, on March 18, 1871, ordered that all section lines within Maricopa county be declared to be highways or roads 4 rods wide; "that is to say, 33 feet on each side of said line, and that said roads shall be opened by order of the board of supervisors whenever they shall deem it expedient." On May 15, 1871, the board ordered that "the public highway be opened, commencing at the northeast corner of section 8, running thence west on the north line of said section north of Phœnix." H.

R. Patrick, a civil engineer and surveyor, said that he was very familiar with the Lount tract, which had included the strip in question, and many years before was employed by Lount's predecessors to survey the line along the south side of Van Buren street. Mr. Patrick said:

"First, I posted a block at the southeast corner of section 5, and stationed my instrument at the quarter corner between section 5 and section 8, which is the southwest corner of the quarter section—southwest corner of the southeast quarter section—and would be at the intersection of the center line of Center street and the center line of Van Buren street; quarter section corner. From that point I ran the line to establish the section line between section 8 and section 5, and then at the proper point, using the legal description of the part that was being conveyed to Dr. Conyers, I set off the 33 feet for the county road on the north side of the section line. I laid off that line 33 feet north of the section line, from the quarter section corner east to the southeast corner of the Conyers tract. That embraced the same property afterwards known as the Lount tract, and I located the south line of the Lount tract 33 feet north of the section line between 5 and 8. The line extended from Center street into what is now Second street, and along the present block lines or lot lines, I think, of the tracts as they are now subdivided. When I made that survey there was no fence on the section line. * * * There was nothing on the section line that struck my view in looking through from corner to corner."

It also appeared that in 1888 what was called the Lount tract, in which appellants include the strip in controversy, was platted as part of "Churchill addition" to the city of Phœnix. This plat showed Van Buren street as full width, 66 feet, from east to west. In 1898 the city of Phœnix filed with the county recorder of Maricopa county the official plat of the Churchill addition to the city of Phœnix, whereon the Lount tract was divided into blocks, with Van Buren street full width. The city of Phœnix, by Ordinance No. 275, passed September 7, 1898, adopted the plat just referred to as the official plat of Churchill addition, which included the Lount tract, and ordained that the position and location, course, width, and length of all streets and public ways were correctly shown upon the official plat, and that all streets and public ways shown were declared to be public and dedicated to public use and benefit at large, subject to the exclusive control and management of the common council of the city in manner provided by law. On March 4, 1895, the city, by ordinance, established the grade of Center street from Van Buren to the center of Jackson street, and on March 22, 1909, the city, by ordinance, gave block numbers to the Lount tract in Churchill addition.

It appeared that by deed dated September 21, 1881, B. L. Conyers and Isabelle, his wife, conveyed to William B. Lount a certain piece of ground, commencing at the intersection of Van Buren and Center streets in the city of Phœnix, on the east side of Center street and the north side of Van Buren street, and running thence east along the line of said Van Buren street 754 feet to a post; thence north 714 feet to a post; thence west 761 feet to a post; thence south 712 feet to the place of beginning. Various other deeds in the chain of title show warranty deed of January 8, 1903, from Hattie L. Mosher, widow, to Julia Lount, conveying the east half of the block of land in Churchill addition to the city of Phœnix, bounded on the north by Polk street,

on the east by First street, on the south by Van Buren street, and on the west by Center street. There was also a deed from Julia Lount to W. W. Moore, dated February 4, 1904, conveying certain lots and blocks in the Lount tract, and describing Van Buren street as constituting the south line of the Lount property. Another deed of warranty, dated April 30, 1908, was by Hattie L. Mosher to Julia W. Mosher, conveying all of the east half of that block of land in Churchill addition, bounded on the north by Polk street, on the east by First street, on the south by Van Buren street, and on the west by Center street.

Turney, who had been engineer of the city of Phœnix, made a survey of the tract known as the Lount tract after 1902, for William B. Lount, one of the plaintiffs, and said that Mr. Lount had told him that the map of Lount's subdivision of Churchill's addition, which he could not then find, had been made by a former city engineer, by prolonging the exact boundary lines of all streets in Churchill's addition and in surrounding streets, Van Buren and Central avenue; that big block corners had been set in the field. Witness said that he went into the field with his instrument, and prolonged all the boundary streets and intersecting streets on exact straight lines of those streets, and that he found the corners as Mr. Lount had described them, and that he measured the blocks and found they conformed exactly with the blocks in Churchill addition; that he then gave the blocks and lots numbers in accordance with the ordinance of the city; that afterwards, in 1913, Mr. Lount asked witness to make a survey of a lot in the Lount tract, and that he did make a survey, and could tell from the survey that the lines of the block conformed to the present Van Buren street exactly. Another witness, a surveyor, testified that he had taken a description given in a decree of distribution that was made in the estate of Julia A. Lount in 1908, and that he had determined the south line of the property involved, and that, as it stood at the time of his testimony, the building on the northeast corner of Central and Van Buren streets is exactly on the property line, 33 feet north of the section line. In speaking of "Central avenue" as on the plat, the witnesses referred to what was "Center street" in the deeds described.

There was also the evidence of the city manager of Phœnix that he had known Van Buren street, between Center and Second, for about 17 years, and that there had been no change in the width of that street during that time. The deputy city assessor and tax collector of Phœnix testified that the records in his office showed assessment of the Lount property by lots and blocks according to the official survey of Churchill addition, and that no assessment had been made upon any part of Van Buren street claimed by plaintiffs.

There was some difference in the testimony of the witnesses concerning the existence of a fence where the present street line is on the south side of the Lount tract; but, as such conflict has been resolved in favor of the defendant, we will not disturb the finding.

The Revised Statutes of Arizona of 1913, tit. 7, c. 2, pars. 1891 and 1896, from the act of April 12, 1893 (Laws 1893, No. 72, art. 11), relating to the official plats of additions to cities, provide that when an addition to a town is laid out the proprietors shall make an ac-

curate map showing streets, alleys, and highways, and the width thereof, lots and blocks, with their boundaries and numbers and dimensions, and requiring such maps to be acknowledged by the proprietor, the plat then to be filed and recorded, and that upon filing of the map or plat "the fee of all streets, alleys, avenues, highways, parks and other parcels * * * reserved * * * to the * * * public, shall vest in such town, in trust, for the uses therein named and expressed." Par. 1895. Paragraph 1896 requires that all additions shall be surveyed and platted and the map submitted to the common council.

[2] Upon all this evidence we think that the court properly held that there was a dedication of the strip in controversy for highway and street purposes. The right of use or travel over which appellants concede was given was more than a mere license; it was in accord with an intent to dedicate to the public use. No particular form or ceremony is necessary to dedicate land to a public use. "All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation." Cincinnati v. White, 6 Pet. 431, 8 L. Ed. 452; London & San Francisco Bank v. Oakland, 90 Fed. 691, 33 C. C. A. 237.

The judgment is affirmed.

In re JACKSON LIGHT & TRACTION CO.

LEE v. NEWTON et al.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1920.)

No. 3508.

1. Judgment ⇐760—Lien of federal court judgment dependent on state law.
Under Act Aug. 1, 1888, § 1 (Comp. St. § 1606), providing that judgments and decrees of federal courts shall be liens on property in the same manner and to the same extent as the judgments of the courts of the state where rendered, and Code 1906, Miss. § 822, providing that a judgment or decree of a federal court, of the state Supreme Court or chancery court, or of any state court of a different county, shall not be a lien on property of the defendant in any county until enrolled in the office of the clerk of the circuit court of such county, a judgment rendered by a federal court in Mississippi is not a lien on property in any county unless so enrolled in that county and then only from the date of enrollment.

2. Bankruptcy ⇐157—No judgment recoverable after adjudication.
The lien of a judgment which became effective as a lien after the bankruptcy of the defendant *held* ineffective against his trustee who, under Bankruptcy Act, § 47a(2) (Comp. St. § 9631), became vested with the rights of a judgment lien creditor as of the date of the adjudication.

3. Bankruptcy ⇐155—Trustee not estopped to deny lien.
That a marshal holding an execution was prevented from making a levy by the statement of the judgment defendant that it had given a supersedeas bond, when in fact it was a cost bond, which did not operate as a supersedeas, *held* not to estop the defendant's trustee in bankruptcy from denying that a lien was acquired as by making a levy.

Appeal from the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

In the matter of the Jackson Light & Traction Company, bankrupt. Dr. C. A. Lee, administrator, appeals from an order denying his claim to a lien, which was objected to by Oscar Newton and others. Affirmed.

For opinion below, see 265 Fed. 389.

J. A. Teat, of Jackson, Miss., for appellant.

William H. Watkins, of Jackson, Miss., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. On May 10, 1918, a judgment was rendered in the United States District Court for the Southern District of Mississippi in favor of the plaintiff in error against the bankrupt, Jackson Light & Traction Company. It was enrolled promptly in the office of the clerk of said United States District Court, but not in the office of the clerk of the circuit court of Hinds county, Miss., the county wherein said United States District Court was held and in which said defendant resided. On July 9, 1918, the clerk of said United States District Court issued an execution, which was placed in the hands of the United States marshal, who handed a copy thereof to an officer of the defendant. Immediately on the issuance of said execution the defendant executed a bond, with surety in the sum of $500, which was entitled a supersedeas bond, and under the belief that it did supersede the judgment the marshal did not levy the execution. Said cause was taken by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit and affirmed (256 Fed. 97, 167 C. C. A. 339), the mandate issuing under date of March 27, 1919. On a subsequent writ of error this court held that said bond was only a cost bond and not a supersedeas bond. Lee v. Jackson Light & Traction Co., 261 Fed. 721.

On March 29, 1919, the defendant Jackson Light & Traction Company was adjudged a bankrupt by the United States District Court for the same Southern District of Mississippi. On April 4, 1919, an abstract of said judgment was enrolled on the judgment roll of said circuit court of Hinds county, Miss. The plaintiff therein filed a proof of debt in said bankruptcy proceedings in said United States District Court, asking to be allowed a priority as a judgment creditor, with a lien as such, on the bankrupt's assets owned by it on May 10, 1918. The claim of priority was denied, and the judgment allowed to be proved only as an unsecured debt, on the ground that said judgment of said United States court was not a lien until enrolled on the judgment roll of the circuit court of Hinds county, Miss., and had no lien prior to the date of such enrollment on April 4, 1919, after the adjudication in bankruptcy. On petition for review the ruling of the referee was affirmed by the District Court.

[1] The plaintiff insists that the judgment, when enrolled, has a lien from the date of its rendition, May 10, 1918, and that, if this is not held to be their meaning, then the statutes of Mississippi discriminate in favor of judgments rendered in the state courts against those rendered in the federal courts. The United States statute regulating

how judgments and decrees of the United States District Courts shall acquire liens on property of the defendants therein is contained in sections 1 and 2 of the Act of August 1, 1888 (25 Stat. p. 357, c. 729; U. S. Comp. St. 1916, §§ 1606, 1607), which reads:

"Judgments and decrees rendered in a [Circuit or] District Court of the United States within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: Provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state."

By the statutes of Mississippi each clerk of a circuit court is required to keep a book or books styled "judgment roll," divided under the several letters of the alphabet, and within 20 days after the adjournment of each term of the circuit court, he must enroll thereon in the order in which rendered, each judgment thereof, by entering on such roll, under the proper letter of the alphabet, the name of each defendant with certain information as to such judgment. Code Miss. 1906, § 818.

A judgment so enrolled shall be a lien on all of defendant's property in said county from its rendition, and shall have priority according to the order of such enrollment in favor of the judgment creditor against the judgment debtor, and all persons claiming the property under him after the rendition of the judgment. A judgment shall not be a lien on any property unless it is enrolled. In counties having two judicial districts, a judgment operates as a lien only in the district within which it is enrolled. Code Miss. 1906, § 819.

A judgment or decree of the United States District Court, or of the state Supreme Court or chancery court or any state court of a different county shall not be a lien on defendant's property until enrolled in the office of the clerk of the circuit court of the county. Code Miss. 1906, §§ 821, 822.

The purpose of the foregoing provisions is quite plain. They provide that judgments entered on the minutes of the circuit court must be enrolled on the judgment roll in the order of their rendition within 20 days after the adjournment of the term of court wherein rendered, and, when so enrolled, shall be a lien from the rendition thereof, and shall have priority according to the order of enrollment against the judgment debtor and those claiming under him. A judgment has no lien unless enrolled. In every case, except that of a judgment in the court on whose records the enrollment shall take place, even in the case of a circuit court of a different judicial district in the same county, a judgment has a lien only from the time when enrolled.

As to every other state, or United States, court judgment, where the same is not rendered in the court where the enrollment takes place,

it is the enrollment that gives the lien and fixes its date. That act is the first entry of record in the circuit court clerk's office of the existence of the judgment. Not so with the case of judgments rendered in such circuit court. There the minutes in the clerk's office would show their existence, and the "judgment roll" but indexes the existing record; but even there the priority is to be "in the order of such enrollment."

We cannot see, therefore, where there is any discrimination against the United States courts when they are put on the same footing with the state Supreme Court, and every other state court at law or in equity where the judgment is not rendered in the same court on whose judgment roll an abstract must be enrolled in order to give it a lien on the property of the judgment debtor. Here no such enrollment was made until April 4, 1919, a week after the adjudication in bankruptcy was had and the lien was clearly null and void, under Bankruptcy Act, § 67, subd. "F" (Comp. St. § 9651).

Again the case is not one of a contest between a state court judgment duly enrolled, and an older federal court judgment likewise duly enrolled, subsequently to the date of the first judgment, the state court judgment claiming a lien from date of its rendition and insisting that the United States court judgment, though rendered first, was to rank only from date of enrollment. Here the judgment claiming priority was not in the situation of a judgment duly enrolled within 20 days after the term was rendered, but was in that of a judgment enrolled long after the expiration of such time.

[2] Meanwhile the bankruptcy occurred and the trustee was appointed. He took not only the title of the bankrupt, but also the rights of a judgment creditor with a lien of the date of the adjudication, as against conflicting liens. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 275, 36 Sup. Ct. 50, 60 L. Ed. 275. Considering the bankrupt's trustee as a judgment creditor with a lien against all the bankrupt's property as enrolled of date March 29, 1919, the plaintiff, Lee, would be only entitled to priority according to date of enrollment. Therefore the trustee's claim as having the lien and right of a judgment creditor was superior to the claim of the unenrolled judgment.

[3] The claim that the defendant Jackson Light & Traction Company, by having informed the marshal that a supersedeas bond had been given and thus prevented him from making a levy, is now estopped from asserting that a levy was not made on July 9, 1918, upon, and a lien so acquired on, its property, and that its trustee in bankruptcy takes only its rights and is bound by such an estoppel, is not tenable. We cannot see where any such estoppel arises against the defendant, or any foundation for a claim that this would create a lien. There is no pretense that any levy was made or that what was done was treated as a levy. It is conceded that no levy was made, or intended to be made, because of the belief, mistaken it is true, that the right to make it did not exist.

Besides the question here presented is one between the creditors as to priorities in the distribution of the estate of the bankrupt. It is not so much a contest between the debtor and this creditor. We can-

not see where any estoppel exists to now assert that no levy was made and that no lien acquired by means of a levy, even if this would have given a lien in the absence of the enrollment of the judgment in the office of the clerk of the circuit court of Hinds county.

The judgment of the district court is therefore affirmed.

WHITESIDE v. VERITY.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1920.)

No. 3336.

1. **Payment ⟸82(1)—For services rendered by brother held sustained by moral obligation, and not recoverable.**
   In a suit to vacate a trust deed and to annul the transaction of which the deed was a part, where it appeared that defendant, acting for complainant, who was his sister, had expended time and money for many years in caring for her interests, and finally in procuring a settlement of a claim involving her husband, from whom she had separated, and had procured a settlement for $30,000, which was more than she expected, the services rendered by defendant, though rendered out of friendship, imposed sufficient moral obligation on complainant to pay therefor to sustain her voluntary payment of $10,000 as compensation for such services.

2. **Trusts ⟸48—Grantor of trust deed, having opportunity to read it, held not misled by silence of grantee.**
   Evidence that defendant made no reply to a letter from complainant indicating that she understood she could revoke the trust deed to defendant does not require cancellation of the deed for fraud, where it appeared that she had ample opportunity to study the terms of the deed before signing it, and that after she signed it defendant stated it was irrevocable, to which statement she made no objection at that time.

3. **Trusts ⟸48—Independent advice unnecessary to sustain trust deed.**
   The fact that the grantor of a trust deed given to her brother acted on the advice of her brother and other members of the family, and had no independent advice, though a circumstance which might be considered in connection with other evidence showing an advantage was taken of the grantor, is not of itself sufficient to require the annulment of the deed.

4. **Trusts ⟸47—Want of caution deed was irrevocable does not defeat it.**
   The fact that a trust deed contained no power of revocation, and that the grantor was not cautioned to that effect before she signed it, is not of itself sufficient to invalidate the deed.

5. **Trusts ⟸48—Circumstances held not to justify canceling trust deed for fraud or undue influence.**
   In a suit to cancel a trust deed, which was given by complainant to defendant, her brother, to secure property obtained by her brother for her from the power of the husband if the parties subsequently became reconciled, the fact that the deed was signed without independent advice to complainant, that she was not expressly cautioned it was irrevocable, and that defendant's daughters were included among the ultimate beneficiaries of the trust, they being members of the class which would be next of kin of the grantor under the conditions under which they would take, *held* not to require the cancellation of the trust, which was apparently made with the dominant purpose of protecting the complainant from dissipation of the fund.

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

Suit by Nannie Wright Verity Whiteside against George M. Verity. Decree for defendant, and complainant appeals. Affirmed.

This suit was brought to vacate a trust deed executed by plaintiff (Mrs. Whiteside) to defendant, and to annul the remainder of the transaction of which the deed was a part. The parties were half brother and sister. At the time in question, plaintiff had been married for some years, and defendant had contributed largely in time and money toward meeting the expenses and the troubles caused by the husband's inability or misconduct. A crisis in plaintiff's domestic troubles had occurred, she had been abandoned and left helpless in New York by her husband, and the defendant went there from Ohio to aid her. He furnished her necessary funds, employed counsel and other assistance, and it came about largely through his efforts that a fund of, net, $30,000 was realized as the indirect result of the husband's supposed misconduct. This was considerably more than plaintiff had expected to get, and defendant suggested to plaintiff, pursuant to a previous understanding between them, that $20,000 should be put in trust for her, and that the excess, being $10,000, should be paid to him in compensation for his expenditures in time and money during the past period of years for her benefit and his efforts in realizing this fund; plaintiff agreed.

The $30,000 was paid to defendant and he came back to Ohio; $10,000 he used for his personal benefit, and he employed Ohio counsel to draw up a trust instrument. On consultation by defendant and his brother-in-law, who was regarded by plaintiff as one of the family, and with the father of plaintiff and defendant, it was agreed, and it was undoubtedly the fact, that this fund imperatively needed protection as against the plaintiff herself, because, if she became reconciled with her husband, as was thought probable (and as happened), she would be quite under his control, and the money would be certain to be dissipated. Accordingly, the trust paper, prepared with the full approval of this family council, was a typical spendthrift trust. It made the defendant the trustee, and provided for paying the income to plaintiff during her life, and, after her death, to plaintiff's then infant daughter during her life, and upon her death to her issue surviving, if any, and, if not, then to plaintiff's four nieces (two of whom were defendant's daughters). It gave the trustee discretion to suspend the income payments when, in his judgment, it was for the best interest of the beneficiary so to do, and it thoroughly and effectively prevented the creation by plaintiff of any valid charge whatever upon the fund or income. This paper was duly signed by plaintiff.

She and her husband did become reconciled, and within about two years she brought this suit in the court below. She alleged that the payment of the $10,000 by her to defendant was without substantial consideration, and was made by her as the result of his undue influence, and while she was in a state of anxiety and worry, and which made her incapable of resisting. She alleged, also, that she was deceived into thinking that the trust deed was a will, and supposed she could change it whenever she wished. Upon final hearing, upon pleadings and proofs, the court below dismissed the bill, and plaintiff appeals.

Albert Bettinger, of Cincinnati, Ohio (Bettinger, Schmitt & Kreis, of Cincinnati, Ohio, on the brief), for appellant.

Rufus B. Smith, of Cincinnati, Ohio (Ralph R. Caldwell and Rufus B. Smith, both of Cincinnati, Ohio, on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). With the exceptions to be noted, the questions involved are of fact. In so far as there is, between the testimony for plaintiff and that for defendant, any conflict involving reliability or credibility, we are compelled, as was the court below, to accept defendant's evidence and to reject that of plaintiff.

[1] No cause is established for rescinding the $10,000 payment. Defendant had undoubtedly expended and suffered for plaintiff's benefit several thousand dollars in money and time, anxiety, and trouble (to say nothing of his part in realizing this fund), for all of which the sum named was not extravagant compensation. Doubtless this had been done mostly out of friendship, and there was, until the end, scant, if any, legal debt; but there was ample moral obligation to justify the sister in making him whole with a liberal hand out of the fund which thus unexpectedly materialized. It is entirely clear that she was, at the time, both willing and glad to have him receive this money, and that she fully understood what she was doing, and was not overreached, and that her mental condition was not such as to justify repudiation of her act.

[2] As to the deed, it is sufficient to say that her intelligent and purposeful assent (save for one matter to be discussed) are as satisfactorily established as it is clear that the provisions of the instrument were, in fact, wise and prudent and for her best interests. The exceptional matter referred to is this: After the plan of the deed was settled upon, and it was in preparation, defendant wrote his sister a letter, explaining the plan adopted and who would be the beneficiaries after her death. To this she replied by letter stating that it was satisfactory, but that, if her husband should return, and she should later become satisfied that he had reformed, she should wish to change the will. To this defendant made no immediate written response, pointing out to her that the proposed trust was not a will, and that she would have no power to change it; and from this it is argued that he both allowed and led her to sign the paper, supposing that, whatever it was, it was revocable.

Of course, if this were the proper inference, the deed could not stand, however wise or prudent it may have been; but the record does not justify that conclusion. The letter written by defendant to accompany the deed, when sent to her for execution, is not proved by copy; but defendant says it was a full and complete explanation of its terms and effect. This letter was mailed to her, but the deed, when finished, was taken to her in New York by the brother-in-law and left with her. She read it over during his absence. Later, in his presence, she read it over again and discussed it with him. He told her, when he gave it to her, that it was a perpetual trust. She was an educated and intelligent woman, then wholly in her ordinary state of mind. No misrepresentation of any kind with regard to it was made to her by any one; and it is difficult to conceive that she could have supposed that it was anything other than it actually was. If, upon such a state of facts, a grantor could set aside a solemn deed, no instrument would be safe.

Ample reconciliation of her formerly expressed desire to reserve the power to change and of her later signature of the paper as it was is found in the very reasonable supposition that her expressed desire was hasty and casual, and that reflection showed her that its satisfaction would be unwise. That she did in fact abandon her wish to have the fund remain subject to her future changes of mind, and was content with the paper as it was, is additionally and persuasively shown by the fact that, when the deed was sent back to defendant, he wrote her

a letter acknowledging it, and expressly stating his satisfaction because the matter was so fixed that—

"neither you nor I nor any one else can now possibly disinherit you or change the matter in any way. * * * In fact, I never knew before that it was possible for any one to have an income so thoroughly protected."

She made no objection to this situation, nor did she in any way intimate that she had been deceived, or did not understand what had been done. There was no suggestion of dissatisfaction until several months had passed, and even then, through a series of letters, no claim of deception or misrepresentation. The conclusion of the court below that her signature to the instrument was deliberate and intelligent must be affirmed.

[3, 4] Plaintiff further insists that the deed was, as matter of law, improvident because of the combined effect of these circumstances: She had no independent advice, but relied upon her brother, the trustee, whose children were ultimate beneficiaries; there was no power of revocation, and she was not explicitly cautioned as to this; and the trustee had the power to suspend the income. We are satisfied that no one of these facts, nor all together, in the light of the whole record, raise any inference of law that the deed should be vacated. Lack of independent advice is a circumstance which might well turn the scale, if there were any reason to think that the trustee had taken an advantage; but it will not of itself call for annulment. Zimmerman v. Frushour, 108 Md. 115, 69 Atl. 796, 16 L. R. A. (N. S.) 1087, 15 Ann. Cas. 1128. The absence of power of revocation and of explicit caution thereon were once thought fatal (Everitt v. Everitt, L. R. 10 Eq. 405), but it is now clear that they are only circumstances, and not of controlling force (Dutton v. Thompson, L. R. 23 Ch. Div. 278; Underhill on Trusts, p. 99; Wald's Pollock on Cont. p. 379; Jones v. Clifton, 101 U. S. 225, 230, 25 L. Ed. 908), especially when power of revocation would be inconsistent with the main purpose of the trust (Dayton v. Stewart, 99 Md. 643, 650, 59 Atl. 281; Wallace v. Industrial Co., 29 R. I. 550, 560, 73 Atl. 25.

[5] The discretion given to the trustee to suspend payments of income to Mrs. Whiteside and allow it to be added to the principal was essential to the purpose of the trust, in order that the income might not be reachable by creditors or assignees, and courts of equity would protect the beneficiary as against any fraudulent exercise or abuse of this discretion. 2 Perry on Trusts, § 510. The fact that the trustee's daughters were included in the class which was the ultimate contingent beneficiary is not significant. Their interest was postponed till the death of Mrs. Whiteside and the death without issue of her then infant daughter. In that event, this class was (almost certainly) the sole next of kin on the mother's side and the natural beneficiary. The selection of this class is no indication of fraud.

Other less important criticisms are likewise not vital. Neither singly or collectively do they justify cancellation. When we consider the respective parts which plaintiff and defendant played in the creation of this fund, the necessity that plaintiff should be protected against herself, if it was to continue to support her, the devising of this trust

with the dominant purpose of protecting plaintiff, and note also the highly probable, if not certain, prompt, and effective dissipation of the fund, if this trust had not been made substantially as it was made, only some imperative rule of law could justify a court of equity in directing the fund to be surrendered.

The decree of the District Court is affirmed.

BASSELL v. HINES, Director General of Railroads.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1920.)

No. 3416.

1. **Carriers ⇐280(1)—Rule as to extraordinary care for passengers held not to extend to trifling dangers, such as are met everywhere.**
   The rule requiring carriers to exercise the highest degree of care for the safety of passengers does not extend to those comparatively trifling dangers which a passenger meets on a railway car only in the same way and to the same extent as he meets daily in other places and from which he habitually and easily protects himself.
2. **Carriers ⇐302(1)—Measure of care to keep aisle free of obstructions.**
   A railroad company *held* to the exercise of only ordinary care to see that hassocks provided in a chair car, and which are moved about by passengers at their pleasure, are not allowed to project into the aisle.
3. **Appeal and error ⇐274(5)—Particular ground of exception to instruction must be urged in lower court.**
   It cannot be assigned as error that the court erroneously placed the burden of proof on an issue of negligence, where no exception was taken to the charge on that ground.

In Error to the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Action at law by John Y. Bassell against Walker D. Hines, Director General of Railroads. Judgment for defendant, and plaintiff brings error. Affirmed.

Smith W. Bennett, of Columbus, Ohio, for plaintiff in error.

James I. Boulger, of Columbus, Ohio (Wm. H. Miller, of Columbus, Ohio, and Henry Bannon, of Portsmouth, Ohio, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The plaintiff below, plaintiff in error here, was a passenger on a Pullman chair car arriving in the railway station at Columbus. After the car stopped and the passengers for Columbus were told to alight, he arose from his seat, and, as he walked down the aisle toward the door, stumbled over a hassock or footstool which was in the aisle, or projected into it, and fell and received the injury for which he sought to recover in this action. He alleges that the insufficient lighting of the car co-operated with the careless placing or leaving of the obstacle to constitute actionable negligence. The court gave to the jury definitions of the care required

respectively, from defendant and from plaintiff, and the jury found a verdict for defendant. Plaintiff assigns as error: (1) That the instructions did not require from the defendant a sufficiently high degree of care; (2) that the jury was permitted to consider an issue outside the evidence; and (3) that upon one issue the burden of proof was wrongly placed.

[1, 2] The instructions put upon defendant the duty to exercise ordinary care to see that the aisle was not obstructed by a footstool. The court declined to charge that the defendant was bound to exercise the highest degree of care and prudence consistent with the conduct of its business. The stricter rule imposing the more extreme liability is the one which expresses the duty of a common carrier as to all the special perils of transportation. The cases to this effect are familiar. Some of them are cited in the opinion of this court, in Memphis v. Bobo, 232 Fed. 708, 711, 146 C. C. A. 634. The leading cases and the text-book discussions indicate (see Indianapolis Co. v. Horst, 93 U. S. 291, 296, 23 L. Ed. 898) that the reason of the rule is that the passenger delivers himself into the custody and control of the carrier, that he is helpless against these perils, and that he is compelled to, and rightly does, rely upon the carrier for protection. This reason extends to and supports the great bulk of the cases where the rule of the highest practicable care has been enforced. The cases where a passenger has been injured by an assault by another passenger (like Meyer v. St. Louis Co., 54 Fed. 116, 4 C. C. A. 221) or by one of the crew (like Lee Line v. Robinson [C. C. A. 6] 218 Fed. 559, 563, 134 C. C. A. 287, L. R. A. 1916C, 358) are not exceptions, because the duty of police protection, for which the citizen ordinarily relies upon the peace officers of the community, is one which the passenger necessarily abandons to the carrier when he becomes a passenger. Cases of injury from a falling berth (like Penn. Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141) or from an imperfectly secured trolley rope (Denver Co. v. Hills, 50 Colo. 328, 116 Pac. 125, 36 L. R. A. [N. S.] 213), or from an exposed rudder chain (Garoni v. Compagnie [Com. Pl.] 14 N. Y. Supp. 797), are nearer the margin line, but are not beyond the reason of the rule. All of these agencies were peculiar to the instrumentality of transportation, and their proper management and control, so that they would not harm a passenger, were wholly in the hands of the carrier.

Plainly, the reason of the rule does not extend to those comparatively trifling dangers which the passenger meets while upon a railway car only in the same way and to the same extent as he meets them daily in his home or in his office or on the street, and from which he easily and completely habitually protects himself. He may, more or less excusably, stumble and fall over a footstool or chair in his home, or an obstacle on the sidewalk, or a hassock in a car; he need never do any of these things, if he takes sufficient care. It did not need evidence to show that these hassocks were under the control of the passengers, and were by them placed and replaced as they desired; and this destroys the basis—sole management and control—for the extreme rule. There is, in our judgment, no sound reason why anything more than

ordinary care, fitted to the circumstances, should be required, nor why the rule of highest practicable care should be applied to such a subject; we do not find any controlling authority, or any weight of authority, which so requires.

Pitcher v. Old Colony Co., 196 Mass. 69, 81 N. E. 876, 13 L. R. A. (N. S.) 481, 124 Am. St. Rep. 513, 12 Ann. Cas. 886, is specially relied upon. In that case, a passenger, alighting from a street car, fell over another passenger's bag resting in the aisle. The trial court had given to the jury the rule of "the highest degree of care consistent with practical carrying on of its business," and plaintiff complained because the court had not given the rule of highest possible care. It was held only that to refuse to give this extreme rule was not error. In Lynch v. Railway Co., 92 Kan. 735, 142 Pac. 938, also relied upon, it is said that the carrier must use the highest practicable degree of care both in carrying passengers to their destination and in setting them down safely; but this was said in a case where the carrier had given an implied invitation to alight, and the passenger, who was responding, was injured by the starting of the train. We find no case, and we are cited to none, where deliberately and after discussion the stricter rule was decided to be applicable to such a case as this. On the other hand, the rule of merely reasonable or ordinary care, to be measured by the circumstances of the case, has been frequently applied under closely analogous circumstances. Such are the falling of a package from the parcel rack (Louisville Co. v. Rommele, 152 Ky. 719, 154 S. W. 16, Ann. Cas. 1915B, 267; Morris v. New York Cent., 106 N. Y. 678, 13 N. E. 455), the falling of a car window (Irwin v. Louisville Co., 161 Ala. 489, 50 South. 62, 135 Am. St. Rep. 153, 18 Ann. Cas. 772; Strembel v. Brooklyn Co., 110 App. Div. 23, 96 N. Y. Supp. 903), a door sill or platform slippery with ice (Connell v. Oregon Co., 51 Utah, 26, 168 Pac. 337; Palmer v. Penn. Co., 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252), baggage in the aisle (Burns v. Pennsylvania R. Co., 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811), a slippery deck (Pratt v. North German Co. [C. C. A. 2] 184 Fed. 303, 304, 106 C. C. A. 445, 33 L. R. A. [N. S.] 532), a cuspidor in the doorway (Hawkins v. Louisville Co., 180 Ky. 295, 202 S. W. 632, 3 A. L. R. 637), or fingers caught in a door (Shaughnessy v. Railroad, 222 Mass. 334, 110 N. E. 962, Ann. Cas. 1918C, 371). The cases are extensively cited and discussed, and the rule stated substantially as it was given by the court below in this case, in Moore on Carriers (2d Ed.) pp. 1079–1081, 1091, 1107, 1108, 1125, 1261, 1263. We conclude that there was no error in this respect.

Complaint was made because the court charged upon the subject of the rule of care in case a passenger had put the hassock in the aisle, and it is said that there was no such evidence and no such issue. Since the hassock could have been misplaced only by the railway employees or by a passenger, and there was no evidence as to how it happened, it is not easy to see how either alternative could have been left out of the trial; but, in any event, the plaintiff cannot complain because the court charged that he might recover, not only upon the theory stated in the declaration, but even on an alternative theory. If this was error, it was error against the defendant, and the verdict made it harmless.

[3] The court told the jury:

"If the hassock got into the aisle of the car through the action of a passenger, it was then incumbent upon the plaintiff, in order to establish negligence upon defendant's part, to show by a preponderance of evidence that the hassock was there a sufficient length of time for the defendant's employees, in the exercise of ordinary care, to have discovered and removed it."

It is argued that the burden should have been put upon the defendant to show that the hassock, in this contingency, had not been there long enough to raise the inference of negligence. There was, in truth, no affirmative evidence whatever that the hassock had been in an obstructive position for any length of time or to dispute the porter's evidence that the aisle was clear a moment before when he passed out, and it might, therefore, be said that it made no difference where the burden of proof was, as there was nothing to show negligence, and a verdict for defendant should be instructed (as was held in Colburn v. Chicago Co., 161 Wis. 277, 152 N. W. 821, and Kanter v. Philadelphia Co., 236 Pa. 283, 84 Atl. 774, and as the court below thought on the motion for new trial); but it is not necessary to decide that proposition. There is no basis for plaintiff's position in this respect, unless in the doctrine of res ipsa, etc.

The burden is always upon the plaintiff to show negligence, and only when the occurrence itself indicates negligence can the burden be thought satisfied and shifted to the other side. Since it is, as a matter of common knowledge, much more probable that such a situation as an obstructing hassock is caused by a passenger than that it is caused by an employee, it might well be thought that the doctrine res ipsa cannot apply to such a case; but that question, also, we need not decide. The paragraph which we have quoted from the charge was a part of a complete discussion of the theory that the hassock might have been put into the aisle by a passenger, which presented to the jury the rules of negligence and contributory negligence which the court thought proper to that subject, including instructions that, if it had not been there a sufficient length of time for the defendant, in the exercise of ordinary care, to have discovered it, the defendant was not liable; but if it had been there so long that the porter or conductor, exercising ordinary care, ought to have discovered it, and had failed to do so, the defendant was liable. The only exception taken was in these words:

"We except to the charge concerning the hassock being pushed into the aisle by a passenger or a third person and the consequent nonliability of the defendant."

This exception related to the whole charge upon this subject. A great part of such charge was unquestionably correct. That fraction which related to the burden of proof was not separately excepted to, nor was the attention of the court directed to that particular subject. The exception was unavailing to raise the question upon which plaintiff in error now relies. Norfolk Ry. v. Earnest, 229 U. S. 114, 122, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172; Denison v. McNorton (C. C. A. 6), 228 Fed. 401, 408, 142 C. C. A. 631.

The judgment must be affirmed.

GENERAL INV. CO. v. LAKE SHORE & M. S. RY. CO. et al.

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

No. 3425.

1. **Monopolies ⇐24(1)—Private suit cannot be maintained under Sherman Act to restrain illegal combination.**
   Anti-Trust Act July 2, 1890, § 4 (Comp. St. § 8823), limits suits to enjoin violations to those brought by the government, and does not authorize a stockholder to maintain a suit to restrain his corporation from consolidating with another on the ground that it would be an illegal combination under the act

2. **Courts ⇐489(8)—Clayton Act does not give state courts jurisdiction to enjoin violations; "courts of United States."**
   Clayton Act, § 16 (Comp. St. § 8835o), vesting "any court of the United States having jurisdiction over the parties" with jurisdiction to grant injunctive relief to any person, firm, or corporation against threatened loss or damage by violation of the anti-trust laws, does not confer such jurisdiction on state courts.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Courts of the United States.]

3. **Removal of causes ⇐111—Jurisdiction on removal dependent on that of state court.**
   Where a state court is without jurisdiction of the subject-matter of a suit, a federal court does not acquire jurisdiction by removal, although it would have had original jurisdiction.

4. **Railroads ⇐144(2)—Bill by stockholder to enjoin consolidation insufficient.**
   A bill to restrain consolidation of two railroad companies on the general ground that it would be a violation of the constitutions, statutes, and public policy of the states concerned, filed by the holder of a fraction of 1 per cent. of the stock of one of the companies, purchased after the consolidation agreement was made, *held* not to state ground for equitable relief, where no objection to the consolidation is made by state authorities, and there is no allegation showing that complainant would suffer injury by depreciation of the value of its stock.

5. **Appeal and error ⇐1194(2)—Questions concluded on reversal.**
   Where a decree dismissing a suit is reversed on appeal, and the case remanded for further action, only the questions which were considered and determined by the appellate court are concluded by its decision.

6. **Removal of causes ⇐111—Jurisdiction acquired continues for all purposes.**
   Where a cause was removable on the ground that the case as made by the bill was one arising under the laws of the United States, jurisdiction of the federal court, acquired by the removal, continues for all purposes.

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

Suit in equity by the General Investment Company against the Lake Shore & Michigan Southern Railway Company and another. Decree for defendants, and complainant appeals. Affirmed.

See, also, 250 Fed. 160, 162 C. C. A. 296.

F. A. Henry, of Cleveland, Ohio, and Elijah N. Zoline, of New York City (Snyder, Henry, Thomsen, Ford & Seagrave, of Cleveland, Ohio, on the brief), for appellant.

Walter C. Noyes, of New York City, and S. H. West, of Cleveland, Ohio (Robert J. Cary, of New York City, on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The General Investment Company filed a bill to enjoin the consolidation of the Lake Shore and the New York Central Railroads. The District Court dismissed the bill, because jurisdiction was not acquired over the New York Central, and that was thought essential to the object of the suit. On appeal to this court, we affirmed the conclusion as to the lack of jurisdiction over the New York Central; but we thought that some of the relief prayed might, in a proper case, be granted against the Lake Shore alone, and that, to that extent, the New York Central was not an indispensable party. Accordingly, we reversed the dismissal and sent the case back for further proceedings in accordance with the opinion. This is reported in 250 Fed. 160, 162 C. C. A. 296, and to that opinion we refer for a fuller statement of the essential facts.

After the remand, the bill of complaint was amended, so as to show that plaintiff's purchase of its five shares of stock in the Lake Shore was not, in fact, made until after the directors' consolidation agreement had been executed. Thereupon the defendant filed a further motion, in which it asked: (1) That the bill of complaint be dismissed, in so far as it was founded upon the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830), and this for the reason that a private individual could not maintain such a bill; (2) that it be dismissed in so far as it was founded on the Clayton Act (38 Stat. 730), and this for the reason that the state court, in which the suit was commenced, had no jurisdiction of a case founded on the Clayton Act; (3) that in so far as it was founded on the Constitutions or statutes of the several states it be dismissed because it did not state a good cause of action. The motion to dismiss was granted, and plaintiff appeals.

[1] 1. *The Anti-Trust Act* (Act July 2, 1890).—The decision in Paine Lumber Co. v. Neal, 244 U. S. 459, 37 Sup. Ct. 718, 61 L. Ed. 1256, is clearly decisive and justifies the dismissal of this branch of the bill, unless the case may be distinguished from that, because this suit is by a stockholder and that was by a stranger. It is not correct to say that the court there decided only that such a suit could not be maintained under section 4 of the act (Comp. St. § 8823), though that happened to be the language used; that case was not brought under section 4, and the plaintiff made no claim of any right given by that section; the decision was that *that* suit could not be maintained; and the reference to "under section 4" must have been intended to express the thought that, under the effect of section 4 upon the whole act, the suit would not lie. It is now said that the effect of the Anti-Trust Act is to make a prohibited consolidation ultra vires of the corporation; that equity always had jurisdiction of a suit by a stockholder to enjoin his corporation from an ultra vires act; and hence that in such a suit as this the court of equity does not depend for its jurisdiction on the Anti-Trust Act, and the case is not one "under the act."

We are unable to see any distinction in principle, in this respect,

between a stockholder's case and the Paine Case. A stranger who was about to suffer irreparable loss from unlawful acts of another had the right to proceed in equity for an injunction against that stranger, just as much as a stockholder did against his corporation. The jurisdiction of equity does not depend on the Anti-Trust Act in the suit by the stranger any more than it does in the suit by the stockholder; in each case alike, the only important effect of that statute is to make unlawful the act sought to be enjoined. The present case is brought "under the anti-trust laws" no more and no less than was the Paine Case. It is to be noticed that, in the dissenting opinion in that case, the stockholders' cases, which had permitted the enforcement by injunction of rights dependent on the act, were approved; but the majority does not suggest that they are distinguishable, and we think that the effect of the majority opinion is to overrule them. The theory of the decision we think must be that the Anti-Trust Act declared certain rights and duties, that it intended there should arise therefrom only two remedies, a public one and a private one, each as specified, and that no other private remedy should depend thereon. Wilder Co. v. Corn Co., 236 U. S. 165, 174, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118. It seems clear enough that the point as to which Mr. Justice Holmes said he was in the minority was as to the effect of the Clayton Act upon the right to an injunction against a labor boycott. Duplex Co. v. Deering (C. C. A. 2) 252 Fed. 722, 743, 747, 164 C. C. A. 562. Holding this view of the Paine decision, it follows that the court below was right in dismissing so much of this bill as was based on the Sherman Anti-Trust Act.

[2] 2. *The Clayton Act* (Act Oct. 15, 1914).—Section 16 of this act (8835*o*, U. S. C. S.) provides that—

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damages by a violation of the anti-trust laws."

The effect of this section undoubtedly is to permit maintenance under the Sherman Anti-Trust Act of that class of suits, the right to maintain which had been denied in the Paine Case; but since the present case was commenced in a state court, and was by defendant removed to the court below, we must inquire whether this section authorized the state courts to act, and, if not, then whether the removal to the federal court makes any difference.

The grant of jurisdiction is to the "courts of the United States." This language has been expressly held not to reach even territorial courts, although they were created by the laws of the United States. McAllister v. U. S., 141 U. S. 174, 179, 11 Sup. Ct. 949, 35 L. Ed. 693. Much less can it reach those courts which are wholly of another jurisdiction. It is true there are cases where this term has been thought to reach some of the courts of the District of Columbia (see Page v. Burnstine, 102 U. S. 664, 26 L. Ed. 268; United States v. Mills, 11 App. D. C. 500, 504); but that was because the language and purpose of the act in question were especially appropriate to be so extended. In the present case the statute was dealing solely with a subject-matter of

exclusively federal jurisdiction, interstate commerce, and while Congress might have intrusted some of its exercise to the state courts, there is no reason to presume such an intention; the natural presumption is rather to the contrary. Not only had the ordinary meaning of the phrase "courts of the United States" become fixed by familiar judicial construction long before the Clayton Act was passed, but it had been customarily used by Congress with the same definite meaning; for example, section 256 of the Judicial Code (Comp. St. § 1233) refers to the "courts of the United States" and the "courts of the several states" as different classes, exclusive of each other. Further, this section pertains only to the remedy, and there would be a strong presumption that a federal remedial statute did not relate to the remedies of another jurisdiction. From these considerations we are satisfied that a suit brought in a state court can get no help from section 16.

[3] When the case was commenced, the state court either had or had not power to give relief because of the federal anti-trust laws. If it had not, we do not comprehend how jurisdiction of the subject-matter could have been conferred by the removal to the federal court. The jurisdictional objection was not as to the person, but as to the subject-matter. In De Lima v. Bidwell, 182 U. S. 1, 174, 21 Sup. Ct. 743, 45 L. Ed. 1041, it was said that defendant neither gains nor loses by the removal, that the case proceeds as if no such removal had taken place, and that the defendant unquestionably has the right, in the federal court, to show that the state court had no jurisdiction. While these statements were made with reference to a different situation from that here existing, we see no reason to doubt their present applicability. It follows that the court below, like the state court, had no jurisdiction of the remedy given by section 16 of the Clayton Act, and could not grant any relief upon that theory.[1]

[4] 3. *State Constitutions and Laws.*—So far as the relief prayed for was shown to stand upon the supposed violations of state Constitutions or laws, no question of jurisdiction is involved; but we must ascertain whether the bill states a good case for the relief sought. We find ourselves able to reach a conclusion upon this subject without inquiry into the ultimate question, elaborately argued by plaintiff, whether the Constitution and laws of (e. g.) Ohio prohibit such a consolidation of railroads as this was.

We first observe that, by the elimination of the New York Central and the failure to reach the Read Committee, a very large part of the allegations of the bill and of the prayers for relief have been left inoperative, and that, although the New York Central has been held not to be an indispensable party as to portions of the relief prayed, it is by no means clear just how much of the bill is left with an effective status. Certainly many of the allegations lose their force when we re-

[1] The status of the present controversy in its relation to the Sherman and Clayton Acts was considered by the Appellate Division, New York, and a suit like this one was dismissed. Venner v. New York Cent., 177 App. Div. 296, 164 N. Y. Supp. 626, affirmed 226 N. Y. 583, 123 N. E. 893, certiorari refused 249 U. S. 617, 39 Sup. Ct. 391, 63 L. Ed. 803.

member that we can consider no controversy to which the New York Central is an indispensable party.

We next observe that the consolidation sought to be enjoined was only a new formulation of the situation which had been existing for many years. It is expressly averred that the obnoxious control of parallel and competing lines had been accomplished, and for many years maintained, by stock ownership and control. It does not seem to be claimed that the proposed consolidation would create any restraints on competition that did not already exist. We find no definite statement that what was proposed would be obnoxious to any statute or constitutional provision which did not relate to competition between parallel lines, excepting the claim that the proposed consolidation would increase the capital stock and debts above the permitted limit. It is probable, also, from the silence of the bill, that during all these years the public authorities of the various states have rested content and have not indicated any belief that public policy was being violated, and it may likewise seemingly be inferred that no public authorities are now objecting to the proposed consolidation, but that, on the contrary, they are all content.

Further, we notice that plaintiff owns only one one-thousandth of 1 per cent. of the capital stock, that no other shareholder has accepted its invitation to join in preventing the imminent irreparable injury, and that this interest plaintiff bought after the consolidation contract was made. He seems to be a volunteer, rather than a conscript. We have, then, a case where a private suitor, with a minimum of ponderable interest, and with no disposition to beware of entrance to a quarrel, is seeking relief upon the sole ground that the public policy of the state is being violated, and where the state authorities have long acquiesced and do acquiesce in any violation there may be. Under such circumstances, the court of equity will be strict in requiring the plaintiff to point out with precision and certainty in what respects the law is about to be violated and to show, clearly and positively, substantial and irreparable injury to its private rights A measure of imperfection in pleading that might well be overlooked in the ordinary controversy should not be disregarded in such a case as this.

When we examine the allegations of the bill with respect to the proposed consolidation, and with respect to (e. g.) the Ohio situation, we find it said to be "a violation of the public policies of the * * * states of * * * Ohio * * * and of the common law of those states * * * and a violation of the various laws of * * * said states aforesaid, providing against and making illegal consolidations of and the control of parallel and competing lines," etc. While, of course, this court will take judicial notice of the Constitution and laws of Ohio, yet such an allegation is thoroughly unsatisfactory as a tender of an issue, and confirms the impression, otherwise strongly produced, that the bill was intended to rest upon the federal anti-trust laws, and that the references to the state laws were by way of makeweight.

If, however, even this indefiniteness in pleading could be excused, we would come to a more vital defect: There is a statement, in words,

of irreparable injury; but that is a conclusion. There is no direct allegation of any pecuniary loss. It is not charged that plaintiff's shares of stock will be worth any less, presently or prospectively, after the consolidation than they are now, nor that they will suffer any net pecuniary injury. True, it is said that the corporation will suffer certain losses and will incur certain penalties, but this is only one side of the account. The bill shows that the stockholders, like plaintiff, will be entitled to receive five shares of the new stock for each one of the old; practically all the stockholders are approving and must regard the consolidation as a benefit; under these conditions, a bill which fails to allege that plaintiff's stock will be worth any less in dollars and cents, or in any other kind of value, now or hereafter, if the consolidation goes through, is fatally defective.

[5] 4. *Our Former Decision.*—Plaintiff insists that the questions we have discussed are not open on this appeal. It is said that, if the bill of complaint was defective for the reasons stated, the action of the trial court was right when it first dismissed the bill, although it did so upon the erroneous ground that the New York Central was an indispensable party. It is further said that upon the first appeal it was the duty of this court to affirm the order of dismissal if it was right for any reason, and that when we reversed the order of dismissal we necessarily decided that the bill of complaint was immune to a motion to dismiss for any reason.

A reference to the former record shows that the motion to dismiss, made in the court below because of lack of jurisdiction over the New York Central, also included, as one of its grounds, the claim that the bill of complaint did not state a good cause; but the opinion of the court below at that time shows that such a question was never reached or considered. When that appeal came up for hearing in this court, it was open to the appellee, the Lake Shore Company, to insist that the dismissal was right for the same reasons that are now insisted upon. The briefs then filed show that this was not done, and that no reference was made by counsel for either party to the questions we have now discussed. There is no reference to them in our opinion. So it must be conceded that the questions now said to have become res judicata, or the law of the case, by our former action, were never presented to us or considered by us; and we cannot think that questions with such a history are foreclosed to us.

It is undoubtedly true that, when an appellate court affirms a decree below, it amounts to a decision, so far as the single case is concerned, that there were no valid objections to the decree, and reaches those unmentioned as well as those discussed. Tyler v. Magwire, 84 U. S. (17 Wall.) 253, 21 L. Ed. 576. The logic of that situation does not apply, where there is a reversal. In the former case, the matter is ended, and there is nothing for further consideration. In the latter event, the case is sent back expressly for further action, and the extent to which further action is concluded depends, not on what might have been decided, but upon what was decided. It is common for an appellate court to say, when reversing, that it leaves certain questions undecided, because they have not been considered; it has not been our

understanding that upon a reversal we were deciding questions not presented or considered; and we think that is not the effect of such a reversal. Mutual Co. v. Hill, 193 U. S. 551, 553, 24 Sup. Ct. 538, 48 L. Ed. 788; Taenzer v. Chicago Co. (C. C. A. 6) 191 Fed. 543, 547, 112 C. C. A. 153.

We interpret our former opinion, and the order denying rehearing, as expressly or by necessary implication leaving open to the court below the right to consider the power to maintain the action under either the Sherman or Clayton Act; and, the decision on those points having been against plaintiff, we think it was not only within the power, but it was the duty, of the court below to consider whether a good case was made under the state laws.

[6] 5. *The Amount Involved.*—The suggestion presents itself whether there may be a duty to remand to the state court rather than dismiss the bill. Since we hold that plaintiff does not state a good case for relief arising under the laws of the United States, it might be said that jurisdiction to dispose of the merits then rests only on diverse citizenship, and that this was an insufficient basis, in the face of our holding that the bill alleges no substantial damages. In a controversy like this, the damage to plaintiff is not necessarily the only amount involved; but, if it were, this result does not follow. If the case had been originally commenced in the federal court, and the jurisdiction of that court had been invoked only on the ground that the case arose under the laws of the United States, it is settled that the court would proceed to dispose of all the questions in the case, even after it had reached the conclusion that plaintiff had failed to make out a good case on the federal question. Siler v. Louisville Co., 213 U. S. 175, 191, 29 Sup. Ct. 451, 53 L. Ed. 753. We do not see how the question is different when the case is begun in the state court and is removed. See Missouri v. Missouri Com'rs, 183 U. S. 53, 59, 22 Sup. Ct. 18, 46 L. Ed. 78. If we thought no federal question was then involved, so that the case had not been removable on that ground, we would have a different situation; but we have not reached any such conclusion as that. The case, as formulated in the bill, plainly was one arising under the laws of the United States. The removal, whether on that ground or not, brought into the federal court a case which then came to be rightly here, and jurisdiction of the case so obtained (and to the extent possessed by the state court) continues for all purposes.

The decree below should be affirmed; but, as we rest the affirmance in part upon an insufficiency of pleading, as to the state Constitutions and statutes and the damages, the affirmance will be without prejudice to the filing in a proper court of a new bill, based upon those constitutions and laws only.

INTERNATIONAL BANKING CORPORATION v. LYNCH.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920.)

No. 3506.

Corporations ⊜559(5), 565(8)—Right of pledgee to sell corporation's securities not affected by appointment of receiver, or by filing statement of its claim.

Appointment of a receiver for an insolvent corporation in a creditor's suit, with an order enjoining interference with possession of defendant's property by the receiver, *held* not to deprive a pledgee of its securities, not a party to the suit, of the right to sell the same in accordance with the terms of the pledge; nor does the filing by the pledgee of a statement of its claim, pursuant to an order of the court, have such effect.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

The International Banking Corporation appeals from an order obtained by John C. Lynch, as receiver of the Pacific Coast Casualty Company, in a suit by Daniel Combs against such Company. Reversed and remanded.

Marcel E. Cerf and C. H. Sooy, both of San Francisco, Cal., for appellant.

Hiram W. Johnson, Jr., and A. A. DeLigne, both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. November 17, 1916, Daniel Combs commenced suit in the court below against the Pacific Coast Casualty Company, a California corporation, alleging among other things, that it was indebted to him in the sum of $3,500 for legal services, and that it had become and was insolvent, and that certain creditors of the corporation other than himself had recovered judgments against it upon their respective claims, and that still other creditors threatened similar suits, the result of all which would be irreparable loss and damage to the plaintiff, as well as to such other creditors, and praying, among other things, the appointment of a receiver of the property of the alleged insolvent, to take possession of and administer all of its property, and for an order enjoining the defendant, its officers and agents, and all other persons, from transferring, selling, or disposing of any of the property of the corporation, or from in any way interfering with such receiver's possession or management thereof.

The appellee was appointed such receiver December 6, 1916, with the usual powers; the order including the restraining order asked for. At that time the Casualty Company was indebted to the appellant International Banking Corporation in the sum of $32,100.23 on various promissory notes that had been theretofore executed to the bank, all of which indebtedness was in part secured by the pledge to it of various bonds and coupons and of 100 shares of the stock of the Cal-

ifornia Wine Association, a corporation, all of which securities were accompanied by an agreement executed by the Casualty Company to the bank on the 25th day of February, 1916, expressly declaring, among other things, that—

"Upon failure of the undersigned [the Casualty Company] to pay any indebtedness to said bank at maturity, or to keep up the margin of collateral securities above provided for, then, in either event, said bank may immediately, without advertisement, and without notice to the undersigned of time or place of sale, sell any of the securities held by it at private sale or otherwise (and as incidental thereto may indorse any thereof in the name and behalf of the undersigned), and shall apply the net proceeds therefrom toward the payment of the liabilities of the undersigned in such manner as it may choose, holding the undersigned responsible for any deficiency, including costs and reasonable attorney fees, remaining after such application. Said bank may be a purchaser, if such sale be at public auction, or at the Board of Brokers, and shall take title free from any right or equity of redemption of the undersigned; such right and equity being hereby expressly relinquished and waived."

March 10, 1917, the court, upon the petition of the receiver, duly verified, setting forth that there were a large number of claims outstanding against the insolvent defendant, entered an order "that all persons having claims of any kind or character whatever against the Pacific Coast Casualty Company, which claims accrued or became due or payable, or for which services were rendered or goods were supplied, prior to the appointment of said receiver, present said claims on or before the 15th day of June, 1917," and directing the proper publication of such notice.

June 14, 1917, the appellant banking corporation filed with the receiver its claim in the sum of $17,514.35. On the same day, to wit, June 14, 1917, the appellant banking corporation, acting upon the advice of its counsel, sold through the Stock and Bond Exchange of San Francisco, pursuant to the power conferred by the pledge agreement, the 100 shares of the capital stock of the California Wine Association for $2,875; that being the highest bid therefor at such sale.

March 18, 1918, the receiver presented to the court below a petition setting forth, among other things, that of the pledged property of the insolvent Casualty Company, held by the appellant International Banking Corporation, the latter had sold 5 Oakland Traction general consolidated mortgage bonds for $1,750, 21 Oakland Transit consolidated first mortgage bonds for $11,550, and 100 shares of stock of the California Wine Association for $2,875, and praying for an order directing the appellant banking corporation to show cause why it should not be punished for contempt of the order of the court theretofore made, restraining all persons from interfering with the property of the insolvent Casualty Company.

Upon the hearing of that order to show cause—the respondent thereto at the time objecting to any jurisdiction of the court respecting the matter—the respondent showed that it had fairly sold the Wine Association stock under the power given by the pledge agreement, after the advice of its counsel to the effect that it had the power so to sell it, and upon such showing the court discharged the rule to show cause.

Subsequently, and on August 28, 1918, the matter having been duly referred to the master, the latter began the hearing on the claim of the appellant Banking Corporation, at which hearing the latter objected to his jurisdiction to determine whether or not the appellant Banking Corporation had the power to sell the securities pledged to it that have been mentioned. The master ruled against the objections made, and found and reported to the court that the sale of the 100 shares of the stock of the Wine Association was void, as being made in violation of the restraining order contained in the order appointing the receiver, and requiring the appellant Banking Corporation "to restore to the fund of securities held as collateral the 100 shares of California Wine Association stock." To such finding and report the appellant Banking Corporation filed exceptions, which were overruled, and the master's report thereupon confirmed by the court, from which action the present appeal comes.

As was expressly found, both by the master and the court, there was present in the case no element of fraud or unfairness; but the view of both seems to have been that the sale of the shares of stock in pursuance of the power given by the pledge agreement under which it was held was void, because of the restraining order issued in the suit of Combs against the insolvent Casualty Company that has been mentioned. Long before that order was made, and, indeed, prior to the commencement of the suit in which it was entered—to which suit the appellant Banking Corporation, as has been stated, was not made a party—the shares of stock had been pledged to the appellant by the Casualty Company as part security for its indebtedness to the appellant, with full power to sell the stock at either private or public sale to satisfy the indebtedness, if not paid when due. The receiver appointed in the suit had the undoubted right to pay the indebtedness for which the stock was held as security, and thereupon to receive possession of it as the property of the insolvent owner; but it is equally clear that without paying such indebtedness he had no such right of possession, the stock remaining subject to sale by its pledgee pursuant to the terms of the pledge agreement.

In the Case of Jersey Island Packing Co., 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, this court held that, where trust deeds were executed by a corporation afterwards becoming insolvent to secure debts not then due, the grantor retained an interest in the property conveyed, which passed to its trustee in bankruptcy for the benefit of its unsecured creditors; the trustee being entitled either to assume possession and sell the property for the benefit of the general creditors after satisfying the lien, or to refuse to take possession if its value, over and above the incumbrance, was not sufficient to justify an attempt to administer it. In the course of the opinion the court referred to the decision in Re Browne (D. C.) 104 Fed. 762, where that court, while declining to determine whether it had jurisdiction to interfere and prevent a fraudulent or oppressive exercise of the right of sale of personal property which had been pledged by the bankrupt more than four months prior to the bankruptcy, in a case where it had been agreed that the creditors intended to deal fairly with the property

pledged and to make an honest effort to sell for the best prices that could be obtained, was of the opinion that the Bankruptcy Act gave the court no authority to interfere between the creditors and the exercise of their right to sell given them by the collateral notes; and this court held that the case might be accepted as authority for the proposition that a District Court would not interfere with a sale by the pledgee of the thing, under the power of sale given by the terms of his contract, when there is no claim that such power is exercised in a fraudulent or oppressive manner—saying:

"The pledgee has a special property in the thing pledged, which entitles him to the possession, to protect which he may maintain detinue, replevin, or trover, and the interest of the pledgor is not subject to execution."

In the instant case the master, whose action in the matter was approved by the court below, took the view, as appears from his opinion appearing in the record, that as the appellant Banking Corporation presented to him on the 14th day of June, 1918, its claim, it thereby waived its right to pursue its pledge, and became a party to the suit of Combs against the Casualty Company, and bound by the restraining order issued therein on the 6th day of December, 1916.

If it be conceded that the decision of this court in the case above cited is not direct authority to the contrary, that even in bankruptcy cases such is not the rule is very clearly shown, we think, by the decision of the Supreme Court in the case of Jerome v. McCarter, 94 U. S. 734, at page 739 (24 L. Ed. 136), where that court distinctly adjudged that the subsequent bankruptcy of the pledgor does not deprive the pledgee of his right to dispose of the pledged property upon the default of the pledgor, holding that the sale of the bonds in that case by the pledgees conferred upon the purchasers the absolute title thereto, and saying:

"The position that the pledgees could not sell the pledge after the adjudication in bankruptcy, is quite untenable. It is sustained by nothing in the Bankrupt Act. The bonds were negotiable instruments. They passed by delivery, and even were there no expressed stipulation, in the contracts of pledge, that the pledgee might sell on default of the pledgor, such a right is presumable from the nature of the transaction. Certainly the Bankrupt Act has taken away no right from a pledgee secured to him by his contract."

The present, however, was a suit in equity by an unsecured creditor against his alleged insolvent debtor to obtain the appointment of a receiver for the purpose of taking possession of and administering its property, without making any other creditor a party to the suit and without in any way undertaking to sue in behalf of the appellant Banking Corporation or of any other secured creditor, nor, indeed, in behalf of any unsecured one. As respects the appellant Banking Corporation, it is obvious that there was no common interest between it and the complainant Combs; on the contrary, so far from their interests being identical, or even similar, they were wholly inconsistent and antagonistic. See 1 Story, Eq. Jurisprudence, § 548; Terry v. Bank (C. C.) 20 Fed. 777.

A suit in equity, said the Supreme Court in Pardee v. Aldridge, 189 U. S. 429, 433, 23 Sup. Ct. 514, 516 (47 L. Ed. 883)—

"is not a proceeding in rem properly so called. It does not purport to summon or invite, by notice or otherwise, all the world to come in, so far as there are any adverse interests. It is more personal even than the common law, and works out its decrees by orders to the defendants. Of course, the adjudication in such a suit does not conclude strangers."

In Risk v. Kansas Trust & Banking Co. (C. C.) 58 Fed. 45, Judge Sanborn held that the appointment of a receiver of an insolvent corporation on the bill of an unsecured creditor does not deprive secured creditors of the right to possess and enforce their securities, and, such securities having come into the possession of the receiver in that case, compelled him to give them up. Such a receiver, said the court—

"is the receiver of the property of the insolvent debtor. He is not the receiver of the property of the secured creditors of that debtor. The contract of the debtor was that these mortgages should not be removed from the custody of the bank until the bonds were paid, except as other mortgages, equal in amount, were deposited in their place. The debtor has not paid, and cannot pay, the bonds. The collaterals are of less value than the amount of the debt they are pledged to secure. Mr. Otis owns that entire debt, and is in reality the only person beneficially interested in the notes and mortgages pledged to secure it. The only right the defendant or its receiver has here is the right to redeem these collaterals by paying the bonds, and that is a right without value."

The filing with the receiver of the sworn statement of the appellant Banking Corporation's account against the insolvent debtor could not operate to make the appellant bound or in any way affected by the restraining order made by the court months before; it was in no sense a pleading in the case, its only function being to inform the receiver of the amount it would be necessary for him to pay in order to redeem the pledged securities and to acquaint him with what the appellant might be entitled to receive, if anything, out of the general assets of the insolvent estate should the securities held by the appellant fail to realize the total amount due it.

Strictly applicable to the case, we think, is the decision of the Supreme Court in Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640, where it was held that a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized the claim has been paid in full—saying (173 U. S. on page 146, 19 Sup. Ct. 366 [43 L. Ed. 640]):

"The secured creditor is a creditor to the full amount due him, when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto, though the receiver may redeem or be subrogated as circumstances may require."

The order and decree appealed from are reversed, and the cause remanded to the court below for such further proceedings as may be necessary or proper, and that are not inconsistent with the views above expressed—costs in this court to the appellant.

STRUETT v. HILL.

(Circuit Court of Appeals, Ninth Circuit. October 11, 1920.)

No. 3539.

1. **Courts ⟸356—Bill of exceptions not proper to present evidence on equity appeal in federal court.**
   The common-law bill of exceptions is not the proper mode to present the evidence in an equity appeal, but the practice on such appeal is regulated by the equity rules adopted by the Supreme Court.
2. **Courts ⟸356—Statement of evidence for equity appeal can be approved after expiration of term.**
   Equity rule 75 (198 Fed. xl, 115 C. C. A. xl), regulating the mode of preserving evidence on appeal, was adopted with consideration of the existing practice, by which appeals were claimed and permitted, regardless of the expiration of terms, so that the expiration of the term at which the decree was rendered does not deprive the trial court of power to approve and direct the filing of the statement of evidence.
3. **Courts ⟸356—Approval of appeal bond does not prevent subsequent approval of statement of evidence.**
   The power of the District Court to settle a statement of evidence on an appeal in equity, equity rule 75 (198 Fed. xl, 115 C. C. A. xl), not limiting time for settlement of statement of evidence, is not lost by the previous approval of the appeal bond and signing of the citation.

In Equity. Suit by Kathryn Struett, formerly Kathryn Smith, against Harry B. Hill. From a decree for the defendant, the complainant appeals. On motion by appellant for an order, directed to the United States District Judge, requiring him to show cause why he should not approve the record of the evidence and proceedings. Motion granted.

The complainant moves the Circuit Court of Appeals for an order, directed to the United States District Judge at Tacoma, Wash., requiring him to show cause why he should not approve the record of the evidence and proceedings in the above-entitled cause as tried before him in equity, and, if the evidence and record lodged with the clerk by appellant be not complete for the purpose of the appeal, that the same shall be so made under the direction of the District Judge. The motion is based upon these facts:

The case was tried in the District Court on October 29, 1919, and on November 20, 1919, decree was entered against complainant. Thereafter, on May 18, 1920, the District Judge allowed an appeal to the Circuit Court of Appeals upon the filing of a petition for appeal, bond, assignment of errors, and citation. At the time of perfecting the appeal, as above set forth, complainant had not filed with the clerk of the District Court any statement of the evidence as contemplated by rule 75 of the Equity Rules of October, 1912 (198 Fed. xl, 115 C. C. A. xl). Thereafter, on June 10, 1920, appellant filed with the clerk of the District Court a motion praying for settlement of the record in the cause and for relief from any default for failure to lodge the record with the clerk before the allowance of the appeal. This motion was served upon counsel for appellee, and after hearing the judge denied the motion and refused to

approve the record, because the same had not been filed within 10 days after the entry of the decree in said cause, or within any extension of time allowed by the court. The solicitor for appellant includes in his motion the statement that prior to the argument of the motion complainant tendered appellee in open court a full and true transcript of the testimony certified by the court reporter.

Appellee objects upon the ground of lack of jurisdiction in this court, and sets forth that no effort was made to present for settlement a statement or bill of exceptions until more than 6 months after the entry of the final decree, and that no extension of time was granted within which to settle the bill of exceptions. Lack of diligence is also urged.

Wm. P. Lord, of Portland, Or., for appellant.

Roberts & Skeel and L. B. Schwellenbach, all of Seattle, Wash., for appellee.

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

HUNT, Circuit Judge (after stating the facts as above). Rule 75 of the Equity Rules makes it the duty of the appellant to file with the clerk of the court in which the appeal is prosecuted a præcipe for the portions of the record to be incorporated in the transcript on appeal, and requires the appellee, if he shall desire an additional portion of the record incorporated, to file with the clerk a præcipe within 10 days unless the time shall be enlarged by the court or judge. The rule also prescribes how the evidence shall be included and puts the duty of condensing and stating the evidence primarily upon the appellant, "who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his præcipe under paragraph 'a' of the rule."

Appellant is required to notify the other parties of such lodgment, and of a time and place when he will ask the court or judge to approve the statement, the time so made to be at least 10 days after such notice. At the expiration of the time named, or such further time as the court or judge may allow, "the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or judge, and if the statement be true, complete, and properly prepared, it shall be approved by the court or judge; and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge, and shall then be approved. When approved it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal." In case of differences between the parties concerning directions or general contents of the record prepared on appeal, they shall be submitted to the court or judge, and shall be covered by directions which the court or judge may give on the subject.

It will be noticed that rule 75 fixes no time within which the statement of the evidence must be settled and filed in order to become a part of the record for the purposes of the appeal. The Court of Appeals for the Sixth Circuit, in General Equity Rule 75, 222 Fed. 884, 138 C. C. A. 574, said that while it is a better practice to complete such a step before perfecting the appeal, and if a term of court should expire

before the final statement of evidence is filed, to enter an order carrying the matter into the next term, nevertheless, it might be that the time would be wholly insufficient to perfect the record during the term, and the expiration of the term might often be forgotten, as it was not regarded as a matter of importance in equity appeals. This construction seems most reasonable.

[1] The common-law bill of exceptions is not the proper way to present the evidence in an equity appeal. The practice is regulated by the equity rules adopted by the Supreme Court. Ex parte Story, 12 Pet. 339, 9 L. Ed. 1108; Johnson v. Harmon, 94 U. S. 371, 24 L. Ed. 271; Buessel v. United States, 258 Fed. 811, 170 C. C. A. 105.

[2] We are in agreement with the view of the court in the case heretofore cited that rule 75 was adopted with due consideration of the existing practice by which appeals were claimed and permitted, regardless of the expiration of terms, and that the trial court has power to approve and direct the filing of the statement of evidence, although the term has expired when the decree was rendered, and no order has been entered carrying the subject-matter over until the next term.

[3] We do not think the power to settle the evidence is lost by the District Court, although there has been an approval of a bond on appeal and a citation has been signed. "It is true," said the Court of Appeals in the case cited, "that for general purposes jurisdiction over the cause is thereby ended, and that the shaping of this statement of evidence involves the decision by the judge of disputed claims; but, upon the whole, the proceeding is rather ministerial, and it sufficiently pertains to the making of the return to the appeal, so that we think a statement of evidence so approved and filed cannot, for that reason alone, be stricken from the record."

In United States v. Great Northern Railway Co., 254 Fed. 522, 166 C. C. A. 80, we held that, in an action in equity to cancel a patent, a motion to strike what was termed a bill of exceptions from the record was without merit, and said:

"A statement of the evidence, with the approval of the judge, is all that is required in an equity cause, where an appeal is to be prosecuted. Federal Equity Rule 75 (198 Fed. xl, 115 C. C. A. xl). An approved statement of the evidence is really what was filed in the present case, and not a bill of exceptions." Westermann Co. v. Despatch Printing Co., 233 Fed. 609, 147 C. C. A. 417.

It is clear that no rule of the District Court can conflict with the rules of the Supreme Court. It being our opinion that the District Court had not lost jurisdiction merely because the record was not filed within 10 days after the entry of decree, or within any extension granted, the order to show cause must be granted, and will issue accordingly.

Motion granted.

COLE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 29, 1920.)

No. 5597.

Counterfeiting ⇐16—Indictment describing "die" as "mold" not objectionable.

In Penal Code, § 169 (Comp. St. § 10339), making it an offense to make or have in possession "any die, hub or mold * * * in likeness or similitude, as to the design or the inscription thereon, of any die, hub or mold designated" for the coining of coins of the United States, the words "die" and "mold" are used interchangeably, and either may be used to designate the same article, and an indictment for its violation is not bad because an article described therein as a "mold" is technically a "die."

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

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Criminal prosecution by the United States against Jack Cole. Judgment of conviction, and defendant brings error. Affirmed.

A. R. Morrison, of Denver, Colo., for plaintiff in error.

Walter F. Daly, Asst. U. S. Atty., of Denver, Colo. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for the United States.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. Plaintiff in error, hereafter defendant, was indicted on an indictment containing six counts, each of which charged a violation of section 169, Penal Code (Comp. St. § 10339). The first count charged that the defendant—

"did knowingly, willfully, unlawfully, and feloniously, and without lawful authority, make and cause and procure to be made a certain mold of plaster, which said mold was then and there in likeness and similitude as to the design and inscription thereon of a mold theretofore designated for the coining and making of certain genuine silver coins of the United States, which had theretofore been coined at the mints of the United States and commonly called one dollar, of the mintage of 1900."

The second count charged that defendant—

"did knowingly, willfully, unlawfully, and feloniously, and without lawful authority, have in his possession a certain mold, which said mold was then and there made of plaster, and was then and there in likeness and similitude as to the design and inscription thereon of a mold theretofore designated for the coining and making of certain genuine silver coins of the United States, which had theretofore been coined at the mints of the United States and called one dollar, of the mintage of 1900."

The third and fourth counts in the same language charged the making and having in possession of a similar mold in similitude of a silver dollar of the mintage of 1884. The fifth and sixth counts in similar language charged the making and having in possession of a similar mold in similitude of a genuine silver dollar of the mintage of 1881.

The defendant was convicted and sentenced on all counts of the indictment.

For the purpose of sustaining the several charges in the indictment, counsel for the United States, over the objection of counsel for defendant, introduced in evidence Exhibits A, B, and C. Exhibit A consisted of plaster of paris set in a wooden frame of about 2⅝ inches by 4 inches in size and containing an impression of the obverse side of a United States silver dollar of the mintage of the year 1881. Exhibit B was a piece of plaster of paris about 4¾ inches by 3½ inches in size, containing an impression of the obverse side of a United States silver dollar of the mintage of the year 1900. Exhibit C was a piece of plaster of paris about 3½ inches by 2½ inches in size, containing an impression of the obverse side of a United States silver dollar of the mintage of 1884. By motion to direct and otherwise, counsel for defendant raised two questions:

(a) Were these exhibits, being one side of a silver dollar, molds as charged in the indictment, or was there a fatal variance in the proof?

(b) The evidence having shown beyond dispute that the United States did not use what may be technically called molds in the making of genuine silver dollars for the years 1881, 1884, and 1900, but did make said coins by what is technically called a die, was there a fatal variance between the allegations of the indictment and the evidence on this point?

The indictment charged that the mold which defendant made and had in his possession was of the likeness and similitude, as to the design and inscription thereon, of a mold theretofore designated for the coining and making of certain genuine silver coins for the years 1881, 1884, and 1900. Counsel for defendant claims that, if the United States had not for said years designated what is technically called a mold for the coinage of silver coin for those years, then the mold that the defendant made and had in his possession was not in likeness and similitude to any mold that the United States had ever designated.

Section 169, Penal Code, reads as follows:

"Sec. 169. Whoever, without lawful authority, shall make, or cause or procure to be made, or shall willingly aid or assist in making, any die, hub, or mold, or any part thereof, either of steel or plaster, or any other substance whatsoever, in likeness or similitude, as to the design or the inscription thereon, of any die, hub, or mold designated for the coining or making of any of the genuine gold, silver, nickel, bronze, copper, or other coins of the United States, that have been or hereafter may be coined at the mints of the United States; or whoever, without lawful authority, shall have in his possession any such die, hub, or mold, or any part thereof, or shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the United States hereinbefore mentioned, shall be fined not more than five thousand dollars and imprisoned not more than ten years."

We are of the opinion that both contentions of counsel for defendant may be considered together. The object and purpose of the law was to prevent the counterfeiting of the coin of the United States. Congress must be presumed to have known that the words "die" and "mold," while for some purposes indicating different instruments, so far as the making of the coins of the United States was concerned, the instrument used might be called a die or mold interchangeably.

It appears from the evidence that, if the reverse side of the genuine silver dollar was made to accompany either of Exhibits A, B, or C, there could be no adjustment of them that would permit the pouring of molten metal upon them in such a way as to make an imitation of a genuine silver dollar. In other words, they were used by the counterfeiter as dies. That the words "die" and "mold" may be used interchangeably to indicate the same instrument is shown by standard authority:

"Close molds, or molds in two parts, called the drag and the case (or cope), forming together a two-part flask, one part being placed over the other, and each being impressed with one half of the matrix or pattern." "The type mold of type founders is of steel, in two pieces, making right and left halves." Cent. Dict. vol. 6, p. 3820. "Die, to mold or form with a die or with dies." Cent. Dict. vol. 3, p. 1606.

Mr. Leech, chief clerk, United States Mint, Denver, testified that two dies are used in the coinage of a silver dollar, the obverse and reverse. The obverse die is the die with the date upon it; the reverse is the other side. We conclude that each of the Exhibits A, B, and C may be properly called a die or mold, as we are of the opinion that Congress did not intend to use the words "die" and "mold" in a technical sense, but intended to prevent the making or having in possession an instrument, whether called a die or mold, of the likeness and similitude as to the design or the inscription thereon of any instrument designated for the coining or making of any of the genuine coins of the United States, whether called a die or mold

Judgment affirmed.

REED v. THURMOND, U. S. Atty.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

No. 1824.

Internal revenue ⇐2—Intoxicating liquors ⇐132—Volstead Act repealed prohibition of removal of untaxed liquors.

The Volstead Act, prohibiting the manufacture and sale of intoxicating liquors, was a radical departure from the policy of the former laws to derive revenue therefrom, and completely covers the same subject-matter, including the transportation of such liquors, so that it impliedly repealed Rev. St. § 3296 (Comp. St. § 6038), which imposed on the removal from a distillery of liquors on which the tax had not been paid a penalty more severe than was imposed by the Volstead Act on the illegal transportation of liquor.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; H. H. Watkins, Judge.

Bruce Reed was convicted of unlawfully removing distilled spirits on which a tax had not been paid from a distillery, and of unlawfully concealing spirits which had been so removed, and he brings error. Reversed.

Walter M. Dunlap, of Rock Hill, S. C., for plaintiff in error.

J. Wm. Thurmond, U. S. Atty., of Edgefield, S. C., and C. G. Wyche, Asst. U. S. Atty., of Greenfield, S. C., for defendant in error.

Before KNAPP, Circuit Judge, and SMITH and WEBB, District Judges.

KNAPP, Circuit Judge. Plaintiff in error, hereinafter referred to as defendant, was indicted in two counts, which charge that on the 3d day of March, 1920, he (1) "did unlawfully remove and aid and abet in the removal of certain distilled spirits, to wit, one-fourth gallon, upon which the tax imposed by law had not been paid, from a distillery to the grand jurors unknown, to a place other than a distillery warehouse provided by law," and that he (2) "did unlawfully conceal and did aid and abet in the concealment of certain distilled spirits," in the quantity above named, which had theretofore been removed from an unknown distillery to a place other than a distillery warehouse provided by law. The indictment is laid under section 3296 of the Revised Statutes (Comp. St. § 6038) and follows its language.

The testimony shows that certain revenue officers, accompanied by some county officials, acting upon a rumor that whisky was being sold at Catawba Junction, in York county, S. C., went there to investigate on the evening of March 3, 1920. Search was made of the waiting room in the Southern Railway Company's station, but no whisky discovered. Finding the defendant, Bruce Reed, in the neighborhood, they questioned him, and he acknowledged that he had some whisky, and showed the officers where it was concealed in the freight room of the station. There was about a quart of it in a half gallon fruit jar. Defendant was thereupon arrested. The further evidence of the government tended to show, and warranted the jury in finding, that the whisky thus found was "blockade" or contraband whisky, on which no tax had been paid. Defendant testified that it had been in his possession "pretty close to a day and a half," and that he had obtained it "from a man coming along changing trains," who had it in a suit case. The jury found him guilty, and he was sentenced to five months in York county jail and to pay a fine of $200.

We put aside all other contentions of defendant in order to decide the case on a more generic and fundamental ground, not advanced or considered in the court below. As above stated, he is charged with the violation of section 3296 of the Revised Statutes, and manifestly his conviction thereunder cannot stand, if that section was repealed or superseded by the act of October 28, 1919, commonly known as the Volstead Act (41 Stat. 305), which went into effect, for all purposes now in hand, on the 17th of January, 1920, the date of the adoption of the Eighteenth Amendment.

It goes without saying that this amendment and the act passed by its authority effected a radical change in the legislative policy and attitude of the country respecting alcoholic beverages. Instead of encouraging, or at least recognizing as legitimate, the production and use of such beverages, and deriving a very large revenue therefrom, the manufacture and sale of any sort of beverage containing one-half of 1 per centum of alcohol or more is now wholly and strictly forbidden. This being so, it would seem necessarily to follow, under the

most familiar rules of statutory construction, that if the Volstead Act is inconsistent with the provisions of section 3296 and also covers the same subject-matter, it supersedes and by implication repeals that section. And to our minds the Volstead Act, in its entire scope and purpose, is plainly inconsistent with the scheme of revenue protection embodied in the Revised Statutes and in the section under review.

Specifically, it is enough to point out that under the former law defendant incurred the penalty for the offense of which he was convicted of both fine and imprisonment, whereas under the present law the punishment for a first offense is limited to a fine of not more than $500. Nor does it seem doubtful that the Volstead Act embraces the entire subject-matter of section 3296. Certainly it covers everything defendant did or was accused of doing; that he could have been convicted under it is not open to question. In short, we are of opinion that offenses of the kind here in question, which have been committed since the Volstead Act went into effect, are punishable only under that act; and we agree with the views expressed in the well-considered opinion in United States v. Windham (D. C.) 264 Fed. 376, from which the following is quoted:

"Taking the new statute as a whole, its provisions would appear to cover and provide for the punishment of every act which could be punished under the former provisions of the Revised Statutes with regard to the manufacture and sale of liquors for beverage purposes. To hold that the old law is continued would therefore be to hold that two inconsistent sets of statutory provisions, punishing the same substantial act, and with differing penalties, were of force, and that a person could be prosecuted and punished under section 3 and section 6 of the new statute for transporting any liquor at all, without the required permit, and at the same time prosecuted and punished under the provisions of section 3296 for transporting liquor without having previously paid the tax that he is forbidden by law to pay."

See, also, United States v. Yuginni et al. (D. C.) 266 Fed. 746.

As defendant was improperly convicted, the judgment must be reversed, and a new trial ordered.

Reversed.

WEATHERS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920. Rehearing Denied February 14, 1921.)

No. 3544.

Criminal law ⇐371(8)—Evidence of similar offenses admissible to show intent.

Evidence in a prosecution for assault with intent to commit robbery, and to steal fish, tending to show that shortly before the offense charged defendant had committed a similar offense. *held* admissible, where its effect was properly limited to the showing of intent.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska; Robert W. Jennings, Judge.

Criminal prosecution by the United States against Al Weathers. Judgment of conviction, and defendant brings error. Affirmed.

O. P. Hubbard and Henry Roden, both of Juneau, Alaska, for plaintiff in error.

James A. Smiser, U. S. Atty., of Juneau, Alaska.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. On writ of error from a judgment of conviction of plaintiff in error under two counts of an indictment charging him, with others, with the crime of assault with intent to commit robbery and to steal fish in the possession of certain named persons. Sections 1897 and 1898, Compiled Laws Alaska 1913.

The evidence is that one Knutson was the master of the cannery tender Forrester, in the employ of the Hoonah Packing Company in Alaska; that on the night of July 7, 1919, he tied his boat, with a scow loaded with fish in tow, to a dolphin at Admiralty Cove, in Alaska; that the master and a member of the crew slept in the same room in the pilot house, and the rest of the crew slept in the forecastle; that about 5 o'clock in the morning of July 8th the master was awakened by shots; that he got up, looked out of the window, and saw a small boat about 2,000 feet away coming in the general direction of the Forrester; that he saw bullets skimming along the water, and heard the hiss of the bullets as they passed the pilot house; that the shooting lasted about 15 minutes, and that probably 50 shots were fired; that after the shooting ceased a bullet hole was found in the bow of the boat, and three or four holes in the scow; that a spent bullet was picked up on the deck; that during the time the shots were fired the boat was recognized as the Diana; that two days later the master saw the same boat at Sisters Island, but she was so far away that he could not see the name; that he changed his course and went in the direction of the boat; that he had a scow in tow, and could not make speed; that he dropped the scow and made his way toward the boat; that she changed her course and came toward the Forrester; that as she came along witness saw two men come out of the pilot house, one holding a gun in his hand, and saw the men drop a cover over the name on the boat; that the men on the Diana called out, "Come on, you square heads!" The defendant was recognized on the deck of the Diana two days after the shooting, and was then carrying a gun.

By several of the errors assigned the plaintiff in error questions rulings admitting certain evidence tending to show that on July 10th, which was two days after the shooting, witnesses recognized the boat Diana as the same boat from which the firing had come on July 8th. It is also said that it was error on the part of the court to admit testimony of a witness who said that he had seen the defendant upon the Diana several days after the occurrence. But, as the important point was identification of the defendant, it is clear to us that the court was correct in admitting the testimony for the purpose of establishing his identity, and also that of the boat.

Plaintiff in error excepted to a ruling of the court admitting testimony to the effect that on June 30th, before the occurrence charged in the indictment, certain fish traps in Admiralty Cove had been open-

ed, and fish had been stolen therefrom. The court admitted such testimony after assurances had been given by the district attorney that it would be connected with the offense charged in the indictment. Afterwards one of the witnesses stated that in his best judgment the boat which he had seen about the traps on June 30th was the Diana, and other witnesses said that they recognized defendant as very like one of the men they had seen on the Diana on June 30th, and that they believed defendant was the man they had seen at that time. For instance, the witness Ferguson was asked whether he had known the defendant Weathers by sight on June 30th. His answer was that he did not know him at that time. We quote what follows:

"Q. When did you see him next? A. I seen him here in the courtroom. Q. You recognized him as the man? A. Yes. He looked very much like the man. Q. To the best of your belief, state whether or not he was the man. A. There is no doubt in my mind but what he is the man."

It was not error to admit evidence which tended to show that defendant was guilty of other similar offenses committed shortly before the time of the offense charged in the indictment. The court expressly charged the jury that the evidence of such other transactions was admitted solely as bearing upon the question of intent; that, if defendant did not do the shooting or make the assault charged, then it would not make any difference what other offenses he might have been guilty of, or with what intent any other things were done; but, if it was found that the defendant did make the assault as charged, then evidence bearing upon other assaults with intent to kill, or to rob or steal from fish traps, could be taken into consideration only as bearing upon the question of intent with which the acts charged in the indictment were done. This statement of the law conforms with well-established rules. Moffatt v. United States, 232 Fed. 522, 146 C. C. A. 480; Deason v. United States, 254 Fed. 259, 165 C. C. A. 547; certiorari denied, 249 U. S. 607, 39 Sup. Ct. 290, 63 L. Ed. 799; Byron v. United States, 259 Fed. 371, 170 C. C. A. 347; Riddell v. United States, 244 Fed. 695, 157 C. C. A. 143.

We find no error, and affirm the judgment.

Affirmed.

MARTIN et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920.)

No. 3509.

Internal revenue ⇐47—Conviction for operating unregistered still sustained by evidence.

Evidence *held* to sustain a conviction for operating an unregistered still.

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

Criminal prosecution by the United States against C. J. Martin and J. S. Newman. Judgment of conviction, and defendants bring error. Affirmed.

O'Leary & Doyle, of Great Falls, Mont., for plaintiffs in error.
Walter W. Patterson, U. S. Atty., of Helena, Mont.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Martin and Newman, plaintiffs in error, were tried and convicted of having had in their possession and custody and under their control at Great Falls, Mont., a certain still set up, which they failed and neglected to register with the collector of internal revenue of the United States for the proper collection district, by subscribing and filing with the collector duplicate statements in writing setting forth the particular place where the still was so set up, the kind and cubic contents of the still, the owners thereof and their places of residence, and the purpose for which the still had been and was intended to be used. From a judgment imposing fine and imprisonment, writ of error was sued out.

The only question presented is whether the evidence was sufficient to sustain the conviction. The evidence of the prosecution was that some police officers went to the premises, a two-story brick building surrounded in part by a fence five or six feet high. The first floor was used as a grocery store, kept by defendant Newman; above the store were furnished rooms. There was a back outside stair from the ground to the second story. The officers tried a basement door on the east side of the building, near the sidewalk door leading to the basement, but found it locked. Two of the officers went into the store, and the third went around down the street and into the alley, and took a place for observation. Martin was seen in the lot. After going into a small outhouse near the back of the lot and staying there a minute, he went back to the store and started to go toward the door at the rear, then changed his course, and went over the fence and up the back stairs leading to the second story of the building. The officers then went upstairs and found Martin in a corner room. The officers took Martin downstairs, and one crawled through a window and found a door in the basement fastened with a wooden bar. He opened the door, and found an oil stove with a plate on it, and two burners going underneath.

The apparatus, proven to be a still, was produced in court, and was explained as having burners upon which was a boiler, to which was connected a coil in the middle of a tank. When found, there was water in the tank running from a hose. The end of the coil extended to a receptacle out of which whisky was dropping. They found receptacles containing whisky. Other things found included charcoal, a funnel, some barley in a sack, stoppers, corks, plugs, root beer, hops, yeast, filtering paper, and sugar. Martin told the officers that he was making root beer, and as a fact there was some root beer found some 10 or 15 feet from the still.

One of the police officers said that upon the day of the arrest defendant Newman was in the store; that when the officers asked Newman to let them into the basement, Newman said he did not have the key; that he had rented the basement to Martin, and that Martin would be back soon; that when they went upstairs there was no re-

sponse to the knocking upon the door, whereupon the officers opened the door and found Martin; that when Martin was asked what his business was, he said he was making root beer.

A witness, who happened to be visiting the family of Newman when the police officers went to the premises, said that she saw the police officer walk out of the building, and that then Newman went to the back of the room with a hammer in his hand, and that he knocked on an empty sack in a corner, or in the middle of the floor; that he gave two or three knocks, then put the hammer down, and went about his business. It appeared that the pounding was behind the door in the corner, and at a point above that portion of the basement in which the still was located.

Defendant Newman stated that he did not own the building, and had not exercised control over it, and had not acted as the agent of his son, who, he said, was the owner. The son said he had bought the property, which was worth about $18,000, when he was about 15 years old, and was the owner at the time of the arrest, and that his father was simply looking after the grocery store for him, the son. He further testified that he was a clerk in another grocery store; that he rented the basement to Martin for a place to make root beer and soft drinks, but about the 17th or 18th of July he agreed with Martin that one Sawyer would be acceptable as a tenant, if he would pay the rent in advance, and that on the 18th Sawyer did pay him a month's rent in advance, but that he never saw Sawyer after Martin was arrested. Witness said that Sawyer had a lock on the outside door, although there were two means of getting to the basement, the inside leading from the store, which was locked, and the door on the outside; that defendant Martin rented two rooms in the second story, or apartment part, of the building. The person referred to as Sawyer was not presented as a witness. Both defendants denied any knowledge of the operation of the still in the basement.

We are of the opinion that there was sufficient evidence to submit to the jury, and that the question of guilt or innocence depended upon the credibility of the witnesses. Inasmuch as the instructions are not included in the record, we assume that the law was properly stated to the jury, and in view of the verdict rendered upon the evidence, this court will not set aside the judgment.

Affirmed.

SHIGEZUMI v. WHITE, Commissioner of Immigration.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920.)

No. 3531.

Aliens ⇐54—Proceeding for deportation sufficient to protect alien's rights.

Where the record of a hearing before a board of special inquiry, resulting in an order for deportation of an alien, was forwarded to the Secretary of Labor, before whom a brief was also filed by counsel for the alien, his substantial rights *held* to have been as fully protected as by a formal appeal.

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 K. Shigezumi, on behalf of Denhichi Ohgi, against Edward White, Commissioner of Immigration. Petition denied, and petitioner appeals. Affirmed.

Albert C. Aiken, of San Francisco, Cal., for appellant.

Frank M. Silva, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The appellant petitioned the court below for a writ of habeas corpus in behalf of Denhichi Ohgi, a native of Japan, who was at the time held in custody by the appellee for deportation back to that country.

By his own testimony, given before the board of special inquiry held under the act of Congress of February 5, 1917 (39 Stat. 874 [Comp. St. 1918, Comp. St. Supp. 1919, §§ 959, 960, 4289¼a–4289¼u]), he shipped from Japan without any passport and as a member of the crew of the steamship Tenyo Maru, and after the ship arrived at the port of San Francisco he surreptitiously entered the United States by swimming ashore. He was thereupon arrested and indicted in connection with his brother and brother-in-law, who were then in this country, charged with having conspired with them to commit that offense, to which indictment he pleaded guilty, and was sentenced to imprisonment for a term of six months, which he served, and, having been discharged from that imprisonment, was arrested for a violation of the immigration laws, and brought before the board of special inquiry for examination of his case, which board found in effect that the said Denhichi Ohgi "entered by water at a time or place other than as designated by immigration officials," and that he was "a Japanese laborer without the necessary passport, as provided in the agreement between the United States government and the Japanese government, in which agreement it is stipulated that no passport shall be issued to a laborer"—the board thereupon advising the offender to make any statement or argument he desired why he should not be deported in conformity with the law, to which the said alien answered:

"My lawyer will talk for me. I cannot say anything much, only that I do not want to be deported."

His attorney, having been given an opportunity to file a brief on behalf of his client, expressly conceded, according to the record, that the hearing was fair and impartial, and the unanimous opinion of the board was that the said Denhichi Ohgi be deported at the expense of the steamship company which brought him here, or at the expense of the government, as might be directed by the Secretary of Labor. The board also advised the said alien that he had no appeal from its decision, but that the record would be forwarded to the Secretary of Labor at Washington for his consideration, pending which he might

be released from custody upon furnishing a satisfactory bond in the sum of $500.

The record of the proceeding was subsequently forwarded to the Secretary of Labor, before whom counsel for the said alien filed a brief in his behalf, resulting in an adverse decision by the Secretary and an order by him for the deportation of the said Denhichi Ohgi. His imprisonment under that order was the basis of the application for a writ of habeas corpus, which the court below denied.

We agree with that court that the record, including the brief of the appellant's counsel, so submitted to the Secretary, and his action thereon, secured for the appellant every substantial right that he could have secured by a purely formal appeal.

The judgment is affirmed.

MOSES LAKE HORTICULTURAL CO. v. FAIRBANKS, MORSE & CO.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920.)

No. 3498.

Sales ⇐81(1)—Delivery held in compliance with contract.

Where a contract for an irrigation pump, to be supplied by defendant to plaintiff, contained no requirement as to time of delivery, but in plaintiff's letter transmitting acceptance of the contract it was stated that use of the pump would be needed within a stated time, and requested delivery within that time, defendant *held* entitled to rely on such statement, and delivery within that time *held* a compliance with the contract.

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 at law by the Moses Lake Horticultural Company against Fairbanks, Morse & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

Reynolds, Ballinger & Hutson, of Seattle, Wash., for plaintiff in error.

Van Dyke & Thomas, of Seattle, Wash., for defendant in error.

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

GILBERT, Circuit Judge. The plaintiff in error brought an action against the defendant in error to recover damages for alleged failure to comply with a contract. The complaint alleged that on February 21, 1918, the plaintiff accepted a written proposal of the defendant to deliver to the former at Neppel, Wash., a certain described pumping equipment; that on April 19, 1918, delivery was made thereof, with the exception of a certain essential hub reducer, without which the equipment was inoperative; that by reason of the failure to deliver the same the plaintiff was delayed 11 days in commencing the work of irrigating its fruit trees and growing alfalfa, to its serious loss

and damage. The defendant denied its failure to comply with the contract, and set up a counterclaim for $332.92, which it alleged remained unpaid of the purchase price of the equipment. The jury returned a verdict for the defendant, upon which judgment was entered.

In the contract no time was specified for the delivery of the equipment. It contained a provision that the receipt of the property when delivered "shall constitute a waiver of all claims for damages by reason of any delay." On February 25, 1918, in sending the acceptance of the defendant's proposal, the manager of the plaintiff sent a letter, which accompanied the acceptance, in which he said:

"May I not request that you endeavor to exercise promptness of delivery of pump and accessories to Neppel. Only 60 to 70 days remain when we shall have need to begin irrigating."

At the close of the trial the court instructed the jury that the defendant had the right to rely on the statement so contained in the letter, and that the evidence showed that the pumping equipment was completely delivered 63 days from the date of the letter, and that the letter estopped the plaintiff to deny that 60 or 70 days was a reasonable time, or to assert that an earlier delivery was within the contemplation of the parties.

Error is assigned to that instruction, and it is urged that the manager's representation was but the expression of an opinion, that the irrigating season that year opened unusually early, and that the defendant knew that the equipment must be ready by the time when it did open. We think the manager's statement was not the mere expression of opinion. The manager had been in charge of the property of the plaintiff for three years. It was he who transmitted to the defendant the acceptance of the proposal, with the accompanying statement as to the time when delivery would be necessary. The defendant had the right to rely upon that statement. The pumping equipment was shipped from West Berkeley, Cal., on March 29, and it was delivered and completely installed by April 30.

As the instruction so given by the court was in effect a denial of the plaintiff's right to recover, it becomes unnecessary to consider the other assignments of error.

The judgment is affirmed.

DIAMOND DRILL CONTRACTING CO. v. MITCHELL et al.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920.)

No. 3479.

1. **Patents ⇐328—Reissue for drill void for laches in making application.**
The Stone reissue patent, No. 14,356, for improvements in diamond core drills, *held* void for laches in not applying for the reissue until 13 years after issuance of the original patent.

2. **Patents ⇐138(2)—Reissue not granted, where other conflicting patents granted.**
A reissue should not be granted after a delay of several years in making application, during which other patents have been granted for new

inventions in the same art, which have gone into use and which would infringe the reissue.

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit in equity by the Diamond Drill Contracting Company against William J. Mitchell and others. Decree for defendants, and complainant appeals. Affirmed.

The appellant, as assignee of Frederick Stone, to whom had been granted on May 11, 1904, letters patent No. 761,332, for an improvement in core drills, brought a suit against the appellees herein for infringement of said patent. One of the defenses interposed by answer was a prior patent for the same invention or improvement issued to Samuel W. Douglass, on November 3, 1891. The appellant thereupon dismissed the suit and caused application to be made to the Patent Office for a reissue, on the ground that the original patent was defective and inoperative, by reason of the patentee claiming as his own invention more than he had a right to claim as new, and stating that the error arose by inadvertence, accident, or mistake on the part of the Patent Office, and without any fraudulent or deceptive intention on the part of the applicant. The application was at first rejected, on the ground that the new claims were anticipated by the Douglass patent; but, upon the appellant filing affidavits to the effect that the Douglass patent was inoperative, the application was finally allowed, and on September 11, 1917, reissue letters patent No. 14,356 were granted.

The appellant thereupon brought the present suit against the appellees, who were the defendants in the prior suit. The appellees by answer denied infringement and challenged the validity of the reissue. The court below was of the opinion that the reissue letters patent were invalid, first, because the application therefor was not timely made; and, second, because the reissue patent seemed to cover an entirely new invention, not disclosed by the original patent, and also held that the devices manufactured and used by the appellees did not infringe.

Reese H. Voorhees and H. W. Canfield, both of Spokane, Wash., for appellant.

Chandlee & Chandlee, of Washington, D. C., White & Randall, of Spokane, Wash., and C. E. Doyle, of Washington, D. C., for appellees.

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

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] We find it unnecessary to consider the question of infringement, for the reason that we are clearly of the opinion that the decree of the court below dismissing the bill should be sustained, on the ground of the appellant's laches in applying for the reissue letters patent. Between the date of the original patent and the application for the reissue 13 years intervened. In order to justify a reissue, it must clearly appear that the original patent was defective, and inoperative to protect the invention intended, that the defect and inoperativeness arose from inadvertence and mistake, and that the patentee has not, by lapse of time and laches, abandoned his right to have the correction made. The patentee of an invention dedicates to the public everything which he does not specifically claim. The public has the right to rely on the dedication, and when others manufacture and put into use a device which embodies that which has been so dedicated to public use, the

presumption is that they have done so in reliance upon the dedication, and the inventor is not permitted by reissue to withdraw his dedication, after it has been accepted and acted upon. It has been held that, in the absence of special circumstances, a reissue should not be granted after a delay of more than two years (Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783); and the rule is strictly applied in cases where, during the delay, others have taken out patents in the same art which would infringe the reissue (James v. Campbell, 104 U. S., 356, 26 L. Ed. 786; Moffitt v. Rogers, 106 U. S. 423, 1 Sup. Ct. 70, 27 L. Ed. 76).

The appellant contends that no lapse of time within the life of the patent bars an application for a reissue in a case where the application narrows the claims, rather than broadens them. It is true that some of the courts have intimated that lapse of time may be of small consequence on an application for reissue, where the original claim is too broad. But there is no room for the distinction in cases where, as here, other inventors, relying upon the state of the art, have patented new inventions and the same have gone into use. Said Judge Coxe in Carpenter Straw-Sewing Mach. Co. v. Searle (C. C.) 52 Fed. 809 (decision affirmed by the Circuit Court of Appeals 60 Fed. 82, 8 C. C. A. 476):

"If an inventor, holding a patent with a void claim, has slept upon his rights for years until other rights have become fixed, what possible difference can it make, upon principle, whether he invades those rights and secures an inequitable advantage by means of a broader claim or a narrower claim? The complainant here seeks to do by a narrower claim (assuming it to be narrower) precisely what other complainants have vainly sought to do by an expanded claim. It cannot be doubted that the attempt is as inadmissible in the one case as in the other."

See, also, Pelzer v. Meyberg (C. C.) 97 Fed. 969, and Hoskin v. Fisher, 125 U. S. 217, 8 Sup. Ct. 834, 31 L. Ed. 759.

Stone's original patent contained no description of means for delivering water into the core barrel from the rod, or means for discharging water from the top of the core barrel exteriorally to the rod. The first five claims broadly include "means," without specifying them. Thus claim 1 is:

"(1) In a drill of the character described, the combination with a rotatable hollow rod and a shell rigid therewith, a concentric inner core barrel, means for delivering water into the core barrel from the rod, and means for discharging water from the top of the core barrel exteriorally to the said rod."

When the appellant was confronted with the Douglass patent, which exhibited means for delivering and discharging water to and from the core drill, it dismissed its prior suit, and its assignor surrendered the patent, applied for the reissue patent, and changed the claims. In his oath forming part of the application, the inventor stated that he had no knowledge of the Douglass patent at the time when he made his invention and filed the original application, that he believed that he was the original and sole inventor of the return water principle in core drills, that the gist of those claims, and the real gist of his invention, was in the use of a return water connection "coupling" having its ports all self-contained.

The first five claims of the reissue patent were accordingly framed to set forth what was claimed to be the gist of the invention. Claim 1 is as follows:

"(1) In a core drill, the combination of a hollow drill rod, a core barrel shell, and a plug member at the upper end of the core barrel shell, a core barrel supported by the plug member within and spaced from the core barrel shell, water connections in the plug member for the downward passage of water from the drill rod to the space between the core barrel shell and the core barrel, and return water connections in the plug communicating with the top of the core barrel and having their outlets extending through the circumferential wall of the plug member to the exterior of the drill."

The language of these claims shows that the inventor now makes as the third element of the claims a special form of plug or hanger or coupling having self-contained passages for conveying water. There was no reference in the original specifications to the water passages as being contained wholly in a plug or coupling, and there was nothing in the original patent to indicate to the appellees herein or to the public generally that the inventor claimed any special device for discharging water into the core barrel from the rod, or for discharging water from the top of the core barrel exteriorally to the rod, or that any special mode of delivery or discharge of water was his invention, or that the claims were for other than well-known "means" for the use of water designed to co-operate with the other elements of the combination, which were the drill with a rotatable hollow rod and a shell rigid therewith and a concentric inner core barrel, so as to make an operative unit, for it was stated in the original specifications:

"It is necessary in all diamond core drill work, when the drill is in operation, to force a current of water to the bottom of the hole in order to wash away the cuttings and keep the diamonds cool."

The appellee Mitchell in the year 1914 purchased the Jenkins invention, for which letters patent subsequently issued on February 15, 1916, No. 1,172,140. In February, 1915, Mitchell caused careful examination to be made of the records of the Patent Office, and, relying on the facts thus ascertained, he manufactured a large number of core drills which are now said to infringe the appellant's patent. He also manufactured a large number of core drills under a patent to Gibeau, issued April 11, 1916, No. 1,179,173, but which he acquired after the reissue here in question. Said Judge Sanborn in Buffington's Iron Bldg. Co. v. Eustis, 65 Fed. 804, 13 C. C. A. 143:

"It would be rank injustice to permit a patentee, after a combination or device that he did not claim has gone into general use, and years after his patent was granted, to read that combination or device into one of the claims of his patent, and to recover for its infringement of every one who has used it on the faith of his solemn declaration that he did not claim it."

The mere fact that Stone at the time of making his original application for patent did not know of the existence of the Douglass patent, which had been issued 12 years prior thereto, is not sufficient to show proper diligence on his part in discovering the alleged inoperativeness of his patent. Had he examined the records of prior patents, he would

have seen that Douglass had claimed "means" for water supply not dissimilar to his own.

"The law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it. Not to improve such opportunity, under the stimulus of self-interest, with reasonable diligence, constitutes laches, which in equity disables the party who seeks to revive the right which he has allowed to lie unclaimed from enforcing it to the detriment of those who have in consequence been allowed to act as though it were abandoned." Ives v. Sargent, 119 U. S. 652, 661, 7 Sup. Ct. 436, 441 (30 L. Ed. 544).

The decree is affirmed.

MINERALS SEPARATION, Limited, et al. v. MIAMI COPPER CO.

(Circuit Court of Appeals, Third Circuit. December 9, 1920.)

No. 2605.

1. **Patents ⟸326(4)—Refusal to adjudge guilty of contempt is not appealable.**
An order refusing to adjudge defendant guilty of contempt for violating an injunction in an infringement suit is not appealable.

2. **Patents ⟸326(2)—Finding against contempt for alleged violation of infringement injunction held not abuse of discretion.**
Where the trial judge found that the modifications or changes made by the defendant in its processes since the injunction to restrain infringement of patent were not plainly mere colorable equivalents of the infringing process, it was not an abuse of discretion for him to refuse to adjudge the defendant guilty of contempt.

3. **Patents ⟸324(2)—Denial of leave to file supplemental bill not appealable.**
An order denying leave to file a supplemental bill after decree on the merits restraining infringement, which bill prayed relief against new processes charged to infringe, is not appealable.

4. **Patents ⟸310(10)—Supplemental injunction not issued against postinfringing processes.**
The practice of issuing a supplementary injunction on supplementary bill to restrain modified processes after the original process was found to infringe is not recognized; the proper procedure being to seek relief by attachment for contempt, by proceedings on accounting, or by original bill for new injunction.

5. **Patents ⟸324(5)—Denial of supplemental injunction reviewable only for abuse of discretion.**
Denial by the District Court of the supplementary injunction against modified practices which it was charged still infringed the patented processes, if made in the exercise of the court's discretion, because the modified processes did not infringe, is reviewable on appeal, under Court of Appeals Act, § 7 (Comp. St. § 1121), only for abuse of discretion.

6. **Patents ⟸317—Discretion is abused by denial of supplementary injunction only if facts or law are misconceived.**
The District Judge abuses his discretion, by denying a supplementary injunction against continued infringement by modified processes, only where his conception of the facts, or the law of the case, was wholly wrong.

7. **Patents ⟸317—Modified processes, after infringement, held not plain infringement.**
Modified processes of ore reduction, adopted after final decree restraining processes as an infringement on a patent, *held* not so clear an in-

fringement of the patented process as to warrant the extraordinary remedy of supplementary injunctive relief.

Appeal from the District Court of the United States for the District of Delaware; Hugh M. Morris, Judge.

Suit by the Minerals Separation, Limited, and another against the Miami Copper Company. From orders of the District Court, denying injunctive relief against modified operations charged to be infringements of the patents in the suit (268 Fed. 862), plaintiffs appeal. Affirmed.

Joseph C. Fraley, of Philadelphia, Pa., Lindley M. Garrison, Wm. Houston Kenyon, and Henry D. Williams, all of New York City, and Thomas F. Bayard, of Wilmington, Del., for appellants.

John F. Neary, of Wilmington, Del., and Maxwell Barus and Charles Neave, both of New York City, for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from two orders of the District Court which, (in the language of the appellants) "taken together," deny injunctive relief against modifications of operations by the appellee charged to be infringements of the patents in suit.

In order to find just what is before us on this appeal it becomes necessary first to determine whether the orders are appealable, and if so, to what extent.

On May 24, 1917, this court found that the three patents in suit were valid and were infringed by the three processes proved. 244 Fed. 752, 157 C. C. A. 200. After the mandate had gone down, an interlocutory decree was entered by the District Court, an injunction was issued, and an accounting begun. During the accounting—now in its third year—it was disclosed from time to time that the defendant had used since the injunction, and still is using, variations of a process of air-froth flotation, or rather, variations of apparatus by which it practiced such process, which the appellants claim were and are the equivalents of the processes or apparatus of processes found to constitute infringements. For relief against the subsequently developed processes (as we shall call them for convenience) the appellants (plaintiffs below) made many moves in the District Court. The ones pertinent to this appeal are the following:

On May 4, 1920, the plaintiffs filed a petition in the District Court and obtained an order to show cause why the defendant should not be adjudged guilty of contempt, or, in the alternative, why a further injunction should not issue restraining the defendant from practicing eleven processes, enumerated and described in the petition, which it had practiced since the filing of the decree. On July 23, 1920, the District Court dismissed the petition and vacated the order to show cause. Failing to stay the defendant in its alleged newly infringing practices by either remedy sought by their petition, the plaintiffs, on July 26, 1920, moved for leave to file a supplemental bill charging infringement by the same eleven processes mentioned in its dismissed petition and praying for injunctive relief both temporary and final.

By its order of August 11, 1920, the District Court, on an opinion previously filed, denied this motion also. Whereupon the plaintiffs below brought this appeal, assigning as error, generally and specifically, the court's order of July 23 whereby it refused supplementary injunctive relief under the plaintiffs' petition and also held that none of the defendant's modifications of procedure were of the character required to sustain a judgment for contempt. The only assignment of error we find bearing on the court's order of August 11 denying leave to file a supplemental bill is joined with an assignment charging error to the court in its refusal to grant injunctive relief prayed for by the petition, and is in the following form:

"The District Court erred * * * 19. In refusing injunctive relief in this suit against all or any of said modifications of procedure on the part of the defendant, by virtue of the aforesaid order entered July 23, 1920, as interpreted and supplemented by the opinion of the Court filed July 29, 1920, *and the order of the Court entered August 11, 1920.*"

[1, 2] On a record thus framed the plaintiffs brought and argued this appeal. The two orders, separately or "taken together," concern three acts of the District Court. The first was its dismissal of the contempt proceeding. Although error is specifically charged against the court for refusing to adjudge the defendant guilty of contempt, it was, of course, not seriously urged at the argument. Concededly such an order is not appealable. But to quiet this one of several phases of this intense controversy—without admitting for a moment that an appeal will lie from an order entered by a trial court in the exercise of its discretion in proceedings in contempt for the violation of an injunction against infringement—we find that, on this aspect of the petition, the learned trial judge did exercise a discretion, and, as he held "that the facts set up by the petition are not of the character required to sustain a judgment of contempt,"—meaning, evidently, that the modifications or changes made by the defendant since the injunction were not plainly mere colorable equivalents of the procedures found to infringe, —he did not abuse his discretion. He arrived at the same conclusion at which we should have arrived if we had been in his place.

[3] So also from the court's order denying leave to file a supplemental bill after decree on the merits praying relief against new practices charged to infringe we find no right of appeal. But in order again to quiet the controversy—without recognizing a procedure whereby the injunctive relief which the law affords a patentee is sought after decree by supplemental bill rather than by original bill—and with the purpose of making this decision as broad as the appellants have endeavored to make the appeal, we have examined the manner in which the trial judge exercised his discretion on this motion—the utmost that could be brought here for review were the matter appealable—and have found that the record discloses no evidence of abuse by the trial judge of his discretion in denying leave to file such a bill.

The only remaining matter before us on this appeal, therefore, is the error charged to the court for refusing injunctive relief as prayed by the petition against processes modified and practiced since the injunction was issued. Admittedly an injunction was refused (section

7, Court of Appeals Act [Comp. St. § 1121]), and in that sense the order is appealable. But this branch of the petition, stated in a few words, was made upon a right claimed by the plaintiffs to an expansion of the injunction and to relief against any and every newly employed process (to be immediately determined as it arises) which is charged to infringe the patent and which may violate the injunction, and was based on a procedure followed by the United States Circuit Court of Appeals for the Second Circuit. Crown Cork & Seal Co. v. Am. Cork Co., 211 Fed. 653; Green Co. v. Adams Co., 247 Fed. 486, 159 C. C. A. 539; Westinghouse v. Christensen (C. C.) 126 Fed. 764, 765. The learned trial judge in disposing of this branch of the petition, said:

"Nor do I find that the practice of enlarging an injunction or granting a supplementary injunction has been adopted in this circuit."

He then continued:

"But, be that as it may, in view of the nature of the new processes used by the defendant as charged by the petition, the questions raised thereby, and the decision of the Circuit Court of Appeals in this case, 244 Fed. 752, I am of opinion that the plaintiff must obtain the relief to which it is entitled, if any, touching the new processes, either through the proceedings now being had before the master and the decree to be entered thereon, or by a new bill, and not otherwise. Which of these procedures is the proper one under all the circumstances, or whether both must be resorted to, one as to some of the processes and the other as to the remaining processes, need not now be determined."

[4] From this language the appellants maintain that the trial judge did not pass on the question of relief against processes practiced by the defendant since the injunction and therefore exercised no discretion in denying a supplementary injunction necessary to protect the appellants against such infringements; but, regarding the procedure by supplementary injunction as one not recognized in this circuit, he disposed of the case summarily. What the trial judge did is clear. What moved him to do what he did is open to two constructions. If he denied supplementary injunctive relief against post-infringing practices because he found no such procedure in this circuit, we think he was right. There is no such procedure here; and, not being disposed presently to establish one, the remedies against infringements after decree are those which now prevail, namely, damages and profits on accounting, attachment for contempt, and original bill. In the last the patentee's right to injunctive relief is fully preserved to him.

[5] If the trial judge was moved to his decree denying plaintiff supplementary injunctive relief, not for want of a valid procedure, but in the exercise of his discretion, the plaintiffs' sole remaining complaint must be that in so doing he abused his discretion. Taking this construction of his action, it appears to us that the trial judge did exercise a discretion. Admittedly, he read and considered the affidavits appended to the petition, applicable alike to the support of both motions, one for attachment for contempt and the other for supplementary injunction, and on the showing of these affidavits he refused to adjudge the defendant guilty of contempt and did not find a case made for supplementary injunction, even though that practice prevail or should be

brought into existence in this circuit. This is plainly so, for in referring to his inability to find that the practice of enlarging an injunction or granting a supplementary injunction had been adopted in this circuit, he continued: "But, be that as it may" (by which we understand he meant—that without regard to whether the practice does or does not prevail in this circuit), he found "in view of the nature of the new processes used by the defendant as charged by the petition, the questions raised thereby, and the decision of the Circuit Court of Appeals in this case," that the plaintiffs must obtain the relief to which they are entitled through the proceedings before the master or by a new bill.

[6] Having studied and comprehended the affidavits in disposing of the prayer for attachment for contempt, as he had to do, the trial judge had fully in his mind all matters which the petition afforded in support of the prayer for a supplementary injunction. On this showing (including affidavits of three witnesses who had testified before the master, embracing the substance of their testimony, and an affidavit of one witness, yet to be called, embracing matters about which he proposes to testify), the trial judge evidently did exercise a discretion, resulting in the denial of the petition for supplementary injunction. But whether he did or not, and without regard to whether he was required so to do in the absence of appropriate procedure, we shall, in an endeavor to quiet another aspect of this controversy, assume that he did exercise a discretion required of him, and shall review his conduct with reference to the one matter over which this Court would in such case have authority, namely, to determine whether he abused his discretion in denying the relief of an expanded injunction. To this end we have read and carefully studied the entire record in the endeavor to ascertain whether the trial judge rendered his judgment upon a wholly wrong comprehension of the facts or the law of the case, and, whether, accordingly, he abused his discretion in this respect,—the only respect in which an appellate court will disturb such an order of a trial court denying injunction. M. Werk Co. v. Grosberg, 250 Fed. 968, 163 C. C. A. 218; Louisville & Nashville R. Co. v. Western Union Tel. Co., 207 Fed. 1, 124 C. C. A. 573 (C. C. A. 6th); Crescent Specialty Co. v. N. F. Co., 219 Fed. 131, 135 C. C. A. 28 (C. C. A. 6th); Welsbach Co. v. Cosmopolitan Incandescent Co., 104 Fed. 83, 85, 43 C. C. A. 418 (C. C. A. 7th); Duplex Co. v. Campbell, 69 Fed. 252, 16 C. C. A. 220 (C. C. A. 6th); Rahley v. Columbia Phonograph Co., 122 Fed. 623, 625, 58 C. C. A. 639 (C. C. A. 4th).

Did the trial judge improvidently exercise his discretion, or did he exercise it upon a wholly erroneous conception of the facts or the law? The law of the case is that announced by this court in its decree. 244 Fed. 752, 157 C. C. A. 200. The facts, applicable to that law, consist of those recited in the affidavits and only those there properly pleaded.

[7] We shall not restate the law of the case but shall address ourselves solely to the new facts. These embody at least eleven new procedures or modifications of procedures charged to be infringements because equivalents of the infringements found by this court in its decree. The processes decreed to be infringements were made up of

several steps in which it was found, speaking most generally, that infringements were completed before the pulp had reached the Callow cells. In none of the eleven modified processes, again speaking generally, is there a centrifugal pump, or a "break in the circuit," or a Pachuca tank, means, or steps held potential in the infringements found. In the later modified procedures Callow cells are employed, exclusive of and inclusive with other means, in some instances with no prior agitation, in other instances with prior agitation without aeration, in still other instances with prior agitation and aeration, indicating agitation in degrees varying as greatly as the adjectives used in describing it; but whether in any of them there is agitation of the kind, in the degree, and for the duration contemplated by the patent is not so clear and unclouded as to make the newly alleged infringing procedures free from doubt and to warrant the extraordinary remedy of supplementary injunctive relief. Brush Electric Co. v. Electric Storage Battery Co. (C. C.) 64 Fed. 775, 776. Unless such clearly appears we cannot say that the trial judge misconceived the facts, and, unless he misconceived the facts, we cannot hold that he abused his discretion. National Metal Molding Co. v. Tubular Woven Wire Co., 239 Fed. 907, 908, 153 C. C. A. 35.

Stress has been laid on a reference made by the learned trial judge to embarrassment because of his lack of familiarity with the facts of the case due to his coming into the case after it had gone to an accounting. To allay any unrest that might arise from this situation and to avoid the appearance of affirming the court's decree upon the negative quality of a finding that we discern no error in its order, we go farther and say, that, having made the law of the case we are presumed to know what it is, and that, applying the law to the facts, which on the defendant's motion to dismiss are regarded most favorable to the plaintiffs, we would have made the same disposition of the case had we been sitting in the District Court when the application for a supplementary injunction was made.

We are of opinion therefore that the order or orders of the District Court should be affirmed and that the case be proceeded with expeditiously and in a manner consistent with the law.

HILL RUBBER HEEL CO. v. I. T. S. RUBBER CO.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1920.)

No. 3410.

Patents ⇐328—Reissue 14,049, for rubber heel, valid and infringed.

The Tufford reissue patent, No. 14,049, for a rubber heel, *held* valid and infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit in equity by the I. T. S. Rubber Company against the Hill Rubber Heel Company. From an order granting a preliminary injunction, defendant appeals. Affirmed.

A. J. Hudson, of Cleveland, Ohio (Thurston, Kwis & Hudson, of Cleveland, Ohio, and John E. Bruce, of Cincinnati, Ohio, on the brief), for appellant.

F. O. Richey, of Elyria, Ohio (Chas. A. Brown, of Chicago, Ill., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. This case turns upon the question of infringement of the same Tufford patent (reissue No. 14,049, January 11, 1916) which we have considered in Fetzer v. I. T. S. Co., 260 Fed. 939, 171 C. C. A. 581, U. S. Rubber Co. v. I. T. S. Co., 260 Fed. 947, 171 C. C. A. 589, Elyria Co. v. I. T. S. Co. (C. C. A.) 263 Fed. 979, and Tee Pee Co. v. I. T. S. Co. (July 15, 1920) 268 Fed. 250. The rubber heel made by the Hill Company, the defendant below, was held to infringe, a preliminary injunction was ordered, and the Hill Company appeals.

Both sides argue forcefully some of the questions of validity and construction which we have considered in the other cases, but we do not find sufficient occasion to modify any of the conclusions formerly reached. We think the court below was right in classifying the defendant's heel with those of the United States Rubber Company, rather than those of the Tee Pee Company. This case illustrates a situation frequently arising:

Convinced that the patentee has made a useful advance, the court sustains the patent. Though it is compelled to distinguish from the prior art by a narrow line of difference, it is satisfied that the patentee's form is a safe distance beyond the line. Then come other forms, which get nearer to the prior art, while still retaining at least part of the distinctive merit of the invention, and it soon becomes apparent that there is no conclusive and thoroughly satisfactory criterion by which some of these forms can be arranged with reference to the division line. The court can only approximate certainty, and determine the issue according to what seem to the court to be the dominant elements of resemblance or difference. In the present case, this becomes especially difficult, because defendant has made only heels which are so small in size that no characteristics of shape are as prominent or as clear as they would be in larger sizes. The upper surface looks to be "saucer-shaped"; such effective measurements as can be made do not dispute this inference, but tend to confirm it; and there certainly is no distinct or sure falling away of the surface, or descending line from the center of attachment to the center of the breast, such as we have found does exist in the Tee Pee heels. Under the facts as we view them, we must resolve the doubt against the defendant.

Defendant also claims immunity because it uses an imbedded plate, said to be like Nerger. We have so far declined to let our finding of invention by Tufford rest on the absence of Nerger's plate; no more can the presence of a plate (which does not prevent the edge sealing) negative infringement.

The order appealed from is affirmed.

BONNIE-B CO., Inc., v. GIGUET et al.

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

1. Patents ⇐313—Invalidity must be obvious to warrant dismissal of bill.
Bill for infringement of a patent cannot be dismissed on motion, because the patent is invalid on its face, unless the invalidity is obvious and the question is not fairly arguable.

2. Patents ⇐35—Commercial success may show patentability of simple article.
The patentability of an article is frequently more difficult to determine when the invention claimed is simple, and in such cases invention is often found by the aid of commercial utility in resolving the doubt as to patentability.

3. Patents ⇐328—1,293,221, for veil, held not obviously invalid on its face.
The Silverberg patent, No. 1,293,221, for a veil adapted for use as both a face and hair or hat covering, *held* not so obviously invalid on its face as to warrant dismissal of a suit for infringement on that ground, in view of the commercial success of the article, even though its validity would be too doubtful to warrant a preliminary injunction.

4. Patents ⇐313—Motion to dismiss does not raise question of infringement.
A motion to dismiss a bill for infringement of a patent, because the patent is invalid on its face, does not bring up questions of infringement, so as to authorize a determination of whether defendants are contributory infringers.

5. Patents ⇐316—Circulars warning trade against infringement held too broad.
Circulars by patentee, warning the trade against infringement, which warned against selling a veil with an elastic cord, or one similar to complainant's veil, are too broad, where the patent was limited to a specific position of the elastic cord.

6. Patents ⇐316—Patentee cannot be enjoined from circularizing the trade.
Defendants in a suit for infringement of a patent cannot have the complainant enjoined from sending to the trade circulars warning against infringement, which are limited to the claims of the patent, since that is clearly within the plaintiff's rights, and defendants have the right to counter circularize the trade.

In Equity. Suit by the Bonnie-B Company, Incorporated, against Julien Giguet and another, for infringement of a patent. On rehearing and reargument on motion to dismiss the bill. Motion denied.
See, also, 269 Fed. 275.

Steuart & Perry, of New York City (James L. Steuart and Sidney R. Perry, both of New York City, of counsel), for plaintiff.
Gerard B. Townsend, of New York City (Rogers, Kennedy & Campbell, of New York City, of counsel), for defendant Giguet.
Davies, Auerbach & Cornell, of New York City (Warner B. Matteson and Martin A. Schenck, both of New York City, of counsel), for defendant F. W. Woolworth Co.

MAYER, District Judge. "My invention" states the patentee, "relates to a veil adapted to be used by women to cover the face, or face and front hair, or face and hat, as the purpose of use may require." The patentee further states:

"I am aware that hair nets of textile material and provided with a circuitous elastic cord substantially like the veil described by me have been used to confine the hair at the back of the head or on the top thereof; but I believe that I am the first to suggest the use of such nets as a veil is used over the face and head in position beneath the chin, and over the front part of the head or hat, as the case may be, for the dual purpose of protecting or ornamenting the face of the wearer, or for any other purpose for which a veil may be worn, and at the same time confining the front hair and holding the hat or other head covering in position. I therefore do not claim such netting with elastic confinement broadly for any purpose, but I have limited my claim to the use of said article as a veil, and for the specific purpose and uses stated; that is to say, as a veil with the dual purpose of covering the face, or face and head covering, and securing the same under the chin of the wearer and over the head or head covering, as the case may require."

The single claim of the patent is:

"A veil for the purposes described, comprising a piece of open mesh fabric of a size to cover the face and head of the wearer, provided around its entire outer edge with an elastic cord secured thereto, whereby said veil is retained in proper position in use, solely by said elastic cord."

[1] The general principles governing the dismissal of bills for patent infringement, where the patent is invalid on its face, are sufficiently familiar not to require elaborate restatement. Richards v. Chase Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; Fowler v. City of New York et al., 121 Fed. 747, 58 C. C. A. 113; Kuhn et al. v. Lock-Stub Check Co., 165 Fed. 445, 91 C. C. A. 389; Fernald v. Oneida Nat. Chuck Co. (C. C.) 167 Fed. 559, affirmed Fernard v. Oneida Nat. Chuck Co., 174 Fed. 1020, 98 C. C. A. 664; Mallinson et al. v. Ryan (D. C.) 242 Fed. 951; Bayley & Sons v. Blumberg, 254 Fed. 696, 166 C. C. A. 194. For such a motion to prevail, the invalidity must be obvious and the question must not be fairly arguable. Where there is a really debatable pro and con, the motion must be denied.

[2] It is the experience of the courts that some of the most troublesome cases in which to determine whether invention resides in the patent are those which involve the simplest expedients. The reason is that the more easily a patent is understood the more difficult it is to relate the mind back to the state of the art as it existed at the time of invention. Thus it happens that invention is often found by the aid of commercial utility in resolving the doubt as to patentability, or by the fact, inter alia, that an article of manufacture long known is so rearranged as to be adapted to an entirely new use, which no one disclosed up to the time in question.

[3] In the case at bar, it is conceded that hair nets and veils were very old, and whether what Silverberg did was invention would be entirely too doubtful, for instance, to warrant the granting of a motion for preliminary injunction; yet the fact that the structure differs, even though slightly, from the prior art, and the further fact that the device met with marked success at the outset and has attained pronounced commercial utility, are sufficient to deter the court from dismissing the bill without that further light which a trial will disclose. Chinnock v. Paterson P. & S. Tel. Co., 112 Fed. 531, 50 C. C. A. 384; Merwin on Patents, p. 351.

[4] The question as to whether or not defendants are contributory infringers is not now here for consideration. The motion to dismiss is to be determined solely from the face of the patent and does not at this time bring up questions of infringement. Plaintiff has sued promptly. It has not circularized the trade, while itself not running the risk of litigation; but, by commencing suit in a court of competent jurisdiction, plaintiff has proceeded with due expedition to test and enforce what it claims are its rights.

[5] Defendants also seek to enjoin plaintiff from notifying the trade as to alleged infringement by means of a circular which it is urged is objectionable. As these circulars or notices are widely distributed to a trade probably not familiar with patent technique, careful analysis indicates that the language may be too broad. The phrase "sell a veil with an elastic cord" is not sufficiently limited, and may inadvertently lead to misunderstanding; and the statement, "According to the patent any one selling * * * a veil similar to the Bonnie-B veil is liable to suit for infringement," might convey to the uninformed the meaning that the patent per se provided that a person selling a similar veil was liable to suit.

These parts or postscript of the circular should be changed, so as to read in substance:

"P. S.—The U. S. Patent Office, Washington, D. C., has granted U. S. Patent No. 1,293,221 on our Bonnie-B veil. This patent is for a veil comprising a piece of open mesh fabric of a size to cover the face and head of the wearer, provided around its entire outer edge with an elastic cord secured thereto, whereby said veil is retained in proper position in use solely by said elastic cord. * * * By virtue of the rights we claim under the patent, we hereby give notice that any one selling or offering for sale, a veil similar to the Bonnie-B veil is liable to suit for infringement."

[6] If the circular shall be amended in substance, as suggested, the motion to enjoin will be denied, for the reason that plaintiff will then be clearly within its rights, and defendants always have the right to counter circularize the trade.

Defendants assert most earnestly that delay over the summer will seriously injure their trade, for which injury, if ultimately successful, they will be without remedy. I have repeatedly pointed out that usually cases involving garment wear should be speedily disposed of, because, often, the vogue is temporary, and ordinarily I should set the case for trial at an early date; but, owing to approaching vacation, any application to advance the cause should be made to the judge holding equity trials, who will be more familiar with the calendar status and with the propriety and possibility of advancing the trial.

Motion denied. Submit order on two days' notice.

BONNIE-B CO., Inc., v. GIGUET et al.

(District Court, S. D. New York. November 6, 1919.)

1. **Patents ⇐328—1,293,221, for veil with elastic cord, held not to disclose invention.**
   The Silverberg patent, No. 1,293,221, for a veil with elastic cord around the outer edge, to be used as a covering both for the face and hair, or hat, which was merely a change of use of a hair net well known to the trade, is invalid for want of invention.

2. **Patents ⇐328—1,293,221, for veil with elastic cord, invalid by reason of prior use.**
   Evidence establishing the three instances of prior use relied on by defendant beyond a reasonable doubt *held* sufficient to show the invalidity of the Silverberg patent, No. 1,293,221, for a veil adapted for use as a face and head covering, even if that patent were not void for want of invention.

3. **Patents ⇐35—Commercial utility alone does not establish invention in article of wear.**
   Commercial utility is available only when there is doubt as to the patentability of an article, and cannot alone establish patentability, especially when the subject-matter of the patent is an article of wear.

In Equity. Suit by the Bonnie-B Company, Incorporated, against Julien Giguet and another, for infringement of a patent. On final hearing. Decree ordered dismissing the bill.

Decree affirmed 269 Fed. 1021. See, also, 269 Fed. 272.

Steuart & Perry, of New York City, for plaintiff.

Donald Campbell, of New York City, for defendants.

MAYER, District Judge. This controversy could be briefly disposed of, so far as its merits are concerned, were it not for the fact that, the litigation having been so earnestly contested, it seems proper to state the reasons leading to the conclusions of the court; besides, the veil under consideration has had a large commercial success, and the result of this suit is evidently of some financial importance to the parties.

"My invention," the patentee states, "relates to a veil adapted to be used by women to cover the face, or face and front hair, or face and hat, as the purpose of use may require." There is but a single claim, which reads as follows:

"A veil for the purposes described, comprising a piece of open mesh fabric of size to cover the face and head of the wearer, provided around its entire outer edge with an elastic cord secured thereto, whereby said veil is retained in proper position in use, solely by said elastic cord."

The patentee contends that he has taken an article old in the art and adapted it to a new use, which necessarily was so unusual as to amount to invention.

[1] Plaintiff was an importer of elastic edge hair nets, which were imported as nets, and frequently in envelopes designating them as hair nets. These articles, prior to his alleged invention, were, accord-

ing to his contention, used solely as nets for women's hair. Plaintiff asserts that he conceived the idea of utilizing them both as a hair net and a veil, and that this was possible by reason of the elastic cord round the entire outer edge, whereby the veil was retained in position in such manner as to act successfully as a veil.

The evidence shows that there was no change whatever in the structure of the article, and that on the question of invention plaintiff must succeed or fail on the doctrine of the new use.

Hair nets and veils apparently have long been sold from the same counters in the notion departments of stores which, among other things, deal in women's wear. Nowhere in the patent law does there seem to be a case where there was a new use in the same art without the slightest change of structure.

It seems unnecessary to set forth in any elaborate way the reasons why the patent fails to disclose invention, even if Silverberg did all he claims to have done, and even if this was a case of first impression.

It has often been pointed out that there is no accurate definition for invention, and that what is or is not invention largely depends upon the eyes and mind of the court having the subject-matter under consideration, and, of course, taking into account the prior art. Even if Silverberg applied an elastic to a hair net or veil material, and then put the structure to use in the manner claimed by his patent, it is difficult to see how such a procedure would amount to invention. The art does not leave much room for invention, as is shown by Schirmer, No. 316,575, Garst, No. 336,712, and Miller, No. 1,028,826.

[2] The case might be disposed of by holding that there was no invention; but, even if the court by such a decision would err, the testimony as to prior use is convincing beyond a reasonable doubt.

Mr. Viret impressed me as a thoroughly truthful man, and his testimony was buttressed by about as complete a series of facts and production of papers and documents as are found in a prior use defense.

We may pass by the Giguet prior use of 1914, and there still remain other uses concerning which there seems to be no question. I think the Carson, Pirie, Scott & Co. use is well proved, as are the so-called Giguet uses. However, if, in the mind of the most critical person, there remained any doubt as to these uses, there nevertheless could not be any doubt as to the sales to the Woolworth Company in March and April of 1916, and the sale by the Woolworth Company to the public. Each step of these transactions was proved by credible witnesses. There is no occasion to doubt the testimony of Viret, of defendant company, and of Faunce, of the Woolworth Company. The testimony of Miss Smith, Miss Horton, and Miss Armstrong was clear and convincing, and the accurate business and recording methods of the Woolworth Company made it possible to produce corroborating documentary proof. While the Woolworth Company is a party defendant, the testimony of the women above referred to was that of really disinterested witnesses.

In brief, the defendant has fully established all its prior use defenses to my satisfaction—a very strong position when one would have been enough.

[3] There is no necessity of reviewing the testimony of the witnesses in detail. It is very simply and clearly exposed in the record. From any point of view, therefore, the conclusion is irresistible that the patent is void, both inherently for lack of invention, and because of the proved prior public use. Indeed, from my point of view, there is nothing in the case, except the argument which flows from large commercial utility. Of course, it is fundamental that commercial utility is available only when a doubt as to patentability arises, but, in any event, as I have had occasion to point out heretofore, commercial success must be approached with caution when the subject-matter is an article of wear. Epstein v. Dryfoos (D. C.) 229 Fed. 756.

Defendant may have a decree dismissing the bill, with costs.

NEW YORK & QUEENS GAS CO. v. NEWTON, Atty. Gen., et al.

(District Court, S. D. New York. December 13, 1920.)

No. 16-44.

1. **Gas ⊜14(1)—In suit to enjoin rate as confiscatory, court cannot fix rate.**
The courts are not rate-making bodies, and in a suit by a gas company to enjoin as confiscatory a rate fixed by statute, questions which might be pertinent where it was sought to fix a rate may prove academic; the only question being whether the rate fixed by statute was in fact confiscatory.

2. **Gas ⊜14(1)—Single year sufficient basis for calculation of cost of production.**
The cost of producing gas for a single year preceding the filing of a suit to enjoin, under then existing conditions, enforcement of a statutory rate as confiscatory is a sufficient basis for the cost of production, and a rate base for the future long enough to call for judicial action.

3. **Evidence ⊜354(18)—Books of gas company, seeking to enjoin as confiscatory statutory rate, admissible.**
Where defendants, members of a Public Service Commission, had full facility to examine and test the accuracy of the books of a gas company, seeking to enjoin as confiscatory the statutory rate, such books were admissible in evidence, as common-law proof of each of the items would be a practical denial of justice.

4. **Gas ⊜14(1)—Cost of defensive emergency service should be excluded, in computing cost of gas production.**
In a suit to enjoin the enforcement of Laws N. Y. 1906, c. 125, prohibiting the charging of more than $1 per thousand feet for gas, the cost of defensive emergency service maintained by the complainant gas company should be disregarded in ascertaining whether the rate was confiscatory.

5. **Gas ⊜14(1)—Expenses of litigation should be excluded in ascertaining whether rate was confiscatory.**
In a suit to enjoin the enforcement of Laws N. Y. 1906, c. 125, on the ground the maximum rate of $1 was confiscatory, expenses of the injunction suit should be excluded.

6. **Gas ⊜14(1)—Interest on unpaid taxes should be excluded in suit to enjoin statutory rate as confiscatory.**
In a suit to enjoin the enforcement of Laws N. Y. 1906, c. 125, fixing a maximum rate of $1 on the ground that it was confiscatory, interest on unpaid taxes should be excluded in ascertaining the cost of the gas as that was not the proper charge under the head of distribution.

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7. Gas ⟸14(1)—Federal tax on bondholders' income should not be considered, in determining whether rate was confiscatory.

Where a statutory gas rate was attacked as confiscatory, the federal tax on the income of the holders of the gas company's bonds should not be charged as part of the expense of distribution or production.

8. Gas ⟸14(1)—That municipality was entitled to receive gas at lesser rate does not make rate to individuals confiscatory.

In a suit to enjoin the enforcement of Laws N. Y. 1906, c. 125, fixing the maximum rate for gas at $1 per 1,000 feet, on the ground that the rate was confiscatory, the fact that the city of New York was entitled to receive gas at the rate of 75 cents per 1,000 cannot be considered in determining whether the rate to private consumers was confiscatory.

9. Gas ⟸14(1)—Rate fixed by statute held confiscatory.

The maximum rate of $1 per 1,000 fixed by Laws N. Y. 1906, c. 125, for gas, *held*, in view of the cost of production and distribution (viz. $1.0129), confiscatory, so that the enforcement of the statute should be enjoined.

10. Courts ⟸92—Expressions of opinions on questions beyond requirements of case are dicta.

In a suit to enjoin as confiscatory a statute fixing a maximum gas rate, where the evidence established that the net cost of production and distribution made the rate confiscatory, expressions by the court as to the rate base or theories in respect thereof or disputed questions not involved in ascertaining the net cost of production and distribution, or as to any questions which go beyond the requirements for determination of the only question involved are dicta, and amount merely to the court's expression of opinion.

In Equity. Suit by the New York & Queens Gas Company against Charles D. Newton, as Attorney General of the State of New York, Denis O'Leary, as District Attorney of the County of Queens, and Lewis Nixon, constituting the Public Service Commission for the First District. On motion by complainant for permanent injunction on the report and opinion of the special master, to which each of the parties had filed exceptions. Injunction granted.

The opinion of Abraham S. Gilbert, as special master, is as follows:

The complainant New York & Queens Gas Company is engaged in the business of manufacturing gas in that part of New York City known as Flushing. It delivers gas to consumers in the Third ward of the borough of Queens in the city of New York. By statute it is required to furnish gas to its private consumers at a price not exceeding $1 per 1,000 cubic feet. It is also required by statute to furnish gas to the municipality at a price not exceeding 75 cents per 1,000 cubic feet.

In this action the complainant company attacks the constitutionality of the statute which limits its charges to private consumers to the sum of $1 per 1,000 cubic feet, upon the ground that such statute is confiscatory of its property. The complainant contends that it does now and has for some time past cost more than $1 per 1,000 cubic feet to make, distribute, and deliver the gas to its consumers. If that claim is sustained by the evidence in this case, the value of the property used in the manufacture and distribution of the gas is of only secondary importance. The question involved in this case is not what rate ought to be authorized by statute, or by order of the defendant Public Service Commission, had no statutory limitation been imposed, but whether the maximum rate now permitted by statute is confiscatory.

Necessary Elements in Complainant's Operating Costs.—It is conceded at the outset that, in order to make gas, it is necessary to have coal, oil, and other incidental manufacturing material and the labor necessary to make and distribute the gas. It is also conceded that, in the operation of a gas plant, repairs are required which call for repair material and repair labor. In or-

der to determine the cost of making and distributing gas, it becomes important to find out how much of the various materials is actually and reasonably used in the manufacture of gas and the reasonable cost of that material; the amount of labor required in the manufacture of gas, and the reasonable cost of that labor; the amount of repairs required, on the average, and the amount of material and labor required for that purpose, and the reasonable cost thereof: and the reasonable expenses of managing the business, delivering the gas to the consumers, and collecting the moneys payable therefor, including the necessary clerical hire, the pay of meter readers, indexers, and bill clerks, the executive salaries, and the like.

Scope of the Complainant's Proofs.—For the purpose of proving the quantity and cost of materials, labor, and the like, as well as the revenues and expenses of its gas business, the complainant company presented to me, as previously to the accountants and experts of the defendants, all of its invoices and vouchers for coal, oil, and other materials and supplies purchased, together with its various pay rolls, works reports, records of manufacture, office reports, and the like, together with its books of account, in which the items of expenditure and revenue shown by these underlying records had been entered. All of this data covered the year 1919 and the first five months of the year 1920. To the invoices for coal, oil, and other materials were attached the certificates evidencing the receipt of the quantities indicated, and to the oil invoices were also attached the certificates of the New York Produce Exchange inspectors, attesting the quantity and quality of the oil delivered. The public accountants employed by the complainant had checked these vouchers and records to the books and certified to the accuracy of both. There was also submitted to me the sworn testimony of qualified witnesses as to the actual cost of oil, coal, and other materials from 1906 down to the present time, including the years 1919 and 1920, and the sworn testimony of experienced operating engineers as to the quantities of coal, oil, and other materials, and of the labor, actually required for the manufacture of gas, and the wages necessarily paid to labor during this period, including 1919 and the first five months of 1920.

The defendants also offered in evidence data showing the operating results, the unit quantities of materials used, the unit costs thereof, and other information as to the revenues and expenses of the complainant company during the years from 1906 to 1920. Various of the underlying records of 1918 and prior years were also produced in court at the instance of the defendants, and various of the entries in the books of the complainant and its predecessor company were placed in evidence by the defendants.

Increased Sales and Increased Costs.—The evidence before me is practically without dispute that since the 1st of January, 1920, labor cost has considerably increased over the year 1919, and that material cost has considerably increased over the year 1919. On the other hand, the vice president and operating manager of the complainant, Mr. Spear, stated on one of the closing days of the trial that in his judgment the sales of the complainant company during 1920 will be about 15 per cent. in excess of the sales during 1919. In my opinion, a finding to this effect is justified and required by all the evidence, although counsel for the complainant points out that from 1918 to 1919 the increase in sales was only 2.6 per cent., and that the average increase during the past five years has been only 7.02 per cent.

An increase of 15 per cent. in the volume of sales will, in my judgment, necessarily tend to reduce the cost, in terms of cents per 1,000 cubic feet of gas sold, of certain of the items classified as distribution costs, particularly in the category of commercial and general office expenses. Any such decrease in the unit cost of these commercial expenses (in the meter-reading, bookkeeping, and billing departments, for example) will probably prove less than would otherwise be the case, by reason of the fact that the company's present office force is small, and is compelled to work on an overtime basis to look after the present volume of sales, and additional staff may be required for increased sales; but, as fairly as I can figure it, increased sales of 15 per cent. over 1919 would ordinarily make a difference of about 4 cents per 1,000 cubic feet, in the distributing cost of the gas sold by the complainant.

Any such saving in the unit expenses of the general office and commercial departments will, however, be at least absorbed by the increased cost of gas manufacture and the increased cost of the labor and material entering into the work of distribution, so that the net effect on the unit distribution costs as they now appear for 1920 will be that, despite the prospective increase in sales the gas as delivered to the consumer, including the commercial expenses, does and will cost considerably more per 1,000 cubic feet than in 1919 or early 1920.

1920 Costs Higher Than Those of 1919.—If, therefore, the actual results of operations for the year 1919 show the rate to be confiscatory, it follows that the net result of operations for the year 1920, which can only be determined in definite figures when the year has ended and the books for 1920 have been closed. will show a larger deficiency than appeared as the result of operations in the year 1919. I have therefore concluded to base my findings as to the cost of making and distributing gas especially upon the operations and costs established for the year 1919, those figures being taken, of course, in the light of what I have just said, that the cost of making and distributing gas in the year 1920 will be in excess of the figures I reach for the year 1919.

Details of 1919 Costs as Shown by the Company's Books.—The books of account, vouchers, manufacturing records, works reports, and the like of the complainant company were placed at the disposal of the defendants, more than six months in advance of the beginning of the trial before me, along with copies of the principal statistical exhibits which the complainant proposed to offer in evidence upon the trial, and were carefully and thoroughly examined and analyzed by counsel for the defendants, their accountants, and engineers. These operating records show that in the year 1919 the actual cost of the gas made at the complainant's works was 63.45 cents per 1,000 cubic feet of gas made, and that the loss in volume, based upon the quantity of gas metered at the consumers' premises, to which I shall presently refer in discussion of this so-called "unaccounted-for gas," was 11.03 per cent. of the gas made. On that basis, the complainant's actual cost of making gas in the year 1919 was 71.73 cents per 1,000 cubic feet of gas sold. The actual distribution expenses, including the commercial expenses (and including also an item of 0.22 cents for defensive emergency service still required in 1919, and 4.62 cents on account of the expenses of the present suit in equity, totaling 4.84 cents, both of which items it is my judgment that I ought to disregard for the purposes of my present inquiry, for reasons hereinafter indicated), aggregated 32 cents per 1,000 cubic feet sold; renewals and replacements, 3 cents per 1,000 cubic feet sold; taxes and interest thereon, 7.07 cents per 1,000 cubic feet sold, making a total actual cost of $1.138 per 1,000 cubic feet of gas sold. The complainant's income from the sale of gas in 1919, according to these same books and records, was 99.51 cents per 1,000 cubic feet, showing a deficiency below actual cost of 14.29 cents per 1,000 cubic feet of gas sold. As against this deficiency, however, the complainant company credits the account with the profit made on its sale of gas appliances, the moneys received as rental of such appliances, and certain interest items, aggregating 6.75 cents per 1,000 cubic feet of gas sold, leaving a net deficiency during the year 1919 of 7.54 cents per 1,000 cubic feet of gas sold, or, in money, the sum of $25,340.89.

The Uniform System of Accounts.—It becomes important, therefore, to determine whether these figures appearing in the books and records of the complainant company have been sustained and confirmed by the proofs submitted in the present record, and whether any of the items of expenditure shown in the accounts should be disregarded by me in determining whether the statutory rate was and is confiscatory.

The books and accounts of the complainant company, like the accounts of all other gas companies in the city of New York since the year 1908, have been kept under the jurisdiction of the defendant Public Service Commission of the state of New York for the First district. The Public Service Commission has prescribed a uniform system of accounts, which is observed by the complainant company, and possesses authority to examine the complainant's books and records at all times, and require changes in the accounts, if deemed advisable.

The powers and duties of the defendant commission are set forth in full in the statute known as the Public Service Commissions Law, and it is unnecessary, I think, for me to dwell at length upon the provisions of that statute at this point.

Unit Quantities of Materials and Labor.—The first question to determine is whether the quantities used by the complainant company, as they appear from the books and records of the company, are correct and set forth a reasonable and necessary use of materials and of labor, or whether there has been a waste of gas-making material and unnecessary use of labor forces, and the books do not accurately reflect the quantities actually needed and used. I have analyzed these figures in the light of the defendants' proofs, and also of the sworn testimony given by Mr. Woods, an operating engineer of wide experience produced by the complainant company, whose testimony has not been directly attacked or contradicted by any witness. Except for some minor variances, when contrasted with the 1919 operating results, such as his estimate of "unaccounted-for" gas at 10 per cent. (the record for 1919 shows 11.03 per cent.), his slight underestimate of the required boiler fuel, and the slight difference as to the figures given by him for the gas oil required, it may be said that the results shown in the operating records closely accord with the sworn expert opinion of Mr. Woods, and are confirmed by his judgment as to the results which might reasonably be looked for and secured.

Complainant's Records Accurately Kept and Reflect Efficient Results.—As to some items, the complainant company in 1919 did a little better than Mr. Woods said he would expect to find its operating staff doing under average operations as of the present time. As to gas oil, Mr. Woods' estimate was the average use of 4.2 gallons per 1,000 cubic feet; the operating results showed an actual use of 4.19 gallons in 1919 and of 4.26 gallons in 1918. As I have already indicated, Mr. Woods thought that the "unaccounted-for" gas would ordinarily not exceed 10 per cent.; whereas, the operating records showed an actual unaccounted for in 1919 of 11.03 per cent., which seems to me a reasonable figure, having in mind all present conditions. On the whole, I am convinced that the operating records of the complainant company have been honestly and accurately kept, and accurately reflect actual, efficient, and reasonable operating results. In arriving at a conclusion, therefore, in this case, I have accepted the actual operating results for the year 1919 as they appear from the books of the complainant company, showing the cost of manufacture to be 63.45 cents per 1,000 cubic feet of gas made.

The Volume of "Unaccounted-for" Gas.—The question of the so-called "unaccounted-for" gas becomes important, in order to determine the cost of the gas actually supplied to consumers. It is conceded that there is an unavoidable loss in gas volume, known in the art as "unaccounted-for" gas. The fact that in any year, in order to deliver a certain number of million cubic feet of gas to consumers, a larger quantity of gas has to be made and sent out than is ever metered on the consumers' premises, is one of the factors affecting and determining the cost per 1,000 cubic feet of the gas delivered to the consumers. Counsel for the defendants contend that the "unaccounted-for" gas of the complainant in the year 1919 was greater than in prior years. That appears to be the fact. I am asked by counsel for the defendants to find that this increase in the "unaccounted-for" gas during the year 1919 has not been explained by the complainant. I am unable to make such a finding, because there is ample evidence in the case indicating that it is practically impossible to regulate the amount of "unaccounted-for" gas, and that factors were operative in 1919 which tended to increase the percentage. Weather and other conditions affect the gas in such manner and form that it is impossible to say that "unaccounted-for" gas should be kept below a certain percentage. Some years it seems to run very high, and in other years it seems to run quite low. This variance is caused by a number of changing conditions. I feel that I am compelled, in considering the operating results of the complainant company, to accept the actual conditions as I find them during the year 1919, and to accept the "unaccounted-for" gas at the figure of 11.03 per cent., which was the exact amount of such loss in volume during that year. In this connection, of course, it should be borne in mind that in 1920, or in some subsequent year,

this percentage may be lessened, so that the actual cost of making the gas in such year, if based upon the rates of pay for labor and the prices of materials prevailing in 1919, might be somewhat less than the figures now shown for 1919. But here, again, it should be noted that, although there may be a reduction in the percentage of "unaccounted-for" gas, whatever reduction may take place from such a cause will be more than absorbed and offset by the increased cost of materials and of labor. Upon the basis of 11.03 per cent. of "unaccounted-for" gas, the complainant's actual cost of manufacture during the year 1919 was 71.73 cents per 1,000 cubic feet of gas sold.

The Cost of Distribution.—This brings me to the cost of distribution and other expenses, including the commercial expense. The defendants challenge only four of the items included in this general item of "distribution and other expenses." They ask me to strike out from the 1919 outlays the item of $747.46 for "defensive emergency service"; the item of $15,518.73, representing the charges made in 1919 on account of the expenses of the present rate suit; interest on insurance, amounting to $57.58; and increased fire insurance, $477.30. I cannot agree with counsel for the defendants in their claim that I ought to eliminate the item "interest on insurance, $57.58" and the item "increase in fire insurance, $477.30."

Eliminated Items.—I do, however, agree with counsel for the defendants that, for the purposes of the test I am required to make in this case, I should eliminate the amount charged in 1919 to the account of the present rate case, amounting to $15,518.73 and the items appearing in the 1919 accounts for defensive emergency service, amounting to $747.46. I limit my statement as I have with respect to these two items last mentioned, because I agree with counsel for the complainant that in establishing a new rate an allowance must be made for the necessary expense to which the complainant company has been put in establishing its right to charge an adequate and remunerative rate for the gas sold by it, despite the existing statutory limitation, which I herein find to be confiscatory. I draw a distinction between analyzing the usual and necessary operating expenses of the company for the purpose of determining whether, in the first instance, the maximum rate fixed by statute is confiscatory, and the analysis of the complainant's expenses which must be made in fixing the fair rate for the future. The latter, of course, must make provision for the complainant's reimbursement for the expense of freeing itself from a statute which the complainant has proved to be confiscatory. That, however, remains to be considered in the fixation of a new rate.

The two items which I have thus stricken out for the purposes of the present inquiry aggregate $16,266.19. The total amount of actual distribution expense for 1919 was $107,597.82. Deducting $16,266.19 from $107,597.82 gives $91,331.63; this divided by 336,000,000 cubic feet, sold in 1919, makes the allowable distribution expense approximately 27 cents, instead of 32 cents, as shown on the books of the complainant company.

Renewals, Replacements, and Taxes.—The item of the cost of providing for the renewal and replacement of property withdrawn from service seems to be agreed upon by all parties at 3 cents per 1,000 cubic feet of gas sold. As to the taxes and interest thereon, amounting to $23,794.71, or 7.07 cents per 1,000 sold, the defendants ask me to eliminate the interest on unpaid taxes, amounting to $233.71, and the federal income tax item of $443.25. I doubt whether these items, particularly the latter, should be included in the cost of taxes to the complainant company; but, if I should eliminate either or both of them, it would make no substantial change in the tax figure, so that, in arriving at my figures, I have taken the tax item as 7.07 cents per 1,000 cubic feet of gas sold.

Conclusions as to 1919 Results.—There appears to be no dispute that the income from sales of gas amounted to 99.51 cents, nor does there appear to be any dispute as to the amount of credit for miscellaneous operating revenue, viz. 6.75 cents per 1,000 cubic feet of gas sold. I have reached the conclusion, therefore, that the actual cost of making and distributing gas during the year 1919, including taxes and the renewal and replacement of property, was $1.088, against which there is to be credited 6.75 cents, leaving a net cost of $1.0205, or a deficiency over the sum realized from gas sales (99.51 cents) of

2.54 cents per 1,000 cubic feet of gas sold. This sum, multiplied by 336,241,400 cubic feet of gas sold during the year 1919, gives $8,540.53 as the actual deficiency in operating expenses for the year 1919, without regard to any return upon any of the complainant's investment in the property used in its gas business. These figures show a confiscation of the complainant's property in 1919, and a confiscation thereof to an even greater extent thus far in 1920, and there might appear to be no necessity for my going further and ascertaining the present fair value of the property, upon which the complainant was and is entitled to earn a reasonable return. Both sides, however, have asked that I make findings with respect to the complainant's property and its value, and in order that the reviewing court may have before it the exact situation of the complainant, I have made my findings in detail with respect to the property and its value.

Franchises and Rights Acquired by the Complainant.—The complainant company was organized in the month of July, 1904. Between the time of its organization and its merger with the Newtown & Flushing Gas Company, it acquired all of the outstanding securities of the Newtown & Flushing Gas Company. It issued for these securities its own securities—$600,000 of stock and $650,000 of bonds. At the time of the merger, the complainant company apparently, so far as this record discloses, owned no property, had no cash, and had no assets of any kind or description. No inventory and appraisal of the property acquired by the complainant seems to have been made the basis of the merger. The securities issued by the complainant for this purpose cannot, it seems to me from the present record, be considered to have been worth more than the property thereby acquired. The Newtown & Flushing Company, when it was merged with the complainant company, owned certain tangible and intangible properties, including certain franchises issued by various village and town officials. No proof was offered tending to show any specific sums as paid to the public authorities for franchises, or what specific amounts were paid by the companies which acquired these franchises to the persons and corporations which theretofore owned them. The record does not show to what extent the cost of these franchises and rights to the Newtown & Flushing Gas Company, as shown by its books placed in evidence by the defendants, represented actual payments for the same to public authorities by that company or its predecessors.

Agreement as to the Cost of Present Tangible Property.—Fortunately, there has been agreement between the parties upon this record as to the cost, up to and as of August 1, 1904, of the tangible properties still in existence and use, which were acquired by the complainant company on that date. The complainant and the defendants agree that the tangible property acquired on August 1, 1904, and still in existence and use, did cost, and as of that date was reasonably worth, at least $280,108, and I accept that figure in arriving at the complainant's total investment and the present value of its property. Since that date, the net additions to the plant and property of the complainant have cost $850,389.08, and there is no dispute as to this item. These two items, not in controversy, cover the actual cost of the tangible property now in use, aggregating $1,130,497.08.

Additional Elements of the Original Investment.—To the first of these items, the complainant asks me, on the basis of Mr. Miller's testimony and the book entries as of 1904 and subsequent years, to add $320,350 for the preliminary organization and development expenses of the enterprise and other items of cost set forth in Mr. Miller's estimate (Complainant's Exhibit 96). It is conceded by the defendants that in the initiating of a gas enterprise there is necessarily incurred preliminary and development expenses, cost of financing, engineering and superintendence expenses, interest and taxes during construction, and the like, as to which varying amounts were testified by the witnesses on each side, principally based upon opinions as to the proper percentages to be allowed for such items. The defendants contend, moreover, that there is no adequate proof before me on which I should base any finding of value for the franchises and rights.

"Going Value."—The complainant further contends that, under the decisions of the courts, I must include in my figures, if they are to be complete and state the full reproduction cost, an amount for so-called "going value." I

readily agree that, in arriving at a statement of the full cost of bringing such a gas project into being and its business to a profitable point, an allowance for "going value" would have to be included. The complainant's testimony in this case was that these elements of cost, commonly referred to as "going value," would, as to this company, amount to at least $500,000. My present task, however, does no necessarily call for such an effort to cover specifically all elements of reproduction cost. I also readily accept the argument that, in arriving at the cost of the tangible and intangible property of the complainant, I should expect to find that the franchises and rights had cost a substantial sum, and that some allowance must be made for the necessary, but undistributable, expenses already referred to. The difficulty here, however, is in finding a satisfactory figure from the evidence available in this record.

The $650,000 of bonds originally issued by the complainant company upon the purchase of the securities of the Newtown & Flushing Company are probably now in the hands of persons who at that time had no connection with the Newtown & Flushing Company. All of the stock of the complainant company is owned by the Consolidated Gas Company of New York. As I have already pointed out, one difficulty here is that I have not before me the satisfactory basis for a finding that the securities issued by the complainant company were worth any more than the book value of the tangible and intangible property acquired, or that under the circumstances already referred to, such property, at the time it was acquired, had cost or was worth more than was shown by the books of the company from which it was acquired.

Basis of Finding as to Undistributable Structural Costs.—At the time of the merger of the Newtown & Flushing Gas Company into the New York & Queens Gas Company, the total property and assets of the former (exclusive of working capital) were carried on the books of the former at $694,678.00. Since that time, plant and equipment so acquired by the complainant on August 1, 1904, has been retired, at a book cost totaling $24,189.14. The tangible property acquired on August 1, 1904, and still in service, is agreed to have cost before August 1, 1904, and to have been worth on that date, the sum of $280,108, exclusive of franchises and rights and "going value," and the undistributed structural items under consideration. The deduction of these two items from the book total of $694,678 leaves only $390,380.86 as representing the book cost to the Newtown & Flushing Gas Company of the franchises and rights, the "going value," and the undistributable structural items hereinbefore mentioned. There is sufficient evidence to warrant my conclusion upon the present record that the item of "franchises, good will, etc.," on the books of the complainant and its predecessors, covered, among other things, preliminary and development expenses, and the various other items which Mr. Miller puts in at a total of $320,350, and also the cost of "franchises and rights," which Mr. Miller puts in at $500,000; and I think it will be fair for me to say, for the purposes of the present case, that for all of these items just referred to the New York & Queens Gas Company actually paid no more than their book cost to the Newtown & Flushing Gas Company and its predecessors, viz. $390,380.86, and that these elements had cost the Newtown & Flushing Gas Company and its predecessors, and were worth, on August 1, 1904, at least that sum.

Working Capital.—To the cost of the present property acquired in 1904 and the net additions to such property since 1904, totaling $1,520,877.94, there must be added an item for materials and supplies, cash on hand and in banks, and the like, commonly called working capital. The experts for the defendants figure this item for the year 1919 at $80,000. Mr. Miller, on behalf of the complainant company, figures the item at $165,000. The expert witnesses called by the defendants frankly concede that the amount to be allowed for working capital is such amount as reasonable business men of experience would require in the conduct of this kind of a business. Taking into consideration the various elements which are and must be provided for in arriving at the necessary amount of working capital, I have reached the conclusion that $135,000 would be a fair sum to be allowed for working capital. I therefore reach the conclusion that the tangible and intangible property, including working capital, used and useful during the year 1919 and as

of January 1, 1920, by the complainant company in the conduct of its gas business, represents an actual investment, and is reasonable and fairly worth at this time, at least the sum of $1,655,877.94, and that it is on at least this amount that the complainant company was and is entitled to have its rate such as to yield a fair return.

Cost and Present Value of Land.—In view of some statements made by me on the record with reference to the value of land and my statement that I would fix the value of land at about $44,000, I should add that upon analyzing the figures I found that land acquired prior to August 1, 1904, is included in the agreed item of $280,108 at $19,423, plus grading and filling, $5,000, making $24,423 for land unimproved, and that additions to real estate since 1904, have cost the complainant $20,630.90, a total of a little more than $45,153.90.

Compliance with Candle-Power Statute.—Statements made by me on the record indicate my views as to the claim made by counsel for the defendants that the complainant company was not entitled to equitable relief because of its alleged failure to comply with the statutory requirements as to candle power, and I therefore deem it unnecessary to say anything further herein upon that subject, which I discussed at considerable length in my opinion as special master in the Consolidated Gas Company Case. In view of the similarity of the record facts, I refer to that opinion for a fuller statement of my views upon the subject. I am clear that this complainant has complied with the candle-power provisions of the statute.

Basis of Finding of "Present Value."—It is proper for me to say, before concluding this opinion, that I have based my finding of fair present value upon what I conceive to be the actual cost of the property to the complainant company. My reasons for the adoption of this criterion or standard of present value in such a suit as this were set forth at length in my opinion as special master in the Consolidated Gas Company Case, to which I refer for a more comprehensive statement of those reasons. In my opinion the property now used by the complainant company is worth at least that sum.

The Undisputed Testimony as to Present Reproduction Cost.—The complainant company offered testimony as to the present reproduction cost of the tangible property of the complainant company. The proof was undisputed that the complainant owns and uses the items of tangible property which it inventoried as of January 1, 1920, and that, exclusive of working capital and the undistributable structural costs, the cost of reproducing the tangible property, as of January 1, 1920, would be at least $2,099,621, as compared with the complainant's actual and unimpaired investment in the same tangible items of only $1,130,497.08. In other words, leaving out working capital and the undistributable working costs, it would cost nearly twice as much to reproduce the tangible property to-day as it did actually cost the complainant and its predecessors.

Of course, to this figure of $2,099,621, to reach a complete figure of present reproduction cost, there must be added amounts, based on the present cost of such items, for organization and development expenses prior to construction; cost of financing; engineering, superintendence, and general contractors' expense and profit; interest during construction; taxes on land during construction; the cost of franchises and rights; administrative, legal, and miscellaneous expenses during construction; certainly the sum of $135,000 for working capital; and perhaps also a suitable amount for "going value." The above-stated investment figure of $1,130,497.08 likewise does not include any allowance for the cost of these items prior to August 1, 1904, although they were, of course, principally incurred before that time. In so far as these undistributed elements arise in connection with the present cost to reproduce this property, I have not thought it necessary to make a finding as to any of them; and in so far as they arise in connection with the complainant's present aggregate investment, I have declined to make any finding assigning to them a value in excess of the item representing their cost to the complainant and its predecessors, viz. $390,380.86, in which they are included to an extent deemed adequate for the purposes of this case.

No Reduction for "Accrued Theoretical Depreciation."—In determining that the complainant's property has a fair present value of at least the amount of

the complainant's actual investment therein as found by me, viz. at least $1,655,877.94, I have made no deduction for what is termed "depreciation," in whatever way calculated. Under any basis of determining present value, the complainant's property is now worth at least the amount of such investment therein, and the sound rule of law and policy seems to require the allowance of a reasonable return upon at least that sum.

Upon the present trial, it was insistently urged upon me by some of the defendants that there should be deducted from the cost of the property (irrespective of whether "original," "pre-war," or "present reproduction" cost be under consideration) an amount claimed to represent so-called "accrued theoretical depreciation," based upon an assumption of "life expectancy" for a gas plant and equipment and the estimated or known number of years since the same was erected or installed. From the testimony given upon the trial, I was strongly impressed that, in respect of a very large proportion of gas property, there is no ascertainable "life expectancy." The withdrawal of such property from service comes about from inadequacy or obsolescence, which cannot be forecast in terms of years or even satisfactorily guessed at. Certain parts of operating machinery and equipment are of course subject to the effects of use. The replacement of these wearing parts enters into the cost of repairs. As to the substantial units of structures, apparatus, mains, and equipment, their withdrawal from the property accounts comes about from causes not attributable to the condition of the property itself, or any diminution in its operating efficiency, but varying utterly with the particular plant, time, local conditions, and service demands, and hence capable of being forecast only as the occasion for such change in plant or equipment becomes imminent.

The Renewal and Replacement of Gas Property.—In other words, in order to keep abreast of improvements in the art of making and distributing gas when and as it becomes economically advantageous to do so, and to meet the growing demand of the public for service more adequately and economically than would be possible through merely making additions and extensions to existing plant and equipment, larger or better and more economical and efficient units of plant and equipment are from time to time installed, to take the place of units which are still operating as efficiently as when first installed. The loss due to such supersession cannot properly be said to have accrued during the period the superseded unit was in service. It occurred when supersession took place. It became a proper charge against the economies to be realized therefrom. It furnished no basis for the imposition of an additional charge against the user of the superseded unit during the period of its useful service, over and above the higher cost of operating it. Such a charge could not be justified, either on the ground that the unit was losing potential life, or that the capital invested in it was being consumed, because neither is true.

Additional Burden on the Consumer Unwarranted.—In order to justify the deduction of "theoretical depreciation," I was asked in this case to assume that a "depreciation reserve" equal to the computed "theoretical depreciation" had been collected from the public, and then to deduct from the company's investment the amount of such assumed reserve. No such reserve had, in fact, been collected or accumulated by this company. The rate chargeable did not permit it, and there is no reason to believe that the Legislature, in prescribing the rate, ever contemplated it. As I have set forth in findings Nos. 32 and 27 of my report, and as I have elsewhere indicated herein, the complainant gas company has maintained its property and investment intact in the past, through renewals and replacements, at an average actual cost of approximately 3 cents per 1,000 cubic feet of gas sold, and no reason appears for believing that it cannot continue to do so on that basis. Even assuming that the statute permitted such a rate, to have imposed on the company's consumers an additional burden nearly twice as great, representing a purely theoretical item of operating cost, merely to accumulate a useless reserve to justify a drastic deduction from investment in some ultimate proceeding as to rates, could not have been justified on any sound theory in the past, and cannot now be sustained as to the future.

Effects of an Unnecessary Reserve.—In order to justify the assumption that a "depreciation reserve" was or should have been collected, defendants' witness Hine testified in this case that such a reserve was necessary, "so that when the property is retired for any cause whatsoever the fund can be charged with the cost of the property." He testified, also, that the reserve should be in his opinion "invested in the property," and that when the funds were needed for renewals and replacements they would be provided "by issuing securities against construction work which had been done originally out of this fund, for the money laid aside for this fund, just to reimburse the treasury on account of these expenditures." This view seemed to me to disregard the obvious fact that, having deducted the amount of the reserve temporarily invested in property from that on which he proposed the company should be allowed to earn a return, he, to all intents and purposes, destroyed the earning power of such property and investment; that therefore he could not issue any securities against such property, there being no earnings therefrom with which to pay interest on the securities; that the reserve could never thereafter be availed of for the purpose for which it was alleged to have been created; and that it would be, in fact, as if it had never been created. Thus he not only failed to sustain his contention that a "depreciation reserve" was necessary for the purposes which he alleged, but he proposed to treat the reserve as if he himself believed it to be both unnecessary and ineffectual, except for the purpose of justifying a deduction from the complainant's investment.

It is obvious that the collection of an unnecessary reserve and its periodic deduction from the value of the property in service would operate to effect a piecemeal purchase, on the part of the public, of the property used by the utility in its service. In other words, it is really asking the consumer to pay for the plant, instead of paying a return on the investment. If such a consummation is desirable, of which there is no evidence, it should be effected openly, and not surreptitiously, under the guise of providing for so-called "theoretical depreciation."

Present Condition of the Property.—Mr. Miller testified that, as of April, 1920, the expenditure of $6,144.07 for repairs, renewals, and replacements, would put the plant, structures, machinery, and equipment in condition substantially as good as when they were erected or installed. His testimony in this respect was not contradicted by that of any witness. This sum, however, does not, in my opinion, measure any impairment in the present value of the property used and useful in the gas business. It represents merely an unmatured obligation to maintain the property in efficient operating condition out of future earnings; the expert witnesses of both the complainant and the defendants agreeing that it was and is maintained in efficient and first-class condition. I therefore have not deducted this or any other sum representing so-called "accrued depreciation" from the amount found by me to represent the investment of the complainant in its gas property upon which it is entitled to have its rate such as to yield a reasonable return.

Shearman & Sterling, of New York City (John A. Garver, William L. Ransom, Charles A. Vilas, and Jacob H. Goetz, all of New York City, of counsel), for plaintiff.

Charles D. Newton, Atty. Gen. (Wilber W. Chambers, Charles J. Tobin, and Clarence C. Cummings, Deputy Attys. Gen., of counsel), for defendant Attorney General.

Terence Farley, of New York City (Ely Neumann and Edward M. Deegan, both of New York City, of counsel), for defendant Public Service Commission.

MAYER, District Judge. The bill prays for a decree which shall declare confiscatory, and therefore unconstitutional, so much of chapter 125 of Laws of New York of 1906 as prohibits the charging of

more than $1 per 1,000 cubic feet of gas sold, for gas furnished to the inhabitants of the Third ward of the borough of Queens, commonly known as Flushing and its environs.

As a necessary accompaniment, the bill further prays that defendant public authorities shall be enjoined from enforcing the rate prescribed by the statute. The special master has submitted a full report, dealing, as he was requested and as he properly should, with the various questions of fact and law presented for his consideration, so that the court should be advised in respect of any question which it might deem necessary for decision.

[1] At the outset, however, it is desirable to make clear that this court is not a rate-making body, and that, on final decree, the question on the pleadings and the proof is whether the statutory rate is confiscatory, and therefore whether the defendant public officers should be enjoined from enforcing it. Questions which might be pertinent, where it is sought to fix a rate which shall be as nearly accurate as possible, may prove academic in a case where the basic question is the constitutionality of the statute prescribing the rate.

It is, of course, elementary that a court approaches the consideration of a case of this kind with an attitude of cautious inquiry, always mindful of certain fundamental canons of construction; e. g., the presumption of constitutionality, the conviction beyond a fair doubt that the statute is unconstitutional, and the like. In that spirit of caution, the court may eliminate for the purposes of the case some contentions which might be successfully pressed in a rate case pure and simple. The subject is delicate, in the sense that it affects a large number of persons, who, if possible, should be led to understand that the result which may place a heavier burden on them is just, and that, after making every fair allowance, it nevertheless appears that there is no escape from relieving a public utility corporation from the operation of a statute which has become unconstitutional by reason of conditions and facts never contemplated nor susceptible of prophecy 14 years ago.

During those 14 years the definite trend of legislation, national and state, has been in the direction of regulation by responsible public agencies. The necessity of thus dealing with the subject has been accentuated by the unexpected and radical economic changes due to the war. But, in addition, there are constant changes, which no one can safely predict. It will suffice to illustrate with the price of oil. Increased demand for oil for use in industries, and purposes not realized in 1904, has been perhaps the greatest factor in enhancing its price. No change in this regard seems to be in sight.

These plain conclusions, based on experience simple to understand, point to the desirability of confining a court decision within the limits of the relief asked for in the bill, leaving to the Legislature the task of providing the machinery whereby rates may be flexible, and may be made higher or lower from time to time, as facts and conditions may warrant. Examining, then, this record and the special master's report, it is apparent that discussion is necessary only in respect of the more important features. Many of the details have been carefully and

correctly disposed of by the master in his comprehensive report, which fully, though concisely, has dealt with the essential features of the testimony. Repetition, in this opinion, of certain findings and of the reasons in support thereof is not requisite, and it is enough to indicate approval of those findings.

[2] 1. The year 1919 is in this case "a sufficient basis for the calculation of the cost of production and the 'rate base' for a future long enough to call for some judicial action." Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, 121 N. E. 772; Consolidated Gas Co. of New York v. Newton et al. (D. C.) 267 Fed. 231; Kings County Lighting Co. v. Nixon et al., 268 Fed. 143. The opinions of Judge Cardozo, Judge Learned Hand, and Judge Hough, in the cases just cited, fully set forth the reasons for this conclusion, and with those reasons on this point I am in full accord.

[3] 2. *The Admissibility of the Books of Account.*—This subject is fully dealt with in the opinions of Judge Learned Hand and of Judge Hough, in the cases supra. Common-law proof of each and every of the thousands of items of the plaintiff's books of account would result in a practical denial of justice. The defendants had full facility to examine into and test the accuracy of the books. Capable cross-examination rarely fails to disclose errors, omissions, and inaccuracies, and injustice is rarely done in a case like this, where there has been such full opportunity for examination.

3. The first inquiry is as to the cost of production of gas; the second, as to cost of distribution. If the cost of production and distribution exceeds the statutory rate, that is the end of the case.

The Cost of Production.—Some attack has been made in respect of the cost of oil. An examination of the record shows clearly that the oil accounts were carefully kept and checked. Most of the slight errors during the course of a month were corrected, and the most generous acceptance of the contentions of the defendants would result in a variance of a few gallons, which, translated into money, would be equivalent to a fraction so negligible as to amount to an infinitesimal part of a mill.

The cost of other materials and of labor is attacked, not on the basis of evidence adduced, but, as it were, on general principles. The suggestion is that certain increased costs are suspicious. Yet there is nothing suspicious in the testimony, and it is a matter of common knowledge that during the year 1919 the cost of materials such as are here concerned, and of labor, rose materially in this and other industries. An examination of the testimony, including the exhibits, leads readily to the conclusion that the special master was right in his figures. It was made entirely plain that these costs, in the main, were greater in the first five months of 1920 than in 1919. The point of the inquiry in respect of 1920 was to ascertain whether there was any likelihood that the cost of 1919 had decreased, or would decrease, and no such hope was realized.

4. *Unaccounted-for Gas.*—There is, however, one item which, by way of extra caution, should be reduced. The "unaccounted-for" gas, so called, for 1919, was 11.03 per cent. This percentage varies.

Some years it may be more; others, less. Therefore the estimate of an expert like Mr. Woods is valuable. This plant, in his opinion, should show a loss of about 10 per cent., and I accept that figure, for the purposes of this case, instead of 11.03 per cent.

In his finding No. 25, the master found that "during the year 1919 this cost of water gas manufacture was 71.73 cents per 1,000 cubic feet of gas sold." This figure was made up of 63.45 cents for cost of production, plus 8.28 cents, cost attributable to loss by way of "unaccounted-for" gas. My figure of 10 per cent., instead of the master's 11.03 per cent., changes the 8.28 cents to 7.45 cents. Therefore the total as found by me, under this head, is 70.9 cents, instead of the master's figure of 71.73 cents.

[4] 5. *Cost of Distribution.*—(a) *Defensive Emergency Service.*—The master excluded this item. In my opinion, he is right. See, also, Judge Learned Hand's opinion in the Consolidated Gas Case, supra.

[5] (b) *Expenses of Litigation.*—These were also excluded by the master, but were allowed by the court in the Consolidated Gas Case. I should follow the decision on this point in the Consolidated Gas Case, were it not that I am firm in the conviction that, while this item may properly be considered in fixing a rate, it is not to be included in determining whether the rate is confiscatory. I agree with the master, both in this conclusion and his reasons therefor.

[6] (c) *Interest on Unpaid Taxes.*—I am of the opinion that this is not a proper charge in this case under the head of cost of distribution and other expenses, and I have excluded it.

[7] (d) *The federal tax on bondholders' income* should not be charged as an expense; nor was it included by the master.

(e) Whether or not the amount of income from insurance participation should be charged as an expense is a debatable question, and for the purposes solely of this decision I have resolved the doubt in favor of the defendants.

(f) The items (c) and (e) figure out 0.09 cents; i. e. $^{9}/_{100}$ of one cent. The total cost of distribution and other expenses, as worked out on Mr. Teele's sheet, was 32 cents. From this total must be deducted an aggregate of 4.93 cents. This last figure is made up as follows: 0.09 for the two items (c) and (e); 0.22 for item (a); and 4.62 for item (b). Added together, the total of these is 4.93 cents. Deducting, then, from 32 cents, the sum of 4.93 cents, leaves, under the heading of cost of distribution and other expenses, 27.07 cents. Add to this the item for replacement of 3 cents, and for taxes 7.07 cents, and the total is 37.14 cents.

6. If then the 70.9 cents and 37.14 cents be added together, expressed in dollars, the total is $1.0804, instead of $1.0880, as found by the master in finding No. 30. Deducting from $1.0804 the figure of .0675 (for miscellaneous operating revenue as found in finding No. 30), the net cost of gas delivered to the consumer in 1919 was $1.0129. In other words, after making the various allowances, supra, in favor of defendants, to an extent greater than found by the master, it appears that in 1919 the net cost of gas delivered to the consumer was

approximately 1.29 cents in excess of the rate of $1 provided for by the statute. In arriving at this figure it will be appreciated that I have stripped the constituent items down to their lowest minimum.

[8-10] 7. If the figure of 99.51 cents, representing the average selling price of gas, be taken, then the deficiency is 1.78 cents per 1,000 cubic feet of gas delivered. The figure of 99.51 cents results from the fact that under the statute plaintiff is required to deliver gas to the city of New York as a municipality at the rate of 75 cents. This rate has not been attacked by suit. The city in its corporate capacity is entitled to have gas furnished to it at a lesser rate than the private consumer. This fact, however, does not afford any reason why the private consumer should make up the deficiency caused by the lower rate of 75 cents to which the city of New York is entitled. In other words, the fact that the average selling price of plaintiff's gas is 99.51 cents is irrelevant to the ultimate question in the case. In determining whether the statute is confiscatory, the inquiry must start with the proposition that plaintiff under the statute may charge the private consumer (as distinguished from the municipality) $1, and then the question is whether the cost of production and distribution is in excess of that $1.

8. It having appeared, supra, that the cost of production and distribution in 1919 was in excess of the statutory rate, even though to a slight extent, and that conditions in the early months of 1920 showed no prospect for a lesser cost, but, on the contrary, indicated increased cost, it makes little difference what elements are included or eliminated from the rate base, or what theories shall obtain in respect thereof. If every debatable figure and question involved in the rate base were resolved in favor of defendants, plaintiff, under the statute, would still fail to receive the return to which it is entitled. For the purposes of this case, it does not make any difference whether the correct rule is reproduction value, with or without so-called theoretical depreciation, or actual cost, with or without theoretical depreciation; nor does it make any difference whether the rate of return shall be 6, 7, or 8 per cent. Any expression of opinion which goes beyond the requirements of the case would be mere dictum, and in the circumstances would announce little more than an individual opinion. Besides, these questions of reproduction value, actual cost, and theoretical depreciation, and the like, are as much, and perhaps more, in the nature of economic questions than questions of law, and there is no need of discussing them, when their determination is not required for the purposes of the case.

For the reasons outlined, plaintiff is entitled to be relieved from the operation of the statute, so far as it requires the furnishing of gas at the $1 rate to private consumers.

HOWARD et al. v. MAXWELL MOTOR CO., Inc., et al.

(District Court, S. D. New York. June 1, 1920.)

1. **Corporations ⇐579(1)—Contingent claim held not barred by reorganization.**

Where, on the reorganization of a corporation which owned the stock of subsidiary companies, and the sale of the property of all the companies through a creditors' suit, there being no secured creditors, provision was made for all stockholders and all creditors of all the companies who proved their claims, but no provision was made for the contingent claim of a lessor, on whose lease a subsidiary was guarantor, but, on the contrary, the decree permitted the reorganized company as purchaser to disaffirm any contract made by its predecessors, and it disaffirmed the contract of guaranty after paying an installment of rent to prevent a default, which would enable the lessor to prove a claim thereunder, the lessor *held* not barred, but on a subsequent default entitled to subject to his claim assets of the guarantor in the hands of the reorganized company.

2. **Corporations ⇐579(1)—Contingent claim not barred by reorganization through judicial sale, where matured by reorganized corporation's default.**

While a contingent claim, which is so uncertain as not to be capable of proof, may be barred by a stockholders' reorganization through a judicial sale of the property, it is not so barred where the reorganized corporation by its own act brings about the default which matures the contingent claim into an absolute liability.

In Equity. Suit by Harold A. Howard and John C. Howard, trustees under the will of Sarah J. Howard, deceased, against the Maxwell Motor Company, Incorporated, and the Maxwell-Briscoe Motor Company. Decree for complainants.

The report of Van Vechten Veeder, Special Master, is as follows:

This is a suit in equity by Harold A. Howard and John C. Howard, trustees under the last will and testament of Sarah J. Howard, deceased, citizens and residents of the state of Illinois, against the Maxwell Motor Company, Incorporated, a Delaware corporation, and the Maxwell-Briscoe Motor Company, a New York corporation, in which the plaintiffs seek to enforce against assets of the Maxwell Motor Company, Incorporated, a judgment secured by them in the Supreme Court of New York against the Maxwell-Briscoe Motor Company as guarantor on a lease. On December 10, 1909, the plaintiffs leased to the Maxwell-Briscoe Chicago Company, an Illinois corporation (its name was subsequently changed to the United Motor Chicago Company), a parcel of real estate in Chicago, Ill., for a term of 20 years at a specified rental. The fulfillment of the conditions and requirements of this lease by the lessee was guaranteed by the Maxwell-Briscoe Motor Company, which controlled the Maxwell-Briscoe Chicago Company through ownership of its capital stock. The business of the Maxwell-Briscoe Chicago Company was the sale of the product of the Maxwell-Briscoe Motor Company, and this business was carried on by a resident manager with the advice and assistance of the president and general manager of the Maxwell-Briscoe Motor Company.

At the time it entered into said guaranty the Maxwell-Briscoe Motor Company was a corporation of good financial standing, carrying on a thriving business in the manufacture and sale of automobiles, having large and valuable plants at Tarrytown, N. Y., Newcastle, Ind., and Providence, R. I. Early in the year 1910 it joined the Dayton Motor Car Company, the Brush Runabout Company, the Alden-Sampson Manufacturing Company, and the Columbia Motor Car Company in the formation of the United States Motor Company. The United States Motor Company was formed through the acquisition of practically all the capital stock of the various companies above named

in exchange for capital stock of the new company. Thereafter the heads of departments of the United States Motor Company directed the operations of the subsidiary companies through supervisors appointed by it. The United States Motor Company purchased and delivered material to the subsidiary companies and paid their pay rolls, and took back from them finished automobiles, crediting the subsidiaries with the agreed price as against the money and material furnished to them. The subsidiary sales companies, such as the United States Motor Chicago Company, sold automobiles on sight drafts with the bill of lading attached, and when they needed financial assistance either the United States Motor Company or one of the subsidiaries indorsed their paper to enable them to secure loans from banks. The United States Motor Company made liberal use, upon its own paper and the paper of subsidiary companies, of the indorsement of the Maxwell-Briscoe Motor Company, which was the largest of the subsidiaries of the United States Motor Company.

In October, 1911, the United States Motor Company issued $6,000,000 of debenture bonds. These bonds were in reality notes of the company. In November, 1911, the United States Motor Company became financially embarrassed. The difficulty arose from the necessity of meeting the interest on its debenture bonds. By the spring of 1912 the financial situation of the company was such that the holders of the debenture bonds organized a committee to protect their interests. One of the principal movers in this matter was the Central Trust Company of New York, which held some of the debentures, and its counsel acted as counsel to the committee.

In the autumn of 1912 a reorganization was decided upon. Accordingly, on September 12, 1912, the Brown & Sharp Manufacturing Company of Rhode Island, to which the United States Motor Company was indebted for materials sold, filed a bill in equity in the United States District Court for the Southern District of New York, alleging the inability of the company to meet its current obligations and asking for the appointment of a receiver. The Maxwell-Briscoe Motor Company and practically all the subsidiaries of the United States Motor Company were joined with it as parties defendant. Answers of all the defendants were filed with the bill of complaint, admitting the allegations of the bill and consenting to the appointment of a receiver. Receivers were appointed on the same day.

On October 10, 1912, the bondholders' committee, then called the reorganization committee, composed principally of well-known New York bankers, issued a plan of reorganization. "The plan contemplates," the committee states, "the organization of a new company or companies to acquire, as mentioned in the plan, substantially all of the property of the motor company and the subsidiary companies free from debt, except certain real estate mortgages aggregating approximately $164,540, and to cause such new company or companies to be supplied with a cash working capital of about $5,000,000 in addition to its accounts receivable, inventories, and other liquid assets. In the opinion of the committee a speedy reorganization is necessary if the value of the property, assets, business, and good will of the motor company and of the subsidiary companies is to be preserved. A good part of the value of said companies is the existing organization of their employees, plants and business and their value as a going concern. The value of the mere physical assets if sold upon a liquidation of the properties would be far less than their intrinsic value, and ruinously less than their value as a concern."

The plan contemplated the creation of a new company and the issue of $11,000,000 first preferred stock, $9,000,000 second preferred stock, and $11,000,000 common stock. Creditors and stockholders depositing under the plan of reorganization were to receive on completion of reorganization cash or voting trust certificates as follows:

1. For each $1,000 principal amount of notes of one or more of the subsidiary companies indorsed by the Motor Company, and notes of one or more of the branch selling companies, indorsed by the Motor Company, or merchandise claims against the Motor Company for goods sold subsequent to

June 15, 1912, or for other claims established against one or more of the subsidiary companies, in cash.....$1,000.00
And in addition the amount of interest due thereon to September 12, 1912.

2. For each $1,000 of indebtedness represented by debenture bonds or bond scrip (whether principal or interest to September 12, 1912), voting trust certificates representing:
   (a) New first preferred stock (50 per cent.).....$ 500.00
   (b) New second preferred stock (50 per cent.)..... 500.00
   (c) New common stock (40 per cent.)..... 400.00
3. For each $1,000 of claims against or established against the Motor Company only (whether principal or interest to September 12, 1912):
   (a) Cash (25 per cent.).....$ 250.00
   And voting trust certificates representing:
   (b) New first preferred stock (25 per cent.)..... 250.00
   (c) New second preferred stock (25 per cent.)..... 250.00
   (d) New common stock (15 per cent.)..... 150.00
4. For each share $100 par value of preferred stock of the Motor Company or of the Columbia Company upon payment of $24 per share, voting trust certificates representing:
   (a) New first preferred stock (24 per cent.).....$ 24.00
   (b) New second preferred stock (25 per cent.)..... 25.00
   (c) New common stock (30 per cent.)..... 30.00
5. For each share of $100 par value of common stock of the Motor Company or of the Columbia Company, upon payment of $24 per share, voting trust certificates representing:
   (a) New first preferred stock (24 per cent.).....$ 24.00
   (b) New second preferred stock (17½ per cent.)..... 17.50
   (c) New common stock (30 per cent.)..... 30.00

Under this plan of reorganization, then, creditors of the subsidiary companies, such as the Maxwell-Briscoe Motor Company, were to receive payment in full; claimants against the United States Motor Company were to receive 25 per cent. cash and the remainder in stock; the debenture bondholders were to receive stock for their bonds; holders of the preferred and common stock of the United States Motor Company and the Columbia Company, upon payment of an assessment of $24 per share, new preferred and common stock. So far as the stockholders are concerned, this plan was carried out. With respect to creditors the terms of participation were described in the plan as follows: "Holders of notes made or indorsed by the Motor Company, or made or indorsed by one or more of the subsidiary companies, may become parties to the plan and agreement of reorganization by depositing their notes indorsed in blank without recourse with the depositary at its said office. Holders of other obligations of or claims against the Motor Company or the subsidiary companies may become parties to the plan and agreement of reorganization by depositing with the depositary at its said office their obligations and claims if evidenced by an instrument in writing, or if not evidenced by an instrument in writing by depositing a statement of such claims, and in either case accompanied by an appropriate assignment or transfer thereof without recourse in such form as may be determined by the committee." By the order appointing receivers all creditors were directed to file with the receivers within 60 days "a duly sworn statement of all and any such claims as they may have or assert against the defendant companies or any of them." The time for filing claims, as finally extended by the court, expired December 15, 1917.

The receivers secured an appraisal by Gunn, Richards & Co. of the real estate, buildings, and equipment of all the plants, first as a going concern and then at auction values (Plaintiff's Exhibit 26). They also had their auditors, West & Flint, prepare a statement of the assets and liabilities of all the companies on September 11, 1912, first as a going concern (Plaintiff's Exhibit 8) and then at auction values (Defendant's Exhibit H). Exhibit 8 shows an excess of assets over liabilities for all the companies of $910,309.33,

while Exhibit H shows an excess of liabilities over assets of $5,492,658. With respect to the Maxwell-Briscoe Motor Company alone, Exhibit 8 shows an excess of assets over liabilities of $3,247,450.77, while Exhibit H shows an excess of liabilities over assets of $720,047.76. The fundamental difference between the two appraisals arises, of course, from the estimated value as part of a going concern and at their auction value; but it is quite as important to consider the nature of the liabilities. Claims were filed against the United States Motor Company to the amount of $12,750,965.54; against the Maxwell-Briscoe Motor Company alone to the amount of $2,637,788.94. This aggregate is, however, very much in excess of the actual liability. Many of the claims filed against both the United States Motor Company and one of the subsidiary companies arise out of two-name paper. In the next place, the United States Motor Company was itself a creditor of the subsidiary companies to the amount of upwards of $4,500,000; and, finally, many of the unliquidated damage claims were against more than one company. With respect to the Maxwell-Briscoe Motor Company alone, Exhibit 8 shows an excess of assets over liabilities of $3,247,450.77, while Exhibit H shows an excess of liabilities over assets of $720,047.76. The difference between the two appraisals is mainly due to the fact that the total assets of this company, other than any company accounts, are appraised at $4,270,901.32 as a going concern, and at $2,023,702.07 at auction values. On the liability side is included, however, its contingent liability to the extent of $994,713.17 as indorser on notes of one or more of the other companies.

The receivers were granted leave to issue receivers' certificates sufficient in amount to enable them to embark on a plan for making cars for the 1913 market, but this plan was not carried out, and the receivers confined themselves substantially to repair work and completion of cars from materials in hand. In this way it was possible to keep the organization intact, and with this important end in view, a recognized expert, Mr. Walter E. Flanders, was employed as manager.

On the application of the receivers for directions, various hearings were had before the court, and it was finally decided to sell the property. The decree of sale, dated November 18, 1912, provided for the conveyance and transfer of the property purchased to the purchaser, his successors, assigns or nominees who "shall be let into the possession of any or all of said property, and shall thereafter hold, possess, and enjoy the said property free from any and all estate, right, title, claim, demand, interest, or equity of redemption of in or to the same of the defendants herein, their respective creditors and stockholders, and any and all persons, firms, or corporations claiming by, through, or under them or any of them, subject only to the right of the court, as herein especially reserved, to retake possession of and resell such property in case the said grantee or grantees shall fail to comply, after due order, with any of the terms and conditions of sale."

The decree of sale further provided as follows: "The purchaser or purchasers, his or their successors, assigns or nominees, shall be allowed the period of 60 days from the date of delivery of possession to him or them by the receivers within which to elect whether or not to adopt or assume any lease, agreement, or other contract which may be included in the property sold or which may constitute an incident or appurtenance thereof, and such purchaser or purchasers, his or their successors, assigns, or nominees, shall not be held to have accepted or assumed any such lease, agreement, or other contract which he, it, or they shall not so elect to accept or assume. Such election shall be made by an instrument in writing subscribed by the purchaser or purchasers, his or their successors, assigns, or nominees, and filed in the office of the clerk of this court, and no conduct or use of rights by any purchaser or purchasers, his or their successors, assigns, or nominees, within said period of 60 days, unaccompanied by the filing of such written instrument, shall be deemed to conclude such purchaser or purchasers, his or their successors, assigns, or nominees, in respect of such election."

On December 12, 1912, the committee's plan of reorganization was declared effective. Pursuant to this plan a new company, called the Standard Motor Company, was organized January 2, 1913. Its name was soon afterward changed to the Maxwell Motor Company, Incorporated. At a meeting

of the reorganization committee held January 6th for consideration of the bid to be made for the property, the minutes show this entry: "Mr. Rathbone made a statement to the meeting with reference to the auction values of the properties of the United States Motor Company and subsidiary companies, and suggested that bids based upon such values be made therefor in the alternative; i. e., bids for the properties themselves, or bids by way of an offer to pay the outstanding claims which have been filed, a certain per cent. of their amount." A resolution was then passed:

"Resolved that bids for the properties of the United States Motor Company, Alden-Sampson Manufacturing Company, Brush Runabout Company, Columbia Motor Car Company, Dayton Motor Car Company, and Maxwell-Briscoe Motor Company be made in the alternative as follows:

	Amount of Bid for Property	Per Cent. to be Paid on Amount of Claims.
United States Motor Company	$3,700,000	32½
Alden-Sampson Manufacturing Company	265,000	24
Brush Runabout Company	350,000	33
Columbia Motor Car Company	390,000	91
Maxwell Briscoe Motor Company	1,400,000	60"

A written bid was accordingly submitted in the names of Henry C. Holt and William McAllister, Jr., two employees of the central Trust Company. This bid (the only bid made) was considered by Judge Hough, and on January 11th he filed a memorandum approving the percentage bid in terms which show on their face that he considered values at forced sale only. Thereafter Holt and McAllister transferred and assigned all their rights in the sale to Charles W. Hill and Leicester C. Collins. A contract was drawn between Hill and Collins, on one side, and the Standard Motor Company (afterwards the Maxwell Motor Company, Incorporated), on the other, which draft was submitted to the directors of the new company at the meeting on January 11th and duly approved. By this contract the company issued for the property bid in at the sale: "Fully paid, nonassessable stock of the Delaware Company (Maxwell Motor Company), namely: (a) 110,000 shares of first preferred stock of the par value of $100 each; (b) 90,000 shares of the second preferred stock of the par value of $100 each; (c) 109,950 shares of the common stock of the par value of $100 each—or $30,995,000 worth of stock."

This contract, which is set out in the minutes of the directors' meeting of the new company on January 11th (Plaintiffs' Exhibit 16), recites: "It is understood that the properties offered for sale under the decree of sale Exhibit A above referred to, and to be acquired by the vendors in pursuance of the bid and of the assignment thereof, and of the contract, Exhibit B, above referred to, between the purchasers and the committee, will be acquired by the vendors at the scrap or auction value thereof, as the same was appraised by appraisers appointed or approved by the United States District Court for the Southern District of New York, no allowance being made for the value of the plants included in said property, as plants which might be used for the purposes for which they were built, nor for any value arising from the value of the property as constituting a complete organization, with its personnel, organization, established business, and good will as a going concern, and that the vendors were enabled to obtain said property by reason of the agreement, Exhibit B, between the purchasers and the committee above referred to, which said agreement was assigned to the vendors, as hereinbefore set forth, said committee acting on behalf of and as agent of creditors who had submitted their claims to the plan and agreement of reorganization, dated October 10, 1912, Exhibit C (hereinafter called the reorganization plan), aggregating upwards of 96 per cent. in amount of the creditors of the several defendant companies in the suit instituted in the United States District Court for the Southern District of New York above referred to; and it is understood that the purchase of said property was made under arrangement whereby creditors who have not assented to the reorganization plan will receive a dividend representing only what they could expect from the sale and liquidation of said property as a closed-down and disrupted property, sold at forced sale; and

it is understood that the price at which the vendors are to acquire the property and business aforesaid does not represent the real value of the property as a going concern with its good will and organization, and that the price named by the vendors in this contract is greatly in excess of the price at which they are to acquire the property offered for sale under the decree of sale, Exhibit A above referred to."

The contract also set forth that "the board of directors of the Delaware Company (Maxwell Motor Company) have by resolution duly adopted by said board determined that the value of the property hereinafter mentioned is at least as great as the par value of the stock to be delivered hereunder therefor." A decree confirming the sale was entered January 11, 1913, and the property was delivered forthwith to the Maxwell Motor Company.

The charter of the United States Motor Company was forfeited January 18, 1916, for nonpayment of the state tax of the state of New Jersey. Meanwhile rent due under plaintiffs' lease had been paid in advance on September 10 and December 10, 1912, and March 10, 1913. On March 11th the Maxwell Motor Company, pursuant to power given in the final decree of sale, filed in court notice of intention not to assume the Maxwell-Briscoe Motor Company's guaranty of the plaintiffs' lease. The lessee defaulted in payment of the rental falling due June 10th. Thereupon the plaintiffs, on June 15th, attempted to distrain for rent on the property of the United Motor Chicago Company. On June 24, 1913, a voluntary petition in bankruptcy was filed by the United Motor Chicago Company, which was adjudicated a bankrupt June 27, 1913, and, after paying a small percentage on claims, was duly discharged.

On August 11, 1913, the plaintiffs brought suit in the Supreme Court of this state against the Maxwell-Briscoe Motor Company upon its guaranty. After issue had been joined in 1914, notice was served on the plaintiffs that they were barred from proceeding by an injunction issued by the United States District Court for the Southern District of New York in the equity action. The plaintiffs thereupon filed a petition in the latter court for leave to proceed or for instructions. Judge Learned Hand decided that, inasmuch as the property had been sold and turned over, intervention in the equity suit would be unavailing, and permission was granted to continue the suit. Thereupon the plaintiffs amended their complaint, so as to show the amount of rentals which had fallen due at that time, the premises being still unrented. Thereafter it was agreed by counsel that, inasmuch as the building had been rented meanwhile under a clause giving the landlord the right to re-enter and rent, but for a rental below the stipulated rate in the original lease, a stipulation should be entered into between the parties whereby, if the motion for judgment which had been made by the defendant should be held against the defendant, a judgment might be entered upon the stipulation for an amount to be fixed by stipulation. A stipulation was accordingly entered into between the parties, whereby, after crediting upon the lease all moneys obtained either in the bankruptcy proceeding or from subtenants before their leases expired, and taking into account all the damages which had accrued up to the time of the stipulation through the failure to pay rent and other payments required by the lease as rental, and also taking into consideration the difference between the rate at which the building was rented for the balance of the term and the rate of rent under the lease with the Maxwell-Briscoe Chicago Company, the amount due was fixed at $132,000 with interest at 6 per cent. from the date of the stipulation.

The trial court found against the defendant on its motion for judgment, holding that "on the last day fixed by the federal court for the filing of claims against the receivers of the defendant, the plaintiffs' claim had not matured, and was therefore not provable, because the principal debtor had not yet defaulted." This conclusion was affirmed by the Appellate Division and by the Court of Appeals, without opinion. Finally, on November 1, 1917, judgment was entered against the Maxwell-Briscoe Motor Company in the Supreme Court of New York County in accordance with the stipulation for $142,560. Execution was thereafter issued and returned no property found December 27, 1917, and this suit was begun July 12, 1918.

The principles applicable to corporate reorganizations were formulated by the Supreme Court in the case of Northern Pacific Railway Co. v. Boyd, 228

U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931, and reaffirmed in Kansas City Southern Railway Co. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579. Reorganization of a financially embarrassed corporation, pursuant to a contract whereby the corporate property is transferred by stockholders from themselves to themselves in a new company, cannot defeat the claim of a nonassenting creditor. As against such creditor the sale is void in equity, regardless of the motive with which it was made. If purposely or unintentionally a single creditor was not paid or provided for in the reorganization, he can assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders are preferred before the creditor, is invalid, and the transaction is void, even in the absence of fraud in the decree. The property is a trust fund charged primarily with the payment of corporate liabilities, and in the hands of the former owners under a new charter is as much subject to any existing liability as that of a defendant who buys his own property at a tax sale. Unsecured creditors need not necessarily be paid in cash. Their interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock. If creditors decline a fair offer, they are left to protect themselves as other creditors of a judgment debtor, and, having refused to come into a just reorganization, they will not thereafter be heard in a court of equity to attack it. If, however, no such tender was made and kept good, such a creditor retains the right to subject the interest of the old stockholders in the property to the payment of his debt. If their interest is valueless, he gets nothing. If it be valuable, he merely subjects that which the law had originally and continuously made liable for the payment of corporate liabilities.

In the application of these principles to the case in issue, the various allegations of actual fraud with which the complaint is replete may be put aside. None has been proved. Actual fraud, however, is not essential to a recovery. Where such a transaction is consummated without offering to an unsecured creditor a fair share of the benefits to be derived from the vesting of the title in the purchaser, the intent or purpose to deprive him of recourse to the property to collect his debt becomes immaterial; the fact that it has that effect charges the purchaser with liability. Central Improvement Co. v. Cambria Steel Co., 210 Fed. 696, 701, 127 C. C. A. 184. The specific defenses asserted in this, as in the state court action by the same plaintiffs, are that the reorganization plan provided for fair participation to the plaintiffs, of which they failed to avail themselves, that the guaranty of the plaintiffs' lease was disclaimed pursuant to the terms of the decree of sale, and that having complied with the terms of the decree the purchaser is free from liability.

It is clear that the reorganization plan did not provide for fair participation by the plaintiffs. It made no provision whatever for them, and they were in fact effectually prevented from any participation. At no time within the period available for filing claims did the plaintiffs have a provable claim on the guaranty. The rental under the lease was duly paid until the sale and transfer of the corporate property. Then the purchaser disclaimed the guaranty and the lessee went into bankruptcy. There cannot be an absolute guaranty of payment, unless there be a principal liability. If there be no debt or default of a third person, there can be no guaranty. Pennsylvania Steel Co. v. New York City Railway Co., 198 Fed. 721, 738, 751, 117 C. C. A. 503. Here there could be no default until the debt matured; the undertaking in question was a contingent, not an absolute, promise. It became effective in creating an absolute liability only upon default by the lessee. The guarantor was therefore under no obligation to pay, and there was no debt to be paid, until the contingent liability had matured into an absolute liability. People v. Metropolitan Surety Co., 205 N. Y. 135, 98 N. E. 412, Ann. Cas. 1913D, 1180.

The plaintiffs are, then, in a position to assert their superior rights. Inasmuch as they were not parties to the record in the equity sale, that decree is not binding on them. Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 505, 33 Sup. Ct. 554, 57 L. Ed. 931. What they are required to prove is indicated by the following passage from the opinion of the Supreme Court in the Boyd

Case, 228 U. S. 507, 508, 33 Sup. Ct. 554, 561 (57 L. Ed. 931): "The invalidity of the sale flowed from the character of the reorganization agreement regardless of the value of the property, for in cases like this the question must be decided according to a fixed principle, not leaving the rights of the creditors to depend upon the balancing of evidence as to whether, on the day of sale the property was insufficient to pay prior incumbrances. The facts in the present case illustrate the necessity of adhering to the rule. The railroad cost $241,000,000. The lien debts were $157,000,000. The road sold for $61,000,000, and the purchaser at once issued $190,000,000 of bonds and $155,000,000 of stock on property which, a month before, had been bought for $61,000,000. It is insisted, however, that not only the bid at public outcry, but the specific finding in the Paton Case, established that the property was worth less than the incumbrances of $157,000,000, and hence that Boyd is no worse off than if the sale had been made without the reorganization agreement. In the last analysis, this means that he cannot complain if worthless stock in the new company was given for worthless stock in the old. Such contention, if true in fact, would come perilously near proving that the new shares had been issued without the payment of any part of the implied stock subscriptions, except the $10 and $15 assessments. But there was an entirely different estimate of the value of the road when the reorganization contract was made. For that agreement contained the distinct recital that the property to be purchased was agreed to be 'of the full value of $345,000,000, payable in fully paid nonassessable stock and the prior lien and general lien bonds to be executed and delivered as hereinafter provided.' The fact that at the sale, where there was no competition, the property was bid in at $61,000,000 does not disprove the truth of that recital, and the shareholders cannot now be heard to claim that this material statement was untrue and that as a fact there was no equity out of which unsecured creditors could have been paid, although there was a value which authorized the issuance of $144,000,000 fully paid stock. If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends, or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever."

If, as the Supreme Court distinctly held, the reorganized corporation is bound by its own recital of the value of the property, the plaintiffs' case is clear. For the situation here is substantially similar to the situation outlined by the Supreme Court in the Boyd Case. The corporate property was sold under the decree for specified per cent. payments of claims (plus administration expenses), which may be regarded as substantially equivalent to the alternative bid of $6,105,000 for the property. The purchaser at once issued $30,995,000 of stock for property which had been bought for something over $6,000,000. This statement is substantiated by the formal recital, to which reference is hereafter made, that the value of the property purchased was equivalent to the stock issued for it. The actual transaction was somewhat different, for stock was issued for the debentures and in part for claims established against the Motor Company. But, excluding from the computation all the stock issued to debenture holders, and assuming that stock was issued for 75 per cent. of all the claims filed against the United States Motor Company, as if it were absolutely liable, the remaining stock issued for the property purchased would at face value still be twice the price paid for it. Of course the Motor Company was not even primarily liable on all the claims filed against it, and the purchasers paid in fact only 32½ per cent. of the face of the claims.

Here, as in the Boyd Case, it is contended that the liabilities exceeded the assets. If this contention were true in fact, it would in this case, as the court said in that case, come near proving that the new shares had been issued without payment of anything beyond the $24 assessment per share. But there was an entirely different estimate of the value of the property when the reorganization took place. The contract between the Motor Company and Hill and Collins contained a recital that the property was acquired at its "scrap or auction value"—"no allowance being made for the value of

the plants included in said property as plants which might be used for the purposes for which they were built, nor for any value arising from the value of the property as constituting a complete organization, established business and good will as a going concern"—all of which the Motor Company secured under the contract. There was a further recital that the price at which the property and business was acquired "does not represent the real value of the property as a going concern with its good will and organization, and that the price named by the vendors in this contract is greatly in excess of the price at which they are to acquire the property." Finally, the contract set forth that the board of directors of the Motor Company had formally "determined that the value of the property hereinafter mentioned is at least as great as the par value of the stock to be delivered hereunder therefor." The fact that at the sale, where there was no competition, the property was bid in at a little over $6,000,000 does not in this case, any more than it did in the Boyd Case, disprove the truth of that recital, and the conclusion follows that the Motor Company cannot now be heard to claim that this material statement was untrue, and that in fact there was no equity out of which unsecured creditors could have been paid.

Apart from the effect of the Motor Company's formal admission, I am satisfied that an equity in the property of the Maxwell-Briscoe Motor Company sufficient in amount to satisfy the plaintiffs' claim did pass to the Maxwell Motor Company under this reorganization and sale. The record does not admit of definite figures, because the reorganization was effected by the purchaser out of court. The receivers filed no accounting in court. The defendants' books were not available, and very little testimony was offered in explanation of the actual working out of the reorganization. The oral testimony concerning valuations affords little assistance. The various appraisals afford the sale basis for definite figures.

The Maxwell-Briscoe Motor Company was the backbone of the United States Motor Company's organization. As a going concern, as the purchaser really acquired it, it was amply solvent. Even at the appraised scrap value it was not found to be insolvent. As Judge Hough said when the question of sale was under consideration (Exhibit G, p. 116): "On the facts and papers submitted the Maxwell-Briscoe Company is not insolvent in the strict sense of the word, but it is insolvent in the ordinary and usual sense of the word; that is to say, it is unable to discharge its liabilities as they accrue," etc.

The appraisal at auction values (Exhibit H) shows assets almost entirely of a tangible nature. The inter-company accounts receivable aggregate only a little over $50,000. On the other hand, $2,422,712.04 of the listed liabilities of $2.795,342.54 are claims against this company jointly with other companies involved. The bulk of this amount appears to represent claims by holders of notes either made or indorsed by one of the other defendant companies. In part, therefore, it represents a contingent, not an absolute, liability on the part of the Maxwell-Briscoe Company. It is admitted that part of this contingent liability was never enforced against that company; there is no proof that any of it was actually so enforced. The facts with respect to the entire reorganization must be available to the defendants, and in the absence of proof theoretical computations favorable to their defense are not persuasive.

Accordingly I respectfully recommend that the plaintiffs have a decree for the sum of $142,500, with interest from November 1, 1917, which shall constitute a lien on assets of the Maxwell-Briscoe Motor Company which passed to the Maxwell Motor Company under the reorganization and sale, and that suitable provision be made for its enforcement against the Maxwell Motor Company.

Norman K. Anderson, of Chicago, Ill., and F. Leon Shelp, of New York City, for plaintiffs.

Larkin & Perry, of New York City (Henry V. Poor and Donald C. Muhleman, both of New York City, of counsel), for defendants.

MAYER, District Judge. This exceedingly interesting case is, in some respects, one of first impression. The facts are carefully set forth in the clear and comprehensive opinion of the special master. It will not be necessary, therefore, to repeat them in detail, but merely to outline so much thereof as is requisite to explain the controversy.

[1] The suit is brought to enforce against assets of Maxwell Motor Company, Incorporated, a judgment obtained by plaintiffs in the New York Supreme Court against Maxwell-Briscoe Company as guarantor on a lease. On December 10, 1909, plaintiffs let to Maxwell-Briscoe Chicago Company, an Illinois corporation (whose name was subsequently changed to United States Motor Chicago Company), certain real estate in Chicago for a term of 20 years for a specified rental. The fulfillment of the conditions and requirements of this lease by the lessee was guaranteed by Maxwell-Briscoe Chicago Company through ownership of its capital stock. At the time it entered into the guaranty, Maxwell-Briscoe Motor Company was in good financial standing, and was doing a successful business in the manufacture and sale of automobiles. In 1910 it joined certain other companies in the organization of United States Motor Company. The last-named company was formed through the acquisition of practically all the capital stock of the various companies in exchange for capital stock of the new company. A system of business was then set up whereby the United States Motor Company directed the operations of the various subsidiary companies.

In November, 1911, United States Motor Company became financially embarrassed by reason of the difficulty of meeting the interest on debenture bonds which it had issued in 1911 to the extent of $6,000,000. A protective committee was formed, and in the fall of 1912 a reorganization was decided upon, and on September 12, 1912, Brown & Sharpe Manufacturing Company, of Rhode Island, filed a bill in equity in this court, alleging inability of the company to meet its current obligations and asking for the appointment of a receiver. Practically all of the subsidiary companies (including Maxwell-Briscoe Motor Company) were joined as parties defendant and filed answers, admitting the allegations of the bill and consenting to the appointment of a receiver. Receivers were thereupon appointed on September 12, 1912.

On October 10, 1912, the reorganization committee issued a plan of reorganization. The plan contemplated the creation of a new company and the issue of first and second preferred stock and common stock. The plan provided only for unsecured creditors and stockholders, as there were not any secured creditors. Such creditors and stockholders as deposited under the plan were to be taken care of as follows: (1) Creditors of the subsidiary companies such as Maxwell-Briscoe Motor Company were to receive payment in full; (2) claimants against United States Motor Company were to receive 25 per cent. in cash and the remainder in stock; (3) the debenture bondholders were to receive stock for their bonds; and (4) holders of the preferred and common stock of United States Motor Company and Columbia Company (one of the subsidiaries), upon payment of $24 per share, were to receive new and preferred stock.

No provision whatever was made in the plan for contingent claims; i. e., for a claim such as that of plaintiff, which would arise only if the rent were not paid. The reorganization plan, so far as it went, seems to have been entirely fair, and to have contemplated a just disposition of the claims of the respective classes of creditors covered by it, and so Judge Hough thought, as is evidenced by his opinion filed January 9, 1913.

By order of court, the usual provision for filing claims was made, and the time therefore expired December 15, 1912. Appraisals of the property (1) as a going concern and (2) at auction values were made by well-known and expert appraisers. Experienced auditors also prepared a statement of the assets and liabilities of all the companies (1) as a going concern, and (2) at auction values.

With these data before the court, and the usual problem as to whether business should be continued by the receivers or the property should be sold, the court, after several hearings, decided that the property should be sold, and accordingly made and filed its decree of sale dated November 18, 1912. This decree provided, inter alia:

"The purchaser or purchasers, his or their successors, assigns, or nominees, shall be allowed the period of 60 days from the date of delivery of possession to him or them by the receivers within which to elect whether or not to adopt or assume any lease, agreement, or other contract which may be included in the property sold, or which may constitute an incident or appurtenance thereof, and such purchaser or purchasers, his or their successors, assigns, or nominees, shall not be held to have accepted or assumed any such lease, agreement, or other contract which he, it, or they shall not so elect to accept or assume. Such election shall be made by an instrument in writing, subscribed by the purchaser or purchasers, his or their successors, assigns, or nominees, and filed in the office of the clerk of this court, and no conduct or use of rights by any purchaser or purchasers, his or their successors, assigns, or nominees, within said period of 60 days, unaccompanied by the filing of such written instrument, shall be deemed to conclude such purchaser or purchasers, his or their successors, assigns, or nominees, in respect of such election."

On December 12, 1912, the reorganization plan was declared effective. Agreeably therewith, a new company, called Standard Motor Company (whose name was afterward changed to Maxwell Motor Company, Incoporated), was organized January 2, 1913. At a meeting of the reorganization committee held January 6, 1913, a resolution was passed to the effect that bids for the properties of the United States Motor Company and the subsidiaries, including Maxwell-Briscoe Motor Company, should be made in the alternative; i. e., either cash for the property, or a per cent. to be paid on the amount of claims. The alternative bids authorized in respect of Maxwell-Briscoe Company were $1,400,000, or 60 per cent. on the amount of claims.

The cash bid, known as bid No. 1, was regarded by Judge Hough as less desirable (for reasons set forth in his opinion of January 9, 1913) than the per cent. of claims bid, known as bid No. 2, and he authorized the acceptance of bid No. 2. After a careful analysis of the figures and a consideration of the whole situation, Judge Hough said:

"This bid No. 2 affords as much security as any person can have at any judicial sale, for it is admittedly made on behalf of a committee of creditors and shareholders who intend to form a ne wcompany, and who control by

assignment more than 90 per cent. of all the admitted liabilities of all the companies; so that in effect, under the plan of reorganization as a part of which this bid is made, nonassenting and contesting creditors have the security of all the property offered for sale to cover a very small proportion of the alleged liability. In my judgment bid No. 2 is the best bid made."

The decree accepting the bid and confirming the sale thereunder, filed January 11, 1913, was intended inter alia—and properly so—to liquidate the claims of nonassenting creditors of Maxwell-Briscoe Motor Company at 60 cents on the dollar. In due course the property was transferred to the new company. The bid which was thus accepted read that the purchasers—

"Will pay or cause to be paid to the holders of claims *heretofore filed* in the above-entitled suits, * * * the following percentages of the amount of said claims as finally determined and allowed, * * * and after the same shall be finally adjudged * * * entitled to share in the distribution of the proceeds of sale. * * *"

On January 11, 1913, however, plaintiffs had not filed any claim, and could not file any claim, for the reason that rent due under plaintiffs' lease had been paid quarterly in advance on September 10, 1912, and December 10, 1912. On March 10, 1913, the rent was again paid in advance, thus putting plaintiffs in a position where the next rent payment would not be due until June 10, 1913.

On March 11, 1913, Maxwell Motor Company (the new company), pursuant to the power (quoted supra) given in the final decree of sale, filed in this court notice of intention not to assume Maxwell-Briscoe Motor Company's guaranty of the plaintiffs' lease. In other words, although the rent was paid on March 10, 1913, the new company on March 11, 1913, the last of the 60 days allowed to it to disaffirm, did then disaffirm or decline to assume the obligation of the guaranty. Plaintiffs, of course, were helpless until June 10, 1913, the next rent day, and on that day the lessee defaulted in the payment of rent.

On June 15, 1913, plaintiffs attempted to distrain for rent on the property of United Motor Chicago Company, the lessee; but on June 24, 1913, the lessee filed a voluntary petition in bankruptcy, and was adjudicated a bankrupt on June 27, 1913, and in due course was discharged; only a small percentage of the claims against it having been made. After considerable litigation, plaintiffs on November 1, 1917, obtained a judgment against Maxwell-Briscoe Motor Company for $142,560, execution was thereafter issued and returned "No property found" on December 27, 1917, and this suit was begun on July 12, 1918.

From the foregoing it will be seen that this was a stockholders' reorganization, but that the case differs in two respects from Northern Pacific Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931, first, in that there were no secured creditors, and, secondly, in that the claim had not accrued at the time of the decree of sale. The question to be decided is whether these differences, on the facts in this case, take it out of the principles laid down in the Boyd Case and followed in Kansas City Southern Railway Co. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579.

In the Boyd Case no provision whatever was made for creditors.

The procedure was the then familiar one, by which the creditor was barred out by mortgage foreclosure decree and the property came back to the stockholders, usually scaled down and after levying an assessment to enable it to continue as a going concern. In the Kansas City Southern Railway Case the court found that the provision made for creditors was wholly inadequate.

In the case at bar, as there were no secured creditors, the reorganization was as much a creditors' as a stockholders' reorganization, and the provisions for the creditors, both in the reorganization plan and in the decree of sale, were entirely fair as far as they went; but the difficulty is that no provision whatever was made for such a claim as that of plaintiffs, although the decree put it in the power of the purchaser, the new company, to destroy the security of the lease. In order that there may be no misunderstanding, it is well to restate that a so-called stockholders' reorganization may be and often is an entirely feasible and desirable method of reconstructing a corporate enterprise, and of thereby saving for creditors and stockholders as a going concern a business which otherwise might be destroyed or disintegrated if knocked down at auction. As said by Judge Sanborn in St. Louis-San Francisco Railway Co. v. McElvain (D. C.) 253 Fed. 123, 133:

"There is no moral turpitude, nor is there any illegality, in the making and performance of an agreement between the bondholders. secured by mortgages, the stockholders, and the unsecured creditors of an insolvent mortgagor, that there shall be a foreclosure and sale of the mortgaged property to or for the benefit of a new corporation, in which all the members of the three classes shall be permitted, at the option of each of them, to take the bonds or stock of the new corporation in substantial proportion to the respective ranks and equities of the classes. Indeed, a foreclosure and sale under such an agreement is the most practicable, equitable, and beneficial method of foreclosure and sale of vast railroad or other properties that has yet been devised."

But, where no provision is made for an unsecured creditor, then the doctrine of the Boyd Case is inescapable; for, said the court at page 504 of 228 U. S., at page 560 of 33 Sup. Ct. (57 L. Ed. 931):

"If purposely or unintentionally a single creditor was not paid. or provided for in the reorganization, he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. They were in the position of insolvent debtors, who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor, was invalid. Being bound for the debts. the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale."

Quoting again from Judge Sanborn in the St. Louis-San Francisco Railway Co. Case, supra:

"The foreclosure decrees and sales which have been held fraudulent in law and voidable as against unsecured creditors in the Boyd Case. and the other cases cited above, were those that had been made under agreements between the secured bondholders and the stockholders of the mortgagor, whereby the stockholders received beneficial interests, by means of stock, bonds,

or otherwise, in the purchasing corporation, without giving or offering any such beneficial interest whatever to the unsecured creditors, in violation of the trust under which an insolvent corporation holds its property. for, first, its secured creditors; second, its unsecured creditors; and, third, and last, its stockholders."

From all that has thus far been said, it is plain that the difficulty in the case at bar is that no provision was made for plaintiffs' claim, and it is not unlikely that the necessity for such provision did not occur to the purchaser, in view of the fact that the Boyd Case was not decided until April 28, 1913, some weeks after the disaffirmance date of March 11, 1913, and its principles were not as well known and as firmly established as they are now.

Plaintiffs, therefore, retained the right to subject the interest of the old stockholders in the property to the payment of their claim. If their interest is valueless, he gets nothing. If it be valuable, he merely subjects that which the law had originally and continuously made liable for the payment of corporate liabilities. On the facts the special master has found that the property of Maxwell-Briscoe Motor Company, of which defendant Maxwell Motor Company, Incorporated, became the owner, was amply sufficient to pay the claim here sought to be enforced, and with that conclusion I agree.

[2] The remaining question is that which arises from the contingent nature of the claim. On this branch of the case it is desirable to limit the court's decision to the particular facts here developed. It may well be that situations may develop where claims of a contingent character may have no standing in a court of equity. The status of contingent claims similar to that at bar is explained in People v. Metropolitan Surety Co., 205 N. Y. 135, 98 N. E. 412, Ann. Cas. 1913D, 1180, and the rules as to what claims are provable are set forth in Pennsylvania Steel Co. v. New York City Railroad Co., 198 Fed. 721, 117 C. C. A. 503. If, therefore, this estate had been wound up prior to March 11, 1913, without a stockholders' reorganization, this claim would not have been provable, and would have been barred.

In such cases there is a fund for distribution, and the necessity for ascertaining claims "at a time consistent with the expeditious settlement" of estates is the reason for holding as nonprovable those claims "which are so uncertain that their worth cannot be ascertained," even if such claims be "highly meritorious." But where, as here, there is a stockholders' reorganization, and the new company by its own act sets in motion the default which matures a contingent into an absolute liability, a court of equity cannot permit it to benefit by that act.

If defendant Maxwell Motor Company, Incoporated, had let March 11, 1913, go by without filing its intention not to assume the lease, it would have been liable to plaintiffs. When it became the owner of the property of Maxwell-Briscoe Motor Company, it knew or ought to have known the latter's contingent liability in respect of this lease, and it would be strange if a court of equity would permit a creditor to be so positioned as to prevent him from proving his claim or participating in a reorganization, while at the same time leaving him remediless by virtue of the act of a corporation created as a part of the plan of

reorganization; for it must not be forgotten that the March rent was paid after the decree of sale and after the delivery of the property thereunder to Maxwell Motor Company, Incorporated.

It is suggested that, if the conclusions of the special master be sustained, difficulties will arise in working out the plans of beneficial reorganizations; but I think this is a needless fear. Equity usually succeeds in molding its decrees to the requirements of the situation with which it deals, and finds a way to practical as well as just results. Other points raised are fully covered by the special master's report and do not require elaboration.

Exceptions are overruled, and the special master's report is sustained. Submit decree on notice.

MARCUS BROWN HOLDING CO. v. FELDMAN et al.

(District Court, S. D. New York. December 15, 1920.)

1. **Courts ⇐347—Multifarious bill against tenant and officer to test Housing Laws considered under equity rule 26.**
   A bill by a landlord against his tenants to require them to vacate the property, and against the district attorney to restrain the enforcement of the New York Housing Laws, though multifarious, presents matters which can properly be considered together, as authorized by Supreme Court rule in equity 26 (201 Fed. v, 118 C. C. A. v), since the determination of the validity of the statutes will settle all questions.

2. **Landlord and tenant ⇐280—Bill in equity does not lie to dispossess tenants.**
   A landlord cannot proceed by bill in equity to dispossess tenants holding over after the expiration of the lease, since an action of ejectment affords a complete remedy.

3. **Trial ⇐11(3)—Bill for legal relief transferred to law side.**
   A bill in equity, which seeks relief obtainable by action at law, need not be dismissed, but can be transferred to the law side, and a repleader granted under Act March 3, 1915 (Comp. St. § 1251a–1251c).

4. **Injunction ⇐105(2)—Will issue to restrain prosecution under unconstitutional statute to protect rights of others.**
   Though, ordinarily, equity will not enjoin prosecution for violation of statutes alleged to be unconstitutional, but will permit that defense to be interposed in a prosecution, it can issue such injunction to restrain prosecution under the New York Housing Laws of 1920 (Laws 1920, c. 951), if they are invalid, since thereunder the landlord's agents and employés can be prosecuted for failure to furnish service to tenants, which would affect the landlord's property rights without his having an opportunity to be heard.

5. **Trial ⇐11(3)—Legal cause, involving same question as equitable cause, will not be transferred to law side.**
   Where a bill in equity states a legal cause of action against tenants and an equitable cause of action to enjoin the enforcement of the statutes on which the tenants rely, both of which causes will be determined by ascertaining the validity of the laws, the legal cause of action need not be transferred to the law side, but can be determined in connection with the equitable cause.

6. **Constitutional law ⇐211—"Equal protection of laws" does not prevent classification.**
   The "equal protection of the laws" guaranteed by Const. U. S. Amend. 14, means the protection of equal laws, and requires every state to give

equal protection and security to all under like circumstances, to the end that no greater burden shall be laid on one than on others in the same calling and condition; but such requirement does not prevent a classification of persons for purposes of regulation, if the classification has reasonable basis under the circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Equal Protection of the Law.]

7. **Constitutional law ⟸48—Statute presumed constitutional.**
Any legislative act is presumptively constitutional, even though it is novel legislation.

8. **Constitutional law ⟸70(3)—Wisdom of legislation not question for courts.**
The wisdom, expediency, or sincerity of legislative action is not open to judicial inquiry.

9. **Constitutional law ⟸48—Court cannot presume that reasonable rent under Housing Laws is not market rent.**
In a suit attacking the validity of the New York Housing Laws of September 1920 (Laws 1920, cc. 943–945, 948–952), which prevent dispossessing of a tenant at the expiration of his term, if he is able and willing to pay a reasonable rent to be determined by proceedings under the statute, in which suit no accusation was made that those charged with adjusting the rent were rendering the laws unconstitutional by their practical interpretation thereof, the court cannot assume that the reasonable rent, as fixed by those proceedings, would differ from the rent which the landlord could obtain by bargain in open market and therefore cannot hold that those laws take the landlord's property for private use.

10. **Constitutional law ⟸12—Constitution not strictly interpreted.**
A Constitution, unlike a Code or a statute, declares only fundamental principles, and is not to be interpreted with the strictness of a private contract.

11. **Constitutional law ⟸117—Contract clause does not override state police power.**
A clause of the United States Constitution, prohibiting a state from impairing the obligation of contracts, does not override the police power of the state to establish regulations reasonably necessary to secure the health, comfort, or general welfare of the community.

12. **Eminent domain ⟸2(1)—Police regulations may interfere with enjoyment of property without providing compensation.**
The Legislature of a state may make police regulations, although they interfere with the full enjoyment of private property, and no compensation is given therefor.

13. **Constitutional law ⟸39—State's public policy is found in Constitution and valid laws.**
No state can have a public policy, except what is found in its Constitution and in its laws constitutionally enacted.

14. **Landlord and tenant ⟸3, 200(1½)—Business of renting dwellings is subject to regulation, including the fixing of rents.**
The business of renting dwelling houses is a matter so affected with public interest that it may be regulated under the police power of the state, and such regulation may include the fixing of rents in times of abnormal stress, since the fixing of the price of necessaries is a long-established exercise of the police power.

15. **Constitutional law ⟸240(1)—Classification of dwelling house landlords for regulation held reasonable.**
The classification of the New York Housing laws, which apply only to landlords renting dwelling houses, is not so unreasonable as to invalidate those laws, in view of the fact that the shortage of dwelling houses was especially acute, and of the necessity of obtaining dwellings without delay.

16. Constitutional law ⇐211—Power of classification restricted, only if no reason could sustain it.

The classification adopted by the Legislature can be held invalid only if there is no reason which can be conceived which would sustain the classification.

In Equity. Suit by the Marcus Brown Holding Company against Marcus Feldman and others. On hearing on application to show cause why an injunction pendente lite should not be granted. Application denied, and bill dismissed.

Hearing under order to show cause, dated November 18, 1920, requiring the defendant Swann, as district attorney, to show cause why he should not be restrained pendente lite from instituting proceedings or actions of any kind against the plaintiff, its agents, etc., for failure or refusal to furnish heat, water, elevator service, etc., to the other defendants; also requiring the other defendants to show why they should not be restrained from "entering upon or continuing to occupy" the dwelling apartment described in the bill of complaint herein, or to make use of any property belonging to plaintiff without plaintiff's consent.

Plaintiff is a corporation of New Jersey; defendants citizens of New York and residents of this district. About September 30, 1920, plaintiff became owner in fee of a large apartment house in this city, worth (as alleged) upwards of $1,000,000. When plaintiff acquired this building, defendants other than the district attorney, were tenants therein holding an apartment under a written lease made by plaintiff's predecessor in title on October 1, 1917, and terminating September 30, 1920, which lease contains the usual mutual covenants for quiet enjoyment and peaceable surrender. This plaintiff landlord and its predecessors in title are in legal effect one legal entity.

In March, 1920, the landlord notified the tenant defendants to surrender possession of the apartment in question at the expiration of their lease; in point of fact the landlord, before giving notice, executed a new lease, taking effect at the expiration of defendants' tenancy, to other parties presumably more satisfactory to the lessor. In June, 1920, the tenant defendants advised the landlord that they were "willing to renew the lease of apartment in your premises at a reasonable increase, to be determined by the mayor's committee."

This was rejected, the landlord writing that it expected the tenants to "surrender the premises on the expiration of lease as therein provided." At expiry the tenant defendants refused to move, and, having answered herein, we assume the truth of their pleading alleging that they now are in occupancy of the apartment aforesaid under the protection of certain statutes of the state of New York, and "are and at all times have been ready, able, and willing to pay the fair and reasonable increase as the same may be determined by a court of competent jurisdiction."

Plaintiff, insisting upon its right to choose its own tenants, brings this suit, alleging the unconstitutionality of the statutes under which defendants justify retention of said apartment, which statutes are (as appears by the tenant defendants' answer) chapters 942 and 947 of the Laws of New York for 1920. Plaintiff alleges, as further violating its rights in the premises, other statutes of New York, being chapters 943–945, inclusive, and chapters 948–952, inclusive, and chapters 131, 132, and 135–138, inclusive, of the Laws of 1920.

Defendant Swann, as district attorney, is sued because by chapter 131, as amended by chapter 951, there is added to the Penal Law of the state the declaration that any lessor, agent, janitor (or the like) of any building wherein lessees are, expressly or impliedly, entitled to hot or cold water, heat, light, power, elevator service, telephone, or any other service or facility, who willfully or intentionally fails to furnish the same, or who so "interferes with the quiet enjoyment of the leased premises by such occupant," is guilty of a misdemeanor.

The prayer as to the tenant defendants is that they be "enjoined and restrained from entering upon or continuing to occupy the apartment herein

described or to make use of any of the property belonging to this complainant without the complainant's consent." As to the district attorney, the prayer is that he be enjoined from instituting any proceeding or action under the statute above alluded to or otherwise, for any failure or refusal on the part of the plaintiff to furnish the facilities above referred to to the tenant defendants or "any other person occupying any part of the building" (belonging to plaintiff) without "its consent or permission, and holding over against its will after October 1, 1920, under color of the statutes and laws" above referred to.

Hearing is on the bill, the answer of the tenant defendants, the affidavit, verified November 17, 1920, of Mr. Joseph A. Seidman, attorney for plaintiff, the affidavit, verified December 3, 1920, of Mr. Samuel R. Gerstein, attorney for tenant defendants, and certain public documents, viz. "Report of the Joint Legislative Committee on Housing," transmitted to the Legislature of New York on September 20, 1920, and the message (bearing the same date) of Governor Alfred E. Smith relative to "housing facilities within the state and recommending legislation in reference thereto."

It thus appears as a fact satisfactorily proven that the statutes above enumerated from chapters 942–952, inclusive (except chapter 946), commonly and collectively known as the September Housing Laws), were made laws, for the reason and in response to the demand or emergency insistently presented to the Legislature by the above-mentioned report of its own joint committee and by the Governor's message. The other statutes complained of by plaintiff are collectively known as the "April Housing Laws." Assuming legislative power to enact all these laws, the April statutes have been almost wholly superseded by those of September. The importance of the earlier statutes, so far as this bill is concerned, seems to be that, should the September acts be voided, argument might be made that the April acts were revived; hence complaint is made of all the housing legislation of 1920.

Joseph A. Seidman, of New York City, for plaintiff.

Francis M. Scott and I. Maurice Wormser, both of New York City, amici curiæ.

Samuel R. Gerstein, of New York City, for tenant defendants.

William D. Guthrie and Julius Henry Cohen, Sp. Deputy Attys. Gen., both of New York City (Elmer G. Sammis and Bernard Hershkopf, both of New York City, of counsel), for Joint Legislative Committee on Housing.

Robert S. Johnstone, of New York City (John Caldwell Myers, of New York City, of counsel), for defendant Swann.

David L. Podell, Benjamin S. Kirsh, and Jacob Podell, all of New York City, for tenant.

Before HOUGH, Circuit Judge, and MAYER and AUGUSTUS N. HAND, District Judges, sitting pursuant to Judicial Code, § 266 (Comp. St. § 1243).

HOUGH, Circuit Judge (after stating the facts as above). Several objections to plaintiff's right to be heard have been insisted on and must be first considered.

[1] The bill (it is said) sets forth several matters of a distinct and independent nature against several defendants and is therefore multifarious. In our opinion this is true, but it is also true that the twenty-sixth Supreme Court rule in equity (201 Fed. v, 118 C. C. A. v) has rendered that defense unavailable, whenever, in the opinion of the court, "sufficient grounds appear for uniting the causes of action in order to permit the convenient administration of justice." The rule has been thus interpreted in this district since its promulgation.

And see Crawford v. Washington, etc., Co., 233 Fed. 966, 147 C. C. A. 635; Eclipse Co. v. Harley (D. C.) 244 Fed. 463, United States v. New England, etc., Exchange (D. C.) 258 Fed. 732.

The separate matters in this bill are two—one a complete severable cause of action against the district attorney; the other (equally complete) against the tenant defendants—yet plainly the constitutionality or the reverse of any action by the district attorney depends wholly upon the constitutionality of these housing statutes. The rights of occupiers against landlords will, as to the services referred to in chapter 951, depend upon the constitutionality of the statutes permitting them to remain where they are not wanted. Consequently the connection between the rights of the tenant defendants and those of the district attorney is so intimate that both rights grow out of the same mass of legislation, and they should be tested together. This case affords a good example of the wisdom of abrogating the strict rule regarding multifarious pleading.

[2] It is further said that the bill as affecting the tenant defendants is no more than an endeavor to bring an ejectment suit in equity. Such efforts have often been made and always failed (Smyth v. New Orleans, etc., Co., 141 U. S. 656, 12 Sup. Ct. 113, 35 L. Ed. 891), and this bill suggests no circumstances under which this court of equity would be empowered to issue mandatory injunctions which would be the equivalents of writs of possession; yet this is the futile prayer of the bill.

[3] But under modern procedure the dismissal of the bill does not necessarily follow. On the contrary, the court is required by Act March 3, 1915, 38 Stat. 956 (Comp. St. § 1251a–1251c), to transfer any action wrongly brought in equity to the law side, and grant a repleader.

This plaintiff might, however, have brought an action for the recovery of possession of real property (ejectment) at law and in this court. No state statute can define or limit the jurisdiction of this court; and this is true, although it be assumed that the defenses in ejectment authorized by the statutes enumerated would be as available to defendants in the United States courts sitting in New York as they are in the tribunals of the state.

[4] It is next objected that the bill cannot stand as against the district attorney, because the question must be raised after indictment, and in the criminal court. Considering the actual sequence of events in Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283, 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, courts of first instance may well refrain from much legal exposition.

It is true that the reasons assigned in some of these cases for going into equity were in substance that the party complaining would be injured in some constitutional right by the operation of a statute al-

leged to be unconstitutional without ever being proceeded against himself, while in this instance plaintiff is personally subject to the operation of chapter 951.

But the public documents above mentioned prove that the object of chapter 951 is not to extend criminal liability to owners of apartment houses, for that was done in April by chapter 131. The purpose is to make criminally liable substantially all of the landlord's servants or agents concerned in the operation of an apartment house; and the reason for this is that it had been found practically impossible to prove guilty knowledge on the landlord's part, wherefore conviction was impossible.

We do not understand that the Supreme Court has in proceedings like this barred from equity *all* persons who may be pursued under a criminal statute, but only those who have under the statute a fair opportunity of raising the constitutional question in criminal proceedings brought directly against them. But in the cases which the Legislature expected to produce by chapter 951 this defendant would have no standing; yet if its agents are convicted such conviction may obviously produce civil suits against and resultant liability on the part of this plaintiff.

Without attempting to define the limitations of bills in equity against officials charged with the administration of the criminal law, we think this suit is within the practice of the cases cited. We therefore have before us two causes of action severally cognizable in this court, though not in the same litigation. This is not because the bill is multifarious, but because one cause of action is legal and the other equitable. We may shortly note here that the jurisdictional amount is well pleaded, which is enough for present purposes.

[5] It is, however, plain that if the statutes affecting the rights of the plaintiff and the tenant defendants are constitutional plaintiff can no more succeed in an action of ejectment at law than it can under this bill in equity, and it is equally clear that if such statutes are constitutional the bill against the district attorney should be dismissed. It is therefore an idle ceremony to separate the causes of action and send one to the law side of the court, and we shall now consider whether in any form of procedure on either side of the court or against any defendant, plaintiff has revealed a cause of action.

Disregarding chapter 948, which affects Buffalo and Rochester only, and speaking generally of the other September laws, the legislative intent is this: Within what may be called the metropolitan district (New York City and contiguous counties) the owners of dwellings, including apartment and tenement houses (but excepting buildings under construction in September last, lodging houses for transients and the larger hotels), are wholly deprived until November 1, 1922, of all legal methods of removing from their premises the tenants or occupants of September, 1920, provided that such tenants or occupants are (in effect) ready, able, and willing to pay a reasonable rent or price for their use and occupation. Whenever (the commonest case in this city) the tenancy was from month to month, any demanded rent greater than that of a year prior to such demand is presumptively unrea-

sonable and oppressive. Whether the landlord attempts to recover the desired rent by personal action, or tries to get back his premises by dispossess proceedings or ejectment, a September occupant can always block him and remain in possession by bringing into court a sum equivalent to the last month's rent, until the issue of unreasonableness is passed on by court and jury. The landlord's former legal rights are intact, however, when the occupant is "objectionable," when the demanding landlord is a "corporation formed under a co-operative ownership plan," and when the building is in good faith required for the purpose of demolition and rebuilding or the personal occupancy of the owner.

A knowledge of pre-existing law and the words of the statutes are enough to prove that the legislative desire is to maintain for about two years the September status of the kind of dwellings in which (by common knowledge) lives the major portion of the population of the metropolitan district. This status is to be maintained against the landlord's will if necessary, but at the option of the tenants, for the landlord cannot select his tenants, but must accept what may be called the statutory tenants, yet every such tenant is and will be as free to depart and choose another landlord as he was before September, 1920.

Finally, to prevent owners from rendering their apartments uncomfortable for, if not uninhabitable by, the unwelcome statutory occupants, any intentional diminution or denial of the ordinary facilities or conveniences of apartment house life is made a misdemeanor on the part, not only of the owner, but substantially of every person connected with the management of the building, if intentional failure to furnish such facilities can be proven against him.

Speaking now specifically of the facts in the present case, the tenant defendants herein, by law older than the state of New York, became at the landlord's option trespassers on October 1, 1920. Plaintiff had then found and made a contract with a tenant it liked better, and had done so before these statutes were enacted. By them plaintiff is, after defendants elected to remain in possession, forbidden to carry out his bargain with the tenant he chose, the obligation of the covenant for peaceable surrender by defendants is impaired, and for the next two years Feldman et al. may, if they like, remain in plaintiff's apartment, provided they make good month by month the allegation of their answer, i. e., pay what "a court of competent jurisdiction" regards as fair and reasonable compensation for such enforced use and occupancy; and meanwhile, if any person concerned in the management of the apartment house intentionally cuts off any of the facilities or conveniences appurtenant to apartment house life when Feldman and Schwartz were presumptively desired as tenants, a crime has been committed.

Since jurisdiction depends on diversity of citizenship, plaintiff is entitled to urge violations of the state as well as the federal Constitution, but this court will confine itself to the latter charter of rights, the construction of the state Constitution having been exhaustively considered by the courts of the state in contemporaneous and similar litigation. It is asserted that by these statutes the obligations of plaintiff's contracts have been impaired, and so have those of a great number of

other landlords. This is plainly true; the interpretation of section 10 of article 1 of the Constitution made in Green v. Biddle, 8 Wheat. 1, 5 L. Ed. 547, has never been departed from.

Further assertion is that plaintiff and other landlords similarly situated have been denied the equal protection of the laws in that the owners of finished and presumably occupied dwellings have been chosen for legislative oppression, when no such burdens have been laid on owners of dwellings as yet unfinished or hereafter to be erected, nor upon those possessed of office and business property, hotels and the like, who use their real estate for purposes of profit in the same manner and to the same extent as do the dwelling house landlords.

[6] It has been often said that the equal protection of the laws mentioned in the Fourteenth Amendment means a pledge of the protection of equal laws, and more specifically that every state shall give equal protection and security to all under like circumstances to the end that no greater burdens shall be laid upon one than are laid upon the others in the same calling and condition. Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. But it is also fundamental that such equality is not as matter of law inconsistent with classification both for benefits and burdens, and exactly how that classification may be made has never been defined, and we think never ought to be, having regard to the infinitely changing circumstances of human society. When by classification or otherwise we arrive at "a partial or private law which directly purposes to destroy or affect individual rights," it is "unconstitutional and void," for "were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another." Cotting v. Kansas City, &c., Co., 183 U. S. at page 105, 22 Sup. Ct. 41, 46 L. Ed. 92. While a forbidden result may be thus denounced, well-founded uncertainty as to means has produced the ruling that "what may be regarded as a denial of the equal protection of the laws is a question not * * * easily determined, * * * no rule can be formulated that will cover every case," and the highest court has gone no further in the way of definition than to say that no class of persons shall be denied the same protection enjoyed by "other classes in the same place and in like circumstances." Connolly v. Union, etc., Co., 184 U. S. at page 558, 22 Sup. Ct. 431, 46 L. Ed. 679. The phrase "in like circumstances" leaves open a question newly presented in each new case.

Again, it is said that these statutes put an end to liberty of contract and take property for a private use, and therefore in both respects amount to a denial of due process of law. That as to one and a very large fraction of the contractual engagements current in this city there is no liberty of contract under these statutes cannot be denied, and that property is taken from the landlord for the use of the statutory tenant is also true, in the sense that the property owner may be and is in this instance compelled to let his property be enjoyed by one whom he does not want, and it may be true in another sense, although the statutory tenant be a person entirely satisfactory except in the amount of rent he pays, if there be any legal difference between what the landlord could

get in the open market for his property and that reasonable rent for the fixing and recovery of which the state still affords legal machinery.

But when appeal is made to the due process clause of the Fourteenth Amendment it must always be remembered that so far as the national Constitution is concerned the phrase has never been authoritatively and finally delimited or defined; definition has been declined, because it is better to ascertain meaning in each case by a process of judicial inclusion and exclusion. Davidson v. New Orleans, 96 U. S. 104, 24 L. Ed. 616.

[7] It is a wearisome truism that any legislative act is presumptively constitutional; it is also true that in popular, if not in professional, estimation the presumption weakens in proportion to the novelty or singularity of the statute. No legislation really like that at bar has been discovered in American history by the research of counsel, and the nearest (and not very near) instances known to us are the stay and collection laws of many states (notably Kentucky) in the early days of the last century, and the limitations upon the private use of real property, considered in Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923.

[8] But, no matter how astonishing the legislation appears to the citizen, it has been so many times said that the wisdom, expediency or sincerity of the Legislature is not open to judicial inquiry, that citation is superfluous. Judicial review is, and always has been, properly limited to an inquiry into the reason for the ascertained legislative intention—starting with the premise that the mere "say so" of the Legislature does not furnish a reason by its mere existence.

This inquiry has led courts very far, and it is doubtless true that reasons have of late years been judicially considered concerning which previous generations were not asked to inquire, and would have perhaps deemed the inquiry superfluous, if not improper. How wide this investigation has become, and how rapidly its scope has enlarged, can be seen by comparing not only the decisions, but especially the briefs and records in Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, with those in Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957.

The reason for the laws here involved is patent from the public documents above mentioned; no appeal need be made to common knowledge or contemporary observation. In October last the Municipal Courts of New York City were flooded with more "notices to quit"—i. e., summary dispossess proceedings—than had ever before been known during an entire year. They amounted to 100,000, and according to the estimate of families commonly used by local relief associations and other statisticians the number of persons involved in each dispossess proceeding was not less than 4, and in all probability 5. This meant that nearly 10 per cent. of the permanent population of the city would (if existing laws took their course) shortly be seeking other habitations on the eve of winter.

The demands of a world at war had for several years produced such application of men, money, and material to other and more immediately lucrative occupations that new dwellings in the city of New York and

adjacent territory were conspicuously absent, while the same attractions that had practically stopped building had increased the home-seeking population of the city to an extent unstated, but certainly large.

This almost total absence of new homes produced a demand for the old out of proportion to the supply. Such demand raised the market value of the old, and correspondingly diminished economic equality, or equality in bargaining, between any actual landlord and any would-be tenant, either new or old. Such conditions produced a reason deemed sufficient by the Legislature to prefer in the struggle for living space the tenants in possession to all others, and to them was given the option of remaining at a reasonable rent, so called—really a statutory charge for use and occupation—but there was secured to the landlord a legal machinery for ascertaining such reasonable compensation.

[9] As matter of law we cannot hold that the market value or price —i. e., what is fetched when goods are bought and sold in the ordinary course of trade (Muser v. Magone, 155 U. S. 240, 15 Sup. Ct. 77, 39 L. Ed. 135)—is for the use of real property anything different from that reasonable rent or use charge secured to the landlord by these statutes. We have nothing before us but the statutes; no accusation is made that those charged with adjusting rent are rendering the acts unconstitutional by their practical interpretation of their duties thereunder. We therefore drop from further consideration the second part of plaintiff's argument regarding the taking of his property for private use. This does not, however, affect the asserted constitutional right to "choose his own tenant." Thus, we think, is reached the only inquiry open to a court: Is the reason assignable for the Housing Laws constitutionally sufficient to overcome the constitutional objections presented?

[10-12] It cannot be too often said that a constitution is not a code nor a statute, that it declares only fundamental principles, and is not "to be interpreted with the strictness of a private contract." Legal Tender Cases, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204. To this doctrine we owe the rulings that even the contract clause of the Constitution does not override the power of the state to establish regulations reasonably necessary to secure the health, comfort, or general welfare of the community—that is, to exercise the police power of the state (Atlantic, etc., Co. v. Goldsboro, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721); that in like manner "reasonable restraints" may be placed upon freedom of contract (Rail & River Co. v. Ohio, etc., Comm'n, 236 U. S. 338, 35 Sup. Ct. 359, 59 L. Ed. 607); and that a Legislature may make police regulations, although they interfere with the full enjoyment of private property, and no compensation be given (Chicago, etc., Co. v. Drainage Comm'n, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175). Such decisions (and we cite but few of many) reduce the question to this: Are these statutes an exercise of police power reasonably suitable for combating or lessening the evil proved, and therefore constitutional, although at other times and under other circumstances they might plainly be obnoxious to fundamental principles of constitutional government?

[13] In briefs something is said to the effect that the statutes are

justified because consonant with the state's "public policy." The assertion gets nowhere, for it is firmly established that no state can have a public policy, except what is to be found in its Constitution and its laws constitutionally enacted. People v. Hawkins, 157 N. Y. at page 12, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736. This case stands or falls on police power. Definition of this phrase has never advanced over Chief Justice Taney's declaration that it is no more than the power inherent in a sovereign. License Cases, 5 How. at page 583, 12 L. Ed. 256. Applied to a state, this means its reserved sovereignty, inherent and incapable of being bartered away, because necessary for the state's existence, and lessened only by what the people of the state joined with all the other people of the other states in conveying to and consolidating in the United States.

On reason, then, if a given subject-matter is appropriate to the exercise of sovereign action, and such action has not been expressly and absolutely prohibited by the federal Constitution as authoritatively construed, the legislative result is not forbidden, where the purpose is within the range of reserved sovereignty, the means appropriate, and the reason sufficient, even though in reaching the result some toes be trodden on; and how many toes and how severely they may be trampled is a question that varies with circumstances. We may inquire, therefore, whether the subject-matter of these statutes is historically appropriate for legislative regulation. While rarely, if ever, exercised in America, there can be no doubt that one of the oldest exercises of sovereignty has been to fix the price and use of some of the necessities of life, especially bread. Shelter is as much a necessary as bread, and that likewise has in times of stress been the subject of regulation, and indeed of apportionment. Freund on Police Power, § 308.

There have been, however, since the dawn of our legal history, some occupations closely allied with the necessities of life, which have always been governmentally regulated, both as to prices chargeable and persons to be served. The usual examples are innkeepers, carriers, millers, ferrymen, and wharfingers. At common law the property of these men was held to be devoted to a public use, and their occupations were public business. State v. Edwards, 86 Me. 102, 29 Atl. 947, 25 L. R. A. 504, 41 Am. St. Rep. 528. From this ancient doctrine grew the famous series of "elevator cases." Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757.

In and by these decisions the doctrine of property devoted to a public use became the doctrine of property affected with a public use, even when (as in the North Dakota Case) the elevator owner really wished to, and actually did, confine his storage facilities to grain he had himself bought and desired himself to sell again. Cf. dissenting opinion of Brewer, J. The step from property affected with a public use to a "business affected by a public interest" (i. e., fire insurance) was taken in German Alliance, etc., Co. v. Kansas, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189), and it must be now accepted on that authority as an "underlying principle that business of certain

kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulations."

[14] Since this pronouncement, and its legitimate and logical sequel, the "trading stamp" case (Rast v. Van Deman, 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455), it may be and has been asserted that any business is affected with a public interest as soon as the electorate become sufficiently interested in it to pass a regulatory statute. It is not necessary to go so far, but we must and do hold that the business of renting out living space is quite as suitable for statutory regulation, and as much affected with a public interest, as fire insurance and trading stamps. It is easy to multiply quotations as to the inviolability of private business. It is singular how uniformly they come from decisions holding some business open to intimate regulation, while saying that, if such business were only private, it could not be regulated; but never is "private business" defined. It is another of those phrases which is left to a process of "inclusion and exclusion," which really means a finding of facts. Thus, when People v. Budd passed through the Court of Appeals in this state (117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460) Judge Andrews declared:

"That no general power resides in the Legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt."

Similarly and very lately it was said in Producers, etc., Co. v. Railroad Commission, 251 U. S. 228, 40 Sup. Ct. 131, 64 L. Ed. 239:

"It is, of course, true that, if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use—that is, to carrying for the public—the state could not by mere legislative fiat, * * * convert it into a public utility or make its owner a common carrier."

That applicant had done just what the present plaintiff wants to do —selected its own customers, but it was regulated into taking customers it did not want, and so was Mr. Budd's elevator.

If, therefore, the allotment of necessaries in times of stress is a governmental function known to historic law, and the business now affected is (in such circumstances) one capable of being affected with a public interest, nothing remains of plaintiff's contention, except the complaint of inequality in legal protection, i. e. of classification. This is the nub of the matter, for it is plain that a reason must be clear which justifies on fundamental—i. e., constitutional—principles, the selection of one class of landlords for regulation and one class of tenants for favor and protection.

[15] The reason is clear; in property other than dwellings there was not, or there was not shown to be, such scarcity as existed in respect of livable rooms and apartments; the consequences of a scramble for stores or offices are not of the same deteriorating social character as is one for homes; men and women who want a place to sleep are peculiarly at the mercy of landlords, and that inequality in bargaining recognized in Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L.

Ed. 780, as a proper reason for regulation was present; while new buildings would certainly cost very much more than had the old ones; wherefore, if price regulation or limitation as to them was attempted in advance of completion at unknown cost, it would probably prevent exactly what was necessary to relieve the shortage that occasioned the evil to be combated.

[16] If the power of classification by Legislatures was ever judicially limited, the effort has been abandoned, unless some limitation can be found in the statement that a distinction is arbitrary, where no "state of facts reasonably can be conceived that would sustain it." Rast v. Van Deman, supra. No such rule, if it be a rule, finds application here. It is unnecessary to further parade decisions; from the Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394, to that of the Producers' Company, supra, at the last term of court, all the Fourteenth Amendment decisions are alike in refusing dogmatic definition and avoiding production of results by an inexorable legal logic; much, indeed most, has been left to circumstances as they arose, so that reported cases are not so much precedents of law as instructive and illustrative historical incidents; the effort has been to apply a sort of "rule of reason" to eternally changing facts.

Having examined the reason for these laws to the best of our ability, we hold it shown that an emergency existed, and that the resultant evil threatened to spread; that the legislative remedy is of a kind long known to the law, though not hitherto used in America; that the business affected is one capable of "superinducing the right of public regulation"; that the reason assignable for such regulation as embodied in the statutes challenged at bar is the kind of reason justifying this kind of statutes, and, it being sufficient in kind, we are not, and as a court cannot be, concerned with its sufficiency in degree.

We speak only in the present tense, and hold the statutes complained of to be constitutional; but it does not necessarily follow that because they violated no fundamental law in September or December, 1920, they will never so violate. Should it be shown thereafter that the reason for the laws had in fact passed, questions may arise not now before us, and as to which we do not wish to seem to foreclose discussion.

It appearing that no ground exists for either suit in equity or action at law, it is ordered that the bill be dismissed, without prejudice and without costs.

MAYER and AUGUSTUS N. HAND, District Judges, concur.

POPE v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, S. D. Florida. April 15, 1920.)

United States ⊜125—Emergency Fleet Corporation may be sued without consent of Congress.

The Emergency Fleet Corporation, which was organized with the ordinary powers and liabilities of corporations, but all of whose stock is owned by the United States, and which operates on money provided by the government, is not a governmental establishment, and may be sued without the consent of Congress to such suit.

At Law. Action by J. W. Pope against the United States Shipping Board Emergency Fleet Corporation. On motion to dismiss, and on demurrer to a plea to the jurisdiction. Motion denied, and demurrer sustained.

George W. Powell, of Dora, Ala., for plaintiff.

H. S. Phillips, of Tampa, Fla., and Fred Botts, of Jacksonville, Fla., for defendant.

CALL, District Judge. The question raised by the motion to dismiss and the plea to the jurisdiction is: Can the Shipping Board Emergency Fleet Corporation be sued; or, is it such a governmental establishment as exempts it from a suit?

The corporation was organized under the laws of the District of Columbia, pursuant to authority contained in the act of Congress (Comp. St. § 8146f), with the ordinary powers and liabilities of corporations provided for by the laws governing the formation of corporations in the District. The United States is the sole owner of the stock of said corporation. The business of the corporation was building and completing ships, and buying material for same, operating and chartering ships, etc. The money paid out was the money provided by the government.

The cause of action alleged in the declaration is a breach of contract of sale made by the corporation with the plaintiff for certain material in storage yards theretofore purchased by the corporation for building, finishing, and repairing ships. Do these facts make the suit one against the United States, and, therefore, not cognizable in this court unless the Congress has consented to such proceeding? I think not.

In the case of Bank of the United States v. Planters' Bank of Georgia, 9 Wheat. 904, 6 L. Ed. 244, the Supreme Court distinctly held that the fact that the state of Georgia was a stockholder in the defendant bank did not make the suit one against the state. This decision was by Chief Justice Marshall, and, so far as I am aware, has never been overruled or modified, nor do I think that the fact that the state was not the sole stockholder, as is the case in the present suit, material.

Under the act of Congress the United States was authorized to subscribe for not less than a majority of the stock, and if such majority had been subscribed for, rather than the whole, it could not well

be said that the decision of the above case did not apply and fully cover the question at issue here.

The Circuit Court of Appeals for the Second Circuit, in the case of Salas v. U. S., 234 Fed. 842, 148 C. C. A. 440, held that a conspiracy to defraud the Panama Railway, the stock in which was owned by the United States, the operating expenses paid by the United States, and the receipts from such operation the property and money of the United States, was not a conspiracy to defraud the United States; and this decision, as I understand it, was made upon the authority of Bank of the United States v. Planters' Bank of Georgia, above. See, also, Gould Coupler Co. v. This Defendant and Employers' Liability Assurance Corporation v. This Defendant, 261 Fed. 716, decided by Judge Hand in the Southern District of New York.

It is true that the Circuit Court of Appeals of the Ninth Circuit in Ballaine v. Alaskan Northern Railway, 259 Fed. 183, 170 C. C. A. 251, 8 A. L. R. 990, held that a suit against the railway company was a suit against the United States, and could not be maintained; this holding being based upon the fact that the United States owned the stock of the railway, operated it, paid its expenses, and received the returns from such operation, which is exactly contrary to the holding in the Salas Case. Giving both decisions careful consideration, the Salas Case impresses me as being based on sounder principles, and I therefore follow it.

The decisions in the cases referring to ships are placed upon consent contained in the act itself, and are therefore of little value in deciding the question here involved, unless it shall be contended that the fact that the government takes stock in corporations engaged in business pursuits other than government purposes by this act impliedly gives its consent to be sued; but that is not the ground on which those decisions rest, as I understand it. They rest upon the ground that the corporation is a legal entity, with a right to sue and be sued, and a suit against the corporation is not a suit against the stockholders, or any of them, and it seems to me that this is a correct statement of the law.

In the briefs I was referred to section 6 of the Deficiency Appropriation Act of October 6, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 251a), passed by Congress, in which Congress specifically mentions this defendant as a governmental establishment for the purpose of preventing transfer of employés from one department to another. Had the contention of counsel been the view taken of the defendant and its actings and doings by the members of Congress, it seems to me it would have been unnecessary, for the specific purpose of preventing the transfer of employés from one department to another, to have mentioned this defendant. It was singled out, and for that express purpose, and, which might readily be said, for no other purpose, it was viewed as a governmental establishment.

For the reasons expressed above, motion to dismiss will be denied, and the demurrer to the plea to the jurisdiction will be sustained.

SHWAB v. DOYLE, Collector of Internal Revenue.

(Circuit Court of Appeals, Sixth Circuit. December 10, 1920.)

No. 3364.

1. **Internal revenue ⊂=8—Estate tax applies to prior transfers in contemplation of death.**
Under Revenue Act 1916, tit. 2, § 201 (Comp. St. § 6336½b), imposing tax on the estate of every person dying after the act took effect, section 202, subjecting to the tax all transfers made at any time in contemplation of death, and section 202b (Comp. St. § 6336½c), creating presumption that transfers without consideration made within 2 years of death are in contemplation of death, transfers made before the act took effect by one who died after it became effective are taxable, since the death is the generating source of the tax, whether the transfer took effect immediately or only at death, and there is no reason why both classes of transfers should not be equally taxed.

2. **Internal revenue ⊂=2—Classification of transfer in contemplation of death as testamentary is within power of Congress.**
A classification of transfers made in contemplation of death and of those intended to take effect after the death of grantor as equally testamentary in character is one within the power of Congress.

3. **Constitutional law ⊂=286—Internal revenue ⊂=2—Tax on testamentary transfers made before act took effect does not deny due process of law.**
Internal Revenue Act 1916, tit. 2, § 202 (Comp. St. § 6336½c), when construed to impose a tax on transfer made before the act became effective by one who died thereafter, is not void, as denying due process of law or as violating Const. amend. 5.

4. **Internal revenue ⊂=6—Tax on testamentary transfers is not "direct tax."**
The estate tax levied by Internal Revenue Act 1916, tit. 2, § 202 (Comp. St. § 6336½c), on transfers made in contemplation of death, is not a "direct tax," within the constitutional requirement of apportionment, but is clearly an excise or duty tax.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Direct Tax.]

5. **Constitutional law ⊂=42—Executor, paying tax, cannot object that it destroyed vested rights of transferees, if not injured.**
The executor of a decedent, who paid the estate tax on a transfer made in contemplation of death before the act became effective, cannot, in an action to recover the tax, object to the statute as unconstitutional, because interfering with the vested rights of the transferees, since any one attacking a statute as unconstitutional must show that the alleged unconstitutional feature injures him.

6. **Constitutional law ⊂=190—Retroactive tax on testamentary transfers is valid.**
The estate tax levied by Revenue Act 1916, tit. 2, § 202 (Comp. St. § 6336½c), on transfers made in contemplation of death, is not unconstitutional merely because it is retroactive, in that it applies to transfers made before it took effect by those who died thereafter.

7. **Internal revenue ⊂=8—Subsequent statute held not construction that earlier one did not tax transfers made before enactment.**
The fact that the Revenue Act of 1919 (Comp. St. Ann. Supp. 1919, § 6336⅛a et seq.) expressly states that transfers in contemplation of death are taxable, whether made before or after the passage of the act, was not a construction by Congress that Revenue Act 1916, tit. 2, § 202 (Comp. St. § 6336½c), which imposed a similar tax without such express provision, did not apply retroactively.

8. Internal revenue ⊂⊃8—Transfer in "contemplation of death" need not be based on apprehension from existing bodily condition.

A transfer is taxable, as made in "contemplation of death," if the expectation or anticipation of death in either the immediate or reasonably close future is the moving cause of the transfer; it not being necessary that death is immediately impending by reason of bodily condition, though the condition of grantor's health at the time of transfer is an important feature in determining the ultimate question whether she was directly actuated by a contemplation of death.

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

9. Appeal and error ⊂⊃215(1)—Use of particular word in instruction held not reversible, without objection.

In an instruction defining the term "contemplation of death," within the federal estate tax statute, the use of the word "distant," in the phrase, "anticipation of death in the reasonably distant future," instead of the word "close," does not require reversal, where there was nothing in the exception to call the trial court's attention to the proposition that the word "close" should have been used, instead of "distant."

10. Trial ⊂⊃139(1)—Court cannot weigh evidence on motion for directed verdict.

A motion to direct a verdict is properly overruled, if there is substantial testimony tending to support a conclusion to the contrary, since the court cannot weigh the testimony.

11. Internal revenue ⊂⊃38—Evidence held to sustain verdict finding transfer made in contemplation of death.

Evidence that 1½ years before her death decedent, who was then about 77 years of age and was suffering from a disease which is usually fatal, made a trust deed without consideration, transferring more than half her property, and shortly thereafter made a will containing some references to the transfer, *held* sufficient to sustain a verdict finding the transfer was made in contemplation of death.

12. Internal revenue ⊂⊃38—Statutory presumption of fact can be considered in determining whether transfer was in contemplation of death.

In an action to recover an estate tax collected on a transfer alleged to have been made in contemplation of death, it was proper to instruct the jury that the presumption created by Internal Revenue Act 1916, tit. 2, § 202b (Comp. St. § 6336½c), that voluntary transfers within 2 years before death are in contemplation of death, could be taken into account in determining whether the transfer was made in contemplation of death.

13. Evidence ⊂⊃472(1)—Witness cannot state fact which was for ultimate conclusion of jury.

In an action to recover a tax collected on a transfer charged to have been made in contemplation of death, it was incompetent for plaintiff to state whether the grantor had an expectation of death in the near future, which was the ultimate fact for the conclusion of the jury.

14. Evidence ⊂⊃471(9)—Witness without personal knowledge cannot testify to understanding.

A witness who apparently had no first-hand knowledge of the matter cannot testify as to his understanding of the purpose of grantor in making a transfer.

15. Trial ⊂⊃75—Objection to testimony as incompetent too late, where same objection to same matter was previously overruled.

Where the objection to a question as to the inclusion of income from a trust in the income tax returns of the grantor for the first year as immaterial was overruled, and the witness answered, a subsequent objection to substantially the same question, and motion to strike substantially the same answer because they were incompetent, is too late to raise the question of the competency of the evidence.

16. Internal revenue ⊂=38—Payment of state taxes held material as to purpose of transfer.

In an action to recover a tax collected on a transfer charged to have been made in contemplation of death, where plaintiff claimed the transfer was made for the purpose of avoiding a state tax, it was material to show that the grantor and the grantee had not paid any taxes in the state and were not liable so to pay.

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Action by Victor E. Shwab, as executor, against Emanuel J. Doyle, Collector of Internal Revenue. Judgment for defendant, and plaintiff brings error. Affirmed.

W. F. Keeney, of Grand Rapids, Mich., and John J. Vertrees, of Nashville, Tenn. (Willard F. Keeney and Julius H. Amberg, both of Grand Rapids, Mich., and John J. Vertrees and William O. Vertrees, both of Nashville, Tenn., on the brief), for plaintiff in error.

D. M. Kelleher, of Ft. Dodge, Iowa, and Myron H. Walker, U. S. Atty., of Grand Rapids, Mich. (Wayne Johnson, Solicitor, Internal Revenue, Raymond Thurber, of New York City, and D. M. Kelleher, of Ft. Dodge, Iowa, Sp. Attys. Bureau of Internal Revenue, and Myron H. Walker, U. S. Atty., of Grand Rapids, Mich., on the brief), for defendant in error.

E. S. Heller, Isaac Frohman, Edward F. Treadwell, John W. Preston, and Garret W. McEnerney, all of San Francisco, Cal., amici curiæ.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Suit by plaintiff in error to recover an estate tax paid under protest.

On April 22, 1915, decedent made to the Detroit Trust Company a deed absolute in form, conveying personal property worth about $1,000,000 in trust, for the payment of both interest and principal to certain beneficiaries, with no reservation in favor of the grantor. The conveyance took immediate effect, and was accompanied by delivery of the property conveyed. It was purely voluntary and without monetary consideration. Decedent died September 16, 1916, possessed of a remaining estate of about $800,000, upon which a tax was assessed and paid upon return by the executor under title 2 of the Revenue Act of September 8, 1916 (39 Stat. c. 463, U. S. Comp. Stat. § 6336½a), which took effect seven days before decedent's death, viz. September 9, 1916. That tax is not involved here, nor is its validity questioned. The tax here in question was assessed under section 202 of the same act (Comp. St. § 6336½c), as upon a transfer made in contemplation of death.

Plaintiff contended below, and contends here: (1) That the act was not intended to reach absolute conveyances in contemplation of death made before the passage of the act; (2) that, if so intended, it is unconstitutional; (3) that there was no substantial evidence that the

transfer was "in contemplation of death," within the meaning of the statute. The trial court denied plaintiff's motion for a directed verdict, held the statute valid and applicable to the trust deed, if made in contemplation of death, and submitted to the jury the question whether it was so made. There were verdict and judgment for defendant.

[1] 1. Was the act intended to apply to transfers made before its passage? Section 202 includes in the taxable value of a decedent's estate (a) property held by the decedent at the time of his death and subject thereafter to the payment of debts and expenses of administration, and to distribution as part of his estate; (b) property "of which decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth"; (c) property held jointly or as tenants in the entirety by decedent and any other person.

It will be observed that the transfers mentioned in subdivision (b) are of two classes—those made "in contemplation of death," and those "intended to take effect in possession or enjoyment at or after" death. We are concerned with the first only of these classifications.

In our opinion the statute evidences an intent on the part of Congress that the tax should apply to all transfers in contemplation of death, whether made before or after the passage of the act, provided the transferor's death occur after the act took effect. This intent is, we think, evidenced by a variety of considerations.

(a) Section 201 (Comp. St. § 6336½b) imposes a tax upon the transfer of the net estate of "*every*[1] person dying after the passage of this act." In section 202 the taxable estate of the decedent embraces all transfers of the two classes already mentioned which the decedent has "*at any time* made." The remaining paragraph of section 202b not already set out declares that—

> "*Any transfer* of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent *within two years prior* to his death without such a consideration [a fair consideration in money or money's worth] shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

The italicized words in each of the above quotations indicate, on their face, an all-embracing intent, and are thus prima facie opposed to a limitation to transfers made after the passage of the act.

[2] (b) The evident theory of the statute is that transfers intended to take effect after the death of the grantor, as well as those made in contemplation of death, are equally testamentary in character. Rosenthal v. People, 211 Ill. 306, 309, 71 N. E. 1121; Keeney v. New York, 222 U. S. 525, 536, 32 Sup. Ct. 105, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139. Such classification is within the power of Congress. The theory of taxation on account of transfers testamentary in character is that death is the generating source of the tax. Knowlton v. Moore, 178 U. S. 41, 56, 20 Sup. Ct. 747, 44 L. Ed. 969; Cahen v. Brewster,

[1] All italics in this opinion ours.

203 U. S. 543, 550, 27 Sup. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215. A transfer is accordingly taxed only at the death of the transferor, no matter how long the transfer may precede death. Congress has accordingly included the two classes of transfers in one and the same section and subjected them, so far as terms go, to precisely the same treatment. In our opinion a transfer intended to take effect in possession or enjoyment after the grantor's death would under this statute be taxable, although made before the passage of the act. Wright v. Blakeslee, 101 U. S. 174, 176, 25 L. Ed. 1048. The natural inference would be, in the absence of substantial evidence to the contrary, that the same result was intended as to transfers made in contemplation of death.

(c) While the interests derived by a grantee under an absolute and immediately effective conveyance in contemplation of death are vested, the same is true of any irrevocable conveyance which takes effect in possession or enjoyment only upon the death of the grantor, although in the latter case such vesting is merely in expectancy. If Congress had power, as we think it had, to tax both classes of conveyances, even if made before the passage of the act, no good reason suggests itself why it should desire to discriminate between the two classes of transfers.

It is not to our minds unnatural, nor is it necessarily unjust, that Congress should intend that one taking a conveyance of a testamentary character, entirely without consideration, should do so at the risk of having the transfer taxed, directly or indirectly, as would be the case were the transfer by will or by conveyance taking effect at or after the grantor's death. Under this statute, however, the remaining estate of the decedent, both in case of a transfer intended to take effect at the grantor's death and in the case of a transfer made in contemplation of death (as well as in the case of transfers by will), is made primarily liable for the tax, and it is only when the estate proves insufficient for the purpose that resort may be had, under section 209 (Comp. St. § 6336½j), to the personal responsibility of the transferee or to the property transferred, and even then a right of action over is given to the transferee. We find in the language of section 209 ("if a decedent makes a transfer of or creates a trust with respect to, etc.") nothing which we think inconsistent with the construction of the act which we find disclosed by section 202 and by the other considerations to which we have called attention. Section 209 pertains merely to the remedy for the collection of the tax.

(d) Congress has not been averse to imposing taxation for a period preceding the passage of the taxing act. This has been ordinary practice with respect to income taxes. Indeed, the revenue act of September 8, 1916, here in question, provided for taxation of income accruing during the entire year beginning January 1, 1916. While in that case less than a year had elapsed, the distinction from the case presented here is one of degree and not of principle. The present income tax act, however, passed February 24, 1919 (40 Stat. c. 18 [Comp. St. Ann. Supp. 1919, § 6336⅛a et seq.]), imposed taxation for the year 1918, then wholly passed.

It is true that if the tax before us is retroactive it might, at least theoretically, affect conveyances made many years before a grantor's death, but this consideration is hardly practical. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say 25 years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years prima facie provision. The considerations which we have enumerated, not only outweigh in our opinion those opposed thereto, but we think clearly, positively, and imperatively demand that the act be construed as intended to apply to transfers of the class here in question, although made before the act was passed, provided the death of the transferor occurs thereafter.

[3-5] 2. Is the statute unconstitutional as applied to the trust deed? In our opinion the act, if so construed, is not void as denying due process of law, or as violating the Fifth Amendment to the Constitution. Billings v. United States, 232 U. S. 261, 282, 283, 34 Sup. Ct. 421, 58 L. Ed. 596; Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 23, 24, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414. Nor do we think the tax is to be classified as a direct tax, and thus void as within the constitutional requirement of apportionment. It is clearly an excise or duty tax. Scholey v. Rew, 23 Wall. 331, 23 L. Ed. 99; Knowlton v. Moore, supra, 178 U. S. at page 78, 20 Sup. Ct. 762, 44 L. Ed. 969; Flint v. Stone-Tracy Co., 220 U. S. 107, 159, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Keeney v. New York, supra, 222 U. S. at page 537, 32 Sup. Ct. 108, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139. Without enumerating every objection suggested against the validity of the tax, we think it enough to say that in our opinion its validity must depend upon whether or not it can be said to interfere with vested rights. As regards this consideration, we may set to one side the interests of the beneficiaries under the trust deed. Not only are they not complaining, but no tax has been assessed against their interests. No interest, vested or unvested, on their part is proposed to be or can be taken under the statute and the existing facts, for not only is decedent's remaining estate able to pay the tax, but it has already paid it. Decedent's estate alone, and those interested therein under her will, must bear the burden. It is settled law that one attacking a statute as unconstitutional must show that the alleged unconstitutional feature injures him. Southern Ry. v. King, 217 U. S. 524, 534, 30 Sup. Ct. 594, 54 L. Ed. 868; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 545, 34 Sup. Ct. 359, 58 L. Ed. 713.

[6] As to plaintiff's interest: Assuming that he is entitled to raise the question, we think the statute not invalid because applying to transfers made before its passage. It does not affect transfers made after the transferor's death. Being within the all-embracing power of Congress over the subject of excise and transfer taxation, it is not necessarily unconstitutional merely because retroactive. Cooley on Taxation (3d Ed.) pp. 492–494; Billings v. United States, 232 U.

S. 261, 282, 34 Sup. Ct. 421, 58 L. Ed. 596, where the validity of the 1909 tonnage tax on the use of foreign-built yachts was assailed as retroactive; Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 20, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414, which involved the validity of the income tax of 1913 as against a similar objection; Stockdale v. Insurance Co., 20 Wall. 323, 331, 22 L. Ed. 348, et seq., which involved the Income Tax Law of 1867. True, none of the cases referred to is on all fours with the instant case; but we think the principles they announce are decisive. Decedent's death being the generating source of the taxation, and the statute validly classifying it as of testamentary character, it logically follows, in our opinion, that it is valid to impose at decedent's death a tax on the testamentary transfer occurring before the passage of the act, regardless of the fact that title had already passed to the transferees. In Cahen v. Brewster, supra, 203 U. S. p. 549, 27 Sup. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215, et seq., a statute imposing an inheritance tax was sustained as to legatees of decedents dying prior to its enactment, but whose estates were still undistributed. This case is not without a certain amount of analogy; nor is there any controlling difference in principle between the assessment of a tax upon a previous testamentary transfer and the imposition of an income tax after the period covered thereby has wholly or in large part passed; nor—considering that death is the generating source of estate taxation—between an estate tax upon a transfer created by will and one upon a transfer created by testamentary deed, merely because in the one case a right of revocation existed while in the other it is absent, or because one took effect before and the other after the death of the transferor.

This conclusion makes it unnecessary to consider the correctness of the construction put upon the act by the trial judge, which distinguished between the "net estate" burdened by the tax, viz.: that which remained at decedent's death, and the net estate resulting from a gross estate which includes, for purposes of measurement, property previously transferred.

[7] Plaintiff urges that, in including in the Revenue Act of 1918 (40 Stat. 1057, 1097) the words "whether such transfer is made or occurred before or after the passage of this act," Congress indicated an understanding that the act here in question was not intended to so provide. We think it, however, the more reasonable inference that the amendment of 1918 was made to elucidate without changing the law, and put at rest any controversy on the subject. Johnson v. So. Pacific R. R. Co., 196 U. S. 1, 20, 21, 25 Sup. Ct. 158, 49 L. Ed. 363; United States v. Coulby (D. C.) 251 Fed. 982, 985, 986, affirmed (C. C. A. 6) 258 Fed. 27, 169 C. C. A. 165.

[8] 3. *Meaning of the Phrase "in Contemplation of Death."*—Plaintiff asked an instruction that—

"The words 'in contemplation of death' do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril."

This request was refused, and the jury instructed that—

"By the term 'in contemplation of death' is not meant on the one hand the general expectancy of death which is entertained by all persons, for every person knows that he must die. * * * On the other hand, the meaning of the term is not necessarily limited to an expectancy of immediate death or a dying condition. * * * The term 'in contemplation of death' involves something between these two extremes. Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease, or injury, or something of that kind. But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer."

It may be conceded that plaintiff's requested instruction would have been proper as applied to a gift claimed to have been made causa mortis—when the grantor was in a dying condition. But the instant case presented no such issue or claim. The transfer in question was an absolute gift inter vivos, claimed by the government to have been testamentary in character. On principle, and without present reference to authority, the ultimate question concerns the motive which actuated the grantor; that is to say, whether or not a specific anticipation or expectation of her own death, immediate or near at hand (as distinguished from the general and universal expectation of death some time), was the immediately moving cause of the transfer. Both the element of "existing condition of body," as distinguished from the grantor's mental state on that subject, and the term "impending," [2] are inconsistent with the prima facie provision of section 202b, which we have set out in paragraph (a) of the first division of this opinion.

Plaintiff's contention also overlooks the contribution which may be made to the grantor's state of mind and motive by a realization of the fact that she had already lived many years beyond the scriptural limit. Of course, the grantor's bodily health, especially as known to her, was an important factor in ascertaining her state of mind and determining the ultimate question whether she was directly actuated by a "contemplation of death." Upon principle we think the court's instruction correct.

Nor do we think the trial court's definition in conflict with any settled and controlling rule of construction. No federal decision directly in point is cited. Plaintiff relies on the decisions of the courts of New York, Illinois, Wisconsin, and California, construing similar statutes antedating the federal act (that of New York—1892—being the first in point of time), not only as authority for the construction for which he contends, but as raising a presumption that Congress adopted the construction put by the highest courts of those states upon their statutes.

In our opinion the decisions relied on by plaintiff do not completely or uniformly support his definition. The New York decisions are not convincing. In the Matter of Seaman, 147 N. Y. 69, 41 N. E. 401 (1895), the expression "in contemplation of death" was said in effect

[2] The Century Dictionary defines "impend" as: "To overhang; be ready to fall; be imminent; threaten; be on the point of occurring, as something evil."

to be confined to conveyances causa mortis. While this statement was obiter, it seems to have been reflected in some at least of the subsequent decisions of the New York courts; and while the proposition above cited was definitely rejected in Re Dee's Estate (Sur.) 148 N. Y. Supp. 423, affirmed (1914) 210 N. Y. 625, 104 N. E. 1128, and conveyances inter vivos held to be embraced within the phrase "in contemplation of death," it would not be unnatural that the decisions meanwhile construing that phrase should be more or less influenced by such earlier classifications. For instance, in the Matter of Spaulding's Estate, 49 App. Div. 541, 63 N. Y. Supp. 694, affirmed 163 N. Y. 607, 57 N. E. 1124, the decision was substantially rested on the ground of lack of evidence that the conveyance was made when the grantor was in extremis, or that it was made to avoid the estate tax. In the Matter of Mahlstedt's Estate, 67 App. Div. 176, 73 N. Y. Supp. 818, 820, decided before the statute had been definitely held to apply to gifts inter vivos, the essential question was said to be whether the transfer "was made in the then belief that he was not going to get well; that it was made in contemplation of his impending death, and for the purpose of defrauding the state of the transfer tax." Manifestly, the question of intent to evade has no pertinency to the case of a purely testamentary conveyance inter vivos. Rosenthal v. People, 211 Ill. 308, 309, 71 N. E. 1121. As showing the lack of the settled construction in New York contended for by plaintiffs, it is significant that in the Crary Case, 31 Misc. Rep. 72, 64 N. Y. Supp. 566, 568, the statute was defined as said to be—

"intended to reach absolute transfers of property when made under a certain condition, viz. when the transferor was contemplating death; that is, the thought of death has taken so firm a hold on his mind as to control and dictate his actions regarding his property, and the business is transacted while contemplating death, and considering what conditions would arise or exist in the event of death without making the transfer, or, to be more specific, the contemplation of death is the sole motive and cause of the transfer."

The state of mind of the grantor was, at least impliedly, recognized as the ultimate test (page 569).

The Illinois decisions fall short of supporting plaintiff's definition. In Rosenthal v. People, 211 Ill. 306, 309, 71 N. E. 1121, 1123, the only definition of "in contemplation of death" is this:

"A gift is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is looking forward to his death as impending, and in view of that event, is within the language of the statute."

The second half of the quotation presumably relates to the application to the statute of the facts of the case. Merrifield v. People, 212 Ill. 400, 72 N. E. 446, contains no definition of the term we are considering. The same is true of People v. Kelley, 218 Ill. 509, 515, 75 N. E. 1038, 1039. There a question of fact was alone involved, the court finding no evidence tending to show that the transferor—

"thought he was about to die at the time he executed said trust deed *or that he made said trust deed in contemplation of his death.*"

In Re Estate of Benton, 234 Ill. 366, 370, 84 N. E. 1026, 1028, 18 L. R. A. (N. S.) 458, 14 Ann. Cas. 107, the definition given in Rosenthal v. People was cited with approval. The court, after citing both the Rosenthal and Kelley Cases, said:

"Under the law as established by the foregoing decisions, the question at issue is whether the gift was made in expectation of death, and a purpose on the part of the donor to place his estate, or some part thereof, in the hands of those whom he desired to enjoy it after his death."

It is true that in People v. Carpenter, 264 Ill. 400, 408, 106 N. E. 302, 305, the court, citing the Rosenthal and Benton Cases, remarked:

"Of course, the words 'in contemplation of death,' as used in these statutes, do not mean that general expectation of all rational mortals that they will die sometime, but it means an apprehension of death which arises from some existing infirmity or impending peril."

But not only do the Rosenthal and Benton Cases fall short of fully sustaining that definition as an exclusive one, but the language we have quoted was purely obiter, as no claim was made that the trust agreements were executed "in view of death," and the decision in the trial court, as expressly stated in the opinion of the Supreme Court, did not rest on that ground. 264 Ill. 408, 106 N. E. 305.

Nor do the Wisconsin cases support plaintiff's contention. In State v. Pabst, 139 Wis. 561, 590, 121 N. W. 351, 359, it is said that the words "in contemplation of death" are—

"evidently intended to refer to an expectation of death which arises from such a *bodily or mental* condition as prompts persons to dispose of their property and bestow it upon those whom they regard as entitled to their bounty."

And again:

"A transfer valid as a gift inter vivos, if made under circumstances which impress it with the distinguishing characteristics of being prompted by an apprehension of impending death, occasioned by a *bodily or mental* state which has a basis for the apprehension that death is imminent, would be a transfer made in contemplation of death within the meaning of the law."

True, in State v. Thompson, 154 Wis. 320, 328, 329, 142 N. W. 647, 649, 650, 46 L. R. A. (N. S.) 790, Ann. Cas. 1915B, 1084, the court cited with approval the holdings in the Pabst Case, which we have already quoted; the quotation which we give in the margin from In re Baker's Estate [3] (83 App. Div. 530, 533, 82 N. Y. Supp. 390–392, affirmed 178 N. Y. 575, 70 N. E. 1094, also decided before the New York statute had been authoritatively held to include gifts inter vivos), and the holding in People v. Burkhalter, 247 Ill. 600, 604, 93 N. E. 379, 380, 139 Am. St. Rep. 351, that—

"Contemplation of death must be the impelling motive for making the gift in order that it be subject to an inheritance tax."

[3] "This court has held that the words 'in contemplation of death' do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril."

The definitions given in these various citations are not uniform or entirely consistent. Moreover, the decision of the Thompson Case seems to have turned at the last on the question whether the grantor's age—

"was so great when the gifts in question were made as to establish the fact that they were made in contemplation of death."

The California decisions are not specially pertinent, for the reason that the California statute contains a definition of the term "in contemplation of death." Estate of Reynolds, 169 Cal. 600, 147 Pac. 268; Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837; Abstract Co. v. State, 173 Cal. 691, 694, 161 Pac. 264; Spreckels v. California, 30 Cal. App. 363, 369, 158 Pac. 549; McDougald v. Wulzen, 34 Cal. App. 21, 166 Pac. 1033; In re Minor's Estate, 180 Pac. 813, 4 A. L. R. 456. It is enough to say of these decisions (a) that they are not authority for the definition contended for by plaintiff; (b) that they specifically reject the New York definition, based upon the confusion between gifts causa mortis and conveyances inter vivos. Estate of Reynolds, supra, 169 Cal. at page 603, 147 Pac. 268.

[9] Criticism is made upon the expression "reasonably distant future," contained in the extract from the charge which we print in the margin.[4] It is, we think, not open to question that, had the word "close" instead of "distant" been used, the instruction would have been proper, so far as concerns imminency. That the trial court regarded the words as equivalent, or intended to use the words "reasonably close," appears from his opinion announced immediately before instructing the jury, in which the words "reasonably close" were used. While "close" and "distant" are frequently directly opposed to each other, yet when used as here they are not necessarily opposed. A time which is only reasonably distant is reasonably close. There was nothing in the exception to the definition as made which would call the trial court's attention to a proposition that the word "close" should have been used, instead of "distant," especially since there had been also an exception given to the court's announced intention to charge a "reasonably close" future. Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 119, 120, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172. Had the court's attention been called to the use of the word "distant," instead of "close," doubtless any question of difference between the two would readily have been obviated.

[10] 4. *The Sufficiency of the Evidence.*—The motion to direct verdict was properly overruled, if there was substantial testimony tending to support a conclusion that the conveyance was made in contemplation of death, even though the testimony would have supported a contrary conclusion, as it doubtless would. We cannot weigh the testimony. In our opinion there was substantial testimony, and as it must be considered in its aspect most favorable to defendant, we

[4] "But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer."

so state it, omitting for the most part specific mention of the considerations relied on by plaintiff, where not as matter of law decisive.

[11] Decedent was about 77 years of age when the trust deed was made. She had rheumatism of the knee, and was subject to frequent attacks of constipation, a condition said to have a tendency in elderly people to auto-intoxication. She had arteriosclerosis, which according to the medical testimony is usually fatal, and she died of apoplexy; a medical attendant testifying that in his judgment the apoplexy and death primarily resulted from hardening of the arteries, secondarily from age. She was a childless widow, and had lived most of the time for many years in the family of a sister, who was a paralytic, and who was the wife of Mr. Shwab, who was one of the beneficiaries in the deed of trust, the executor of decedent's will, and her business partner. Mr. Shwab had sole charge and management of the business, which was carried on at Nashville, Tenn., where Mr. Shwab and his family resided. During his life he was to receive the entire income from the trust estate. He was given the right to require sales of the trust securities to be made from time to time, and select substitutes therefor, and to have accountings made to him by the trustee. After his death the income was to be divided among six of the children of Mr. and Mrs. Shwab, subject to letting in a seventh child on the failure of issue of any of the other six. There were other provisions not important here.

The trust deed contains an express recital of decedent's desire "to make a division of the part of her estate particularly described herein"—words naturally importing a testamentary conveyance. On May 26, 1915, slightly more than a month after the trust deed was executed, decedent, her sister, and Mr. Shwab made their respective wills. Decedent's will, after making comparatively small bequests to the sister and her children, and providing for a continuance of the business after her death, at the option of Mr. Shwab, gives the latter absolutely the bulk of her estate, the will stating that—

"He and his wife, my sister Emma, and I have considered the disposition of our estates and agreed as to what under all the circumstances will be best for those for whom it is our desire to provide. * * * My sister will understand why I have bequeathed nothing to her. She has an abundance and well knows my affection for her, and that I have in contemplation that form of disposition of my estate which eventually will benefit those she loves so dearly"—referring to her sister's children.

Considering the recitals we have quoted from the trust deed and decedent's will, and taking into account all the attendant circumstances, it was open to inference by the jury that the deed was intended by decedent as part and parcel of one and the same general testamentary disposition. In 1914 decedent purchased a summer home in Michigan and became at that time a resident of that state. She continued to live in her sister's family, except during the summer. While there was testimony tending to show that decedent's motive in making the trust deed was merely to avoid Tennessee taxation, the jury was not bound under the evidence to so conclude, especially in view of the fact that she had never been called upon to pay taxes upon her se-

curities in Tennessee, and that she was in fact a resident of Michigan when the trust deed was made. The record contains, and counsel have discussed, a variety of considerations affecting the question of motive and the broader question whether the trust deed was made in contemplation of death. We think it clear that the evidence presented a question of fact for the jury's determination.

[12] 5. The instruction that the "presumption" afforded by the prima facie clause of section 202b, which is referred to in subdivision (a) of the first division of this opinion, could be taken into account in determining the fact of "contemplation of death," was not erroneous. R. R. Co. v. Landrigan, 191 U. S. 461, 473, 474, 24 Sup. Ct. 137, 48 L. Ed. 262. The provision in question raises a presumption of fact, not a presumption of law, and under well-settled rules a presumption of fact may be taken into account in determining the ultimate fact. The presumption is merely a rule of evidence whose enactment is within the legislative competency. Mobile, etc., R. R. Co. v. Turnipseed, 219 U. S. 35, 42, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463. The very object of a presumption of fact is to supply the place of facts. Lincoln v. French, 105 U. S. 614, 617, 26 L. Ed. 1189. Of course, a presumption can never be allowed against ascertained and established facts. But unless the statutory presumption may properly be taken into account in determining the ultimate fact, it has no office. Elements which, in the absence of evidence to the contrary, are made sufficient to conclusively establish the ultimate fact, cannot be said to have no evidentiary influence in reaching that conclusion.

[13] 6. *Admission and Exclusion of Evidence.*—We find no reversible error in either of the respects complained of. The witness Spicer was not shown competent to answer the question put to him. It was plainly incompetent for Mr. Shwab to state a fact which was for the ultimate conclusion of the jury, viz. whether Mrs. Dickel had any expectation that she was in danger of passing away in the near future.

[14] It was also plainly incompetent for the witness Hager to testify that he understood that Mrs. Shwab, Mr. Shwab, and Mrs. Dickel made their wills together, "so that they would not excite Mrs. Shwab." He apparently had no first-hand knowledge of the matter.

[15] As to the inquiry of Mr. Shwab, on cross-examination, respecting the inclusion in Mrs. Dickel's income tax return of the first year's income under the trust deed: The court had already held that the income tax returns were not admissible. The question asked Mr. Shwab regarding the making of such return was objected to only as "immaterial." No exception was taken to the overruling of the objection. The subject was, in our opinion, material. He then testified, without objection, that the first year's income from the trust estate was included in that income tax return as part of Mrs. Dickel's income. It was only after the question had been substantially repeated that it was objected to as "incompetent, immaterial, and irrelevant," but without statement of the ground of the asserted incompetency, and without motion to strike out the testimony already

given. The objection was overruled, and the answer was substantially the same as before. The witness then testified at some length in explanation of an asserted mistake in making such inclusion.

[16] It is unnecessary, in our opinion, to determine whether the testimony in question was, for any reason, incompetent, for we think the objection on that score came too late. We do not intimate an opinion that it was incompetent. It was material to show that neither Mr. Shwab nor Mrs. Dickel had paid any taxes in Tennessee, or were liable to be required to so pay, in view of the fact that such liability had been put forward by plaintiff's counsel as the reason for making the trust deed in question.

Finding no error in the record, the judgment of the District Court must be affirmed.

PATTON-TULLY TRANSP. CO. v. TURNER et al. CLARK v. PATTON-TULLY TRANSP. CO. FREEMAN v. SAME.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1920.)

Nos. 3374, 3420, 3421.

1. **Shipping ⟸204—Derrick boat a "vessel," within limited liability statute.**
A derrick boat, carrying a derrick used for loading logs from the river bank upon boats for transportation in interstate commerce, *held* a vessel within the meaning of the limited liability statute (Rev. St. § 4283 [Comp. St. § 8021]), and a suit for limitation of the owner's liability for explosion of the boiler used to operate the derrick within the admiralty jurisdiction.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vessel.]

2. **Seamen ⟸29(2)—Negligent failure to keep vessel in safe condition renders owner liable for resulting injury.**
The duty to use reasonable care in keeping a ship and her appliances in safe condition is a continuing duty resting upon the owners during a voyage and is nondelegable, and for injuries resulting from its breach the owners are liable to seamen, even if there is an entire lack of that privity or knowledge which will deny to the owners their right to limit their liability.

3. **Seamen ⟸29(2)—When unseaworthiness is contributing cause.**
If the unseaworthiness of the vessel was a contributing cause of injury to seamen, without which it probably would not have happened, it does not affect the owner's liability that negligence of members of the crew developed this unseaworthiness into action and made it destructive, when it would otherwise have been harmless.

4. **Seamen ⟸29(2)—Owner held negligent in failing to keep vessel in seaworthy condition.**
The owner *held* chargeable with negligence in permitting the fusible plug in the crown sheet of the boiler of a derrick boat to be replaced by a hard metal plug, which remained for a considerable time when the boiler was leaking and the injector was in defective condition.

5. **Shipping ⟸208—Defect held not with privity or knowledge affecting limitation of liability.**
Defective condition of the boiler of a derrick boat, due to the replacement of the fusible plug in the crown sheet by those in charge with a nonfusible one, in consequence of which the boiler exploded, killing several men, *held* not with the privity or knowledge of the owner, which prevented limitation of his liability, where the boiler was properly equip-

ped with a fusible plug when sent to the work, and extra plugs were provided for use as needed, and so far as appeared the boiler was in proper condition when last inspected by the owner a few weeks before the explosion.

6. **Shipping ⟸208—Negligence is not privity or knowledge, affecting limitation of liability.**
Negligence on the part of the owner of a vessel does not necessarily constitute privity or knowledge of unseaworthiness, which will deprive him of the right to a limitation of liability.

7. **Admiralty ⟸21—State death statutes enforceable in admiralty.**
A court of admiralty may award damages against the owner of a vessel for the death of a seaman thereon, where such right of action is given by the statutes of the state where the death occurred and by those of the state where the vessel belongs.

8. **Seamen ⟸29(4)—Owner not liable for death of seaman through own negligence.**
There can be no recovery against the owner of a vessel for the death of the master and fireman through explosion of the boiler, which was due solely to negligence for which both were chargeable.

9. **Admiralty ⟸21—Law of home state held to govern death on vessel.**
Liability for the death of seamen, killed by explosion of a boiler on a boat, the home port of which was in Tennessee, and which, when absent therefrom, was employed in interstate commerce, *held* governed by the statute of Tennessee, although the deaths occurred in the waters of Mississippi.

10. **Limitation of actions ⟸118(2)—Filing claims in admiralty "commencement of action."**
Filing of death claims in a suit for limitation of liability *held* the "commencement of actions," within the meaning of the statute of limitations.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commencement of Action.]

11. **Seamen ⟸31—May recover for effects lost in explosion.**
Seamen *held* entitled to recover for personal effects lost through an explosion on the vessel.

Appeal from the District Court of the United States for the Western Division of the Western District of Tennessee; John E. McCall, Judge.

Petition of the Patton-Tully Transportation Company for limitation of liability. Petitioner appeals from a decree denying such limitation as to the claim of Robert Turner, administrator, and others, and Lizzie Clark, administratrix, and Edward Freeman, administrator, appeal from disallowances of their claims. Decree reversed, and case remanded.

Thomas M. Scruggs, of Memphis, Tenn. (H. B. Anderson and C. N. Fox, both of Memphis, Tenn., on the brief), for petitioner appellant.

W. P. Biggs and L. H. Graves, both of Memphis, Tenn. (Lee M. Russell, of Jackson, Miss., H. H. Rodgers, of Louisville, Miss., and Charles L. Rice, on the briefs), for various claimants and cross-appellants.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The Patton-Tully Company was the owner of what was called a derrick boat, used in loading logs upon the

deck of the barges by which the logs were transported on the Mississippi river to the company's sawmill at Memphis. The derrick was operated by steam power. While the boat was in the state of Mississippi, the boiler exploded. The master and the fireman and four of the crew were killed, two were hurt (one of those hurt also losing some personal property), and the boat was sunk. It was raised and taken to Memphis, and the Patton-Tully Company filed in the court below, in admiralty, its petition for limitation of liability under R. S. § 4283 (U. S. C. S. § 8021). The two surviving members of the crew and the representatives of all those killed appeared and filed proofs of claim and answers to the owner's petition. The answers denied the existence of admiralty jurisdiction, insisted that the explosion was the result of negligence by, or with the consent of, the owners, and asked that the petition should be dismissed. The court below sustained the jurisdiction, found that the owner was not entitled to a limitation of liability, and that liability existed in favor of all claimants excepting the representatives of the master and the fireman, and directed a reference to assess damages. The commissioner's report, pursuant to this reference, was later made and confirmed. The Patton-Tully Company and the representatives of the master and fireman appeal.

The question of liability centers around the fusible plug in the crown sheet of the boiler. This boiler was provided, as is quite common, with four devices which pertained to safety from explosion. Two were for the information of the fireman, through his observation or use of them in the performance of his duty. These were the glass water gauge, which indicated the height of the water in the boiler, and gauge cocks in a vertical row shortly above the crown sheet, by trying which he could ascertain where the water level was, as to each one which he tested. The other two safety devices were intended to be automatic. One was the usual safety valve, which normally comes into frequent use during operation, and without any attention by the fireman relieves the steam pressure, if it becomes too high. The last was the fusible plug. A hole was drilled and suitably threaded in the crown sheet in its center and highest point. Into this was screwed a threaded plug of a metal which would melt as soon as the water disappeared from the upper side, and the steam in the boiler would be blown down through the opening, extinguishing the fire. It was familiar knowledge that, as soon as all the water above the crown sheet was turned into steam, the crown sheet could and would become overheated, perhaps red hot, and if then water were pumped into the boiler and came into contact with this hot metal it would flash into steam, making an increase of steam pressure which might be too great and too sudden for the safety valve to take care of, and an explosion would follow. Prior to this accident, the master and the fireman had inserted in this crown sheet opening an iron or steel plug, and the absence of the fusible plug which had formerly been in position was undoubtedly one of the efficient causes of the explosion.

[1] 1. *The Jurisdiction.* In the trial court, the crew—the death and damage claimants—insisted that the derrick boat was not a structure pertaining to navigation; in other words, that the injuries were not mar-

itime torts, and hence that there was no admiralty jurisdiction. The owner insisted to the contrary. The ultimate action of the District Court having been favorable to the crew, they lost interest in their jurisdictional objection and do not mention it in this court. Even the administrators of the master and fireman, who were denied recovery, do not touch this question in their assignments of error. On the other hand, the owner now suggests, rather than urges, to this court that there was no jurisdiction in the court below.

The question whether this derrick boat, situated as it was, should be treated as appurtenant to the land or to the navigable water impresses us as close. In Cope v. Vallette Dry Dock Co., 119 U. S. 625, 630, 7 Sup. Ct. 336, 30 L. Ed. 501, it was held that a floating dry-dock was not within the admiralty jurisdiction, though doubtless it was capable of being towed from place to place and might be used for transporting the apparatus and appliances which constituted its permanent cargo. In The Blackheath, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236, it was decided that admiralty had jurisdiction over an injury by a floating vessel to a permanently fixed beacon. Many of the cases are cited and reviewed by Judge Cochran in Barnes Co. v. One Dredgeboat (D. C.) 169 Fed. 895, and by Judge Rellstab in Berton v. Dry Dock Co. (D. C.) 219 Fed. 763. The derrick which this boat carried was a loading apparatus, and especially intended to take logs from the bank and deposit them upon an adjacent boat. The machinery was of the type commonly found upon permanent wharfs. From the cases cited, we assume (without expressly deciding) that a wharfboat or floating wharf, carrying this type of loading machinery, but firmly moored to the land, would be outside the maritime jurisdiction, even though it was contemplated that it might, on occasion, be towed to another location; and we likewise assume that a barge carrying similar machinery, but customarily moved about a harbor and transferring cargo from one vessel to another, would be within that jurisdiction. It is at least not clear in which class this particular derrick boat should be placed, considering what the record shows and fails to show as to its capacity and uses; but we think the question suggested becomes immaterial in this case. The derrick boat was, at this time, undoubtedly in service as an instrumentality of interstate commerce, and if the Limited Liability Act is intended to reach such a boat, constitutional basis for that result is found in the commerce clause, even if it might not be in the admiralty and maritime clause. Providence Co. v. Hill Co., 109 U. S. 578, 589, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038. Is, then, a boat like this within the intended scope of the Liability Act?

Section 4283 reaches "any vessel." It was the theory of the act that always when a vessel was on a voyage between ports, and commonly until its return to the home port, the owner would have scant opportunity for personal control, and therefore ought to be relieved from the full effect of the respondeat superior rule. This theory applied with lessened force to ordinary vessels upon inland lakes and rivers, and with little, if any, force to the class of quasi vessels which often remain in or about one harbor and have no propelling power—barges, lighters, etc. Accordingly, section 7 of the original act of 1851 (R. S.

§ 4289 [Comp. St. § 8027]) provided that the act should not apply "to the owners of any canal boat, barge or lighter, or to any vessel of any description whatever used in river navigation." In 1886, either because the original theory of the act had not justified section 7 or from a change in the theory, this section was amended so as to direct that the liability limiting provisions "shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or inland navigation, including canal boats, barges and lighters," U. S. C. S. § 8027. This last-quoted language is therefore controlling upon the present question. In a certain broad sense, all these floating structures, including even floating dry docks, are vessels; but it is accurate enough to say that they constitute a general class, which may be called quasi vessels, and which is divided into subclasses by more specific nomenclature. Under the general and familiar rule of construction, "expressio unius," etc., specific classes, not enumerated, would be excluded; for example, a dredge or pump boat is not a canal boat, and not within the ordinary definitions of a barge or lighter, and we have not seen decisions that undertake to classify such a boat under this section of the statute.

This derrick boat was not a canal boat, nor, in the ordinary sense, a barge. It did at least closely approximate a lighter. A lighter often has lifting means for elevating cargo, though it commonly transfers cargo from the shore to itself, and then from itself to the ship, instead of directly from the shore to the ship, as here. There is not much inherent distinction, nor apparent reason for excluding this from the statute and including ordinary lighters. Both are directly essential to the transportation of freight by water, while the connection therewith of (e. g.) a dredge, is more indirect and remote.

Upon the whole, we conclude that the lack of jurisdiction to proceed under this statute as to this derrick boat is not so clear that we ought, practically on our own motion to decline to proceed. See In re Eastern Dredging Co. (D. C.) 138 Fed. 942; The Sunbeam (C. C. A. 2) 195 Fed. 468, 115 C. C. A. 370.

The first reading of section 4283, as now printed, suggests doubt whether a boiler explosion is an "act, matter or thing, lost"; but the explanation found in Butler v. Boston Co., 130 U. S. 527, 549, 550, 9 Sup. Ct. 612, 616 (32 L. Ed. 1017), makes it clear that there is a misprint, and that it should be construed as if it read "act, matter or thing, loss, damage," etc.

[2] 2. *Liability.* It must be taken as clearly settled that if the explosion was due solely to the negligence of the fireman in permitting the water to get too low, or in starting the injector when the water was too low, there is no liability in favor of the seamen injured. The mere operating negligence even of one in authority does not create liability; and this rule has not been changed by the statute declaring that the one in authority is not a fellow servant of the seamen under him. Chelentis v. Luckenbach Co., 247 U. S. 372, 384, 38 Sup. Ct. 501, 62 L. Ed. 1171.

It is equally clear that there is liability if the injuries result from lack of original seaworthiness (s. c., 247 U. S. 381, 38 Sup. Ct. 503 [62 L. Ed. 1171]); and we think it is the proper inference from the prin-

ciples stated in the opinion just cited as well as from the discussion in The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760, that the duty to use reasonable care in keeping the ship and her appliances in safe condition is a continuing duty resting upon the owners during the voyage, that this is nondelegable, and that, for injuries resulting from its breach, the owners are liable to the seamen, even if there is an entire lack of that privity or knowledge which will deny to the owners the right to limit their liability.

[3] We do not find this to be expressly decided in cases which are later than, and recognize the rule of, The Osceola; but it had often been held prior to The Osceola. The Osceola seems to accept these holdings as right, when based on a failure to maintain the ship or appliances in seaworthy condition, and there is close analogy to the common law nondelegable duty of maintaining a safe place to work. Globe Co. v. Moss (C. C. A. 6) 245 Fed. 54, 59, 157 C. C. A. 350. Of course, if the unseaworthiness was a contributing cause of the injury, without which it probably would not have happened, it makes no difference in the owner's liability that the negligence of these of the crew developed this unseaworthiness into action, and made it destructive when it would otherwise have been harmless. Kreigh v. Westinghouse Co., 214 U. S. 249, 257, 29 Sup. Ct. 619, 53 L. Ed. 984.

[4] Proceeding to this question of fact, whether the master used reasonable care in maintaining the boat's appliances in seaworthy condition, we conclude that he did not. It is strenuously urged that the fusible plug did not pertain to the seaworthiness of the boat, that the water gauges and try cocks were all the appliances necessary to complete safety, and that the fusible plug was only the means of avoiding the fireman's possible negligence in using the devices which of themselves answered every requirement of safety on the theory that the operator would do his duty. We cannot accept this view as controlling. It appears that such plugs were in very common use; that they were required by the federal regulations (although this particular kind of boat was not within the regulations); and one of the witnesses for the boat gave the expert opinion that they were essential to safety. However, the case does not rest on this alone. The injector was in bad order, and was likely to fail to operate unless assisted, and the boiler was leaking. These conditions had continued for some time, and they must have been known to the master. In light of their existence, the office of the fusible plug as a safety device was emphasized. We think that to substitute a permanent for a fusible plug in a boiler, where it was abnormally difficult to maintain the proper water level, was a failure to exercise reasonable care to keep the boat in seaworthy condition, and that, therefore, the owners and the boat were liable for the explosion to which this combination of leaky boiler, defective injector, and nonfusible plug contributed.

[5] 3. *Limitation.* Was this lack of seaworthiness with the knowledge or privity of the owners? It is conceded that, if we are to accept the conception that this boat was on a voyage from her home port, she was in proper condition when she left the port of Memphis some two years before. The boiler was in all respects in good condition, there

was a fusible plug in position, and there was a supply of additional plugs on board to be used in case of necessity. We doubt vary much whether the "knowledge or privity" of the owners can be measured by the boat's condition when she left Memphis; the general manager of the company could be in almost daily communication with the boat, if he wished, and, in fact, he made frequent visits of inspection. He had been upon or around the derrick boat for several days about five weeks before the accident; but this is not important, because there is no evidence tending to show that any appliance was not then in good condition. There was direct evidence to the contrary, which we see no reason for discrediting; and hence there can be no denial of the right to limit liability, except upon the theory that the unseaworthiness developed after this visit of inspection, and that the owner (and, in this case, this must mean the general manager) had knowledge of it. The District Judge found that these conditions existed; but, while this finding is entitled to great weight, we are unable, upon this record, to accept it.

It is not very important where the burden of proof technically rests, because, where the ship was in good condition when last under the owner's personal control, there is the common presumption that such condition continues until the contrary appears. Save surmise from the fact that they put in a permanent plug, there is nothing to show that the supply of fusible plugs on board had been exhausted, and this surmise is not persuasive. There is nothing tending to show knowledge by the manager of the lack of fusible plugs, if there was a lack, or that a permanent one had been inserted, or that the injector was not working well. There was evidence tending to show a letter saying that the boiler was leaking, and asking that some one be sent to fix it; but this did not suggest the lack of fusible plugs, which is to be taken as the essential element in constituting unseaworthiness, and it does not appear that there should have been any apprehension of explosion from the mere fact that the boiler was leaking to an extent so slight as not to prevent its use.

The Supreme Court early laid down the proper rule for the application of this limiting liability statute. It said, in Providence Co. v. Hill Co., 109 U. S. 578, 588, 3 Sup. Ct. 379, 386 (27 L. Ed. 1038):

> "If the courts having the execution of it administer it in the spirit of fairness, with a view of giving the shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment."

[6] In the same case, it is pointed out (109 U. S. on page 602, 3 Sup. Ct. 395, 27 L. Ed. 1038) that "privity or knowledge by the owners is quite a different thing from their neglect," and that there may be neglect on their part which will not deprive them of their right to limitation.

We conclude that there was neither privity nor knowledge on the part of the owner, as to the lack of the fusible plug, and hence that the owner is entitled to limitation of liability.

[7] 4. *Liability for Death.* Under the maritime law, unaided by statute, as under the common law, negligently causing death does not give rise to liability in favor of the estate of the deceased person or his surviving kin (The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358); but where one ship wrongfully inflicted an injury, causing the death of one upon another ship, and the injury was inflicted on the high seas, and while both ships belonged in a state the laws of which gave an action for wrongful death, it was held that the right of action thereby given could be enforced in any proper court of admiralty (The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264). It was later held (Southern Pac. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; Chelentis v. Luckenback, supra) that a state statute establishing a general code of liability for injuries as between master and servant would not be enforced in admiralty as between owner and seamen. It may be urged with some force that, in The Hamilton, the state statute was accepted because it was not inconsistent with any code of maritime law, but was rather supplementary to the already existing liability in damages for such an injury, for, if the injury had been of a degree not resulting in death, admiralty would have required no aid from the state statute to give redress.

On the other hand, it may be contended that, in the Jensen Case, the state compensation act was rejected, because, as between master and servant—owner and seaman—there was an existing code of maritime law, which denied indemnity for negligence, with which code the compensation act was inconsistent, and so, by analogy, that a death act is also inconsistent with the maritime code of duties and liabilities of the owner and seaman—even more inconsistent than the compensation act —because it imposes an extreme liability where there was none, instead of a greater liability where there was already some. However, we are not satisfied to limit the application of The Hamilton in this way. The whole theory of a cause of action for death was foreign to admiralty, by The Hamilton a state death act was recognized, and the reason suggested why there should be one rule when the offending ship was the seaman's own, and another when it was not his, does not appeal to us as convincing. In Thompson Co. v. McGregor, 207 Fed. 209, 124 C. C. A. 479, we enforced in admiralty a death act in favor of a seaman (though the question just suggested was not raised and the Jensen Case had not been decided).

Since this explosion took place within the state of Mississippi, and the boat belonged in Tennessee, and both states have death acts, it follows that the court below might lawfully award damages for the death of a seaman, if the facts justified.

[8] 5. *The Master and the Fireman.* From the proof, it must be assumed that either the master or the fireman had inserted this permanent plug, and that the other one had either participated or approved, and that, for at least a week or two after its insertion, both had continued its use without objection. It is not important whether the applicable state law abolishes the defense of assumption of risk, or whether such a regulation would reach the admiralty courts. However that may be,

there are sufficient reasons why neither the representatives of the master nor of the fireman can recover.

The master carried the responsibility for the insertion of this plug. Either he directed it, or, having power to prevent, he permitted it. It must be treated as if it were his act; but there cannot be liability by the owner to the master to keep the boat safe against the master's own negligence. The same act by the master, which made the boat liable to the seamen because his act was the owner's act, cannot make the boat or the owner liable to him. As between him and the owners, his act is his, not theirs. No liability reaches the owners in favor of the seamen, except through the master as a conduit; and he cannot be the conduit of his own wrong for his own benefit. In the common relation of master and servant, we cannot suppose that the rule of respondeat superior makes the master liable *to the servant* for whose negligent act the master must (as to others) *respond.*

Liability as to the fireman might well be denied on the same theory as that just stated with regard to the master; but more controlling is the fact that the fireman's carelessness in operation was surely the primary cause of the explosion. He knew of whatever degree of unsafety there was, he knew of the added duty thereby put upon him to watch the water, and he failed in that duty. On him, more than in any other one place, rests the blame for the ensuing death and destruction. He cannot be heard to say that a boiler defect, consisting only in the lack of a safeguard against his carelessness, and which defect would have been harmless, except for his negligence, was, as to him, an efficient contributing cause of the explosion.

[9] 6. *The Applicable State Statute.* It was early held, in collision and towage cases, that the statute of the state in the territorial waters of which the accident happened, was the applicable statute. City of Norwalk (D. C.) 55 Fed. 98; Robinson v. Detroit Co. (C. C. A. 6) 73 Fed. 883, 20 C. C. A. 86. In The Hamilton, supra, it was decided that, when the injury occurred upon the high seas, the admiralty courts would apply the death statute of the state in which the vessel had its home port, and this was (at least in part) upon the theory that the vessel was constructively within the jurisdiction of its home state, when that jurisdiction had not been superseded by that of another sovereignty having territorial control of the place of the accident. This court had occasion to consider somewhat exhaustively the whole subject, and to review the decisions and to reconcile some seeming conflict, in Thompson Co. v. McGregor, supra, 207 Fed. 215–219, 124 C. C. A. 479. In that case a seaman upon a lighter had been killed by the explosion of a steam boiler on its deck. The home port of the lighter was in Michigan; the explosion happened while it was in the territorial waters of Canada. By the death act of Canada, a suit which had been brought to recover damages for the seaman's death was barred by limitation; by the death act of Michigan, the suit was in time. We held that the liability of the boat and its owner for that death was given and regulated by the law of Michigan, and not by that of Canada. We distinguished the earlier towage and collision cases, because they pertained to navigation rules—a subject within the control of the local sover-

eignty; while the boiler explosion on the boat's deck had to do with the internal management and discipline of the boat, and because, for such purposes, the boat remained a part of the territory of its own state.

We are not able to distinguish Thompson v. McGregor from the present case. The facts are, for this purpose, identical, except that the conflict of laws there suggested was between Michigan and Canada, while here it is between Tennessee and Mississippi. Whatever force there is in this difference tends to confirm the adoption of the Tennessee law, since, in the Thompson-McGregor Case, the boat was, for many purposes, subject to the Canadian jurisdiction, while in the present case it is not easy to see in what substantial respect the Mississippi jurisdiction had attached so as to supersede the admiralty jurisdiction of the United States. In other words, the case is not as strong for the application of the law of the place of the accident as was the Thompson-McGregor Case.

Whenever the boat was outside of Tennessee, it was engaged in interstate commerce. Going up or down the river, it would be crossing state lines constantly. It might be difficult, if not impossible, to know in what state the boat was when some accident on board happened. It would be unfortunate if the liability of the owner to a seaman for death, or the measure of damages, changed whenever a state line was crossed.

It follows that all awards for death were made upon the basis of the statute of the wrong state, and therefore the commissioner's award upon these claims and the decree of the court thereon must be set aside and a new assessment of damages had. Under these conditions, it would not be worth while to discuss some troublesome questions presented by the attempt to interpret and apply the Mississippi statute.

[10] The proofs of claims, filed in this cause, must be treated as the commencement of actions, within the meaning of any statute of limitations.

[11] 7. *The Survivors.* We see no reason why one of the survivors should not recover for the reasonable value of clothing lost and for the amount of currency said to be lost. The question is not at all one of passenger and carrier; and, if it were of that class, there is nothing unreasonable or unusual in the conduct of one of the crew in keeping on the boat, in a trunk or on the person, the articles and the relatively small amount of money here claimed. The awards to the survivors for personal injuries and for property lost are not to be disturbed, except as they must go only against the fund.

The decree is reversed, and the case remanded for further proceedings.

Petition of BAXTER.

In re ORINOCO CORPORATION.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1920.)

No. 3388.

1. **Bankruptcy ⟸440—Order held reviewable by petition to revise.**
An order of a court of bankruptcy directing a trustee to carry out a settlement previously made pursuant to authority given him on his petition *held* an order made in the bankruptcy proceeding, and reviewable on a petition to revise.

2. **Bankruptcy ⟸252—Administrative orders as to compromise by trustee may be made by judge in first instance.**
General Order in Bankruptcy No. 12,[1] providing that after a general reference all proceedings, except such as are required by the act or by the General Orders to be had before the judge, shall be had before the referee, does not deprive the judge of authority to hear in the first instance a petition by the trustee for authority to settle an adverse claim.

3. **Bankruptcy ⟸252—Petition by trustee for authority to settle controversy sufficient.**
Petition by a trustee for authority to settle a controversy *held* not jurisdictionally defective, under General Order No. 33 (89 Fed. xiii, 32 C. C. A. xxxiii).

4. **Bankruptcy ⟸252—Estoppel by laches to attack order.**
An order authorizing a trustee to compromise a controversy *held* not subject to attack by a creditor after a delay of five years, on the ground that no notice of the proposed compromise was given, as required by Bankruptcy Act, § 58a(7) being Comp. St. § 9642a(7), where it is found as a fact that the compromise agreement was fair and made in good faith, and such creditor had actual knowledge of it at the time, and permitted it to be carried out by the adverse parties, to such extent that they could not be restored to their former position.

5. **Bankruptcy ⟸252—Settlement of controversy based on consideration.**
A compromise and settlement of a controversy by a trustee *held* not without consideration, where it disposed of litigation by which a large fund claimed by the estate was tied up, and its possible loss threatened, by the payment of a comparatively small sum.

Petition for Revision of Proceedings of the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister and John W. Peck, Judges.

In the matter of the Orinoco Corporation, bankrupt. Petition by George N. Baxter to revise orders of the District Court. Affirmed.

George N. Baxter, of Washington, D. C., in pro. per.

Constant Southworth, of Akron, Ohio (Maxwell & Ramsey, of Cincinnati, Ohio, H. H. Glassie, of Washington, D. C., and Charles P. Rogers, of New York City, on the brief), for respondents.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. The situation out of which the present controversy arises is this:

In the year 1883 the government of Venezuela gave to one Fitzgerald a 99-year lease of a large tract of land for mining and other purposes. This concession was afterwards assigned by Fitzgerald to the Manoa

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

[1] 89 Fed. vii, 32 C. C. A. xvi.

Company, Limited, by the latter to the Orinoco Company, by that company to the Orinoco Company, Limited, and by the last-named company to the Orinoco Corporation. After operations had been conducted to some extent under the concession, the government of Venezuela caused it to be annulled, and the Orinoco Company, Limited, to be ousted therefrom, and caused or permitted certain property used in operations upon the concession to be confiscated. On September 9, 1909, an agreement was reached between the government of the United States and that of Venezuela, by which the latter agreed to pay to the United States $385,000 in eight equal annual installments for the benefit of the Orinoco Corporation and its three predecessors named, in satisfaction of all claims of those four corporations. This sum of $385,000 has been fully paid by the government of Venezuela.

Shortly after the payment of the second installment the Orinoco Corporation was adjudicated bankrupt by the district court below. On June 20, 1911, the Department of State of the United States ordered the payment to the trustee in bankruptcy of the Orinoco Corporation of the entire fund of $385,000, less $75,000 to go to the Orinoco Company, Limited, $8,000 to certain attorneys, and $6,000 to be deducted on account of expenses incurred by the government of the United States in the settlement of the claims; this disposition being in accordance with arrangements between the Orinoco Corporation, the Orinoco Company, Limited, and certain other interested parties, with the approval of the District Court and of the court having charge of the insolvency proceedings of the Orinoco Company, Limited. The Treasurer of the United States eventually paid the full net amount to the trustee of the Orinoco Corporation. Meanwhile, on June 30, 1911, when but two installments of the indemnity fund had been paid by Venezuela, one Safford, claiming to be a stockholder and creditor of the Manoa Company, Limited, filed his bill in the Supreme Court of the District of Columbia, claiming an equitable lien upon the indemnity fund, and asking a receivership over the installments already paid into the treasury. Fitzgerald, who was made defendant by cross-bill, also set up an equitable interest in the fund, claiming that certain of the properties had been reconveyed to him by the Manoa Company, Limited, and excepted from subsequent conveyances.

On November 6, 1914, the trustee in bankruptcy of the Orinoco Corporation applied to the District Court for authority to compromise the claims of Safford and Fitzgerald by the payment to them of $35,000. By an order bearing date November 6, 1914, the trustee was formally authorized to compromise the claims and suits referred to for the sum stated, and on such terms as he should deem for the best interests of the estate. On the same date a written agreement was made between the trustee, on the one hand, and Safford and Fitzgerald, on the other, by which the former promised the latter, in consideration of their promise to release their claims and demands against the fund, to pay them $35,000, and to release them from liability on account of the injunction undertakings in the suits in the Supreme Court of the District of Columbia, as well as from liability to the trustee on all accounts, including liability for damages occasioned by such litigation.

This promised payment not having been made, Safford, on July 5, 1919, petitioned the District Court for an order directing the trustee to pay forthwith to Safford and Fitzgerald the agreed sum of $35,000 and interest thereon. The trustee declining to oppose Safford's petition, Baxter, the petitioner herein, and one Dolge, both being creditors of the bankrupt Orinoco Corporation, filed their petition in the District Court, setting forth certain defenses thereto.

On July 28, 1919, after hearing before District Judge Hollister, who had made the original order of November 6, 1914, the Safford petition was granted, and that of Baxter and Dolge dismissed. Thereafter the trustee in bankruptcy, for reasons not here important, asked the court to vacate the order of July 28, 1919, directing him to pay the $35,000 in question, and Baxter and Dolge applied for a rehearing thereon. Both these petitions were on due hearing denied and findings of fact made by Judge Peck, who had succeeded Judge Hollister on the latter's death. The present proceedings are brought by Baxter alone, under section 24b of the Bankruptcy Act,[2] to revise the order of July 28, 1919, which directed the trustee to carry out the settlement with Safford and Fitzgerald, as well as the order of December 9, 1919, denying the petition for rehearing. Both the trustee in bankruptcy and Dolge refused to join with Baxter in this proceeding. The respondents are Safford, the representatives of Fitzgerald, and the Berkshire Investing Company, which claims by assignment a portion of the Fitzgerald interest.

[1] 1. The motion to dismiss the petition to revise is denied. We see no merit in the contention that the proceedings under review present "a controversy arising in bankruptcy proceedings," and so reviewable only by appeal. The character of the proceeding below in a reviewable sense is, in our opinion, determined by the summary nature of the order of July 28, 1919, directing the trustee in bankruptcy to pay the $35,000 to Safford and Fitzgerald, in accordance with the authority for settlement given November 6, 1914, and by the equally summary order of December 9, 1919, denying the motion to vacate the order of July 28, 1919, and refusing rehearing thereon. The orders complained of are clearly "administrative orders in the ordinary course of bankruptcy between the filing of the petition and the final settlement of the estate." In re Farrell (C. C. A. 6) 176 Fed. 505, 508, 509, 100 C. C. A. 63, 66, 67; Barnes v. Pampel (C. C. A. 6) 192 Fed. 525, 527, 528, 113 C. C. A. 81. Safford and Fitzgerald had originally no right to demand that the settlement authorized by the order of November 6, 1914, be made, and did not so demand. The original order was made only on the trustee's petition, as a purely administrative act. The circumstance that Safford and Fitzgerald later asked a carrying out of a settlement previously made by administrative order does not change the character of the proceeding in a reviewable sense.

The objection that the petition for revision was filed too late is not well taken. The amendment to our rule 34 (261 Fed. v, 171 C. C. A. v), requiring petitions to revise to be filed within 20 days from the entry of the order of which revision is sought, was not effective, ex proprio vigore, until April 11, 1920, which was more than a month

[2] Comp. St. § 9608.

after the petition was filed in this court. The direction of the District Judge that proceedings for revision be taken on or before January 9, 1920, was ineffective, in the absence of showing that copy of the amendment to rule 34 had been served upon counsel for the petitioner. The amendment to the petition made April 6, 1920, was allowed by this court while it had jurisdiction of the case, and is not forbidden by rule 34. We see no jurisdictional defect in the bond given by petitioner under the order of December 9, 1919, which was duly filed in that court. The security is not governed by section 1660 of U. S. Compiled Statutes of 1916.

2. Petitioner asserts the fatal invalidity of the order of July 28, 1919 (which granted Safford's petition that the trustee pay the agreed sum of $35,000), and the order of December 9, 1919 (which affirmed the order of July 28), on the ground that the order of November 6, 1914, which authorized the trustee to make the compromise, was ineffective for several reasons.

[2] (a) General Order in Bankruptcy No. 12 provides that after a general reference "all proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee." The petition of November 6, 1914, was presented directly to the judge, who clearly had jurisdiction over it. The provision just quoted does not take from the judge authority to hear in the first instance an application of this kind. In re De Ran (C. C. A. 6) 260 Fed. 732, 739, 171 C. C. A. 470.

[3] (b) General Order in Bankruptcy No. 33 provides that the application for authority to settle a controversy by agreement with the other party shall "clearly and distinctly set forth the subject-matter of the controversy, and the reason why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise." The petition is attacked as fatally lacking in this respect. We are not so impressed. The petition distinctly recited that in the Safford and Fitzgerald case the Supreme Court of the District of Columbia enjoined the payment to the trustee in bankruptcy of the Orinoco Corporation, out of the treasury of the United States, of the whole or any part of the Orinoco indemnity fund. It reports a proposition of compromise of the controversy therein, embracing the release to the trustee by Safford and Fitzgerald of all their claims against the trustee in bankruptcy of the Orinoco Corporation, as well as against that corporation, the dissolving of the injunctions so far as they interfere with the payment of such funds to such trustee in bankruptcy, etc.; such compromise to be a complete satisfaction and settlement between all parties concerned and to "put to end all controversy which has been pending in the District of Columbia court," whereby the installments of the indemnity fund accruing from time to time "have been prevented from coming into the hands of said petitioner as such trustee."

The trustee asked authority "to compromise and settle said controversy in a sum not to exceed $35,000 upon such terms as he may deem for the best interests of the estate." The application thus "clearly and distinctly set forth the subject-matter of the controversy." The

"reason why the trustee thinks it proper and most for the interest of the estate that the controversy be settled" is naturally and necessarily implied in the recitals that by such settlement the obstacles which up to that time had prevented the trustee in bankruptcy from getting possession of the funds so impounded by the action of the Supreme Court of the District of Columbia would be entirely removed. We think the petition for leave to compromise not jurisdictionally defective. It will be presumed in its aid that the court took into account the existence of the obstacles referred to, with which the court was entirely familiar.

[4] (c) Section 58 of the act (Comp. St. § 9642) provides for notice to creditors of the "proposed compromise of any controversy," and General Order in Bankruptcy No. 28 [3] for such notice and hearing when it is proposed to "compound and settle any debt or other claims due or belonging to the estate of the bankrupt." It is not entirely clear that either section 58 or this General Order applies to a summary proceeding of this nature. But, assuming the contrary, petitioner is in our opinion clearly estopped to complain. Judge Peck, in denying the petition for rehearing and the motion to vacate the order requiring the trustee to pay the $35,000 as agreed, said:

"It does not appear that notice was given to the creditors of this application to compromise or that the creditors assented thereto, nor does it appear to the contrary. The order was made five years ago. No steps were taken to review the order."

But this is not all. Judge Peck formally found as facts that the compromise agreement made pursuant to the authority of the District Court, and all steps taken under it, or in connection with it, by Safford and Fitzgerald, were fair and in good faith, and without any fraud on their part, and that counsel for the trustee at that time had full knowledge of the facts relating to the transaction; also that no creditor or interested party other than Baxter and Dolge complained of the compromise; further, that Baxter and Dolge, in person or by counsel, had actual knowledge of it, and that neither ever took any steps to have a final disposition of any objection thereto prior to July 15, 1919, nor was any evidence offered at the hearings in support of the allegations in the pleadings filed by them. It was also found that, while this compromise agreement was not, after its execution, reported in writing to the District Court, yet that court was very shortly thereafter advised of the fact of its execution and of the compromise. These and all the other findings of fact were made upon agreement of counsel thereto. We are bound to accept them as true, and can consider only the questions of law raised. In re Stewart (C. C. A. 6) 179 Fed. 222, 228, 102 C. C. A. 348. Moreover, upon his motion to set aside the order requiring the trustee to carry out the compromise, as well as on his petition for rehearing, petitioner had full opportunity to try out the merits of the questions which he now seeks to raise. On both principle and authority it must be held that petitioner has lost whatever right he ever had to complain of lack of notice. In re Ives (C. C. A. 6) 113 Fed. 911, 914, 51 C. C. A. 541.

[3] 89 Fed. xi, 32 C. C. A. xxviii.

(d) We see no merit in the criticisms that the order of November 6, 1914, made by the District Court below, was invalid, as assuming to authorize the trustee to compromise upon terms deemed by him for the best interests of the estate, or that the agreement actually executed thereunder exceeded even such assumed authority in that it stipulated to release Safford and Fitzgerald from all liability to the trustee. The District Court knew of the agreement made and presumably regarded it as within its order. Nor do we see anything to criticize in the fact that the Fitzgerald interests were not parties to Safford's petition to the court below to have the settlement carried out. Fitzgerald's representatives appeared on the hearing below, are made respondents to the proceedings here, and are claiming the benefit of the action there had.

[5] 3. Petitioner specially stresses the proposition that the compromise settlement authorized by the order of November 6, 1914, was without valuable consideration. The argument is that the only consideration which the trustee in bankruptcy of the Orinoco Corporation was to receive from Safford and Fitzgerald was the release of their claims and demands against the portion of the fund awarded by the Secretary of State to the trustee, while, in reality, Safford and Fitzgerald had at the time no claim or demand to give up, for the reason that the fund in controversy already belonged to the trustee in bankruptcy, free from any lien or interest on the part of Safford and Fitzgerald. This conclusion rests upon the assertion that the Secretary of State had full jurisdiction of the subject-matter and of the parties asserting claims against the fund, including Safford, Fitzgerald, and the trustee in bankruptcy, and that the order of distribution made by the Secretary had the force and effect of a judgment, thereby estopping Safford and Fitzgerald from asserting any claim or demand against it. To this defense of lack of consideration there is more than one answer. In the first place, it is by no means clear that the Secretary of State had judicial authority to determine finally the distribution of the fund, and thus foreclose inquiry by the ordinary courts. There is an intimation to the contrary in Le Crone, Receiver of the Orinoco Co., Ltd., v. McAdoo, Secretary of the Treasury (decided June 1, 1920) 253 U. S. 217, 40 Sup. Ct. 510, 64 L. Ed. 869. Again, the distribution made by the Secretary purports to be based on the consent of the four interested corporations, and the approval of the courts in charge of the bankruptcy and receivership proceedings respectively. Indeed, the communication of the Secretary to attorneys concerned in the controversy between Fitzgerald and Baxter, sent contemporaneously with the notice of the proposed distribution, clearly indicates that the Secretary had no intention to "attempt to pass upon the respective claims of the different companies."

But there are further facts to be reckoned with: Safford's bill before referred to, which was filed in the Supreme Court of the District of Columbia, following the distribution made by the Secretary of State, was directed against the Secretary of the Treasury, the Treasurer of the United States, the four corporations before named, Baxter and Fitzgerald, and others, including Dolge, who was then

the trustee in bankruptcy appointed by the District Court. It challenged the right of the Orinoco Corporation to the sum awarded it, asserted that the agreement on which the distribution was based was obtained through fraud and collusion between certain of the interested private parties and corporations, and claimed as judgment creditor of the Manoa Company, Limited, an interest on Safford's part in the fund to the extent of $56,000. Fitzgerald also asserted fraud and collusion in obtaining the distribution. This suit challenged the binding authority of the action taken by the Secretary of State. If the Secretary's action was merely ministerial, the Supreme Court of the District of Columbia had authority to determine the merits between the parties, unless the District Court in bankruptcy had prior exclusive jurisdiction. Houston v. Ormes, 252 U. S. 469, 472, 40 Sup. Ct. 369, 64 L. Ed. 667. But although the District Court was claiming exclusive jurisdiction over the entire sum awarded the Orinoco Corporation, but a small portion of it had then been paid; at the same time, the Secretary of the Treasury and the Treasurer of the United States were under injunction of the Supreme Court of the District of Columbia from delivering outside of that district any warrant on the fund; and although the trustee in bankruptcy of the Orinoco Corporation denied that he was subject to the jurisdiction of the Supreme Court of the District of Columbia, that court insisted that the trustee had submitted himself to its jurisdiction, appointed that officer receiver in the Safford case (that appointment was accepted), and enjoined him from disposing of any of the funds except by paying the same to himself as receiver of that court.

A sharp conflict, amounting to a deadlock, between the District Court and the Supreme Court of the District of Columbia as to jurisdiction over the fund was presented. To say the least, it was by no means so clear and certain that the Supreme Court of the District of Columbia was without jurisdiction as to render without consideration a compromise which would dispose of that conflict by the payment of the comparatively small sum of $35,000. That as a practical proposition the trustee in bankruptcy was, in that capacity, threatened with possible loss of control over at least the bulk of the fund sufficiently appears, notwithstanding the affirmance by this court (Orinoco Iron Co. v. Metzel, 230 Fed. 40, 144 C. C. A. 338) of an order made by the District Court after the compromise authority of November 6, 1914, was given, restraining the prosecution of suit in the Supreme Court of the District of Columbia on the part of the Orinoco Iron Company, whose claim had already been presented to the district court. Upon the facts found, the trustee in bankruptcy was justified in favoring the compromise in question, provided he acted in good faith. Union Bank v. Geary, 5 Pet. 99, 114, 8 L. Ed. 60. That he so acted is not open to question on this record. It follows that the defense of lack of consideration for the compromise must be overruled.

4. The court below found as a fact that Baxter and Dolge allowed the compromise in question to be fully performed by Safford and Fitzgerald, præcipes to be filed for the dismissal of the suit in the Supreme Court of the District of Columbia, and the injunctions there-

in vacated, as agreed by such compromise, and $226,500 to be paid into the registry of the District Court. The court further found as a fact that "there has been no excuse or explanation for the laches of the said Baxter and Dolge existing since November, 1914." If the compromise agreement is not carried out, the Safford and Fitzgerald interests cannot be restored to the position they previously occupied. We agree with the conclusions of the District Court that petitioner is now estopped from complaining of the compromise agreement.

It follows, from these views, that the orders of the District Court complained of must be affirmed.

NASHVILLE, C. & ST. L. RY. CO. v. UNITED STATES.*

(Circuit Court of Appeals, Sixth Circuit. December 7, 1920.)

No 3426.

Internal revenue ⟸9—Allowance from gross income for "depreciation" of property held proper.

On an issue as to the amount a railroad company was entitled to deduct from gross income for depreciation of property, under Corporation Tax Act Aug. 5, 1909, § 38, subd. 2, the court *held* to have correctly instructed that the measure of depreciation was the difference in the intrinsic value of the property as a whole at the beginning and end of the year, and that enhanced value of parts through repairs and replacements should be set off against depreciation of other parts not repaired or replaced.

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

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

Action by the United States against the Nashville, Chattanooga and St. Louis Railway Company. Judgment for the United States, and defendant brings error. Affirmed.

See, also, 249 Fed. 678, 161 C. C. A. 588.

Fitzgerald Hall, of Nashville, Tenn. (Frank Slemons, of Nashville, Tenn., on the brief), for plaintiff in error.

Lee Douglas, U. S. Atty., and Wm. H. Ewing, Asst. U. S. Atty., both of Nashville, Tenn., for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. This case is before this court a second time. In substance it is this: In June, 1916, the United States, under the direction of its Commissioner of Internal Revenue, brought suit to recover from defendant an excise tax of 1 per cent. claimed to be due from it for each of the years 1909 and 1910, under section 38 of the Revenue Act of August 5, 1909 (36 Stat. 11, 112, c. 6), which makes every corporation to which it applies "subject to pay annually" a special excise tax of 1 per cent. on its net income, to be determined by deducting from gross income, among other things, operating expenses, losses sustained, "including a reasonable allowance for de-

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 375, 65 L. Ed. —.

preciation of property," interest on indebtedness, and taxes. The declaration alleged the filing by defendant with the Commissioner of Internal Revenue, on February 25, 1910, and February 21, 1911, respectively, of returns of its net income for the respective years 1909 and 1910; that both returns were incorrect as to the amount of defendant's income—that for 1909, in that it included, as an item of deduction from gross income, an alleged charge of $26,000 to expenses, which was not a necessary expense actually paid out of income in the maintenance and operation of its business and properties; those for both years, in that they included charges to depreciation of roadway, amounting to $249,024.54 for the year 1909 and $239,229.70 for the year 1910, which were not charged against the capital valuation of the roadway on its books, and were not reasonable allowances for depreciation of roadway within the meaning of the act; that the three items named were disallowed by the Commissioner of Internal Revenue and held by him to be incorrectly charged, and that they were in fact not correct and proper deductions from gross income, and that the total amounts so deducted, which should have been included as net income in said returns, were for the year 1909 $275,024.54, and for 1910 $239,229.70; that the defendant was thus indebted to the United States and subject to pay an income tax of 1 per cent. upon the amounts stated; that it had failed and refused to make payment; and that the alleged taxes were thus due from defendant and payable by it to the United States.

The railway company demurred to the declaration upon grounds, so far as now important: (a) That the government could not recover an excise tax in advance of an assessment by the Commissioner of Internal Revenue; and (b) that the railway company, having made its returns and paid the assessments made by the Commissioner, could be made subject to no further obligation unless the Commissioner should discover some item to be false within three years from March 1st of the year succeeding the calendar year for which the return is made. The trial court sustained the demurrer. This court reversed that action, and remanded the case for further proceedings and trial. 249 Fed. 678, 161 C. C. A. 588. The railway company then pleaded nil debet to each of the two counts of the declaration, together with special pleas to each count, raising the identical questions which had before been presented by its demurrer to the government's declaration. The government's demurrers to these special pleas were sustained by the District Court, on the authority of this court's decision. Upon trial by jury there were verdict and judgment against the railway company for $5,142.50, being 1 per cent upon the amount of the three items in question. This writ is to review that judgment.

1. Upon the present hearing counsel for the railway company, in support of its special pleas overruled below, has again argued at great length the questions presented to and considered by this court under defendant's demurrer to the government's declaration. All of these questions, which relate equally to the special pleas, were, upon careful consideration, decided by this court against defendant's contention. It is unnecessary here to repeat the grounds of that decision, which

sufficiently appear from our published opinion. 249 Fed. 678, 161 C. C. A. 588. The argument now advanced sheds no additional light upon the subject. We content ourselves with saying that we find no reason to depart from our former conclusions. The assignments of errors numbered 1 to 5, inclusive, are accordingly overruled.

2. The remaining assignments relate to the refusal to direct verdict for defendant, to the charge as given, and to the refusal of certain of defendant's requested instructions. A consideration of the criticisms relating to the charge will aid in determining whether there was a case for the jury.

Defendant conceded on the trial that the deduction of the $26,000 item in its return for 1909 was not authorized. The court accordingly properly instructed that the government was entitled to a verdict for at least $260.00 on this account. The substance of the charge otherwise was that the question of fact to be determined was merely whether the deductions made by defendant in its excise tax reports for the years 1909 and 1910, viz. $249,024.54 for the former year, and $239,229.70 for the latter year, were in whole or in part reasonable allowances for depreciation of roadway during those respective years; that if such allowances were reasonable the government is not entitled to recover; that if they were not reasonable the government was entitled to verdict for 1 per cent. of the amounts improperly deducted. The jury was specifically instructed to consider, first, "the depreciation, either physical or functional, in the value of those parts of the roadway which have not been repaired or renewed or replaced"; and, second, "what has been the effect of the repairs, renewals, and replacements that have been made to other parts, and determine whether, after you strike a final balance at the end of the year, the roadway is of greater or less value, or of equal value, than or to that which it was at the beginning of the year," and that if it should be found "that the value of the roadway, its actual value, is as great at the end of the year, after these repairs and replacements have been made for which credit has been given as an expense deduction, then there is no depreciation in value of * * * the roadway, within the meaning of the statute," but that "if, after making such repairs, replacements, and renewals in the different units of the roadway, it should be found that some parts have been made more valuable by the putting in of new parts in place of wornout parts, yet the depreciation in the rest of the roadway, in the deterioration, obsolescence, etc., of other units which have not been changed, and so little done in repairing and replacing that at the end of the year, taking it as a whole, the depreciation in value has exceeded the repairs, replacements, and renewals, so that it is worth less than it was, * * * to that extent the railway is entitled to a deduction of 1 per cent."

The first specific criticism to the charge is that depreciation was made to depend upon the relative value of the roadway "in dollars and cents" at the beginning and end of the respective years. The contention is that the criterion is "earning power," "value for use," not its value to an investor. In point of fact, the court did not use the expression "dollars and cents" in its charge to the jury. Its various expressions

were "value," "net value," "actual value," "real value," doubtless meaning intrinsic value, value in "dollars and cents," as distinguished from market value, which defendant's testimony showed might be affected by considerations other than intrinsic value.

The criticism is without merit. Not only is it clear that market value was not meant, but the criticism loses all point through the specific admission of defendant's counsel, made upon the trial, that "the road as a whole, for the purpose of carrying on the business of a common carrier, was just as valuable at the end of the year as at the beginning," and by the equally express admission of defendant's chief engineer, not only to the same effect as that of counsel, but, further, that it would be worth as much to "any persons that wanted to buy it for a railroad."

The further criticism is made that "the court refused to permit the jury to consider depreciation, physical or functional, in the units constituting roadway, track, and structures"; the argument being that, as "a railroad is a composite property, it is impossible to figure depreciation of a road as a whole without first considering depreciation of the units."

The court, however, did not instruct that depreciation of units could not be considered in determining the ultimate question whether there was net depreciation in the roadway as a whole. It is true that, after stating that there would be no depreciation if repairs, renewals, and replacements had placed the roadway in the same value as at the beginning of the year, it was said:

"In that sense you should not consider each of the individual units that enter into the roadway."

But the meaning of that statement was made clear by the paragraph immediately following:

"It was not intended to have a system of bookkeeping with reference to each particular cross-tie or each particular rail, but you should look to the value of the roadway as a whole, comparing its value at the beginning of the year with its value at the end of the year."

Further evidence of the meaning of the charge appears from the later use of the term "net value"; also by earlier reference to the making of repairs, renewals, and replacements in the roadway, by "taking out units that had decayed or whose usefulness was at an end and putting in others, taking out cross-ties, decayed cross-ties, worthless cross-ties, and putting in new cross-ties, taking out rails worn out and putting in new rails, repairing and replacing different units in its roadway system from time to time," as well as by the instruction that the jury should consider "depreciation, either physical or functional, in the value of those parts of the roadway which have not been repaired or renewed or replaced, then also consider what has been the effect of the repairs, renewals, and replacements that have been made to other parts, and determine whether, after you strike a final balance at the end of the year, the roadway is of greater or less value, or of equal value, than or to that which it was at the beginning of the year."

The contention on which defendant seems to rest its chief criticism

seems to be that, notwithstanding the roadway as a whole was intrinsically just as valuable at the end of the year as at the beginning of the year; that is to say, although depreciation in given units had been fully overcome by appreciation in others, the railway company would still be entitled to credit for depreciation in such individual units as had depreciated. We think this contention of defendant not sustained by reason or authority, and that the court correctly charged the true criterion. If, as is not entirely clear, it is meant to further suggest that the consideration of functional (as distinguished from physical) depreciation was not allowed by the charge to be taken into account, the suggestion is plainly without merit. Not only did the court define the roadway as including "structures connected with the roadway, such as stations, toolhouses, and matters of that sort," but it included in depreciation a lessening of original values "due to wear and tear, decay, gradual decline from obsolescence—that is, getting out of date and inadequacy." In our opinion, the jury was given the correct rule for determining the existence or nonexistence of depreciation, which accords with the "ordinary and usual sense" of that term "as understood by business men." Van Baumbach v. Sargeant Land Co., 242 U. S. 503, 524, 37 Sup. Ct. 201, 61 L. Ed. 460. To say that property can depreciate without impairment of either intrinsic value or efficiency is to our minds a solecism.

3. *The Refusal to Direct Verdict.*—The sole question in this regard is whether or not there was substantial testimony tending to support the government's contention that there was during the years 1909 and 1910 no net depreciation in the intrinsic value of the roadway and structures considered as a unit. It is not highly important to the determination of this question whether the controversy arose on one theory and was tried on another, nor whether the claimed depreciation would have been allowed under the system of bookkeeping employed by the government, had the charges therefor been set up on the railway company's books. 249 Fed. at page 686, 161 C. C. A. 588.

It appears that defendant arrived at the depreciation charges by estimating the value of the perishable structures as one-third the cost of the road (less equipment and real estate), and then taking 3 per cent. of this one-third value, on the theory that the average life of the various perishable elements was 33⅓ years. Whether or not these depreciation estimates were reasonable was a question for the jury.

In our opinion there was substantial testimony tending to support the government's contention. It appeared that there was expended in round numbers for maintenance of way and structures—that is to say, for repairs, renewals and replacements—for the year 1909 of $1,600,000, and for the year 1910 of $1,554,000, and that no substantial part of these sums was carried in defendant's accounting as additions and betterments. It was admitted by defendant's chief engineer that the expenditures for 1909 "kept the road in a normal condition to carry on its business," that "its normal condition was a good condition," and that the expenditures "had made good the normal amount of depreciation." There was testimony by competent witnesses of railway experience that "there may be depreciation in the units comprising the

roadway, track, and structures of the railroad, while there is no depreciation in the machine as a whole"; also that it is possible "to maintain the roadway, track, and structures, so that there will be no depreciation if we consider the roadway, track, and structures as a composite whole"; also that "the service life of any normally operated and normally and well maintained railroad is perpetual, and it is maintained in the condition of property serving its purpose by annual renewals and replacements."

The testimony, considered as a whole, tended to support the conclusion that the amounts expended by defendant during the years in question for repairs, renewals, and replacements should and would have fully offset the depreciation in the various units, and that the defendant's railway and structures were, as a whole, maintained throughout the years in question in fully as good condition, and were of fully as great intrinsic value, as at the beginning of the respective years. The jury would have been clearly justified in inferring from the testimony of defendant's chief engineer, taken as a whole, that the value of the roadway had not depreciated during the two years in question; in other words, that the repairs and renewals that had been made were of such a character as to leave the road at the end of each year of value equal to that at the beginning of the year. That officer's testimony so impressed the trial judge, who stated his opinion from the evidence that "there is no reasonable deduction for depreciation established." Defendant did not directly controvert the situation so shown. Its chief, if not its only, reliance seems to have been on the proposition that, in spite of it all, there was inevitable annual depreciation in some of the perishable elements not entirely renewed or replaced, so justifying the contention that for this reason there was depreciation within the meaning of the act, even though the roadway as a whole had not decreased in value. To this argument, as already said, we cannot assent. It follows that the trial judge rightfully refused to instruct verdict for defendant.

Finding no error in the record, the judgment of the District Court is affirmed.

VALMAS DRUG CO. v. SMOOTS.

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

No. 3430.

1. **Evidence ⇐544—Physician in general practice competent to testify as to cause of eye disease.**
   A physician in general practice *held* competent to testify as an expert that in his opinion a diseased condition of plaintiff's eye was caused by the presence of zinc sulphate in an eyewash.

2. **Druggists ⇐9—Liable for negligence in selling harmful preparation.**
   Medical testimony that zinc sulphate, in the proportion contained in an eyewash prepared and sold by defendant, was, or might be, injurious when the wash was used as directed, *held* sufficient to justify submission to the jury of the question of defendant's negligence in placing it on the market, coupled with statements on the containers and in advertisements that it was harmless, and recommending it as a home remedy.

3. Druggists ⇐9—Risk from harmful ingredient in preparation sold generally not assumed by purchaser.

One not a physician, who purchased and used an eyewash recommended by the maker for use as a home remedy and bearing a statement on the container that it was harmless, cannot be held, as matter of law, to have assumed the risk because a statement of the ingredients was also given.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action at law by Carrie Smoots against the Valmas Drug Company. Judgment for plaintiff, and defendant brings error. Affirmed.

James V. Oxtoby, of Detroit, Mich. (Oxtoby & Wilkinson, of Detroit, Mich., on the brief), for plaintiff in error.

Eugene P. Berry, of Detroit, Mich. (Berry & Berry, of Detroit, Mich., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Writ to review judgment against defendant Drug Company for injuries alleged to have been suffered by plaintiff through the use of an eyewash manufactured and put upon the market by defendant.

Defendant caused to be manufactured and placed upon the market, by selling to wholesale druggists, tablets for making an eyewash, called "Bon-Opto," doing considerable advertising at Detroit, Mich., through an advertising agency. The package intended for the individual consumer contained a 2-ounce bottle, an eyecup and 14 five-grain tablets. According to the accompanying directions, the treatment was to be had by dissolving one of the tablets in the bottle full of water, the entire of the two-ounce solution to be used for a given eye bath. The tablets, according to the formula indorsed upon the package, contained chloretone, zinc sulphate, sodium chloride, boric acid, menthe poivree, and camphre de menthe. The quantities of the various ingredients were not given on the package, nor was the formula otherwise given by defendant to the public. Each tablet contained $^{21}/_{125}$ of a grain of zinc sulphate (white vitriol), which was a trifle more than 3 per cent. of the contents of the tablet. The package was accompanied by detailed directions for applying the solution to the eyes, together with a series of exercises therefor, and for the general health, calculated to extend over a period of six months. Application of the wash "two to four times daily for best results" was recommended. The package contained an indorsement that Bon-Opto was "for use by physicians and as a home remedy in the treatment of eye troubles"; also a legend announcing it to be "healing, soothing, non-irritating, and harmless." On another face was a statement which we print in the margin.[1]

[1] "For use by physicians and as a home remedy in the treatment of inflamed, weak, watery, tired, sticky, sore, irritated eyes and eyelids, acute and chronic catarrhal conjunctivitis, congestion of the eye, either recent or of long standing, caused by colds, overwork, or exposure to smoke, wind, sun and dust encountered in automobiling, travel, etc. Bon-Opto may be prescribed and used freely."

The evidence on plaintiff's part tended to show that, on reading a newspaper advertisement "that you could throw away your glasses" if you used Bon-Opto, she bought a bottle at a retail drug store; that she was then 45 years old, was "going through changes," and had used glasses for reading and sewing (but not otherwise) for about 14 years, having changed them twice; that her glasses needed changing, and that she bought the remedy because of the newspaper advertisement mentioned, her eyes being otherwise well; that after reading the directions carefully she used 11 of the tablets on as many nights and as directed by the literature accompanying the package, bathing only the right eye, intending to treat the left eye similarly in case the right eye was benefited; that each use of the tablet caused smarting which at first continued about 10 or 15 minutes, and then passed off until the next tablet was used; that her eye got worse and inflamed; that after about a month she consulted a physician in general practice, who found an inflammation of the outer membrane of the eye, which was then so bad as to require bandaging to protect it from the light; that the physician gave her a prescription which she had filled several times, causing some temporary, but not permanent, relief; that later her eyes again troubled her, and her physician advised her to consult a specialist, which she did some months later, with the result that four ulcers were found on her right eye, which the specialist treated for two or three months.

It appeared without dispute that zinc sulphate is an astringent. There was testimony which would support a conclusion, not only that zinc sulphate would not be prescribed for defective vision or for the purpose of having a person do away with glasses, that there is no "catch-all" preparation for diseases or conditions of the eyes, but that zinc sulphate is not suitable for all cases of weak eyes; that it should be used with caution, and only on physician's prescription; that it is irritative, and if continued long enough causes changes in the structure of the eye; and that the condition from which plaintiff suffered resulted from the use of the zinc sulphate. On the other hand, there was competent testimony that zinc sulphate was a common ingredient in eyewashes, and that so weak a solution as used by plaintiff would not injure the eye.

The assignments of error, so far as argued, are: First, the admission of the testimony of the general medical practitioner referred to, who it is alleged was incompetent to give expert testimony; and, second, the refusal of the motion and requests to direct verdict for defendant, on the grounds (a) that there was no evidence of negligence on defendant's part; (b) that the claim of injury from the use of the tablets was merely speculative; (c) that there was no evidence that the presence of zinc sulphate in the tablets was the proximate cause of plaintiff's injuries; and (d) that inasmuch as plaintiff was advised by indorsement on the package containing the tablets that they contained zinc sulphate, and as the quantity in a given tablet was in fact but slightly more than 3 per cent. of the total ingredients of the tablet, plaintiff was sufficiently advised (by such description) of the presence of zinc sulphate, and so assumed the risk of using it.

[1] 1. The general medical practitioner was permitted to testify, against defendant's objection, in answer to a hypothetical question, that on the assumptions contained therein it was his opinion that the condition of plaintiff's eye, from which she suffered, including the ulcers thereon, was caused by the use of the zinc sulphate. Error is assigned upon this ruling, as well as upon the refusal to strike out the testimony of the witness generally as to the cause of plaintiff's suffering and injury—all on the ground that the witness was not competent to testify as an expert.

The objection and motion to strike were properly overruled. The witness obtained his medical education at the Saginaw Valley Medical College and the Detroit College of Medicine; he had been a practicing physician for 25 years, and was then engaged in the general practice of medicine; while he had never given particular attention to diseases of the eye, he did undertake to treat such diseases until he concluded, through their failure to respond to his treatment, that they should be referred to a specialist. He treated plaintiff for a time following the use of the eyewash. The facts that he was not an oculist, had never made a specialty of any particular branch of his profession, and had never used an eyewash containing zinc sulphate, did not, as matter of law, make him incompetent to testify as an expert. His testimony indicated that he was acquainted, from actual practice, with the nature and effect of zinc sulphate on the human system and its members generally. It is not to be presumed that reputable medical colleges fail to give suitable instruction in the fundamental principles of materia medica, toxicology, and opthalmology, or that one without either instruction or experience on these subjects would be permitted to engage in general practice in Michigan. The weight of his testimony was for the jury. This conclusion accords with the general weight of authority. Samuels v. United States (C. C. A. 8) 232 Fed. 536, 542, 146 C. C. A. 494, Ann. Cas. 1917A, 711; Detroit Ry. Co. v. Kimball, (C. C. A. 6) 211 Fed. 633, 636, 128 C. C. A. 565; People v. Thacker, 108 Mich. 652, 660, 66 N. W. 562; Hardiman v. Brown, 162 Mass. 585, 587, 39 N. E. 192; Siebert v. People, 143 Ill. 571, 579 et seq., 32 N. E. 431; People v. Benham, 160 N. Y. 402, 440, 441, 55 N. E. 11; 1 Wigmore on Evidence, § 687.

2. The refusal to direct verdict for defendant; and, first, on the ground that there was no evidence that defendant was negligent. We accept the statement of defendant's counsel that the question on this branch of the case is:

"Whether the use of $^{21}/_{125}$ of a grain of zinc sulphate in each tablet was negligence, taken in connection with the advertisement which plaintiff below claimed to have relied upon in purchasing and using the tablets and the trouble with her eyes as testified to by her."

Unquestionably, the evidence would have supported a verdict for defendant. It may also be conceded, at least for the purposes of this opinion, that without the testimony of the general practitioner there was not sufficient proof of defendant's negligence to justify submitting the case to the jury. But the testimony of that witness substantially tended to show negligence. He testified that—

"The main proposition is the constant use of the drug with the zinc sulphate in it, or of even a smaller per cent., 3 per cent. constantly used as she used it, a woman of her age, with the condition existing in her eyes as I have stated, that the astringent would cause the condition she suffered from. * * * I mean the zinc sulphate and the per cent. in Bon-Opto."

True, defendant's president testified that, before undertaking the manufacture of the tablets, he consulted and was told by several physicians and specialists that there was nothing about the tablet that would injure any one's eyes, and there is also testimony that even a far larger proportion of zinc sulphate than used in Bon-Opto was harmless. But the jury was not bound to accept this testimony as relieving defendant of negligence, in view of the evidence on plaintiff's part as to the effect of zinc sulphate in the quantity used, and having in mind the newspaper advertisement testified to by plaintiff, as well as the representations on the package that the remedy was not only "nonirritating and harmless," but that it was for use as "a home remedy"—implying that it was safe in all cases and without occasion to resort to physicians' advice or prescription. The jury might well have concluded that, although it was customary to use as much or more zinc sulphate in an eyewash, it was negligent to offer it to the public, not only without caution, but with the sweeping (and, at least in one case, extravagant) claims said to have been made for it. See Simpson v. United States (C. C. A. 6) 241 Fed. 841, 844, 845, 154 C. C. A. 543. In our opinion there was substantial proof of defendant's negligence requiring the submission of the case to the jury.

[2] 3. The trial court properly denied the requests for direction of verdict on the grounds of lack of evidence that the zinc sulphate contained in defendant's tablets was the proximate cause of plaintiff's injury, and that the proof of such cause was purely speculative. If the evidence on plaintiff's part is to be accepted as true, there was substantial evidence, not only that such use was a proximate cause of plaintiff's injuries, but that it was the sole proximate cause thereof. The testimony, taken as a whole, is not rendered speculative, nor does evidence of proximate cause disappear, through the consideration, standing alone, that the inflammatory condition of plaintiff's eye when first seen by the medical practitioner was of a character and appearance which might have been caused otherwise than by the use of zinc sulphate, as, for instance, by infection, or by irritation incident to contact of foreign matter with the membrane of the eye. This consideration did not stand alone.

[3] 4. Nor did the court err in refusing the request for directed verdict on the ground that plaintiff had assumed whatever risk there was in using the tablets. It is true, she was advised of the presence of zinc sulphate, although not of the amount thereof; but plaintiff did not assume the risk from its use, unless she knew and appreciated the danger therefrom, or should have done so. Yazoo R. R. Co. v. Wright (C. C. A. 6) 207 Fed. 281, 285, 125 C. C. A. 25. Plainly, plaintiff could not be held, as matter of law, to have assumed the risk of harm in the face of defendant's assurance, indorsed upon the package, that there was no danger of harm.

The judgment of the District Court is affirmed.

COPELAND v. HINES, Director General of Railroads.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1920.)

No. 3431.

1. **Appeal and error ⊜927(6)—Direction of verdict not without effect on reviewing court.**
   Where the trial court has directed a verdict for defendant, the reviewing court may safely assume that plaintiff's case was not helped out by an impressive atmosphere not shown in the record.
2. **Master and servant ⊜286(34)—Evidence insufficient to take question of railroad flagman's negligence to jury.**
   Where plaintiff's intestate, who was engineer of a following train on a foggy night, disregarded two block signals set against him and the signal given by a brakeman sent back for the purpose, and although the rules required him, in case he could not see the signals, to stop or proceed with great caution, ran at full speed into a stalled train ahead, evidence that the brakeman sent back to signal had proceeded but half the distance required by the rules and practice when he met the coming train, but not showing that he delayed unduly, beyond that he walked very slowly on account of the fog, *held* insufficient as matter of law to establish negligence of the railroad company contributing to the death, which entitled plaintiff to recover under Employer's Liability Act (Comp. St. §§ 8657–8665).
3. **Master and servant ⊜137(7)—Warning to following train by block signal sufficient.**
   It was not negligence for a railroad company to fail to give warning through its train dispatcher to a following train that the train ahead was stalled, where it had established an efficient block signal system, which gave such warning.

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

Action at law by H. P. Copeland, administrator, against Walker D. Hines, Director General of Railroads. Judgment for defendant, and plaintiff brings error. Affirmed.

Luther Day, of Cleveland, Ohio (Robert H. Dawson and Day, Day & Wilkin, all of Cleveland, Ohio, on the brief), for plaintiff in error.

Thomas M. Kirby, of Cleveland, Ohio (Squire, Sanders & Dempsey, of Cleveland, Ohio, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. A freight train became stalled on the east-bound main track of the Pennsylvania Railroad. The automatic block signal system was in use and was in effective operation. One of these signals, which we may call No. 1, was about 300 feet west of the rear of the stalled train. The next one, which we identify as No. 2, was 4,500 feet farther west. According to this system, when an east-bound train passed No. 2, and while it remained in the block between No. 2 and No. 1, No. 2 showed a red light. As the train left the block and entered on the next block east, No. 1 showed a red light, and No. 2 changed from red to yellow, and would continue yellow so long as any part of the train was in the block adjacent on the east

to No. 1. When that block also became unoccupied, the light at No. 2 would change from yellow to white. It was the duty of the engineer on any following train, when he passed the yellow signal to reduce speed and bring his train under control, and this meant, the witnesses say, to reduce to a speed of from 5 to 10 miles an hour. If, then, this engineer at a subsequent block got the red signal, he must stop until the light again became yellow or white. There was also a rule and practice which, when a train stopped upon the main track, required the flagman to go back far enough to protect his train and be prepared to give his stop signal to any following engineer. The testimony tended to show that this rule and practice were rightly subject to the interpretation that "far enough to protect his train" meant about 40 car lengths, or 1,600 feet.

The stalled train sent for help, which soon arrived in the shape of a light train, consisting of engine and caboose, coming from the west. It coupled onto the rear of the other train and prepared to help. Pursuant to the rule and practice, the light train sent a flagman back. In his progress west, he had reached a point about 800 feet from his own caboose when he saw another train approaching. It was close to him before it was visible, because of the extreme fogginess prevailing, but with his red and white lights he gave the prescribed stop signal. This train was a special fast freight, running about 35 miles an hour, and it is undisputed that it passed the yellow block at No. 2, and passed the brakeman's stop signal, and passed the red block at No. 1, all at full speed and without any attention to the signals. It crashed into the standing train, and the engineer, who thus had not seen or had disregarded all signals, was killed. His representatives brought this action in the court below, under the federal Employers' Liability Act (Comp. St. §§ 8657–8665). His negligence is not denied, but it is the theory of the action that his personal negligence and the negligence of the railroad in not giving the flagman's stop signal farther west cooperated, whereby each became a proximate contributing cause, in which event, as specified in the act, and as pointed out by the Supreme Court in Norfolk Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172, and as applied by this court in Pennsylvania Co. v. Cole, 214 Fed. 948, 131 C. C. A. 244, and by the Supreme Court in Union Pacific v. Hadley, 246 U. S. 330, 38 Sup. Ct. 318, 62 L. Ed. 751, his representatives would be entitled to recover a proportionate part of the damages.

The trial court directed a verdict for the defendant. Clearly, the case should have been given to the jury, if there was substantial evidence indicating that there was negligence by the railroad in the matter of the flagman's signal and that such negligence was a proximate contributing cause of the disaster. The critical question is, therefore, as to the existence of such evidence on each of these points.

[1] We may observe, in a preliminary way, that the action of the trial judge in directing a verdict and in refusing a new trial is not wholly without importance. We have often pointed out (e. g., Louisville Co. v. Lankford, 209 Fed. 321, 325, 126 C. C. A. 247) that the manner of witnesses, their emphasis, etc., may give the case a color

not perfectly reflected in the printed record, and that, when the trial judge sent the case to the jury and refused a new trial after a verdict for the plaintiff, the reviewing court must be especially cautious in concluding that there was nothing sufficient to justify that course. The converse must be true. Where the conclusions of the trial judge have been what they are upon this record, the reviewing court may safely assume that the plaintiff's case was not helped out by an impressive atmosphere not shown in the transcript. Patton v. Railway Co., 179 U. S. 658, 660, 21 Sup. Ct. 275, 45 L. Ed. 361.

[2] We assume upon this record that due diligence required the flagman to go back 1,600 feet, if he could, and there establish his signal post, and that his failure to do so, if he had been able, might rightly have been considered, even under the other circumstances of this case, an effective contributing cause; but those assumptions do not reach the present facts. There is no claim that the flagman unduly delayed in getting his signals and starting back down the track, or that he failed to give his signal when the engine approached. In fact, there is no suggestion that he could have done anything which he did not do, excepting that he should have walked faster. The only testimony on that subject is his, speaking as a witness for plaintiff. He says: "I walked very slowly; it was very foggy." To walk slowly on a dark and very foggy night would hardly be criticized, and so the essential inference of negligence rests on his use of the word "very." In deciding, not how far, but how fast, to go, he had a right to assume that the yellow block was showing as it was, and that the engineer of any following train would be especially careful in the thick fog and would come on under control. He knew, also, that the standing train was protected by a red block 300 feet in its rear, and that his own signal, given at the point which he could and did reach, even when walking slowly, in connection with the red block, was fairly sufficient to protect his train against any following train that should be reasonably expected. Even from the point he did reach, a signal which was observed would have enabled the following train to slow down, so as to minimize the danger, if not entirely to avoid it.

In addition, no attention was paid to any one of the three signals which the engineer did receive. It is the merest surmise that he would have paid any attention to the flagman's signal if it had been given a little further west. There is no substantial reason to think that this would have made any difference. A signal which, at 800 feet, was neither observed nor obeyed, would in all probability have been equally inefficacious a few car lengths farther back. We find, then, that on the subject of negligence there is at best only a dubious inference, and, on the subject of causal relation, not even that. A mere conjecture, standing upon a basis of uncertain inference, does not make substantial evidence. Such a case lacks both the quantitative and the qualitative essential minimum (Patton v. Ry., 179 U. S. 658, 665, 21 Sup. Ct. 275, 45 L. Ed. 361; Virginia Ry. v. Hawk [C. C. A. 6] 160 Fed. 348, 352, 87 C. C. A. 300; Richards v. Mulford [C. C. A. 6] 236 Fed. 677, and cases cited on page 681, 150 C. C. A. 9) and for the same conclusion on somewhat analogous circumstances, see Great Northern v.

Wiles, 240 U. S. 444, 448, 36 Sup. Ct. 406, 60 L. Ed. 732; Virginian Ry. v. Linkous (C. C. A. 4) 230 Fed. 88, 144 C. C. A. 386. Though the general rule is that the jury should say what cause is proximate (Milwaukee v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256), it is no more invariable than is the rule as to what is negligence, and the two cases last cited are illustrative exceptions. We have no difficulty in distinguishing the facts of this case from those of the Hadley and Cole Cases, supra; indeed, as to the particular matter we are discussing, there is no resemblance. In those cases, the negligence of the flagman was conceded, and the issue which was considered proper for the jury was as to the negligence of the following engineer. In the present case, the engineer's negligence is admitted, and it is the conduct of the flagman which is criticized.

It is also suggested that the flagman failed in his duty because he did not use a fusee. Ordinarily, a fusee may be left by the flagman, burning on the track, when he leaves his station and is called back to his train; possibly there is evidence tending to show that it would be prudent, in such a fog as this, for the flagman to light a fusee and let it burn while he was keeping his protecting station; but there is nothing to show that it was either customary, or was a reasonable precaution, for the flagman, going back to his intended station, to carry a burning fusee as he walked; nothing short of this would have been of the slightest importance on this occasion.

[3] It is also urged that the company was negligent, in that the train dispatcher did not give notice to the fast freight of the obstruction at this point. This is in effect to say that it was negligent to permit one train to follow so close after another that there would not be time for the leading train to stop and send a flagman back the necessary distance. It is not made to appear that any such system of notice would be practicable, nor is it claimed that there was any rule or practice requiring the same. The automatic block system was to meet this very situation. Through that system, the company did, on this occasion, give notice to this engineer that the track was obstructed a short distance ahead of him; but he disregarded the warning.

It should be added that the rules required the engineer, where for any reason he could not see the block signals, to stop or proceed with great caution, and that the crew of the preceding light train and others of the fast freight saw and observed these block signals. The fireman of the fast freight was not sworn; we infer that he also was killed.

The judgment is affirmed.

SMITH v. UNITED STATES (two cases).*

THOMPSON v. SAME.

(Circuit Court of Appeals, Eighth Circuit. December 7, 1920.)

Nos. 5245, 5246, 5380.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

On petition for rehearing. Denied. For former opinion, see 267 Fed. 665.

John Lee Webster, of Omaha, Neb., for plaintiffs in error.

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

PER CURIAM. A careful reading of the learned counsel's brief filed with the petition for a rehearing has not caused us to change the conclusions reached heretofore on the questions of law involved in these writs of error. The authorities cited had been examined when the opinion of the court was prepared, and they have again been examined, including the additional authorities cited in the present brief, and we see no reason for setting aside or modifying our former opinion.

Counsel devote a part of their brief to the statement in the opinion of the court as to the number of horses owned and sold by the defendants. The earnestness with which counsel have argued this proposition has caused us to again examine the entire evidence on that point, although the conviction of the defendants would have to be affirmed, regardless of the number of horses owned and sold by the defendants, as there were so many false and fraudulent representations made by the defendants in the sales of these wild horses that there is no room for a reasonable doubt of their guilt, and the jury so found.

The evidence on that point, as is usually the case in all trials, is conflicting; the defendants testifying that they had bought a large number of horses on the Coconino county range. But their testimony is not convincing. The defendant J. Sidney Smith testified that they had about 9,000 horses on the range; but he bases his testimony upon what others told him, and the number mentioned in bills of sale given to him, as he never counted the horses. Whether these bills of sale described the number of horses alleged to have been sold correctly he does not know, but considerable doubt is thrown on the correctness of these bills of sale by the testimony of other witnesses.

Mr. John Sinclair, who testified that he sold to the defendants about 150 wild horses on the range in 1910, stated that when he prepared the bill of sale the defendant Smith wanted him to put in 1,100 wild horses, instead of the number actually sold. This he refused to do.

Mr. E. C. Hodder, a witness introduced by the defendants, and who was their attorney when the United States Live Stock Company

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 450, 65 L. Ed. —.

was incorporated, produced on cross-examination a number of letters written by Mr. Tom E. Pollock, president of the Arizona Central Bank, at Flagstaff, Ariz. Mr. Pollock testified that he had received a number of letters from parties, living in different states, asking about these wild horses, offered for sale by the defendants, and he had answered them to let them alone, as he doubted whether these defendants owned as many horses as they had sold, and whether it is advisable to buy them; that the defendants J. S. Smith and Thompson spoke to him about it in 1910, and—

"I advised them not to refer to the bank in any way, because I advised both, by letter and by conversation, that the bank would absolutely refuse to have its name connected with it."

Mr. Hodder had produced a list showing the brands of several thousand horses on the range; but whether these brands were of either of the defendants the list fails to state. A copy had been sent to Mr. Pollock. Mr. Pollock testified that when this list was shown to him he either advised the defendant Thompson personally or by mail that the estimate signed for by these people (Gleason and Thomas) was simply absurd. Mr. Hodder, on cross-examination, produced a letter from Mr. Pollock to the defendant Thompson, dated September 20, 1910, in which he wrote him:

"I beg to inclose you copy you sent me regarding payments made by Mr. Gleason and Mr. Thomas, as I would not want to be put in position to have you advise people to me, expecting me to say that I don't know anything about these horses, because I think I do; nor would I, under any circumstances, advise anybody that the number you have there under the copy is correct. As I told you when you were here, I think the number is entirely too large, and I therefore request that you do not use me as reference as to the number of horses."

In June, 1911, he wrote again, in reply to a letter from the defendant Thompson, dated May 29, 1911, in which he writes:

"In the first place, you never paid Mr. Volz or Mr. Gleason a good many thousand dollars for these horses, and the transfers on the records here show, as I think I am rightly informed, the sale or trading of something over 6,000 head of horses. From the way you have handled this horse proposition, I certainly cannot in any way advise anybody to have business dealings with you, and do not want to be referred to. * * * When you were out here in person some time last year, I told you then that the situation would not warrant any such sales or trading as you folks were making, and while I did not want to injure you in any way, if you think that I am going to boost a proposition that I think in my own judgment is a very bad one, you are very much mistaken, because I will not do so. * * * There is no doubt but what there must have been quite a bunch of horses in the first outfits, but the fact that the brands in which the greater number of horses were running were mortgaged to Volz and on record here, I do not see how you have any other horses to sell or trade."

Mr. Arnold, another witness for the defendants, testified that at one time he was a partner of these defendants in these horses, and that he had bought numbers of horses from Volz and Gleason, who were partners. But in a statement which he made before the trial and which was introduced, he stated that Volz—

"had only about 100 horses, including saddle horses, colts, and mares in foal; that, while there were about 10,000 wild horses on the range, he does not know whether any of them were branded, and, if so, in whose brand; that he and the defendant shipped about 10 carloads of wild horses, about 250 head, to Omaha, and the expense of catching and shipping these 10 carloads was greater than the money realized from the sale of the horses."

Another witness for the defendants, Mr. Middleton, testified that he bought 75 horses from the defendants; that he saw several thousand horses on the range, with different brands, but they were wild, and he caught none of them, nor gathered any. He further testified that cowboys would take any horses they could get hold of and brand them with Smith's brands, without regard to right or wrong. Other witnesses introduced by the defendants testified to seeing wild horses there, and that some were shipped by the defendants, but whether they belonged to the defendants or not they did not know.

On the other hand, the witnesses for the government testified to facts based on their own knowledge. Mr. Cronen, the county recorder of deeds for Coconino county, testified that the records of his office show that there were filed for record bills of sale executed to different parties by these defendants to the number of 10,855 horses; 4,489 horses were covered by bills of sale executed by the United States Live Stock Company, 5,581 horses by the defendant J. S. Smith, and 785 by the defendant C. A. Smith. In addition, several witnesses introduced by the government testified that they had bought horses from the defendants and received bills of sale, but did not record them.

Mr. Drake testified that he is professor of forestry at the University of Montana; was forest inspector in the Coconino County Forest Reserve from December, 1906, to January 1, 1909; from that date until June 1, 1911, he was deputy supervisor of the same area, and from June 1, 1911, to September, 1914, the forest supervisor of that reserve; that during the year 1910 the entire number of horses of every kind and description, belonging to everybody, upon the National Forest Reserve in Coconino county, was 3,500, of which 1,600 were branded stock, owned by the ranchers and horsemen and used in connection with their business, and approximately half of the remainder were unbranded stock; that during the years 1909 and 1910 there were about 1,900 head of wild horses on the entire reserve, branded and unbranded. He further testified that under the state law the unbranded horses belonged to the livestock commission of the state; that from his own knowledge the United State Live Stock Company's and Smith Bros.' branded horses in the year 1909 were approximately 600; that in 1912 there were not more than 250 or 300 horses bearing the brands of the Smith Bros. and the United States Live Stock Company, and about the same number in 1913.

Mr. Ed Johnson testified that he is the live stock inspector, and that the number of horses shipped from the reserve in 1912 were between 50 and 60, nearly all broke, none of the Smith brands. The wild horses would have to be trapped. To run them down and get them an aeroplane would be best. He further testified that in 1912

and 1913 there were approximately 500 horses on the entire range, branded and unbranded.

Mr. Thomas J. Eakins testified that he was the live stock inspector at the time he testified, and has been since May, 1911; that he is thoroughly familiar with the Coconino County Forest Reserve, and with the brands known as the Smith Bros.' brands and the United States Live Stock Company's brands; that as live stock inspector he is required to keep a record of all live stock shipped out since he has been live stock inspector; that during the years 1909 and 1910 there were shipped out from all places on the reserve 510 horses, and of these 239 head by the defendants; that they had on the reserve about 300 head in 1911, 520 in 1912, and approximately the same number in 1913, and some few less in 1914.

Mr. Priest testified:

"I know the brands on the forest reserve; have been familiar with them for years. I would say there was 300 or 400 horses on the Coconino County Reserve during the year 1910 bearing the Smith brands. I would say there was from 1,500 to 2,000 horses of all brands, including farmers and rangers and everybody, during that time."

From this brief review of the testimony we see no reason for making any changes in the former opinion of the court.

The petition for rehearing is denied.

CHEMUNG IRON CO. v. LYNCH, Collector of Internal Revenue.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1920.)

No. 5572.

Internal revenue ⇐9—Corporation, receiving royalty from subleased ore lands, "doing business"; "income."

A corporation, lessee of iron ore lands, which subleased the same for mining purposes, receiving a royalty, and which employed an engineer to supervise the work of the sublessee and expended money in exploration to make sure that all available ore in the land was mined, *held* to have been "doing business," within the meaning of Corporation Tax Act Aug. 5, 1909, and to be subject to tax thereunder on the net receipts from such royalties as "income."

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

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by the Chemung Iron Company against Edward J. Lynch, Collector of Internal Revenue. Judgment for defendant, and plaintiff brings error. Affirmed.

A. L. Agatin, of Duluth, Minn., for plaintiff in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn., for defendant in error.

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

CARLAND, Circuit Judge. Action by plaintiff in error, hereafter called iron company, to recover from defendant in error, hereafter called collector, corporation excise taxes paid under protest. The case was tried to the court, a jury being waived. At the close of the evidence, counsel for iron company requested the court to declare the law in its favor. The request was denied, and a judgment rendered in favor of the collector.

It appears from the pleadings and evidence without dispute that for the years 1909, 1910, and 1912 the Commissioner of Internal Revenue assessed corporation excise taxes under the Corporation Excise Tax Law of 1909 (36 Stat. 11, 112), against the iron company, amounting in the aggregate to $12,923.83; that said taxes were paid under protest, and subsequently an application for a refund was made in accordance with the provisions of section 3226, Rev. Stat. (Comp. St. § 5949), and denied; that plaintiff did no business and received no income, gross or net, within the meaning of the above tax law, during the years aforesaid, unless certain acts performed by the iron company pursuant to the terms of a contract entered into with the Oliver Mining Company, hereafter called mining company, constituted the doing of business and the receipt of income. On January 1, 1903, the iron company, as stated in the brief by its counsel—

"was the owner of several mining leases (about 11 in number) covering various parcels of lands in St. Louis county, Minn., and each of which provided substantially that the owners of the property demised the lands covered by the respective instruments for the purpose of exploring for, mining, and removing the merchantable iron ore which might be found therein, for and during a specified period varying from 25 to 50 years from the date of the instruments, respectively, giving the lessee exclusive right to occupy and control the demised premises and to erect all necessary buildings, structures, and improvements thereon; the owners, however, reserving the right to enter for the purpose of observing the operations from time to time, and of measuring the amount of ore mined and removed, in such manner as would not interfere with the work of the lessees; the lessee in each of said mining leases agreed to pay the owners a certain price or royalty per ton for all iron ore mined or removed from the premises, and to make such payments at certain intervals; the lessee further agreeing to mine and ship a specified quantity of ore in each year, and, if for any reason the agreed amount should not be mined and shipped, nevertheless to pay the owner for the minimum amount so specified, and to take credit therefor and apply any sums so paid for ore not actually mined and shipped upon ore mined and shipped thereafter in excess of such minimum. In the event of default by the lessee in the observance of their contract obligations, the owners are entitled at their election, after due notice to the lessee to remedy the default, to terminate the contracts."

"The iron company, being the owner of said 11 leasehold estates, did on January 1, 1903, enter into a contract with the mining company, by the terms of which it subleased to said mining company all the lands covered by said leases for the entire terms of which they had been leased to it, except in each case the nominal period of the last day or two of the original leasehold period, for the purpose of permitting the mining company to do, in and upon the several parcels of land so demised, all and every the acts and things, but no more, which the iron company was entitled to do by said underlying leases."

In said lease the mining company covenanted to observe the underlying leases and contracts, to exhaust the merchantable ore bodies, to operate the mines in accordance with the requirements of good engi-

neering, to not waste ore, to furnish fee owners reports and maps to furnish the iron company duplicate and monthly reports of shipments, to permit the iron company to have access to the premises of the mining company, to pay taxes, to furnish tax receipts, to not assign or sublet demised premises, to permit entry of premises by the iron company, to deliver annual reports of exploration to the iron company, and to pay the iron company a royalty of 50 cents on each gross ton of iron ore mined and removed from the demised premises under and by virtue of the terms of the lease. Said lease also contained the following provisions:

"That the Chemung Company may at all times enter upon said premises or any part thereof, and view the same and take all reasonable means to ascertain the condition thereof, and the quantities of iron ore removed therefrom, or remaining therein, and to that end it may at any time, and from time to time, explore by drills or otherwise any and all of said premises, but not so as to unreasonably or unnecessarily hinder or interrupt the proper business or operations thereon of the Oliver Company."

"Therefore the parties hereto agree that, if either of the parties hereto shall serve a written notice upon the other, stating that the then merchantable iron ore bodies in any of the parcels hereby demised are practically exhausted, a mining engineer selected by each of the parties hereto shall within 60 days thereafter carefully examine and inspect such premises. * * *"

"To the end aforesaid the Chemung Company will, during the first five years of this lease, explore the demised premises for iron ore, and will from time to time, as requested, but not oftener than once a month, furnish the Oliver Company with all the results of such explorations, and will at all times permit the Oliver Company to examine such work of exploration and ascertain its nature and results, but not in such a manner as to interfere therewith; and the Oliver Company will from time to time as requested, but not oftener than once a month, furnish the Chemung Company with all the results of any explorations of said premises it may make, and with all the information it may acquire in its mining operations thereon, tending to show the quantity and quality of iron ore therein."

It appears from the evidence in the case that during the years 1909, 1910, and 1912 the iron company employed a secretary at a salary of $100 per month, a bookkeeper at a salary of $75 per month, and a mining engineer at a salary of $2,450 per year. The engineer was engaged by the iron company to superintend or inspect mining operations carried on by the mining company under its lease. Said engineer visited the mines from time to time, and reported to the iron company, in order that it might be advised whether the mining company was carrying out the terms of the lease.

The iron company expended, during the years 1909, 1910, and 1912, $59,898 in exploring the leased lands for its own advantage, profit, and gain. The evidence also shows that the nature of the business to be carried on by the iron company, as shown by its articles of corporation, was that of mining, smelting, reducing, refining, and working iron ores and other minerals. On this state of the record, counsel for the iron company contends that said company, during the years 1909, 1910, and 1912, was not doing business, and that the money paid to and received by it from the mining company under and pursuant to the contract of lease was not income, gross or net, within the meaning of the Corporation Tax Law. A plausible argument is made by

counsel for the iron company in support of said contentions, but we are unable to distinguish in principle the present case from that of Von Baumbach v. Sargent Land Co., 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. 460. It was stated in the case cited that the employment by the Sargent Land Company of another company to see that the mining operations were properly carried out and that the lessees lived up to the terms of their contracts was doing business, and that no particular amount of business was necessary in order to bring the company within the terms of the Corporation Tax Law. The exploration by the engineer of the iron company was to make sure that all ore that was in the leased land was extracted, and of course the work was done for the purpose of profit, as no company would expend the amount of money that the iron company did without intending to make a profit. The contention of counsel for the iron company that the royalties received by it under the lease were not income, within the meaning of the Corporation Tax Law, is also ruled against said company by the case above cited. The contention of counsel resolves itself into the proposition that the royalties received under the lease by the iron company constituted the conversion into money of what was its capital on January 1, 1903. In regard to this contention we need only to quote from the opinion in the case above cited as follows:

"This court held that it was not correct to say that a mining corporation was not engaged in business, but was merely occupied in converting its capital assets from one form to another, and that while a sale outright of a mining property might be fairly described as a conversion of the capital from land into money, the process of mining is, in a sense, equivalent to a manufacturing process, and however the operation shall be described, the transaction is indubitably 'business' within the meaning of the act of 1909, and the gains derived from it are properly the income from business, derived from capital, from labor, or from both combined. Further, 'as to the alleged inequality of operation between mining corporations and others, it is, of course, true that the revenues derived from the working of mines result to some extent in the exhaustion of the capital. But the same is true of the earnings of the human brain and hand when unaided by capital, yet such earnings are commonly dealt with in legislation as income. So it may be said of many manufacturing corporations that are clearly subject to the act of 1909, especially of those that have to do with the production of patented articles; although it may be foretold from the beginning that the manufacture will be profitable only for a limited time, at the end of which the capital value of the plant must be subject to material depletion, the annual gains of such corporations are certainly to be taken as income for the purpose of measuring the amount of the tax.'

"It is contended that this case is inapplicable, because the facts disclose that the ores were being mined by a corporation upon its own premises. In our view, this makes no difference in the application of the principles upon which the case was decided. We think that the payments made by the lessees to the corporations now before the court were not in substance the proceeds of an outright sale of a mining property, but, in view of the terms of these instruments, were in fact rents or royalties to be paid upon entering into the premises and discovering, developing, and removing the mineral resources thereof, and as such must be held now, as then, to come fairly within the term 'income' as intended to be reached and taxed under the terms of the Corporation Tax Act.

"The prior decisions of this court in Stratton's Independence v. Howbert, 231 U. S. 399, and Stanton v. Baltic Mining Company, 240 U. S. 103, in which the Stratton Case was followed and approved, are decisive of this question."

Counsel for the collector made a motion for judgment on the pleadings in the court below, which was denied. The claim of counsel was that the collector in the case at bar was not the collector in office when the taxes were collected. The judgment below was in favor of the collector, and he of course did not sue out a writ of error; nevertheless counsel has argued the point here for the purpose of maintaining that the judgment below was right in any event. In view, however, of the state of the record and our affirmance of the judgment on the merits, we decline to consider the ruling complained of.

Judgment affirmed.

CAMPBELL et al. v. WIREBACK et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

No. 1811.

1. **Copyrights ⟸9—Advertising cuts held copyrightable.**
   Advertising cuts, appearing in catalogues and made from drawings originally designed and prepared by persons of skill and artistic capacity, are copyrightable.
2. **Copyrights ⟸26—Application by partnership in firm name is substantial compliance with statute.**
   An application by partners for a copyright, made in the name of the partnership, though such name indicated a corporation, substantially complied with the statute.
3. **Copyrights ⟸26—Application not insufficient for want of statement of citizenship or domicile.**
   An application for a copyright, made in 1911, when no rule of the register's office required a statement of the applicant's citizenship or domicile, was sufficient, though there was no such statement.
4. **Copyrights ⟸26—Issuance of certificate cannot be attacked collaterally because of nonobservance of administrative regulation in application.**
   The acceptance of an application for a copyright, not in strict compliance with a rule of the register's office requiring a statement of the citizenship or domicile of the author and applicant, operated as a waiver of such administrative regulation, and the action of the register in issuing the certificates of registration could not be collaterally attacked because of such nonobservance.
5. **Appeal and error ⟸932(1)—Lower court presumed to have exercised discretion in awarding damages.**
   In a suit for infringing a copyright, where it appeared that defendant had printed 4,000 catalogues containing the infringing cuts and that 750 had been distributed, it must be presumed that the court, in awarding as damages $1 for each of the infringing copies found in defendant's possession, exercised the discretion given by the statute, and that such award expressed its deliberate judgment of what was just under the facts and circumstances.
6. **Copyrights ⟸87—Compensation for infringement held committed to trial judge's discretion.**
   Where the damages from infringement of a copyright are indirect and not capable of ascertainment, the compensation which the copyright proprietor shall receive is committed to the discretion of the trial judge.
7. **Copyrights ⟸87—Damages awarded held not abuse of discretion.**
   In a suit for infringement of a copyright, where it appeared that defendants had printed 4,000 catalogues containing the infringing cuts,

and distributed 750 of them, an award as damages of $1 for each of the infringing copies found in defendant's possession *held* not an abuse of discretion, especially where no counsel fees were allowed.

Appeal from the District Court of the United States for the District of Maryland, at Cumberland; John C. Rose, Judge.

Suit by Joseph F. Wireback and others, partners doing business as the Pittsburgh Orthopedic Company, against Thomas D. Campbell and others, partners doing business as the Maryland Orthopedic Company. Judgment for plaintiffs (261 Fed. 391), and defendants appeal. Affirmed.

Arthur P. Greeley, of Washington, D. C. (Horace P. Whitworth, of Westernport, Md., on the brief), for appellants.

Edward A. Lawrence, of Pittsburgh, Pa. (A. Taylor Smith, of Cumberland, Md., on the brief), for appellees.

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

KNAPP, Circuit Judge. In the court below the appellees were plaintiffs and the appellants defendants; they will be so designated in this opinion. The material facts are not in dispute and may be summarized as follows:

Plaintiffs are partners doing business at Pittsburgh, Pa., under the firm name of Pittsburgh Orthopedic Company. For some years they have been engaged in the manufacture of orthopedic devices, including an "extension shoe" patented by the plaintiff Wireback, and have built up a large and valuable trade. Their products are sold by mail order and by traveling salesmen, and in both methods they make use of illustrated catalogues, of which two appear to have been issued, one in 1911 and another in 1916, and which were copyrighted in those years respectively. These catalogues are of considerable artistic merit; they are printed on tinted paper of fine quality, and the original drawings from which the cuts are reproduced were made by persons especially skilled in work of that kind.

One of the salesmen employed by plaintiffs was C. Russell Cox. He had a relative at Barton, Md., by the name of Hoffa, whom he visited in the early part of 1918. Believing the World War would create a great demand for artificial limbs, they agreed to go into the business of making them, under the firm name of Maryland Orthopedic Company; Hoffa furnishing the capital, and Cox the experience. Thereupon Cox left the plaintiffs' service and proceeded to get up a catalogue for the new concern. Among other things he went to the Pittsburgh engraver, who had made the cuts for plaintiffs from the artist's drawings, and arranged for copies of some of the copyrighted cuts, including those of the extension shoe. For some reason, however, Cox seems to have dropped out about the time operations were commenced, and the business was actually carried on by the present defendants. There is no doubt, as the trial court finds, that they intended "to make and sell goods just like those of the plaintiffs"; and the fact of infringement, if the cuts in question were properly copyrighted, is not open to dispute.

In April, 1919, this suit was brought to restrain the further infringement of plaintiffs' copyrights and for damages. The decree of the court below grants the injunction prayed for and awards damages in the sum of $4,000.

[1] It is contended here, first, that the cuts reproduced in defendant's catalogue are not copyrightable matter, but this contention is refuted by abundant authority. It is sufficient to cite Westermann Co. v. Dispatch Co., 249 U. S. 100, 39 Sup. Ct. 194, 63 L. Ed. 499, in which the Supreme Court assumes the validity of a copyright of pictorial illustrations of styles in women's apparel, and which therefore seems controlling of the instant case. Among other cases of like import and directly in point are Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460, which sustains a copyright on circus posters showing groups of performers; Da Prato Statuary Co. v. Guiliani Statuary Co. (C. C.) 189 Fed. 90, holding that a catalogue of cuts of pieces of statuary was copyrightable; White Co. v. Shapiro (D. C.) 227 Fed. 957, sustaining the copyright of a catalogue containing cuts of lighting fixtures; and Stecher Lithographic Co. v. Dunston Lithographic Co. (D. C.) 233 Fed. 601, upholding the copyright of chromos or lithographs of certain vegetable products. Bearing in mind that plaintiffs' cuts are made from drawings which "were originally designed and prepared by persons of skill and artistic capacity," as the court below finds, the case in hand comes clearly within the rule which we believe to be stated correctly in Weil on Copyrights, p. 226, as follows:

"A mere advertisement of a bare list of articles, prices or facts would seem not to be copyrightable. It would lack the minimum of originality necessary for copyright. On the other hand, catalogues or other advertisements having originality, or quasi artistic character, are copyrightable. It requires very little originality indeed to render proposed advertising matter copyrightable."

[2-4] It is further contended that no action can be maintained on plaintiffs' copyrights because they were not registered in accordance with the Copyright Law. The only defects alleged are in the applications for the copyrights of 1911 and 1916. In the former, the Pittsburgh Orthopedic Company, without naming the persons composing that firm, is given as the applicant and author, and "no statement is made as to whether the author is native-born or naturalized citizen or permanent resident of the United States"; in the latter the Pittsburgh Orthopedic Company is likewise named as applicant and author, and the country of which the author is a citizen or subject is stated to be "U. S. A." It is therefore said that the first application omits an essential statement, while the second contains a misstatement, because a partnership cannot be a citizen. These objections are extremely technical, and especially so as there is no question that all the plaintiffs were in fact citizens of the United States. That a partnership may obtain a copyright in the firm name, even if that name indicate a corporation, seems to be assumed, if not directly held, in a number of cases. Bleistein v. Donaldson Lith. Co., 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460; Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct.

177, 32 L. Ed. 547; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349; Scribner v. Clark (C. C.) 50 Fed. 473; Stecher Lith. Co. v. Dunston Lith. Co. (D. C.) 233 Fed. 601. And no decision of contrary import has been brought to our attention. Indeed, the practice of using the firm name, when a partnership applies for a copyright, appears to be rather common. Even the defendants copyrighted their catalogue in the name of Maryland Orthopedic Company.

As to the matter of citizenship, it is enough to say that there is no statutory requirement for the inclusion of a statement of citizenship or domicile in the application for copyright; nor, so far as we are advised, was such a statement required by any rule of the register's office in 1911 when plaintiff's first application was filed. And the rule adopted in 1913 and since in force prescribes merely refusal of registration as the penalty for its nonobservance. We are therefore constrained to hold, without arguing the point, that the acceptance of plaintiff's applications operated as a waiver of the administrative regulation, if in fact it was not strictly observed, and that the action of the register in issuing to them the certificates of registration cannot be collaterally attacked in this proceeding. In short, we are of opinion that plaintiffs have substantially complied with the statute and that the copyrights obtained by them are entitled to full protection.

[5-7] The remaining contention is based on the award of damages. It appears that defendants prepared a catalogue of their appliances, including the infringing cuts, and had 4,000 copies printed. Of these some 750 had been distributed at the time of the trial; the others were still in their possession. In the opinion of the court below all that is said on the question of damages is this:

"The plaintiffs are entitled to an injunction and to a decree for the statutory $1 for each of the infringing copies found in defendants' possession and for the destruction of such copies."

This is claimed to show that damages were assessed at $4,000, not in the exercise of discretion, but merely on the basis of the number of catalogues which defendants had printed, and therefore that it is not an award of "such damages as to the court shall appear to be just," as the statute provides. We do not so construe the award. The language is perhaps a little ambiguous, but the meaning and intent are not uncertain. The court is presumed to know the provisions of the Copyright Act, and to have exercised the discretion which that act enjoins, and the award must therefore be accepted, unless the contrary distinctly appears, as expressing its deliberate judgment of what is just under the facts and circumstances developed at the trial. In such a case as this, where the damages are indirect and not capable of ascertainment, the compensation which the copyright proprietor shall receive for the injuries caused by the infringer is committed to the discretion of the trial judge. This is distinctly held in Westermann Co. v. Dispatch Co., 249 U. S. 100, in which the Supreme Court says, at page 106, 39 Sup. Ct. 194, 195 (63 L. Ed. 499):

"The fact that these damages are to be 'in lieu of actual damages' shows that something other than actual damages is intended—that another measure

is to be applied in making the assessment. * * * In other words the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them."

We are unable to find any abuse of discretion in making the award under review, and this conclusion is supported by the fact that no counsel fees were allowed, as might have been done. The case is an aggravated one in many ways, and the damages inflicted by the unconscionable conduct of defendants are properly measured, as the quoted decision holds, by "the court's conception of what is just."

Affirmed.

AMERICAN MERCHANT MARINE INS. CO. OF NEW YORK v. TREMAINE et al.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920.)

No. 3513.

1. **Insurance ⇐143(3)—Statute requiring entire contract to be in writing does not prevent reformation of contract for mistake.**
   Rem. Code Wash. 1915, § 6059—31, providing that every contract of insurance shall be construed according to the terms and conditions of the policy, except when made pursuant to a written application intended to be made a part of the contract, in which case the insurer shall deliver a copy of the application with the policy, otherwise it shall not be a part of the contract, *held* not to affect the power of a court of equity to reform an insurance contract on the ground of accident or mistake.
2. **Appeal and error ⇐173(10)—Defense of laches must be made in trial court.**
   An appellate court will not consider a question of laches not raised in the trial court.
3. **Insurance ⇐313—Warranty as to date of sailing material to marine risk.**
   A warranty as to date of sailing in a contract insuring a scowload of lumber on a voyage in Alaskan waters *held* material to the risk.
4. **Partnership ⇐205—Failure to serve nonresident partners not ground for dismissal.**
   That members of a defendant partnership, who were nonresident aliens, had not been served, *held* not ground for dismissal on motion of the resident partner.

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

Suit in equity by the American Merchant Marine Insurance Company of New York against H. G. Tremaine, S. L. Buckley, and John Doe Buckley, partners as the Buckley-Tremaine Lumber Company. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

The court below dismissed the bill brought by the appellant to reform a policy of marine insurance. The complaint alleged that on October 3, 1919,

the appellees made written application to the appellant for insurance on certain lumber while on a scow in tow of a tug from Craig, Alaska, to Prince Rupert, B. C., and thence in double tow of approved tug to Seattle, Wash., voyage actually to commence in October, 1919, and that the appellant insured the lumber in the sum of $4,875 for the voyage so set forth, and indorsed on the application its written acceptance in that sum; that on October 6, 1919, the appellant executed and delivered to the appellees its certificate of insurance in the usual form, which the appellees accepted in substitution of the "cover note" in accordance with custom and usage; that in drafting the certificate the scrivener employed by the appellant, by accident and mistake, failed to incorporate therein the provision in the cover note to the effect that the voyage described should commence during the month of October, 1919, and that without knowledge of that omission, and believing that the certificate of insurance did in fact contain all the provisions of the cover note, the appellant's agent by accident and mistake signed the certificate and caused it to be delivered; that the appellees, also believing that the certificate did in fact contain the said omitted provision, accepted the said certificate, or, having knowledge of the omission and of the accident and mistake, they neglected to disclose the fact of the omission to the appellant; that the provision omitted was a material and express warranty materially affecting the risk, and that the contract should be reformed so as to express the agreement between the parties.

The appellees moved to dismiss. The motion was allowed, on the ground that, the contract having been entered into in the state of Washington, reformation of the instrument was forbidden by the Insurance Code of that state (Rem. Code 1915, § 6059—31; Laws 1911, p. 195, § 31), which provides: "Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract, and the insurance company making such insurance contract, unless as otherwise provided by this act, shall deliver a copy of such application with the policy to the assured, and thereupon such application shall become a part of the insurance contract, and failing so to do it shall not be made a part of the insurance contract."

Harold M. Sawyer, of Portland, Or., Alfred T. Cluff, of San Francisco, Cal., and Grosscup & Morrow, of Tacoma, Wash., for appellant.

Frank A. Huffer and William H. Hayden, both of Seattle, Wash., and Gerald H. Bucey, of Tacoma, Wash., for appellees.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] We think that the statute has no relation to the subject-matter of the present suit. This is not a case of the construction of an insurance contract. The appellant is not here attempting to assert rights under the contract. It is here seeking to reform the written expression of the contract as found in the policy, and have it set forth the true agreement upon which the minds of the contracting parties had met, and had expressed in writing, and which by accident and mistake had not been included in the policy. The effort is to let into the contract something entirely distinct from the sense and construction thereof. The statute was clearly never intended to stand in the way of the reformation of insurance policies, or to curtail a power which is everywhere conceded to courts of equity.

Many states have adopted similar statutes, the object whereof is to require that the whole agreement between the insurer and insured

shall be expressed in the policy. But in so legislating there is no denial of power to reform contracts of insurance. To provide that, if a copy of the application is not delivered to the assured, it shall not become a part of the contract, is not to say that a court of equity may never correct a mutual mistake after the policy is delivered. The statute but expresses the general rule, which obtains in the absence of statute, that a policy of insurance, issued and accepted by the insured, is in law the final contract between the parties, and supersedes all preliminary agreements in respect to the insurance, in the absence of fraud or mistake.

The court below relied upon Joyce on Insurance, § 190, which declares that such statutes must be complied with; otherwise the application and all testimony relating thereto will be excluded, so that an application which is not made according to the policy or shown by it in any way cannot be considered. The text-writer was there referring to cases in which liability under contracts of insurance is either asserted or assailed in actions in court, and the decisions to which he refers are all in cases of that character. The same is true of the cases cited by the appellee herein.

[2] It is contended that the ruling of the court below is sustainable on grounds other than that on which it was based. One of those grounds is said to be the appellant's laches. The contract was made in October, and the suit was brought about five months later. It does not appear from anything alleged in the bill that there was laches, and laches was not made a ground of the motion to dismiss. It is true that the bill fails to state the time when the appellant discovered the mistake; but, there having been no suggestion of laches in the court below, this court would not be warranted in affirming the judgment for such a defect in pleading, which, if it had been pointed out in the court below, might have been cured by amendment.

[3] It is contended, also, that the bill fails to show whether the words omitted from the policy were intended to be a warranty or a mere representation, or that they were material to the risk. The words which were omitted do not in themselves indicate that they were not what they were alleged to be, "a material express warranty, materially and substantially affecting the rights and obligations" of the appellant. It is obvious that a warranty as to the date of sailing of a scowload of lumber on a voyage in Alaskan waters may be very material to the risk. 26 Cyc. 639. In McLanahan v. Universal Insurance Co., 1 Pet. 170, 188 (7 L. Ed. 98) Mr. Justice Story said:

"That the time of sailing is often very material to the risk cannot be denied."

[4] It is said that the bill was properly dismissed, because of the appellant's failure to bring more than one of the three defendants into court. The defendant who resided in the district was served with process. His copartners, being nonresident aliens, had not been served. The resident partner brought the case on for hearing on his motion to dismiss, and he cannot complain that his codefendants had not then been served. The only question before this court is whether it was

error to dismiss the bill, and that question is in no way affected by the fact that but one of the defendants was before the court.

The decree is reversed, and the cause remanded to the court below for further proceedings.

UNITED STATES v. HUDSON.

(Circuit Court of Appeals, Eighth Circuit. November 24, 1920.)

No. 5589.

1. **Reformation of instruments ⟸36(3)—Bill held to show mutual mistake in patent for land, warranting reformation.**
   A bill by the United States, alleging that it sold a tract of public land to defendant by a written contract providing that, on completion of deferred payments, a patent should be issued to defendant, which should contain a provision "reserving to the United States a right of way for canals and public roads constructed or hereafter to be constructed," but that, through inadvertence and mistake the patent issued reserved right of way only for "ditches or canals constructed by authority of the United States," and that since its issuance a road maintained by complainant over the land since 1868 for the use of itself and the public, and the use of which was indispensable in connection with an irrigation system of complainant, had been fenced up and closed by defendant, *held* to state a cause of action for reformation of the patent.
2. **Equity ⟸363—Motion to dismiss admits facts well pleaded.**
   A motion to dismiss a bill in equity for want of equity admits the facts well pleaded.

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

Suit in equity by the United States against Frank L. Hudson. Decree for defendant, and the United States appeals. Reversed.

Charles L. Rigdon, U. S. Atty., and David J. Howell, Asst. U. S. Atty., both of Cheyenne, Wyo.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. Appellant brought this action to reform a patent issued to appellee, June 8, 1917, for the S. E. ¼ section 1, township 2, W. R. M., Wyoming, by inserting in said patent a reservation of a right of way to appellant for a public road constructed or to be constructed through said land, and that when said patent should be so reformed that appellee be ordered to forthwith remove any and all obstructions placed upon said right of way, and that he be enjoined from in any manner interfering with the use of said right of way by appellant as a public highway. Appellee moved to dismiss the complaint for want of equity. The motion was granted, whereupon appellant moved for leave to amend, which motion was also denied. Appellant appeals from said order.

The complaint alleged that appellant sold the land above described to appellee January 30, 1914; that said sale was evidenced by a written agreement, executed by and between appellant and appellee, by the

terms of which appellee was to pay $2,560 for the land, $1,280 cash and balance in deferred payments, evidenced by two promissory notes, payable on or before one and two years after date, with interest at 6 per cent.; a patent to issue for said land upon payment of the notes; that said patent should contain a reservation in the following language:

"Reserving to the United States a right of way for canals and public roads constructed or hereafter to be constructed."

When the patent was issued and delivered by appellant to appellee it contained a reservation in the following language:

"And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States."

The complaint further alleged that by inadvertence and mistake the patent did not contain a reservation for a right of way for said public roads constructed or to be constructed through said lands. Copies of the agreement to sell and the patent issued in pursuance thereof were attached to the complaint as exhibits. The complaint further alleged that long prior to the year 1868, the Indians, freighters, and trappers had established a trail or road extending from Ft. Washakie to the town of Landers, Wyo., which trail or road passed through the land above described; that in the year 1868 the appellant began the improvement of said road, and since that date had improved, surveyed, and marked said road, and continually since said date, and until appellee obstructed said road, as set forth in the complaint, had kept said road in repair as a public highway; that from the year 1868, up to and until the acts of the appellee had obstructed said road, said road had been continually used as a highway by appellant and the public generally; that by reason of such use of said road as a public highway an easement in the land above described became vested in the public; that said road had been and would continue to be indispensable to appellant in connection with the proper maintenance and operation of its irrigation systems, and especially of the Ray Canal system of irrigation; that many of the most important concrete structures of said canal system could not be reached by any other wagon road; that on or about November 1, 1916, and at other times thereafter and up to the present time, appellee had wrongfully and willfully obstructed said road by building a fence across the same, whereby the public and the appellant were, and still are, prevented from the use and enjoyment of said road. In Hearne v. Marine Ins. Co., 20 Wall. (87 U. S.) 488, 22 L. Ed. 395, the Supreme Court, speaking by Justice Swayne, said:

"The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.

"The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one

side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified."

[1, 2] This excerpt from the opinion of the Supreme Court states the law which must rule this case. The motion to dismiss admitted facts which were well pleaded. The appellant by the admission of appellee has shown exactly in what the mistake consisted and the correction that should be made. There can be no reasonable doubt in the mind of this court as to either of these points. The mistake consisted of inserting in the patent the language above mentioned, instead of the language which the parties agreed should be inserted by their contract of sale, and it follows that said mistake should be corrected by inserting in the patent the reservation that the parties agreed should be inserted. As both parties agreed that the reservation contained in the contract should be inserted in the patent, and it conclusively appears that said reservation was not inserted, the mistake is mutual; neither party intending the patent should read the way it does. In other words, in the language of the Supreme Court, it appears that both have done what neither intended. The appellant delivered and appellee accepted a patent, which appellant had not intended to issue nor appellee to accept, as shown by their contract of sale. See authorities cited by the Supreme Court in note to above case. The cause of the failure of the patent to express the real agreement between the parties is, in the absence of fraud, not material. Bradford v. Union Bank, 13 How. 57, 14 L. Ed. 49; Stone v. Hale, 17 Ala. 557, 52 Am. Dec. 185; Smith v. Jordan, 13 Minn. 264 (Gil. 246), 97 Am. Dec. 236; Nelson v. Vessenden, 115 Minn. 1, 131 N. W. 794, 35 L. R. A. (N. S.) 1167; Leitensdorfer v. Delphy, 15 Mo. 160, 55 Am. Dec. 137; Ann. Cas. 1914D, 227, note.

The learned trial court gave no reason for its decision, and appellee has not been represented by counsel in this court. We see no reason, however, why the complaint does not state a cause of action in equity for the reformation of the patent and the other relief prayed for.

The decree below is reversed, and the case remanded, with instructions to allow the appellee to answer, if he shall be so advised, and the appellant to amend its complaint, if it shall desire to do so, and to otherwise proceed in the cause not inconsistent with this opinion.

PREYER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1920).

No. 1793.

Intoxicating liquors ⇐236(5)—Evidence of possession insufficient to warrant inference liquors were destined to point within state.

In prosecution for transporting intoxicating liquor into the state, contrary to the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a–10387c), evidence that the defendant was a Pullman car porter on a run extending through the state, and that the liquor

was found in his possession on the car, *held* insufficient to warrant the inference that the liquor was destined for points within the state, and therefore insufficient to sustain a conviction for violating the Reed Amendment.

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

Henry J. Preyer was convicted of transporting liquor into the state of South Carolina, in violation of the Reed Amendment, and he brings error. Reversed and remanded, with instructions to grant a new trial.

S. M. Wetmore, of Florence, S. C., for plaintiff in error.

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

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. Plaintiff in error, hereinafter referred to as defendant, was indicted for transporting liquor into the state of South Carolina, in violation of the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a–10387c). The alleged offense was committed and the first trial had before the decision of the Supreme Court in United States v. Gudger, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653. At that time it was assumed that defendant would be guilty if he brought the liquor into South Carolina, though only for the purpose and in the course of carrying it through that state to another state. In consequence no issue was made as to the destination of the liquor and that question was not submitted to the jury. In view of this misconception of the law as afterwards declared by the Supreme Court, and because the proofs failed to show that the liquor claimed to have been found in defendant's possession, or any part of it, was intended to be delivered in South Carolina, this court reversed the judgment of conviction. 260 Fed. 157, 171 C. C. A. 193.

On the trial now under review the jury were properly instructed, but defendant was again convicted. The error here asserted is the refusal of the trial court to direct a verdict in his favor, on the ground that there was no evidence to sustain a finding that the liquor in question was destined to the state of South Carolina.

Defendant was the head porter of a Pullman sleeper running from Washington to Tampa, Fla., and was on duty at the time of his arrest. The sole witness for the government testified that he was the chief state constable of the Eastern district of South Carolina; that it was his duty to search for violations of the liquor laws, including the bringing of whisky into that state; that on the 10th of October, 1918, about 2 o'clock in the morning, he boarded Atlantic Coast Line train No. 85, south-bound, at Dillon, S. C., the first stop made by that train in the state; that he got on the day coach, and from there went through several Pullmans and into the one of which Preyer was head porter; that another porter was also there, a swing porter named Terry, who relieves the other porters on the run from Richmond to Charleston;

and that the conductor was not in that car. His further testimony in chief is as follows:

"I entered the car from the front door; went into the train. Preyer was midways of the Pullman car, stooping down about the middle. I had my flashlight, shining the flash down. He said, 'Howdye, Mr. Eichelberger; nothing doing.' I passed on back to the back of the car, where Terry was shining shoes. I left the smoker and came back, going to the front of the train; came to the locker, which is about as tall as a man, in the front of the car. I said, 'Preyer, I would like to see in there.' He said he didn't have the keys. I undid this bunch of keys here and said, 'I guess I have keys to fit it.' He backed up in this position, and said I couldn't see in there without the permission of the conductor. I asked him where the conductor was, and he said, 'The next car in front.' I left the car to go out— He said the conductor was in bed, in a berth in the drawing room; so just as I got out of the car the door was shut. I turned to go back, tried to undo it, and the door was locked. I couldn't get back in the car. About a minute or so later, Conductor Simpson, the conductor in charge of the train, came, out, and I hands him my ticket, and he smiled, and I went back in the car. Just as I got back in there, by this locker, I smelled the odor of liquor and looked down and saw a suitcase. This was the same locker which I had requested the defendant to open, which he had refused to open. There was a suitcase there open with a bottle of whisky broken in half, in two; some of the whisky was still in the bottle. The suitcase was right outside the door, right down on the floor, and Preyer was then about the middle of the car, shoving a suitcase under a berth. I came up and pulled the suitcase from under the berth; it was a straw suitcase, about 26 inches long. It contained rye whisky, 26 pints. Well, when I went on back there Preyer went in the smoker, and picked up the suitcase; he went on in the smoker, and as he went in the smoker Terry came out and went to the front of the train. I followed Terry, and when we got to the last berth, front of the train, he was pushing a suitcase under that. I looked at that suitcase; it was a straw suitcase and contained 24 pints of rye whisky. Then I went back to the smoker where Preyer was, and he was sitting on the long seat in the smoker, and had his hands behind him, like this, pushing down something, in this position; so I grabbed him by the hand and pulled it out, and his keys dropped out; and I reached over behind and there was a little black handbag—had 7 pints of whisky in it; rye whisky. In the broken bottle, and the 24 pints and the 26 pints and the 7 pints there was the same brand of whisky. All of it was in pints. When I got the bunch of keys in one hand, the little bag in the other, I came back—by that time we were nearing Florence. Preyer said he had passengers to get off the train going to Augusta; so I let him get the passengers off, and by the time the train was ready to go I called the man there and handed him the two suitcases of whisky; told him to take care of them for me. While Preyer was getting the passengers off, I was in the car. I kept him in sight, and watched him all the time, and Terry stayed there, too. The train went off, then, by the time he put the passengers off. I put the men under arrest, but the train didn't stop, so I couldn't get off the train until we got to Lanes. I saw the conductor when we got to Florence. I did not see any one else in the coach; that is, any other officials. I just saw the two porters, and Preyer is the man on trial here. I took both off at Lanes, put both under arrest, and searched and got three more suitcases of whisky out of the same Pullman car; rye whisky in pints. I don't remember what the total was in all of them. The total haul on the Pullman was 103 pints, all of the same brand and in pint bottles."

As nothing more unfavorable to defendant appears in the cross-examination of this witness, or elsewhere in the testimony, his statement comprises all there is of the government's case.

When the case was here before, we expressed the opinion that there was no substantial proof that the liquor claimed to have been found

in defendant's possession was destined to the state of South Carolina. That opinion is strengthened by examination of the present record, which certainly gives no greater support to the government's contention. It is therefore enough to say, without reviewing the evidence, that nothing is shown which in our judgment tends to prove, or from which a jury could reasonably infer, that he intended to deliver in that state any part of the liquor in question. The constable's testimony, at the most that can be claimed for it, is at least equally consistent with an intention on defendant's part to carry whatever liquor he had with him, if any, to the state of Florida, the destination of the car on which he was employed; and, that being so, there was failure to prove the charge laid in the indictment, and a verdict in his favor should have been directed.

The judgment will be reversed, and the cause remanded, with instructions to grant a new trial.

Reversed.

HARLEY et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

No. 1810.

1. **Criminal law ⟸1156(2)—Insufficiency of evidence cannot be reviewed on exception to denial of new trial.**
   The allowance or refusal of a new trial is purely a matter of discretion, and not reviewable, except for abuse of discretion, so that the objection that the evidence was insufficient to sustain the conviction cannot be reviewed on exception to the denial of a new trial.
2. **Criminal law ⟸951(5)—Retaining jurisdiction to allow bill of exceptions does not authorize new trial after expiration of term.**
   With the expiration of the term at which a criminal case was tried, the trial court's power over the case ceases, except as to the matters over which jurisdiction was expressly retained, so that the trial court cannot entertain a motion for new trial on the ground of newly discovered evidence after the expiration of the term, though it had granted an extension of time within which to file a bill of exceptions, and that bill had not yet been filed.

In Error to the District Court of the United States for the Western Disrict of South Carolina, at Greenwood; Henry H. Watkins, Judge.

T. L. Harley and another were convicted of illicit distilling, and they bring error. Affirmed.

N. G. Evans, of Edgefield, S. C., for plaintiffs in error.

C. G. Wyche, Asst. U. S. Atty., of Greenville, S. C. (J. Wm. Thurmond, U. S. Atty., of Edgefield, S. C., on the brief), for the United States.

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

KNAPP, Circuit Judge. Plaintiffs in error, herein called defendants, were found guilty of illicit distilling and seek by this writ of error to reverse the judgment of conviction.

On the merits the record raises no question for review. Defendants apparently acquiesced in the submission of the case to the jury, as no motion was made for a directed verdict, either at the conclusion of the government's proofs or on the whole testimony. Nor was any exception taken to the judge's charge. Indeed, the only exception at the trial relates to a wholly unimportant statement by one of the government's witnesses; it is not even referred to in the brief of defendants' counsel.

[1] After the adverse verdict a motion was made on the minutes for a new trial, on the ground that the evidence was insufficient to sustain the finding of the jury, and the denial of this motion is assigned as error. But the question cannot thus be brought to this court. It has repeatedly been held that the allowance or refusal of a new trial is purely a matter of discretion, and therefore not reviewable, except for abuse of discretion, which is not here alleged. Bishop Co. v. Shelhorse, 141 Fed. 648, 72 C. C. A. 337; Pocahontas Distilling Co. v. United States, 218 Fed. 782, 134 C. C. A. 566; Moore v. United States, 150 U. S. 62, 14 Sup. Ct. 26, 37 L. Ed. 996; Holder v. United States, 150 U. S. 92, 14 Sup. Ct. 10, 37 L. Ed. 1010. We take occasion to say, however, that careful examination of the testimony satisfies us that enough was shown by the government to raise a substantial question of fact which was properly submitted to the jury. On the merits the judgment must be affirmed.

The record presents another question which should perhaps be briefly noticed. The facts are not in dispute. Defendants were tried and convicted, motion for new trial on the minutes made and denied, and sentence imposed on the 6th of November, 1919. On the same day, counsel for defendants having announced in open court his intention to sue out a writ of error, an order was passed "that the time for the service of the bill of exceptions in said case be allowed at any time within 60 days from this date." The term at which this took place expired and the court adjourned without day on the 13th of that month. No other order was made, nor was any asked for, during that term. Later the time for filing bill of exceptions was extended by order to the 15th of March, 1920. The writ of error was sued out within the time allowed by statute. On the 30th of January notice of motion, to be heard on the 3d of February, for a new trial on the ground of newly discovered evidence, set forth in the petition of defendants and certain affidavits, was served on the United States attorney. Hearing of this motion was had on the 18th of February. At that time the writ of error had not been sued out, nor had the bill of exceptions been allowed and filed. Without passing upon the merits, the court denied the motion for want of power to entertain it, the term at which the judgment was entered having expired, and no order having been made reserving jurisdiction for any such purpose.

[2] This ruling of the learned judge is clearly correct. It follows repeated decisions of the Supreme Court which have settled the law beyond question, as will be seen by reference to United States v. Mayer, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. Ed. 129, and the numerous cases therein cited. The fact that in the Mayer Case the writ of error had

been issued before the motion for a new trial was made, while in the instant case it had not, is of no importance. The Mayer decision is not placed upon any such ground, but very distinctly on the ground that the jurisdiction of the trial court came to an end at the expiration of the term in which judgment was rendered. In short, the federal authorities broadly hold that, after the term expires at which a case is tried and judgment entered, the trial court cannot set aside or alter its judgment, except as permitted by standing rule or provided for by special order. In the case at bar there was neither standing rule nor special order, and manifestly the order allowing further time for setting the bill of exceptions did not and could not serve to retain jurisdiction to hear a motion for a new trial. The claim that the Mayer Case "has been reviewed and modified" in Abbott v. Brown, 241 U. S. 606, 36 Sup. Ct. 689, 60 L. Ed. 1199, is wholly unfounded. That case turned on the question whether the term at which judgment was entered had expired when the motion for a new trial was heard. The Supreme Court held that it had not, but in so doing expressly approved of the ruling in United States v. Mayer.

Decisions of state courts of contrary import, many of which defendants cite, are not in point and cannot be followed. As the Supreme Court said in Bronson v. Schulten, 104 U. S. 410, 417 (26 L. Ed. 797):

"The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts."

The question whether this court, to which the cause has been removed by writ of error, has power to authorize the trial court to hear the motion on the merits is not now presented and therefore need not be discussed. It is enough to say that affirmance of the judgment will be without prejudice to the right of defendants to make such application, provided the same be made within 30 days from the date of this decision.

Affirmed.

KNOWLTON et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920.)

No. 3514

Intoxicating liquors ⇐238(2)—Evidence of bringing into prohibition state sufficient to make jury question.

Evidence, including the undenied fact that defendants were arrested in a prohibition state with two automobiles loaded with liquor, near the boundary of a state which was not prohibition, *held* sufficient to justify submission to the jury of defendants' guilt of illegally bringing the liquor into the state.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Criminal prosecution by the United States against George E. Knowlton and Jerry Knowlton. Judgment of conviction, and defendants bring error. Affirmed.

John Manning and John J. Beckman, both of Portland, Or., for plaintiffs in error.

Lester W. Humphreys, U. S. Atty., and Hall S. Lusk, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error were convicted and sentenced under an indictment which charged them with violation of the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), by transporting intoxicating liquors from the state of California into the state of Oregon, the laws of which state prohibited the manufacture and sale therein of intoxicating liquor for beverage purposes. The error which they assign is that the court below overruled their motions for a directed verdict of acquittal.

The evidence was that on June 10, 1919, at about 4 o'clock a. m., two automobiles, one a Stutz and the other a Mercer, were found at the side of a main traveled road about 35 miles north of the California state line. The occupants of the automobile were asleep. George Knowlton and his wife, Florence, were in the Stutz car, and Jerry Knowlton was in the Mercer car. Both automobiles were loaded with liquor. George Knowlton stated to the arresting officers that he had a small amount of liquor for his own use, and both plaintiffs in error stated that they had bought the liquor in Oregon. George Knowlton gave his name as George W. Wilson, and Jerry Knowlton gave his as James King. There was evidence that on June 9, at Davis Creek, Cal., 12 or 15 miles south of the Oregon line, two men and a woman went into a store and bought provisions. Lougenour, the storekeeper, identified Jerry Knowlton as one of the three, but was unable to identify the other two; but he testified that through the window he saw two automobiles, one a Stutz and the other a Mercer. The witness Ash testified that on the same day, between 1 and 2 o'clock, at Alturas, 45 miles from the Oregon line, Jerry Knowlton drove a heavily loaded Mercer car into his garage; that the car was so heavy that it broke through the floor of his garage; that Jerry Knowlton gave him a drink out of a partially filled bottle of brandy, which he pulled out of the car; that the back of the car seemed to be well filled, but the contents were covered over. Keser testified that at Alturas, on the same day, between 10 and 11 a. m., he repaired a tire and furnished gasoline for a Stutz car in which were a man and a woman; that the back of the car was filled up level with the back seat and covered over with a blanket or canvas. He testified that the Stutz car had white wire wheels, and that the car was a kind of maroon color, or red, with gold stripes. Kock testified that on the 8th or 9th of June, at Alturas, two men came into his lunch counter and purchased 20 sandwiches, 10 of which were beef heart sandwiches; that Jerry Knowlton was one of the men, but he could not

say who the other was. It was proven that, shortly after the plaintiffs in error were arrested, they had luncheon, and that Jerry Knowlton produced from his car beef heart sandwiches. It was also shown that after the arrest Florence Knowlton attempted to escape with the Stutz car, with its contents. At Bend the officers took 234 bottles from the Stutz car, and they testified some were filled with whisky, some with brandy, and that there were a few bottles of gin, and that the bottles had revenue stamps on them. The plaintiffs in error offered no evidence, except that of a witness who testified that the wheels of the Stutz car were black, and that the body was red without stripes, and that the fenders were black.

We think the evidence was sufficient to justify the submission of the case to the jury. There was evidence that on the afternoon of June 9 Jerry Knowlton was at Alturas, Cal., with a Mercer car heavily loaded, the contents concealed by a covering; that on the same afternoon he was seen with the same Mercer car at Davis Creek, 25 miles nearer to the Oregon line; and that at 4 o'clock in the morning of June 10, he was found in the state of Oregon, 35 miles from the California state line, with the same automobile loaded with 201 bottles of intoxicating liquor. From these facts the jury were justified in finding that the liquor was brought across the state line from California. The hypothesis that the load which was in the car in California had been taken out, and that in the meantime a load of liquor had been obtained in the state of Oregon, is too improbable to be worthy of consideration.

As to George Knowlton, the record shows that he was in the company of Jerry, and was his brother; that when arrested he and his wife were in a Stutz car, which was loaded with liquor; that a man and a woman in a Stutz car accompanied Jerry Knowlton to Davis Creek, Cal.; that a man and a woman in a heavily loaded Stutz car were in Alturas, Cal., on the same day that Jerry was there in his Mercer; and that a man was with Jerry when he bought the sandwiches at Alturas. We do not consider the discrepancy in Keser's description of the Stutz car sufficient to discredit his testimony. There was nothing in the circumstances to direct particular attention to the color of the car. The value of his testimony was for the jury to determine. The foregoing facts and circumstances, together with the unexplained possession of a large quantity of liquor in course of transportation in a state in which it could not have been lawfully purchased, and near to the boundary line of a state in which such purchase was lawful, constituted evidence sufficient to go to the jury as to the guilt or innocence of George Knowlton. Laughter v. United States, 259 Fed. 94, 170 C. C. A. 162; Berryman v. United States, 259 Fed. 208, 170 C. C. A. 276; Lindsey v. United States (C. C. A.) 264 Fed. 94.

The judgment is affirmed.

MORGAN CONST. CO. v. DONNER STEEL CO.

(District Court, W. D. New York. October 27, 1920.)

1. **Patents ⟸328—863,841, for cooling bed for rolling mills, valid and infringed.**
The George patent, No. 863,841, for an improved conveyor or cooling bed for use in rolling mills, while for a combination of old elements, *held* valid, as marking an advance in the art; also infringed.

2. **Patents ⟸49—Infringement evidence of utility.**
The utility of an invention, although it has not gone into general use, is established as against a defendant by his persistent infringement.

In Equity. Suit by the Morgan Construction Company against the Donner Steel Company. Decree for complainant.

George H. Kennedy, Jr., of Worcester, Mass., for plaintiff.
Winter & Brown, of Pittsburgh, Pa., for defendant.

HAZEL, District Judge. The bill alleges infringement by defendant of plaintiff's patent No. 863,841, issued to Jerome R. George August 20, 1907, relating to improvement in conveyors for metal rods used in rolling mills, and commonly called cooling beds. Its construction consists of frames or bars for supporting the hot metal rods as they are mechanically moved forward step by step, together with a series of lifting and carrying supports or frames for lifting the hot bars or rods over the surface of the supporting bars at intervals. The object of the inventor was to make the supporting and lifting bars of such shape and form that, when acting in combination, they would serve to hold the heated metal in contact and automatically straighten it while being moved step by step or by intermittent movements from one end of the cooling bed to the other. The specification states:

"In conveyors of this class as now used the upper surface of both lifting and supporting bars are straight and in horizontal planes, and the metal rods which are being conveyed sometimes come in contact with each other, which is likely to distort their shape. When the supporting bars have straight supporting surfaces, there is no means to correct any lateral bends which the heated rods may receive."

It also states that the inventor does not wish to confine himself to the curved form of the supporting surfaces of the lifting bars, as the desired result was achievable by other forms.

The patent has seven claims. Five are involved herein. The omitted claims are limited to a lifting bar with wave-shaped depressions. It will suffice to set out the broad and specific claims only:

"1. In a conveyor for metal rods, the combination of supporting bars having serrated upper edges, lifting bars normally entirely below said serrated upper edges of said supporting bars, and means for moving said lifting bars in a circle, whereby the upper surface of said lifting bars passes entirely above the serrated upper edges of the supporting bars."

"7. In a conveyor for metal rods the combination of fixed supporting bars provided with a series of notches arranged in sets transversely across the conveyor, with the sides of said notches in each set in the same plane, a series

of movable notched bars, and means for actuating said movable bars to lift a metal rod from one set of notches in said fixed bars and deposit it in another set of notches."

The defenses are lack of novelty and invention and noninfringement. The record shows that in making steel ingots, billets, bars, etc., of varying lengths, the heated metal as it emerges from the run-out of the mill is ordinarily cooled on a conveyor or cooling bed before it is handled. A large number of separate pieces of hot metal are usually placed on the cooling bed, arranged side by side and moved intermittently across it. It is desirable that the metal bars or billets should not in their heated condition come in contact with each other, as experience has shown that by contact they are often bent or distorted; and hence it is necessary that they should be moved on supporting surfaces, which help to prevent or correct any bends or curves in them. To accomplish this the supporting members of the device in suit are notched, and the notches aligned with corresponding wave-shaped depressions in the lifting member, so that the lowest part of the notches upon which the heated metal rests comes in the same plane with the depressions on the lifting member.

[1] The invention was not in any sense a generic one. The separate elements of the combination of the claims in suit were old and performed useful functions in prior cooling beds, but the inventor was the first to combine in a single apparatus the step by step arrangement present in the known straight-edged bar device and in old devices with serrated edges on bars on skids aligned for carrying the hot rods; the carrying being effected by a rocking or oscillating mechanism of the skids or bars. The assembling of the parts by the patentee not only involved notching the supporting and lifting frames, but necessitated aligning the notches in a certain way, so that they would come in exact relationship, so as to control the heated rods in their movements. The prior patents to Johnston, to McDonald and McKee for so-called shuffle bar conveyors, to Edwards, to Kellogg for gravity notched cooling beds, to Geer, the so-called Illinois and Republic and Austrian cooling beds, disclose types of known devices. Such structure the patentee designed to improve, since according to the specification the shuffle bar conveyors were open to the objection of bending the hot rods in their travel, while the rocking and gravity devices operated on a different principle.

In none are contained the combination of elements in suit; i. e., the edged supporting bar or frame, the serrated lifting bar or frame, positioned normally below the upper surface of the supporting bar and mechanically moved in a circle to cause the lifting bar to pass above the teeth of the supporting bar. By his new combination of old parts or elements separately shown in prior devices the patentee, I think, advanced the art a little, and by his invention produced a new and useful result, one operating upon a somewhat different idea from prior patents. It is the law that a combination of old elements is patentable, if they have been combined to operate in a new way or to accomplish a new and useful result. Not only does the combination of elements operate in a new way, but as heretofore stated they jointly

function to keep the hot rods straight in their travel, thus preventing their distortion, besides enabling easier handling and transference, advantages or benefits not obtained in prior devices.

The claims in issue are entitled to a fair interpretation and of a scope sufficiently liberal to afford protection to the actual thing invented. To restrict them to a particular form of depressions or notches in the lifting bar, or to read into the claims a wave-shaped depression or curves with the crest arranged in a particular manner, would not afford such protection.

The defendant company in its cooling bed, in fairness it must be said, without having any prior actual knowledge or information of complainant's patent in suit, adapted a similar combination at its plant, save that the serrations on the surface of the lifting support are of different shape. Defendant claims that a departure from the patent in suit resulted by its adaption; that a new use eventuated, in that the hot bars, after being lifted by the sides of the serrations, are allowed to slide or tumble to the bottom as they are carried over the edged surfaces of the stationary support. The tumbling or sliding action of the hot rods after the lifting began was due in the main, in my opinion, to lateral adjustment of the serrated bars and to the form of the serrations. Some additional benefits no doubt were attained in the way of rolling or tumbling action, but the changes in the serrations were changes of form only, and any improvements resulting therefrom were such as a skilled mechanic could make. Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; Comptograph Co. v. Mechanical Accountant Co., 145 Fed. 331, 76 C. C. A. 205. Defendant's structure retained the substance of the invention in suit and it has all the advantages.

[2] It was contended that complainant's structure as described in the specification and claims is impracticable, its impracticability being inferable from the fact that only one cooling bed has actually been constructed, the construction being under the broad claim only; but the rule that the utility of the invention is established by the fact that defendants have persisted in infringing it is thought to apply. Rumford Chemical Works v. New York Baking Powder Co., 134 Fed. 385, 67 C. C. A. 367. Under our laws a patentee was not obliged to manufacture the apparatus described in the patent. Its nonuse does not deprive him of the protection of the patent laws. In view of the construction by complainant of other cooling beds, or their preference for another type of apparatus, nonuse of the patent in suit was not unreasonable. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 406, 28 Sup. Ct. 748, 52 L. Ed. 1122.

The plaintiff may have a decree holding the patent valid and the claims in controversy infringed by defendant.

In re GOLDBERG.

(District Court, E. D. Missouri, E. D. December 17, 1920.)

No. 9010.

Aliens ⊂=62—Qualifications for citizenship stated.

It is an indispensable prerequisite to the admission of an alien to citizenship that he possess an acquaintance with and working knowledge of the Declaration of Independence and Constitution of the United States, and have a comprehension of the obligations and responsibilities of citizenship arising from his taking the oath of allegiance, and it is not sufficient that during his residence he has been peaceable, industrious, of good character, and law-abiding.

Petition of Bear Goldberg for naturalization. Denied.

M. R. Bevington, Chief Naturalization Examiner, of St. Louis, Mo., for the United States.

DYER, District Judge. The question presented by this case is what degree of acquaintance with American institutions and ideals is essential, on the part of a candidate for naturalization, to warrant favorable action upon his petition. To state the question another way, how ignorant may an alien be of American institutions and ideals, and still be admitted to citizenship? Although this question is one of of the gravest any naturalization judge can be called upon to determine, there appears to be but one modern authority to be found in the reports, that of In re Meakins (D. C.) 164 Fed. 334, 335, in which Judge Whitson most clearly states:

"* * * While it may not be impossible for one to be attached to the principles of the Constitution of the United States, who is without definite knowledge of the workings of the government in detail, he must have sufficient general information concerning it as to enable him to give a reason for his faith; and where, as in this case, an applicant does not know how the laws are made, who makes them, nor how they are enforced, he is illy prepared to participate in the selection of the persons who shall perform those duties. He cannot be attached to principles of which he is entirely ignorant. * * *"

The candidate represents in his own behalf that he has resided continuously within the United States for more than five years immediately preceding the date of his petition, that he has at all times behaved as a man of good moral character, that he has been law-abiding, industrious, and that his family life has been all that it should be. But is the boon of citizenship to be granted on a showing of this character? I think not. All the matters presented by the petitioner constitute nothing more than the duty any good citizen owes himself, his country, and his God. As stated by Mr. Justice Van Devanter, speaking for the Supreme Court of the United States in the case of Luria v. United States, 231 U. S. 22, 34 Sup. Ct. 13, 58 L. Ed. 101:

"* * * Citizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensa-

tion for the other. Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency. Minor v. Happersett, 21 Wall. 162, 165; Elk v. Wilkins, 112 U. S. 94, 101; Osborn v. Bank, 9 Wheat. 738, 827. * * *"

And again (231 U. S. on page 23, 34 Sup. Ct. 13, 58 L. Ed. 101):

"* * * In other words, it was contemplated that his admission should be mutually beneficial to the government and himself; the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past. * * *"

While a candidate for naturalization is to be commended for having acquired material wealth, and for having lived a blameless life, during his period of residence here, nevertheless such a state of affairs does not relieve him in any way of the necessity of possessing a working knowledge of the form and general structure of our government, and of the responsibilities and duties, as well as the privileges of a citizen thereof. Lacking such qualifications, it is impossible for him to swear, either intelligently or conscientiously, that, as required by law, he is "attached to the principles of the Constitution of the United States," or that he is "well disposed to the good order and happiness of the same." Under our form of government, the people, theoretically, at least, make, interpret, and execute the laws. Accordingly, their reasonable intelligence and education are indispensable prerequisites to the preservation and transmission of civil liberty and republican institutions.

The requirements of law cannot be held to have been met on a mere showing of the candidate that he is peaceable, industrious, of good character, and law-abiding. By reference to decisions of the courts announced prior to the Naturalization Act of 1906 (34 Stat. pt. 1, p. 596), and during the period the government did not, as now, exercise supervision of the naturalization of aliens, we find declared in In re Naturalization, 5 Pa. Dist. R. 597, that no person will be naturalized who has not a general familiarity with the federal Constitution and with our method of government, state and national. The act of Congress requires each applicant to take an oath that he is attached to the principles of the Constitution. No applicant will be permitted to so swear unless he knows what these principles are. No person should be naturalized who has not some general comprehension of what the Constitution of the United States is and of the principles which it affirms. In re Bodek (C. C.) 63 Fed. 813. Also see Rushworth v. Judges, 58 N. J. Law, 97, 32 Atl. 743, 30 L. R. A. 761; In re Conway, 9 Misc. Rep. 652, 30 N. Y. Supp. 835; In re Lab's Petition, 3 Pa. Dist. R. 728, 5 Pa. Dist. R. 597; In re Kanaka Nian, 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726. The applicant's oath to support the Constitution of the United States will not be accepted, if, upon examination, it appears that he does not understand its significance, or is without such knowledge of the Constitution as is essential to the rational assumption of an understanding to support it. In re Bodek, supra.

Any detailed consideration of the question of law involved in this case at once raises the inquiry as to the causes that brought about the

enactment of the present naturalization statute, which has in operation proved a most workable and satisfactory rule. The people of this country are indebted for their present naturalization statute, as they are indebted for numerous other beneficent laws that actually protect their interest, to Theodore Roosevelt, then President of the United States, who on December 5, 1905 (Doc. No. 46, 59th Congress, 1st Session), called upon the law-making body to bring to an end the notorious naturalization frauds that had shocked the country for years. In United States v. Janke (D. C.) 183 Fed. 278, we find this picture of the times, by Judge Amidon:

"In the year 1906 Congress had before it for months the question of the proper regulation of the admission of foreigners to citizenship. The subject had been brought impressively before the country by the discovery that extensive frauds had been committed under the laws then in force. In cases arising at St. Louis (Levin v. U. S., 128 Fed. 826, 63 C. C. A. 476; Dolan v. U. S., 133 Fed. 440, 69 C. C. A. 274) it appeared that corrupt politicians, in order to forward their corrupt purposes, had gathered together mobs of foreigners and brought them to the courthouse, grouped according to their nationality—Huns, Italians, Armenians, and Jews. They were collected in the corriders of the courthouse, and each band placed under the generalship of a policeman, and then marched in blocks before the judges of one of the high courts of that city, and there, under a merely formal ceremony, in which the oath was administered to the entire block, they were admitted as citizens. In some cases the formality of going before the court was omitted, and citizenship papers issued to lists furnished by ward politicians. Upon investigation it was found that many of these people had been in the United States for only a few days. Similar frauds were subsequently discovered in other cities."

The same court, in United States v. Lenore (D. C.) 207 Fed. 867, 868, makes the further statement:

"In 1902 fraudulent and illegal practices in the naturalization of aliens were discovered in the city of St. Louis, Mo. Some of these misdoings are recounted in the opinion in Dolan v. United States, 133 Fed. 440, 69 C. C. A. 274. The prosecutions which resulted in the Eastern district of Missouri led to investigations in other cities, and the discovery of many fraudulent and illegal practices in the issuance of certificates of naturalization. In some cases perjury and subornation of perjury were resorted to for the purpose of deceiving the court and obtaining certificates for aliens who had not resided in the country for the requisite time. In other cases foreigners were marched into the court in large companies, and the oath of allegiance administered to the whole company, although many of them were unable either to speak or understand the language that was used. Two persons made the ordinary witness' oaths for the whole company. Upon this sham and spurious proceeding certificates were issued. In other cases clerks of court issued such certificates without any proceeding in court whatever, and fabricated a judicial record to support the certificates. It was even discovered that some clerks were engaged in a regular brokerage business in certificates of naturalization. This practice went so far that some of these certificates were sold to aliens residing abroad, who had never been in the United States, in order that they might be used for fraudulent purposes, both with respect to foreign countries and this country. The result of these investigations was gathered together in an elaborate report, which was presented to Congress and resulted in the passage of the act of 1906. Congressional Record, vol. 40, part of page 7036; House Documents, col. 44 (Miscellaneous) 59th Congress, 1st Session."

The legislation adopted, as a result of President Roosevelt's insistence, while containing safeguards not previously found in our laws on the subject, and while reserving to the United States the right to appear and to be heard in connection with every naturalization ap-

plication, was nevertheless not self-enforcing. So we find this complaint upon reference to the annual report of the Commissioner of Naturalization for the year 1918, page 9:

"It is perhaps a natural consequence arising from the lax and informal procedure under the old system, but it is a fact that some of the judges have appeared to think the bureau entirely too technically exacting in its persistent view that the law must be complied with in its every detail, and that the entire burden and responsibility of establishing beyond reasonable doubt his personal fitness for citizenship rests upon the petitioner. Whether the courts, consciously or not, hold this view, their rulings in too many cases indicate their position to be that the allegations in his petition constitute all that is required of a petitioner, and that, having made them in the manner required, the petition is to be treated as a rule against the government, to show cause why he should not be admitted, thus casting upon the government the burden of refuting the allegations made. To illustrate: A petitioner claims good behavior and love of American institutions and their basic principles; witnesses testify to good behavior and consequent belief of the attachment professed. Thus the case is made up. If the government cannot produce evidence of misconduct or disloyalty, under this view the petitioner is entitled to be naturalized. In other words, his fitness to become a citizen and his loyalty after being admitted is assumed beforehand, just as under our system of criminal jurisprudence every man is assumed to be innocent of any crime until the contrary is proved, and the burden of proving unfitness and disloyalty rests upon the government, as in a proceeding for conviction of crime or misdemeanor. Fortunately such instances of judicial misconception are few, but they are sufficiently persistent to justify, or rather to require, that attention be drawn to them."

And again, for the year 1914, pp. 16, 17:

"Under the report on the field service of the bureau consideration will be given to the list of denials for failure to comply with the law. It is sufficient to say under the present heading that there is a strong disinclination in some of the courts to strictly enforce the naturalization law and deny petitioners who may possess the personal statutory qualifications, but in whose applications there appear omissions of some one or more requirements of the law, either on the part of such petitioners, or, especially, on the part of clerks of courts. This attitude of the courts may be summed up tentatively in these words: 'I know that this is a good man and that he will make a most desirable citizen. To satisfy the court upon this point is the single purpose of all the formal or technical requirements of the law. As I am already satisfied upon this vital point, what is the use, either as regards the welfare of the public or the ultimate result, of denying this petitioner, and putting him to the consequent mortification, delay, and additional cost, merely to force him or the clerk of this court to supply the omission of a technicality which in this case is useless?'

"This view is appealing, if not conclusive, to the nonprofessional mind, which is proud of its ignorance of the law and its methods, and of its unquestionable claim to perfect acquaintance with the rules of common sense. Its essence, however, is plainly a judicial proviso attached to a legislative enactment by which—in those cases in which the processes of the judicial mind perceive the legislative method to be not simply useless, but actually obstructive of the purpose sought by the legislative branch of the government—the court dispenses in whole or in part with the technical formalities of the naturalization law. Fortunately instances of this kind are of less frequent occurrence each year, though still sufficent in number to be the occasion of reasonable apprehension to administrative officers that dangerous precedents are being established, which threaten the efficiency of the present law. When the law requires a specified physical presence, will hypothetical or constructive presence, but actual physical absence, be a sufficient compliance with its terms? When the law says 'continuous,' does it mean unbroken, or does it, between the lines, convey the assurance that, if the break in continuity is not too long, or if caused by a commendable response to some call of natural duty, discon-

tinuity will not be seriously regarded? Is the 'personal' knowledge required of witnesses in regard to a petitioner's qualifications merely an ignorance on their part of his lack of such qualifications? When the required legal posting of the notice of the names of petitioner and his witnesses has not been complied with for the statutory period, may it be held that a petitioner is legally before the court and that the law in respect thereto is merely 'directory,' and the failure to post is not the fault of the petitioner but of the clerk of the court?

"These and many similar questions are arising daily, and if the courts were to be guided by the theory above propounded it seems clear that the process of 'construction' of law would degenerate into a process of destruction and the ultimate crumbling away of many of the provisions which, whether necessary or not, are still a part of the law of the land, to the support of which all those engaged in applying it have pledged themselves under solemn oath."

The law, however, is succinctly stated by Mr. Justice Pitney, in Johannessen v. United States, 225 U. S. 240, 32 Sup. Ct. 616, 56 L. Ed. 1066, in the following language:

"An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen, upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the Acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not he takes nothing by his paper grant"

—and by Mr. Justice McReynolds in United States v. Ginsberg, 243 U. S. 474–475, 37 Sup. Ct. 422, 425 (61 L. Ed. 853):

"An alien, who seeks political rights as a member of this nation, can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare. * * * No alien has the slightest right to naturalization, unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it, as provided in section 15, and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact, it is illegally procured; a manifest mistake by the judge cannot supply these, nor render their existence nonessential."

The problem under consideration is not one that concerns the courts alone. On the contrary, it is a problem that vitally affects every man, woman, and child within the United States. By way of illustration, reference may properly be made to the fact that during the period 1900–1914, inclusive, 13,377,087 immigrants were admitted to the United States. Of these, 11,726,606 were over 14 years of age, and of this latter group 3,116,182 were illiterate in their own tongue—a proportion of 26.55 per cent. of illiterates over 14 years of age; 48.1 per cent. of these illiterates were between the ages of 20 and 45 years; only 16 per cent. of these illiterates were under 20 years of age. Much of this immigration was from the so-called oppressed lands. Because of conditions surrounding them prior to their emigration to America it is not to be wondered at that a considerable number of these immigrants may hate any government, and that to them all government is obnoxious. We cannot escape the fact that our candidates for citizenship must necessarily come from these immigrants.

Nor can we ignore the fact that the unfit, as well as the fit, present themselves for citizenship. In re Clark, 18 Barb. (N. Y.) 444; In re Spencer, Fed. Cas. No. 13,234, 5 Sawy. 195; Ex parte Douglass and Sandburg, 5 West. Jur. 171; In re Guliano (D. C.) 156 Fed. 420; In re Di Clerico (D. C.) 158 Fed. 905; In re Ross (C. C.) 188 Fed. 685; United States v. Ollson (D. C.) 196 Fed. 562; In re Talarico (D. C.) 197 Fed. 1019; In re Trum (D. C.) 199 Fed. 361; United States v. Bressi (D. C.) 208 Fed. 369; In re Centi (D. C.) 211 Fed. 559; United States v. Raverat (D. C.) 222 Fed. 1018; In re Hartman (D. C.) 232 Fed. 797; United States v. Wursterbarth (D. C.) 249 Fed. 908; United States v. Darmer (D. C.) 249 Fed. 989; In re Addis (D. C.) 252 Fed. 886; United States v. Swelgin, 254 Fed. 884; United States v. Kramer (C. C. A.) 262 Fed. 395; In re Kornstein (D. C.) 268 Fed. 172.

At the last session of Congress, figures were presented to the committee on immigration and naturalization of the House of Representatives, during its hearings on H. R. 10404, to the effect that at that time there were in round numbers about 11,000,000 adult aliens in the United States; that of these some 2,500,000 had filed their declarations of intention, leaving approximately 8,500,000 who had never taken any step whatsoever towards citizenship. It is quite apparent from these figures that the "melting pot" has not melted. This was repeatedly emphasized during the World War. The line of racial cleavage was as distinctly drawn in this country then as in Europe. Very considerable portions of our population of foreign birth seemed concerned more with what was best for the lands of their nativity rather than with what was best for the country of their adoption. Cases such as Schurmann v. United States (C. C. A.) 264 Fed. 917, deal with this situation. This foreign element must either be lifted up to American standards, or America must eventually be reduced to their standards. We must become all-American, or, failing this, we will in time become all-alien. And before any given candidate is clothed with the right of franchise under our naturalization laws, he should be required to make a convincing showing that the Americanization process in his case has reached the stage where he is heart and soul with us, and that his naturalization would be more a benefit than a detriment to the country. If any doubt should be entertained as to the soundness of this conclusion, it is necessary only to consider the present flood of immigration (all prospective candidates for naturalization), which in the short time that has elapsed since the Armistice has reached the pre-war height. Limitations due to shipping have alone kept the country from being flooded. So critical has become the situation that the present Congress has been appealed to, to suspend all immigration for a reasonable period of time.

The courts are chargeable with no further duty in a case such as we are here considering than to see that the individual candidate has fittingly prepared himself for citizenship. But even a casual consideration of such a case must, however, convince any thoughtful person that as an indispensable prerequisite to naturalization the candidate must possess an acquaintance with, and working knowledge of, the principles of the Declaration of Independence and Constitution of the United States. An intelligent sympathy with, and understanding

of the purposes of these great charters of human liberty must be shown by the candidate, and he must have a comprehension of the obligations and responsibilities of citizenship arising from his taking the oath of allegiance forming a part of his naturalization proceeding.

The candidate, in the instant case lacking these essentials, his petition will be denied.

In re SILBERSCHUTZ.

(District Court, E. D. Missouri, E. D. December 17, 1920.)

No. 8982.

Aliens ⇐62—Claiming draft exemption as enemy subject negatives prior declaration of intention.

An alien subject of Austria-Hungary, who made his declaration of intention prior to the war with that country, but who subsequently claimed exemption under the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k) on the ground that he was a subject of an enemy country, *held* not entitled to admission to citizenship on such declaration.

Petition of Abraham Silberschutz for naturalization. Denied.

M. R. Bevington, Chief Naturalization Examiner, of St. Louis, Mo., for the United States.

DYER, District Judge. The petitioner for naturalization in this cause is a subject of the former Austro-Hungarian monarchy. His status since December 7, 1917, has been that of an enemy alien. Within that period of time, he has filed the application for citizenship now under consideration. In support of the same, he has made a part thereof a declaration of intention executed some five years ago, or prior to the declaration of war against the country of his nativity. The evidence discloses that in the questionnaire executed by him under and pursuant to the regulations promulgated by virtue of the Act of May 16, 1917, known as the "Selective Service Act" (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), he claimed exemption from military service under class 5–E, while under Series VII of said questionnaire he stated he was not a citizen of the United States and pleaded exemption on that ground.

In support of its motion to dismiss the application for citizenship of this petitioner, the government has introduced in evidence a certificate of the Adjutant General of the United States army, over his seal, certifying to the facts respecting the plea in bar interposed to military service in the instant case on the ground of the enemy alien status of the registrant. The court will take judicial notice of the signature of the said Adjutant General and of the seal of his office. The petitioner does not challenge the correctness of this certificate of the War Department, nor does he challenge the truthfulness of the recitals contained in his questionnaire. But, even should he attack said questionnaire, parol evidence would not be admissible to impeach a formal written instrument of its character, particularly when we keep in mind that said questionnaire was executed under the solemnity of an oath.

An alien must establish that his petition for naturalization is based upon a declaration of intention to become a citizen of the United States of America, made by him in good faith in accordance with the requirements of the naturalization statute, not less than two nor more than seven years previous to the date of filing of his petition for naturalization. In said declaration of intention he must declare in good faith that it is his bona fide intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign power, prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty to which he owes allegiance, and the said petitioner for naturalization must further establish that his attitude, conduct, and behavior during all of the time subsequent to the making of such declaration of intention has been consistent, or in accord with the bona fides expressed in said declaration. Further, the Naturalization Act (34 Stat. 596) mandatorily prescribes that an applicant for the grant of the privilege of American citizenship must affirmatively establish that, during at least all of the five years immediately preceding the date of filing of his petition for naturalization, he has been attached to the principles of the Constitution of the United States of America, and well disposed to the good order and happiness of the same, and that his attitude, conduct, and behavior has been such as is consistent with such an attachment, and has been such as evidences a willingness to support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

The assertion of said petitioner for naturalization, in his declaration of intention filed in support of his petition, that it was his bona fide intention to become a citizen of the United States of America and to renounce forever all allegiance and fidelity to any foreign power, prince, potentate, state, or sovereignty, and particularly by name to the ruler of whom he was at that time a subject, was not made in good faith, and his attitude, conduct, and behavior subsequent to the making of said declaration has not been consistent or in accord with the intention so expressed by him in said declaration of intention, and his attitude, conduct, and behavior during the five years immediately preceding the date of filing of his petition for naturalization has not been such as establishes that he is attached to the principles of the Constitution of the United States of America, and well disposed to the good order and happiness of the same, and that he was and is willing to support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic, and bear true faith and allegiance to same, in light of the fact that the said petitioner, being then and there an alien, and a subject of enemy origin, in his questionnaire asserted and claimed exemption from induction into the military forces of the United States of America under the said act, on the ground of being such enemy alien, thereby negativing the bona fides of the declaration of intention upon which his petition for naturalization is based, and invalidating and voiding said declaration of intention. Further, the assertion by the petitioner of this claim for exemption as an alien establishes that he was not, during all of the

period of five years immediately preceding the date of filing of his petition for naturalization, attached to the principles of the Constitution of the United States of America, and that he was not well disposed to the good order and happiness of the same, and that he was not willing in the hour of our national peril to support and defend the Constitution of the United States of America against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

It must therefore be held that the said petitioner is ineligible at this time to be admitted to American citizenship, and his petition for naturalization must be denied on the grounds and for the reasons assigned. This order of denial will be with prejudice.

In re TOMARCHIO.

(District Court, E. D. Missouri, E. D. December 17, 1920.)

No. 8867.

1. **Army and navy ⟸20—Registrants are bound to know Selective Service Law and rules.**
   Under Selective Service Regulation, § 91, providing for the form and conditions of the questionnaire, and section 6, giving the regulations the effect of law, and charging persons subject to registration with knowledge thereof, every registrant was bound by the rules governing the execution of questionnaire, and cannot plead ignorance of their requirements.

2. **Army and navy ⟸20—Registrants bound by actions of scriveners adopted by them.**
   Registrants whose questionnaires were written out by volunteer scriveners, and who thereafter signed and swore to the questionnaires as so prepared, adopted the acts of the scriveners as those of their agents, and cannot avoid the consequences of answers to questions contained therein.

3. **Evidence ⟸385—Parol evidence inadmissible to contradict or vary written document.**
   When any judgment or other judicial or official proceeding, or any grant or contract, has been reduced to writing and is evidenced by a document or series of documents, the contents of such documents cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence.

4. **Aliens ⟸62—Exemption claim by declarant bars admission to citizenship.**
   Act July 9, 1918, § 2, amending Selective Service Act, § 2 (Comp. St. Ann. Supp. 1919, § 2044b), so as to bar from citizenship one who had declared his intention to become a citizen and thereafter claimed exemption from military service on the ground of alienage, was merely declaratory of the law, and did not add to nor detract from the inherent powers of the court under the naturalization law to hold a plea of alienage in bar of performance of military service a bar of admission to citizenship.

5. **Aliens ⟸60—Admission to citizenship is privilege not right.**
   The opportunity to become a citizen of the United States is a mere privilege extended to the alien, and not a right.

6. **Aliens ⟸60—Naturalization law should be strictly and uniformly enforced.**
   The Naturalization Act of 1906 should be strictly enforced, and enforced with uniformity, in view of the express requirements of the Constitution that the rule of naturalization shall be uniform.

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

7. Aliens ⊂⊃62—Exemption claim in any portion of draft questionnaire bars admission to citizenship.

An alien who, after declaring his intention to become a citizen, claimed exemption from military service on the ground of alienage in any part of the draft questionnaire returned by him, is barred from admission to citizenship, so that one who claimed such exemption on the first page of his questionnaire cannot be naturalized, though, in answer to the question under Series 7, he stated that he did not desire exemption on that ground.

Application for naturalization by Sebastiano Tomarchio. Denied.

M. R. Bevington, Chief Naturalization Examiner, of St. Louis, Mo., and Marguerite Zoff, Naturalization Examiner, of Washington, Mo., for the United States.

DYER, District Judge. The government asks the dismissal of this application upon the ground that the candidate in the draft claimed exemption under class V–F. This motion is resisted on the ground that under Series VII of his questionnaire the candidate stated he had not therein claimed exemption because of his alien status.

More than two years have gone by since the signing of the Armistice, on November 11, 1918, and the last draft registration day, which was September 12, 1918, and in that time details surrounding the execution of questionnaires have all but been forgotten. The importance of the subject is such that there should be preserved in some readily accessible law report (such as the Federal Reporter), a reprint of pertinent portions of the questionnaire form showing just what was required of registrants. I accordingly make a part of this opinion a copy of the notice to those affected by the Selective Service Laws, which appeared at the top of the second page of each and every questionnaire. It is particularly to be noted that the specific instruction is given that each and every portion of the questionnaire must be completed, before any entries whatsoever were made on the first page of such questionnaire:

IMPORTANT NOTICE TO REGISTRANTS AND OTHER INTERESTED PERSONS.

CAREFULLY READ, OR HAVE READ TO YOU, EVERYTHING ON THIS AND THE FOLLOWING PAGE BEFORE PROCEEDING FURTHER.

General Rules Governing the Answering, Execution, and Filing of This Questionnaire.

Every registrant shall immediately upon receipt of a Questionnaire proceed as follows:

He shall first carefully read, or have read to him, the instructions printed on this and the next page of the Questionnaire, and also the particular instructions printed in the Questionnaire with each series of questions.

He shall then take up each series of questions, beginning with Series I, and answer all questions which he is required to answer and sign his name where required by the instructions.

He shall make no mark nor answer upon page No. 1 until he has answered the 12 series of questions; but after having done so and before he executes his affidavit on page No. 15, he shall answer the question near the bottom of page

No. 1 and sign his name thereto. If he wishes to waive all claim of exemption or deferred classification, he shall sign the waiver at the bottom of page No. 1.

He shall then upon the first page of the Questionnaire place a cross mark (X) in the space opposite the division which describes his status constituting the ground or basis for deferred classification. The registrant is not limited to making one cross mark (X) indicating his status as to deferred classification, but may make a sufficient number of marks to indicate his status in relation to every ground for discharge or exemption which exists in his case.

He shall then swear or affirm to the truth of his answers by executing the "Registrant's Affidavit" on page 15.

Series VII of the questionnaire, cited in behalf of the candidate, follows:

SERIES VII. CITIZENSHIP.

Instructions.—Every registrant must answer the first three questions. If he answers "yes" to all of these questions, he need not answer the remaining questions nor sign his name. If he answers "no" to either question No. 1, 2, or 3, he must then answer the remaining questions and must sign his name.

Q. 1. Are you a citizen of the United States? A. 1. .....
(Yes or no.)

Q. 2. Were you born in the United States? A. 2. .....
(Yes or no.)

Q. 3. Were both of your parents born in the United States? A. 3. .....
(Yes or no.)

If your answer to all the questions Nos. 1, 2, and 3 is "yes," do not answer any other questions and do not sign your name. If your answer to either question No. 1, 2, or 3 is "no," answer the following questions and sign your name.

Q. 4. If you are not a citizen of the United States, have you ever taken out first papers (that is, declared your intention of becoming a citizen); if so, when and where? A. 4. .....
.....

Note.—Registrants, except alien enemies, who are not citizens but who have taken out their first citizenship papers will be classified as citizens and will not be exempted or relieved from military service as aliens.

Q. 5. If you are not a citizen of the United States and have not declared your intention of becoming a citizen, do you claim exemption from service in the Army of the United States on that ground? A. 5. .....
(Yes or no.)

Q. 6. If you are not a citizen of the United States and have not declared your intention of becoming a citizen, are you willing to return to your native country and enter its military service? A. 6. .....
(Yes or no.)

Q. 7. Where and on what date were you born? A. 7. .....
.....

If you are a noncitizen Indian, born in the United States, do not answer questions Nos. 8 to 13, but answer questions Nos. 14 to 16.

Q. 8. Give the birthplace and present residence of each of your parents. A. 8. .....
.....

Q. 9. If your parents or either of them live in the United States, state how long each has resided in this country. A. 9. .....

Q. 10. If either of your parents has been naturalized in the United States, state (*a*) which parent; (*b*) when and where naturalized. A. 10. (*a*) .....; (*b*) .....

Q. 11. If you were not born in the United States, state (*a*) at what place, and (*b*) on what date you arrived in this country; and (*c*) whether you came with your father or mother or either of them. A. 11. (*a*) .....; (*b*) .....; (*c*) .....

Q. 12. If you are a naturalized citizen of the United States, state when and where you were so naturalized. A. 12. .....

Q. 13. Have you ever voted or registered for voting anywhere in the United States; if so, when and where? A. 13. .....
.....

If you are an Indian born in the United States and claim you are not a citizen, answer the following questions.

Q. 14. State (*a*) when you were allotted; (*b*) when your father was allotted; (*c*) when your mother was allotted. A. 14. (*a*) .....
(*b*) .....; (*c*) .....

Q. 15. Have you received a patent in fee to your land? A. 15. .....

Q. 16. State (*a*) whether you live separate and apart from any tribe; (*b*) if so, when you intend to return to tribal life; and (*c*) how long you have lived away from tribal life. A. 16. (*a*) .....; (*b*) .....; (*c*) .....

.....

Note.—See Sec. 79 S. S. R. (Signature of registrant.)

As the last and most important feature, there is set out below a verbatim copy of page 1 of the questionnaire form:

QUESTIONNAIRE

(TO BE USED AFTER JUNE 5, 1918.)

	Registration No.	Name of Registrant: Telephone No.....
	Serial No.	..... (Christian name.) (Surname.)
	..... Order No.	Address ..... (Street and number or R. F. D.)
(Stamp of Local Board.)	.....	City ..... County ..... State .....

☞NOTICE TO REGISTRANT.—You are required by law to return this Questionnaire filled out in accordance with instructions contained herein within seven days from date of this notice. Failure to do so is a misdemeanor punishable by fine or imprisonment for one year and may result in the loss of valuable rights and in immediate induction into military service.

(Date) ....
Member of Local Board.

CLAIM FOR EXEMPTION OR DEFERRED CLASSIFICATION

NOTE TO CLAIMANTS.—This form is to be used for claiming exemption or deferred classification by or in respect of any registrant and for stating the grounds of claim. Place a cross (x) in Column A opposite the division that states the ground of claim. Boards are required to consider only grounds thus indicated by the claimant in Column A.

Column A.	Division.	CLASS I.
.....	A	Single man without dependent relatives.
.....	B	Married man, with or without children, or father of motherless children, who has habitually failed to support his family.
.....	C	Married man dependent on wife for support.
.....	D	Married man, with or without children, or father of motherless children; man not usefully engaged, family supported by income independent of his labor.
.....	E	Unskilled or not a necessary farm laborer.
.....	F	Unskilled or not a necessary industrial laborer.
.....	G	Registrant by or in respect of whom no deferred classification is claimed or made.
.....	H	Registrant who fails to submit Questionnaire and in respect of whom no deferred classification is claimed or made.
.....	I	All registrants not included in any other division in this schedule.

DEFERRED CLASSES.

CLASS II.

.....	A	Married man with children or father of motherless children, where such wife or children or such motherless children are not mainly dependent upon his labor for support for the reason that there are other reasonably certain sources of adequate support (excluding earnings or possible earnings from the labor of the wife), available, and that the removal of the registrant will not deprive such dependents of support.
.....	B	Married man, without children, whose wife, although the registrant is engaged in a useful occupation, is not mainly dependent upon his labor for support, for the reason that the wife is skilled in some special class of work which she is physically able to perform and in which she is employed, or in which there is an immediate opening for her under conditions that will enable her to support herself decently and without suffering or hardship.
.....	C	Necessary skilled farm laborer in necessary agricultural enterprise.
.....	D	Necessary skilled industrial laborer in necessary industrial enterprise.

CLASS III.

.....	A	Man with dependent children (not his own), but toward whom he stands in relation of parent.
.....	B	Man with dependent aged or infirm parents.
.....	C	Man with dependent helpless brothers or sisters.
.....	D	County or municipal officer.
.....	E	Highly trained fireman or policeman, at least 3 years in service of municipality.
.....	F	Necessary customhouse clerk.
.....	G	Necessary employee of United States in transmission of the mails.
.....	H	Necessary artificer or workman in U. S. armory or arsenal.
.....	I	Necessary employee in service of United States.
.....	J	Necessary assistant, associate, or hired manager of necessary agricultural enterprise.
.....	K	Necessary highly specialized technical or mechanical expert of necessary industrial enterprise.
.....	L	Necessary assistant or associate manager of necessary industrial enterprise.

CLASS IV.

.....	A	Man whose wife or children are mainly dependent on his labor for support.
.....	B	Mariner actually employed in sea service of citizen or merchant in the United States.
.....	C	Necessary sole managing, controlling, or directing head of necessary agricultural enterprise.
.....	D	Necessary sole managing, controlling, or directing head of necessary industrial enterprise.

CLASS V.

.....	A	Officers—legislative, executive, or judicial of the United States or of State, Territory, or District of Columbia.
.....	B	Regularly or duly ordained minister of religion.
.....	C	Student who on May 18, 1917, or on May 20, 1918, was preparing for ministry in recognized theological or divinity school, or who on May 20, 1918, was preparing for practice of medicine and surgery in recognized medical school.
.....	D	Persons in military or naval service of United States.

.....	E	Alien enemy.
.....	F	Resident alien (not an enemy) who claims exemption.
.....	G	Person totally and permanently physically or mentally unfit for military service.
.....	H	Person morally unfit to be a soldier of the United States.
.....	I	Licensed pilot actually employed in the pursuit of his vocation.
.....	J	Persons discharged from the Army on the ground of alienage or upon diplomatic request.
.....		Member of well-recognized religious sect or organization, organized and existing on May 18, 1917, whose then existing creed or principles forbid its members to participate in war in any form, and whose religious convictions are against war or participation therein.

REGISTRANT OR OTHER INTERESTED PERSON MUST ANSWER THE FOLLOWING QUESTION.

Q. Do you claim exemption or deferred classification in respect of the registrant named above? If so, state the divisions of each class and each class in which you claim that he should be classified.

A. .....; in Division .... of Class ...., and Division .... of Class ....,
(Yes or no.)
and Division ....; of Class .... (Date) .....

(Address.) ..... (Sign here.) .....

WAIVER OF CLAIM FOR EXEMPTION OR DEFERRED CLASSIFICATION.

(To be signed by registrant or other interested person whenever a waiver is used.)

I hereby waive all claim of exemption or deferred classification of the registrant named above.

(Date of signing.) ..... (Sign here.) .....

The "Notice to Registrant" and "Note to Claimants," forming a portion of the above form, and graphically placed therein, are particularly deserving of attention.

Section 91 of the selective service regulations prescribed by the President under the authority vested in him by the terms of the selective service law (Act May 18, 1917 [Comp. St. 1919, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k]) with supplementary and amendatory acts and resolutions, provides:

"(a) The Questionnaire (Form 1001, sec. 268, p. 188) shall consist primarily of a number of questions, divided into 12 series of questions (addressed to and to be answered under oath by every registrant), designed for the purpose of ascertaining the status of every registrant in relation to the various matters, things, and circumstances constituting ground for exemption of deferred classification. The Questionnaire shall also contain, as an integral part thereof, affidavits in support of claims for exemption or deferred classification in certain cases hereinafter specified. It shall also contain particular and specific regulations and instructions to registrants concerning each series of questions and the procuring and filing of certificates and affidavits in certain cases. On the first page of the Questionnaire there shall be printed a notification and instruction requiring the registrant (whose name, together with the date of notice, shall be inserted) to fill out and return the Questionnaire in accordance with the regulations. (See sec. 268.)

"(b) The first page of the Questionnaire shall also contain a place for the registrant or other person to claim exemption or deferred classification and a place for a waiver by the registrant or other person of such claim.

"(c) The answers and affidavits must be signed and sworn to in strict ac-

cordance with these regulations, and in strict conformity with the particular rules and instructions relating to the several series of questions in the Questionnaire itself."

Section 6 of said regulations provides:

"These Rules and Regulations have the force and effect of law, and all registrants, and all persons required by the Selective Service Law and these Rules and Regulations to be registered, and all persons claiming or to claim any right or privilege in respect of any registrant are charged with knowledge of the provisions hereof. Failure by any registrant, or by any person required to be registered, to perform any duty prescribed by the Selective Service Law or by these Rules and Regulations, whether or not the time of the performance of such duty is required by these Rules and Regulations to be posted or entered in the records of the Local or District Board, and whether or not formal notice is required by these Rules and Regulations to be given (such as registering and reporting change of status and other duties), is a misdemeanor punishable by imprisonment for one year, and may result in loss of valuable rights and privileges and immediate induction into the military service; and such failure shall also be considered as a waiver of any right or privilege which might have existed in favor of such person if he had performed such duty."

We have presented the question of whether a candidate may evade the consequences of a claim for exemption from military service on the ground of alienage, appearing on page 1 of his questionnaire, through specifically reciting under Series VII thereof that he made no such claim, or through not answering said Series VII at all, or so answering as to make it impossible to determine his real attitude.

[1] There can be no question but what every registrant was bound by the rules governing the execution of questionnaires. Under said rules, he was first required to acquaint himself with the demands made on him by the Selective Service Act, then to execute as prescribed all portions of his questionnaire other than page 1, following which he was to consolidate on said page 1 such claims as he may assert, and which represented those claims alone that were actually binding on the draft board. It is to be further remembered that all questionnaires were executed under the solemnity of an oath.

In the consideration of a case such as this notice must be taken of the psychological phenomena below discussed. Candidates, who during the war pleaded their alien status in bar to the performance of military duty, will now be found most vehement in their protestations of loyalty, and of their yearning to take up arms in defense of the country of their adoption. Fighting ceased some two years ago, and there is now no longer any danger attached to their tardy proffers of military assistance. When soldiers were needed, however, these fair-weather friends were to be found tying the hands of the local draft boards through pleading their alien status. And they now state their war records as made up by their questionnaires work an injustice, due to the fact the claims made therein are inconsistent with their real mental attitude.

[2] In support of this, the claim is made that in very considerable numbers of instances, more or less incompetent scriveners had to be employed, these being generally overworked and sometimes somewhat callous volunteers from the local bar. But it cannot be escaped that

these scrivener attorneys, who aided registrants at the headquarters of local draft boards, acted as the agent of the party whose questionnaire was filled out. The law placed upon the registrant the duty of acquainting himself with all requirements under the Selective Service Act. This he could not then, and cannot now, shift to the shoulders of another. When he signed and swore to this questionnaire, that document became his writing, and all responsibility for what may be contained therein was assumed by him. He cannot at this late date escape the consequences of declarations against interest contained therein, by any resort to impeachment of the questionnaire. Any attempt to contradict or vary or explain away the matters reduced to writing in the said questionnaire would be a violation of the parol evidence rule.

[3] As was most clearly stated in Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 324–332, 22 Sup. Ct. 133, 46 L. Ed. 213, it is a well-established rule of the common law, which has been embodied in statutes in a number of states, that when any judgment of any court, or any other judicial or official proceeding, or any grant or other disposition of property, or any contract, agreement or undertaking has been reduced to writing, and is evidenced by a document or series of documents, the contents of such documents can not be contradicted, altered, added to, or varied by parol or extrinsic evidence. To the same effect is Lumber Underwriters v. Rife, 237 U. S. 605, 35 Sup. Ct. 717, 59 L. Ed. 1140. Both at law and in equity, parol testimony is inadmissible to vary a written instrument. Forsythe v. Kimball, 91 U. S. 291, 23 L. Ed. 352; Richardson v. Hardwick, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145. Parol evidence to contradict, or substantially to vary, the legal import of a written agreement, is inadmissible. Renner v. Bank of Columbia, 9 Wheat. 591, 6 L. Ed. 166; Union Selling Co. v. Jones, 128 Fed. 674, 675, 63 C. C. A. 229. See, also, Brown v. Spofford, 95 U. S. 480, 24 L. Ed. 509; Gill v. General Electric Co., 129 Fed. 351, 64 C. C. A. 101; Blue Mountain Iron & Steel Co. v. Portner, 131 Fed. 60, 65 C. C. A. 298; Pitcairn v. Philip Hiss Co., 125 Fed. 110, 61 C. C. A. 657; Hirsch v. Georgia Iron & Coal Co., 169 Fed. 578, 95 C. C. A. 76.

It necessarily follows that the original questionnaire of a given registrant constitutes solemn acts, declarations, and admissions against interest, which cannot be impeached, contradicted, varied, or explained away by parol evidence. It is plain, also, that any different rule would greatly increase the temptations of registrants to commit perjury. The parol evidence rule, above considered, has always been regarded as one of the greatest barriers against both fraud and perjury. It is not to be modified in any particular in a case such as this.

In the case of In re Silberschutz (D. C.) 269 Fed. 398, the rule of law pertaining in cases such as this has been considered at considerable length. In the Silberschutz Case, however, the petitioner was an enemy alien. In the instant case, the petitioner is an Italian subject.

[4] By an act of Congress approved July 9, 1918, section 2, sentence 2 of the act approved May 18, 1917 (Selective Service Act

[Comp. St. Ann. Supp. 1919, § 2044b]), has been amended to read as follows:

"Such draft as herein provided shall be based upon liability to military service of all male citizens or male persons not alien enemies who have declared their intention to become citizens between the ages of 21 and 30 years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this act: Provided, that a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen, and he shall forever be debarred from becoming a citizen of the United States."

(Note. The following countries were not neutral during the World War, to wit: Belgium, Brazil, China, Costa Rica, Cuba, France, Great Britain, Greece, Guatamala, Haiti, Honduras, Italy, Japan, Liberia, Montenegro, Nicaragua, Panama, Portugal, Russia, San Marino, Serbia, Siam, Austria-Hungary, Germany, Bulgaria, and Turkey. All other countries were neutral.)

But this was merely declaratory of the law. It neither added to, nor detracted from, the power inherent in the courts under the naturalization laws to hold a plea of alienage in bar to the performance of military service operated likewise as a bar to admission to citizenship. The bona fides of the intent and desire of an applicant for American citizenship constitutes one of the salient and material issues involved in a naturalization proceeding. The attitude, conduct, and actions of a candidate, as disclosed in his questionnaire, are matters that must be taken judicial notice of, in a naturalization proceeding; and where in such questionnaire the petitioner is shown to have anywhere claimed exemption from military service on the ground of alienage, he is not eligible or qualified to be, nor should be, admitted to American citizenship. The courts seem to be in more or less uniformity as to this.

Counsel for the government submit a statement showing that for the period beginning July 1, 1919, and ending June 30, 1920, applications for naturalization have been denied by the United States District Courts sitting at Kansas City, and at St. Joseph, Mo., at Ft. Dodge, Iowa, at Wichita, Kan., at Ft. Smith, Ark., and at Muskogee and Guthrie, Okl., where it has been established that the alienage has been pleaded under the selective service laws as a bar to the performance of military service. The circuit courts for Jefferson and White counties, Ark., have taken the same position, as have the circuit courts for Christian, Franklin, Jackson, Madison, Marion, Monroe, Montgomery, Pulaski, St. Clair, and Saline counties, Ill. The same rule appears also to have been followed by the city courts of Alton, East St. Louis, Granite City, and Herrin, Ill.; in Iowa, the district courts of Appanoose, Benton, Blackhawk, Boone, Buchanan, Butler, Calhoun, Cass, Cedar, Cerro Gordo, Cherokee, Clayton, Clinton, Crawford, Dallas, Delaware, Des Moines, Fayette, Floyd, Franklin, Grundy, Guthrie, Hamilton, Hancock, Hardin, Harrison, Howard, Ida, Iowa, Jones, Kossuth, Lee, Lyon, Mitchell, Monroe, O'Brien, Osceola, Plymouth, Pocahontas, Polk, Pottawattamie, Scott, Shelby, Sioux, Story, Tama, Washington, Webster, Winneshiek, and Woodbury counties follow

the same rule, as does the superior court for Cedar Rapids, Iowa; in Kansas, the district courts for Atchison, Barton, Butler, Cloud, Crawford, Ellis, Ellsworth, Finney, Harvey, Johnson, Kingman, Leavenworth, Lincoln, McPherson, Mitchell, Nemaha, Reno, Russell, Shawnee, Trego, and Wyandotte counties are in like agreement; in Missouri, the circuit courts for Franklin, Nodaway, Pettis, and St. Charles counties hold likewise; in Nebraska, the district courts for Adams, Buffalo, Cass, Cedar, Clay, Colfax, Cuming, Dawson, Dodge, Douglas, Gage, Hall, Hamilton, Hayes, Holt, Kearney, Lancaster, Madison, Otoe, Perkins, Platte, Saunders, Scotts Bluff, Thayer, Thurston, Valley, and Washington counties are shown to adhere to the rule in question; and in Oklahoma, the district courts for Alfalfa, Blaine, Kay, Okmulgee, and Pottawatomie counties pursue the same rule of law. These states represent the naturalization district that has local headquarters in St. Louis, and which is under jurisdiction of the officers presenting this case on behalf of the United States.

[5] We must not lose sight of the fact that the opportunity to become a citizen of the United States is a mere privilege, and not a right. Johannessen v. United States, 225 U. S. 240, 32 Sup. Ct. 613, 56 L. Ed. 1066; United States v. Ginsberg, 243 U. S. 474, 475, 37 Sup. Ct. 422, 61 L. Ed. 853. While every worthy candidate for naturalization should be aided and welcomed, the interests of our body politic require that we withhold citizenship until the entire worthiness of the applicant concerned is fully known and established. Under present conditions, we confer naturalization on all against whom the Naturalization Service is not able, with its extremely limited means of inquiry (the Naturalization Office at this point has one field examiner to about each 125 courts of naturalization in its district), to prove unworthiness. In the case of In re Goldberg (D. C.) 269 Fed. 392, there is discussed more or less at length the reasons leading up to the enactment of the existing naturalization statute.

[6] Following the prosecutions of which Levin v. United States, 128 Fed. 826, 63 C. C. A. 476, and Dolan v. United States, 133 Fed. 440, 69 C. C. A. 274, were the outgrowth, I was privileged to submit recommendations for legislation designed to eliminate the fraudulent practices then prevailing in naturalization matters. The Act of June 29, 1906 (34 Stat. pt. 1, p. 596), which was enacted at the suggestion of then President Theodore Roosevelt, contained substantially the suggestions submitted at the time by me. Since then, in the Circuit and District Courts for the Eastern Division of the Eastern Judicial District of Missouri, it has been my duty as judge to hear and determine in round numbers some 10,000 naturalization applications. This experience convinces me that any relaxation of the terms of the aforesaid Act of June 29, 1906, whether judicial or administrative, can only work irreparable harm to the country. The law should be strictly enforced. Nothing brings any law into greater disrepute than its spineless enforcement, unless it be its erratic enforcement. In other words, consistency in interpretation and enforcement is absolutely essential.

To say, as many of these military "slacker" candidates are wont to contend, that every naturalization case must be considered on its individual merits, is the sheerest sophistry, being equivalent to saying that the law is to be differently construed in connection with every case—if there are 100,000 cases, then there shall be 100,000 different interpretations of the law; this despite the fact the Constitution of the United States in express terms provides that it shall be a uniform rule, without compliance with which citizenship may, of course, not be lawfully procured. I therefore take this opportunity to call attention to the fact that while the courts have a duty to perform in naturalization matters; so, also, has the executive branch of the government charged with the administration of the Naturalization Act, to wit, the Naturalization Service. As was succinctly stated by Circuit Judge Lowell, in Re Mudarri (C. C.) 176 Fed. 466, the United States cannot "put the court to an independent investigation of the law or of fact, without announcing its own contention in the matter." That which the United States is unwilling to support by argument the court cannot consider. The withholding from the court of any facts to which it is entitled cannot be countenanced.

This is the one defect of the existing naturalization statute. Should the opportunity ever again present itself to me to recommend changes in the said statute, from my experience in these matters I would recommend such amendment as would insure the court in every case being put in possession of every fact, so that it would be in a position to dispose of every issue as the law might require. As it now is, the Naturalization Service has the facts. Whether the court receives those facts is dependent on whether the said service, in pursuit of its administrative policy, sees fit to present the same. This is a condition of affairs that should be corrected, as for want of evidence presented, and objections properly interposed, a court can be stripped of all opportunity to itself determine the disposition to be made of a given application for naturalization. Regardless of whether this administrative control, possessed by the executive branch of the government over the subject of naturalization, has ever been abused, or not, it cannot be questioned, but what the situation discussed should be so treated in any revision of the law as to insure without question the trial courts being acquainted with every feature developed in the preliminary investigation of each and every case. Such a course can only strengthen the hold of the Naturalization Service on the affections of the public, which demands, not merely an honest enforcement of the statute, but a lawful and fearless enforcement as well. The courts will gladly assume their share of personal responsibility for such lawful, honest, and fearless enforcement.

Paragraph (e) of section 79 of the selective service regulations expressly provides that no enemy alien will be accepted for military service, and states local boards will be held personally responsible that no such enemy alien shall be placed other than in class V. Therefore it was not necessary in any instance for such a registrant to set up the plea of alienage. The draft board, in any instance, on its own motion, was charged by law with the duty of properly classifying all such

parties. Enemy aliens were admittedly in an embarrassing position during the war. If the heart of any such registrant was truly with America, he could not have better demonstrated this than by signing the waiver to deferred classification at the foot of page 1, and by omitting in any other place on said page 1 any claim whatsoever based on his enemy alien status. As to friendly aliens, nationals of the countries associated with the United States in the World War, and as to neutral aliens, any plea of alienage set up by them must be held to be a deliberate attempt to evade military service altogether; and all such claims, regardless of whether made by enemy, friendly, or neutral aliens, must be considered in connection with any naturalization application that may be filed by them.

[7] It accordingly follows that the dominant feature is whether alienage was pleaded in any portion of the questionnaire. It is immaterial, for naturalization purposes, where in the questionnaire such claim was set up, or the manner in which it was asserted. If made anywhere, in any manner, that fact, for the reasons stated in Re Silberschutz, supra, must necessitate the denial of the application for citizenship. In the instant case, the candidate, an Italian subject, having on page 1 of his questionnaire asserted his alienage as a bar to military service, his declaration of intention will be declared canceled, and his petition for naturalization denied with prejudice.

LANDON et al. v. COURT OF INDUSTRIAL RELATIONS OF STATE OF KANSAS et al.

(District Court, D. Kansas, First Division. August 7, 1920.)

No. 136-N.

1. **Gas ⇐14(1)—Plaintiffs in other suits held not necessary parties to suit to restrain enforcement of rates.**
   In a suit against a state Court of Industrial Relations to enjoin the enforcement of rates fixed for gas companies, plaintiffs, in other suits against one of the gas companies to have legal and reasonable rates fixed, who do not ask leave to intervene in the suit at bar, are not necessary parties to the latter suit, and a motion to make them parties defendant therein will be denied.

2. **Appeal and error ⇐1212(3)—Decision of Supreme Court held to require determination of controversy between defendants.**
   In a suit by a gas supply company against a state Court of Industrial Relations and numerous distributing companies and municipalities, to restrain the enforcement of a rate fixed for the distributing companies, of which the supply company had received a proportion, the decision of the Supreme Court on a former appeal, which, though determining that the supply company was not interested in the rate attacked, remanded the case to the trial court to determine all the issues involved, including those arising on the several bills and cross-bills, and answers in the nature of cross-bills, requires the trial court to determine the validity of that rate as affecting the defendant distributing companies.

3. **Public service commissions ⇐21—Provisions for attacking order within 30 days not a limitation.**
   The provision of Laws Kan. 1911, c. 238, § 21, for affirmative action to question an order of the Public Utilities Commission, applicable to the Court of Industrial Relations, within 30 days after the entry of such

order, is not a statute of limitations, which bars the suit attacking the order after the expiration of that period.

4. Equity ⊂=87(1)—**Equity can restrain confiscatory rate after statutory period of limitations.**
A court of equity may entertain a suit to restrain the enforcement of a confiscatory rate established by a state Public Service Commission, even after the expiration of the period of limitations fixed by the statute for suits attacking the order.

5. Gas ⊂=14(1)—**Presumption in favor of orders lessened by irregularities at hearing.**
The presumption in favor of the validity of an order of the state Court of Industrial Relations fixing a rate for natural gas is greatly lessened, if not entirely removed, by a showing that it was not based upon evidence as to the plant values of the distributing companies or their operating expenses, and that some of them were given no notice of the proceedings.

6. Gas ⊂=14(1)—**Reasonableness of proportion paid to supply company material in determining reasonableness of rates.**
At a hearing to determine the reasonableness of rates fixed for gas distributing companies, a portion of which was paid to the supply company, the question whether the portion paid to supply company was reasonable for its services is material, even though the supply company was not bound by the established rate, since it is essential, in determining whether the rate was reasonable, for the distributing companies to determine whether the payments by them to the supply company were reasonable or should be reduced.

7. Gas ⊂=14(1)—**Rates fixed by Court of Industrial Relations for distributing companies held confiscatory.**
Evidence that under the 28-cent rate allowed by the Kansas Court of Industrial Relations, under Laws Kan. 1911, c. 238, § 30, for the sale of natural gas by distributing companies, those companies were unable to earn in any case more than enough to meet operating expenses, cost of gas, and depreciation, and in some cases could not meet those expenses, *held* to show that the rate was unreasonable, unjust, and confiscatory, and violated the United States Constitution.

Suit by John M. Landon and another, as receivers of the Kansas Natural Gas Company, against the Court of Industrial Relations of the State of Kansas and others. On second hearing on the issue whether the 28-cent rate fixed by the Court of Industrial Relations for the gas distributing companies was reasonable. Rate held confiscatory and unreasonable.

See, also, 245 Fed. 950; 269 Fed. 423.

Chester I. Long, of Wichita, Kan., John H. Atwood, of Kansas City, Mo., and Robert Stone, of Topeka, Kan., for John M. Landon, receiver.

T. S. Salathiel, of Independence, Kan., and Robert A. Brown, of St. Joseph, Mo., for Kansas Natural Gas Co.

John J. Jones, of Wichita, Kan., for George F. Sharitt, receiver.

Charles Blood Smith, of Topeka, Kan., for Fidelity Title & Trust Co.

Fred S. Jackson, of Topeka, Kan., for Public Utilities Commission of Kansas and its members.

J. W. Dana, of Kansas City, Mo., for Kansas City Gas Co., Wyandotte County Gas Co., and Citizens' Light, Heat & Power Co. of Lawrence.

James D. Lindsay, of Jefferson City, Mo., for Public Service Commission of Missouri.

C. A. Loomis, of Kansas City, Mo., for Jackson County Gas Co., Gardner Gas Co., Edgerton Gas Co., Wellsville Gas Co., Anderson County Light & Heat Co., Richmond & Princeton Gas Co., Baldwin Gas Co., Kansas Farmers' Gas Co., Ottawa Gas & Electric Co., Western Gas & Light Co., Wier Gas Co., and Parsons Gas Co.

T. F. Doran, of Topeka, Kan., for L. G. Treleaven, receiver.

Edward Sapp, of Galena, Kan., for Macon Gas Co.

W. E. Brown, of Atchison, Kan., for Atchison Ry., Light & Power Co.

Floyd Harper, of Leavenworth, Kan., for Leavenworth Light, Heat & Power Co.

H. J. Smith, of Kansas City, Kan., for Kansas City, Kan.

R. B. Caldwell, of Kansas City, Mo., for Kansas Gas & Light Co. and Home Light & Power Co.

E. W. Clausen, of Atchison, Kan., for city of Atchison.

B. F. Bowers, of Ottawa, Kan., for city of Ottawa.

L. V. Stigall and Charles L. Crowley, both of St. Joseph, Mo., for city of St. Joseph.

M. A. Fyke, of Kansas City, Mo., for Kansas City, Mo.

W. E. Ziegler, of Coffeyville, Kan., for Coffeyville Gas & Fuel Co.

H. H. Diechler, of Coffeyville, Kan., for city of Coffeyville.

T. M. Vrady, of Parsons, Kan., for city of Parsons.

George P. Hayden and H. O. Corwine, both of Topeka, Kan., for city of Topeka.

F. S. Jackson, of Topeka, Kan., for all Kansas cities not otherwise represented.

BOOTH, District Judge. Following the decision of the Supreme Court in said above-entitled cause (249 U. S. 236, 591, 39 Sup. Ct. 268, 389, 63 L. Ed. 791, 577), and the filing of mandates, June 6, 1919, and pursuant thereto, the court allowed amended and supplemental pleadings to be filed, with the view of framing more clearly from the standpoint of the distributing companies the issue whether the 28-cent rate order made by the Public Utilities Commission of Kansas, December 10, 1915, was confiscatory of the property of the distributing companies, as well as noncompensatory to the receiver. The issues in the cause as to the old supply contracts, their validity, present status and effect as to the receiver, and as to the Kansas Natural Gas Company, remain in the case.

Amended and supplemental pleadings have been filed by the receiver, the Kansas Natural Gas Company, Fidelity Title & Trust Company, the Public Utilities Commission of Kansas (now the Court of Industrial Relations, which latter name will be used henceforth), the Public Service Commission of Missouri, upwards of 20 distributing companies, and several cities, all having been parties to the cause at the time of the former trial. At the request of counsel, and for the greater convenience in handling the case, the issues as to the supply contracts and related matters have been segregated and reserved for future hearing; the present hearing being confined to the issues in reference to the 28-cent rate order of December 10, 1915, and related issues.

Before taking up the pleadings and evidence on these latter issues, it is proper to notice and dispose of certain preliminary applications and motions:

[1] 1. Motion by the Kansas City Gas Company and the receivers of the Kansas Natural Gas Company to bring in as additional parties defendant certain parties who have brought suits in their own individual behalf against the Kansas City Gas Company, claiming that that company has at certain specified times charged more than a legal and more than a reasonable price for gas, and praying for the fixing of legal and reasonable rates, for an accounting in reference to excessive charges, and for an injunction against charging excessive rates: These various plaintiffs do not ask leave to intervene in the present suit, and in my judgment they are not necessary parties to the present suit, 136–N. Furthermore, their interest as consumers of gas is in my judgment represented either by the city of Kansas City or by the Public Service Commission of Missouri. Accordingly the motion to make them parties defendant is denied.

2. Motion on behalf of the city of Kansas City to dismiss this suit as to it: This motion is based upon several alleged grounds: (a) That the plaintiff's complaint in making Kansas City a party defendant proceeded upon the theory that the business of the receiver was interstate commerce, and that the interstate movement of gas continued up to the consumer's burners; that inasmuch as the Supreme Court has negatived this theory there is no longer any reason for retaining Kansas City as a party defendant. (b) That the original preliminary injunction, though still in force, was not operative against Kansas City, and it therefore furnishes no basis for retaining Kansas City as a party defendant. (c) That the cross-bills and answers on which the case is to be retried do not involve Kansas City, and that there are no issues in the case in which it is concerned. This motion to dismiss was interposed prior to the completion of the amended and supplemental pleadings, and consideration of the motion has been postponed until said pleadings were completed.

Without discussing in detail the several grounds of the motion, it is sufficient to say that an examination of the pleadings as now made up has led me to the conclusion that there are certain questions involved in the issues, and especially in connection with the rights of Kansas City under the original ordinance and supply contract of November-December, 1906, which render Kansas City a proper, if not an indispensable, party to the present suit. The motion to dismiss is therefore denied.

3. The question whether the distributing companies can properly maintain in the present suit the inquiry whether the 28-cent rate order was confiscatory is raised by the Court of Industrial Relations. It is contended that the issues raised by answers and cross-bills of the distributing companies are new controversies between them and their codefendant, the Court of Industrial Relations, and that such new controversies are not of such character as can properly be tried and determined in the present suit. It is further claimed that said distributing companies cannot maintain such inquiries in the present suit, because no affirmative action was taken by them to question the order of

December 10, 1915, within 30 days thereafter, as provided by section 21, chapter 238, Session Laws of Kansas 1911. Dismissal of the several cross-bills is prayed.

[2] In my judgment this question of proper procedure is no longer open for discussion. The Supreme Court, by its decree in this cause on April 28, 1919, ordered as follows:

"The decrees below are reversed, and the cause is remanded to the trial court, to hear it anew and determine all the issues involved, including those arising on the several bills, cross-bills, and answers in the nature of cross-bills, in conformity with the views expressed in the opinion of this court, and to take such further proceedings as may be appropriate and consistent with such opinion. All temporary injunctions in force at the time of the entry of the decrees from which appeals were taken shall be continued in force until otherwise ordered."

These directions were not a mere routine formula; they were specially framed to meet the situation after the original opinion had been handed down. Formal petitions were presented to the Supreme Court, wherein the facts of the situation were fully and clearly set forth, among them that the distributing companies were all in court in the present suit; that they were vitally interested in the 28-cent schedule; that their contentions were, and had been on the trial, that said schedule was confiscatory as to their property; that at least one of the distributing companies had upon the trial filed its answer in the nature of a cross-bill against the Public Utilities Commission of Kansas, alleging the invalidity and confiscatory character of the 28-cent rate order, and demanding relief against the Public Utilities Commission; that inasmuch as the Supreme Court had now held that the receivers of the Kansas Natural Gas Company were not in position to complain of the 28-cent schedule, the other distributing companies desired to interpose similar pleadings, and to try out the issue of the confiscatory character of the 28-cent rate order on their own behalf.

Any doubts which may have been entertained at one time by this court as to its power to allow a hearing to the distributing companies touching the confiscatory character of the 28-cent rate order, without express permission of the Supreme Court, have been effectually removed by the directions of that court above quoted. Not merely permission has been granted, but explicit directions given to proceed to such hearing. Those directions have become the law of the case. That the conclusion was eminently wise cannot be doubted; and I may add, further, that it would be a reproach to modern equity procedure if such conclusion could not have been reached.

[3, 4] As to the 30-day period provided in the Kansas statute above cited, it is sufficient to say that the provision in question has been held by the Supreme Court of Kansas not to be a statute of limitation. Ætna Ins. Co. v. Lewis, 92 Kan. 1012, 142 Pac. 954. See, also, Emporia Telephone Co. v. Public Utilities Commission, 97 Kan. 139, 154 Pac. 262. And even if said provision were in the nature of a statute of limitation, nevertheless a court of equity might still entertain a suit of this character even after the statutory period. Emporia Case, supra. See, also, Prentiss v. Atlantic Coast Line, 211 U. S. 210, 232, 29 Sup. Ct. 67, 53 L. Ed. 150.

Turning to the merits: It is shown by the evidence that the following distributing companies, amongst others, were supplied with gas by the receiver of the Kansas Natural Gas Company at the time of the making of the 28-cent rate order, and thereafter while such schedule was in force, and the facts established by the evidence in relation to said distributing companies and their experience under the 28-cent schedule were as follows:

The Consumers' Light, Heat & Power Company, under Treleaven, as receiver, was operating in Topeka, Kan., with approximately 110 miles of mains, 11,000 meters, and a plant valued at in round numbers $1,700,000. The assessed valuation of the plant for taxation purposes for 1916 was $1,370,000.

Total receipts from January to September, 1916, under the 28-cent rate		$190,968.00
Paid receiver of Kansas Natural Gas Company for gas		124,076.00
Balance		$ 66,892.00
Operating expenses	$34,935.00	
Depreciation	15,000.00	
Taxes and insurance	20,563.00	
Total		$70,498.00

Leaving a deficit, without providing any sum for interest or dividends.

The Atchison Railway, Light & Power Company, operating in Atchison, with 2,400 meters and a valuation of in round numbers of $379,000, received an—

Income from the sale of gas, from January to September, 1916		$ 46,721.00
Paid receiver for gas		31,151.00
Balance		$ 15,570.00
Operating expenses	$9,075.00	
Taxes	1,932.00	
Depreciation	4,454.00	
Total		$ 15,461.00
Leaving a net of		$ 109.00

—with which to pay interest and dividends.

The Wyandotte County Gas Company, operating in Kansas City, Kan., with 188 miles of mains, approximately 17,000 meters, having a plant valuation of approximately $1,900,000, had a—

Gross income during the year 1916 (the whole year being placed upon a 28-cent rate calculation)		$402,635.00
Paid the receiver of the Kansas Natural Gas Company for gas		251,647.00
Balance		$150,988.00
Operating expenses	$79,212.00	
Taxes	36,469.00	
Total		$115,681.00
Balance		$ 35,307.00

If from this is taken depreciation of 2 per cent. on depreciable property, amounting to $35,000, balance would be $307, with which to pay interest and dividends.

The Citizens' Light, Heat & Power Company, operating in Lawrence, Kan., with 57 miles of mains, 3,400 meters, and a plant valuation of $300,000 to $350,000—

Received during the year 1916 (the whole year being reduced to 28-cent basis)		$133,095.00
Paid the receiver of the Kansas Natural Gas Company		88,730.00
Balance		$ 44,365.00
Operating expenses	$11,671.00	
Taxes	2,122.00	
Payment to city of 2 per cent	2,661.00	
Total		$16,454.00
		$ 27,911.00
Depreciation reserve		$ 9,353.00

Leaving a net balance of approximately $18,500, which would be equivalent to a return on the valuation of approximately 5.3 per cent.

Leavenworth Light, Heat & Power Company, of Leavenworth, Kan., having a plant valuation in round numbers of $300,000, and 3,200 consumers, had a net income for the year 1916 (computing the whole year on the 28-cent basis) of $15,600, with nothing deducted for depreciation and renewal.

The 28-cent rate order was, of course, not binding upon the distributing companies of Missouri, those companies being under the jurisdiction of the Public Service Commission of Missouri. At the time of the entry of the 28-cent order by the Public Utilities Commission of Kansas, certain of the distributing companies of Missouri were operating under rates fixed by city ordinances. This was notably the case in Kansas City, Mo. The experience of the Kansas City Gas Company, with a rate for gas not far from 28 cents during 1916 and with subsequent rates during the succeeding years, is of great probative value. The average rate under the ordinance of Kansas City, Mo., for 1916, was 27½ cents; from January to September, 1917, 30 cents. On July 31, 1917, this court entered an order, known as the 60-cent rate order, which became effective from and after the meter readings made September 1–10, 1917. This 60-cent schedule remained in force until the order of this court known as the 80-cent rate order, entered November 13, 1918, and going into effect from and after meter readings made about November 20, 1918. These 60-cent and 80-cent schedules, with the orders of the court, were filed by the Kansas City Gas Company with the Public Service Commission of Missouri in substantial compliance with the Missouri statute providing for the filing of the schedule of rates by public utilities with said commission. Those schedules became effective over the whole system, whether in Kansas or Missouri. The results of operations in Kansas City, Mo., under the several rates, are shown in the following table:

Exhibit No. 514.

Kansas City Gas Company Revenues.

	1916		1917		1918		1919	
Revenues:								
Sale of gas with penalties and minimum bills		$1,487,331.64		$1,330,625.44		$1,756,313.20		$2,622,680.28
Operating expenses:								
Payments to the receiver	$927,409.91		$808,955.04		$997,974.05		$1,194,388.14	
Other operating, expenses	368,588.01		439,061.19		485,988.18		664,958.44	
Taxes	124,636.55	$1,420,624.47	123,109.22	$1,371,125.46	141.040.26,	$1,625,002.49	177,526.07	$2,036,872.65
Net profit on operating without depreciation reserve		$ 66,697.17	(red)	$ 40,500.01		$ 131,310.71		$ 585,807.63
Nonoperating revenues		78,100.42		69,899.87		65,350.07		$ 85,485.83
		$ 144,797.59		$ 29,399.86		$ 196,660.07		$ 671,293.46
Depreciation reserve—2 per cent. on depreciable property		$ 130,000.00		$ 130,000.00		$ 130,000.00		$ 130,000.00
Left for interest and profits		$ 14,797.59	(red)	$ 100,600.14		$ 66,660.78		$ 541,293.46
Eight per cent. on $9,556,500 (value of property)		$ 764,520.00		$ 764,520.00		$ 764,520.00		$ 764,520.00
Deficit	(red)	$ 749,722.41	(red)	$ 865,120.11	(red)	$ 697,859.22	(red)	$ 183,226.54
	Gas was sold in 1916 at 27c until November 19, when rate was made 30c; average price was 27.5c for year.		Gas was sold in 1917 at 30c per M. from January to September meter readings, then balance of year 60c. Average price for year was 37.51c per M.		Gas was sold in 1918 for 60c, paying receiver 57½ per cent. of receipts up to middle of December, then 80c rate went into effect, receiver getting 40 per cent. of receipts.		Gas sold all year in 1919 at 80c per M. 40 per cent. paid to receiver until August 25; after that 28c at city gates according to accounts. Actual payments, however, have been made on 40 per cent. basis, so that on a 40 per cent. basis there was $812,477.48 left for depreciation, interest and profits, compared with $671,293.46. or $141,184.02 more than shown above, leaving a deficit of $42,042.52.	

It is plainly apparent that the old ordinance rates in Kansas City were noncompensatory, and that the rates charged under the orders of this court were not excessive or unreasonable, and were not even sufficient to pay a fair rate of return upon the full value of the property in public service. The evidence also shows that the other distributing companies above mentioned experienced similar results under the rates authorized by the court. The distributing companies above mentioned during 1916 distributed more than 60 per cent. of the total gas furnished for domestic use by the receiver of the Kansas Natural Gas Company to all consumers.

It is not necessary to review in detail the results of the operations by the other distributing companies under the 28-cent schedule and subsequent schedules authorized by the court. The evidence has, however, been examined and considered, and as to all of them, with few exceptions, it leads to the same conclusions. Evidence was introduced at the hearing on behalf of the following distributing companies: The Ft. Scott & Nevada Light, Heat, Water & Power Company; Parsons Gas Company; Home Light, Heat & Power Company and Kansas Gas & Electric Company, operating in Pittsburg, Kan.; Johnson County Gas Company; Gardner Gas Company; Edgerton Gas Company; Wellsville Gas Company; Anderson County Light & Heat Company; Richmond & Princeton Gas Company; Baldwin Gas Company; Kansas Farmers' Gas Company; Ottawa Gas & Electric Company; Weir Gas Company; Tonganoxie Gas & Electric Company; American Gas Company, operating in the cities of Galena, Oswego, Altamont, Scammon, Cherokee, and Empire City, Kan.; St. Joseph Gas Company; Joplin Gas Company; Oronogo Gas Company; Carl Junction Gas Company; Weston Gas & Light Company. The distributing companies not offering evidence represented less than 8 per cent. of the meters in service in 1916.

Evidence on the part of the distributing companies touching going value and certain other material elements has been largely omitted, for the reason that the inquiry upon this trial has not been what was a reasonable and compensatory rate for the distributing companies at the time of the making of the order of December 10, 1915, but the inquiry has been whether the 28-cent schedule was confiscatory as to the distributing companies, and those companies have been content to rest their case with respect to that issue upon showing which would have been even stronger, had the omitted elements been included.

[5] Another ground of attack upon the 28-cent rate order alleged and insisted upon by many of the distributing companies is that, while the application by the receiver to the Public Utilities Commission of Kansas, in 1915, for higher rates, has been held by the Supreme Court to have been a petition "to permit higher charges to customers by local companies," and while the rates under the order of the commission of December 10, 1915, were "rates prescribed for the latter" (local companies), yet the order in question was not based upon any evidence as to the plant values of the distributing companies or the operating expenses or the cost to them of the distribution of the gas. Further-

more, that in case of some of the distributing companies no notice of the proceedings before the Public Utilities Commission was given them, that they did not appear in said proceedings, that they were not present at the hearings. The evidence supports many of these contentions, and especially those relating to the absence of evidence before the Public Utilities Commission as to the plant values of the distributing companies and their operating expenses. Whether this state of affairs rendered the order of December 10, 1915, absolutely void as to the distributing companies, may be open to question; but at least the presumption of reasonableness and of compensatory character which ordinarily attends such a rate order was, under the circumstances above mentioned, greatly lessened in force, if not entirely removed. It is but fair to add, however, that on the theory then adopted by the Public Utilities Commission and by most of the participants in the hearings which led up to the 28-cent rate order, the above described evidence as to the distributing companies was not of vital importance.

Several further questions raised by some of the distributing companies as to the validity of the order of December 10, 1915, are disposed of by the case of Public Utilities Commission of Kansas v. Wichita Railroad & Light Company, 268 Fed. 37, decided by the Circuit Court of Appeals of this circuit July 15, 1920.

[6] Upon the hearing at the retrial of this cause the receiver has introduced, in addition to his other evidence on the issues involved, substantially all the evidence introduced by him upon the former hearing as to the noncompensatory character of the 28-cent schedule. Objection has been raised to this latter class of evidence on the ground that the Supreme Court has decided that the receiver had no such interest in the 28-cent schedule as to enable him to maintain a suit to have that schedule adjudged confiscatory as to him. The evidence has been received, however, because in my judgment such evidence has a direct probative value in determining the issue whether the 28-cent schedule was confiscatory as to the distributing companies. Under the practice in vogue two-thirds of the collections under the 28-cent rate went to the receiver and one-third to the distributing companies. In determining whether the rates prescribed for the latter were confiscatory, it is of importance to know whether the price these distributing companies paid for the gas which they distributed was or was not unreasonably high. Upon this latter inquiry the evidence offered by the receiver is admissible and of vital importance, unless admission be made by the Court of Industrial Relations that the moneys paid by the distributing companies to the receiver of the Kansas Natural Gas Company were reasonable items in the operating expenses of the distributing companies. Such admission has not been made upon the record, and the evidence therefore offered by the receiver has been considered. From such evidence it clearly appears that the amounts paid by the various distributing companies to the receiver (being the proportion of the 28-cent rate which it was assumed by the Public Utilities Commission would be paid to the receiver) were

noncompensatory to the receiver, and that there was no reasonable expectation or possibility that the distributing companies could obtain a reduction of said proportion of the 28-cent rate so paid to the receiver.

Upon the former trial, when it was assumed that the 28-cent schedule was prescribed for and intended to be binding upon the receiver of the Kansas Natural Gas Company, findings in detail were made to the effect that the 28-cent schedule was confiscatory of the property and business under the care of said receiver. Upon the present trial, in the light of the decision of the Supreme Court, such findings are neither necessary nor proper; but it is found that though the 28-cent rate schedule was not prescribed for the receiver, and was not binding upon him, yet that such schedule was put into effect by the receiver and the distributing companies with the same division of proceeds, and that said schedule was noncompensatory to the receiver. This conclusion is demonstrated by tabulated evidence, offered upon the former trial and again upon the present trial, showing the actual experience of the receiver during the period when the 28-cent schedule was in operation.

After a careful consideration of all the evidence, I have reached the following conclusions:

[7] That the rates in force on January 1, 1911, under section 30, chapter 238, Laws of Kansas 1911, for the sale of natural gas by the defendant distributing companies to consumers in Kansas, were on December 10, 1915, and still are, noncompensatory, unreasonably low, confiscatory, and violative of the Constitution of the United States.

That the proportional part of said rates being paid by said distributing companies to the receiver of the Kansas Natural Gas Company on January 1, 1911, and subsequent thereto, was noncompensatory to the receiver, and did not furnish the said receiver a fair and reasonable return upon the property in his charge used and useful in furnishing said gas to said distributing companies.

That the order of December 10, 1915, of the Public Utilities Commission of Kansas prescribing rates for the sale of natural gas by the defendant distributing companies to consumers of gas in Kansas, known as the 28-cent rate order, and the rates thereunder, were on said date, and still are, as to said distributing companies, noncompensatory, unreasonably low, confiscatory, and violative of the Constitution of the United States.

That the proportional part of the rates prescribed by the 28-cent rate order which was paid by said distributing companies to the receiver of the Kansas Natural Gas Company during the time said rate schedule was in force was noncompensatory to the receiver, and did not furnish the said receiver a fair and reasonable return upon the property in his charge and used and useful in furnishing said gas to said distributing companies.

That the rates authorized under the 60-cent rate order of this court, and adopted under injunctive compulsion of this court by the distributing companies in Kansas and Missouri, as well as the rates which the

60-cent rate order superseded (some fixed by ordinance and some by order of the state court of Montgomery county, Kan.), and the rates authorized under the 80-cent rate order of this court, superseding the 60-cent schedule, were all of them noncompensatory, both to the receiver and to the several distributing companies, both in Kansas and Missouri; no one of said rates affording a fair return upon the property used and useful in furnishing and distributing said gas.

That the preliminary injunction which issued out of this court heretofore and on the 1st day of August, 1916, restraining and enjoining the Public Utilities Commission of Kansas and its members and its attorney, and the Attorney General of the state of Kansas, from enforcing the statutory rates provided by section 30, chapter 238, Laws of Kansas 1911, and from enforcing the rates provided by the order of the Public Utilities Commission of Kansas of December 10, 1915, known as the 28-cent rate order, and from enforcing any of the penal provisions of the laws of Kansas for failure to maintain in effect such rates, or any of them, was properly, legally, and providently issued.

Since this suit was commenced and the preliminary injunction issued, there have been many developments bearing upon the issues involved. Errors of this court upon the former trial have been corrected upon appeal; the relationship of the various parties to the suit, the extent and limitations of their rights and powers, have been more accurately defined; above all else, changes in economic conditions surrounding the production and distribution of natural gas have caused changes in the attitude of the various parties toward each other, respectively, as to many of the issues in the cause. The receiver is no longer contending that he is conducting an interstate commerce business which extends to the burner tips of the consumers. The Court of Industrial Relations of Kansas is not contending that the 28-cent schedule under the order of December 10, 1915, is reasonable and compensatory under present conditions, nor is it threatening to enforce the same, or penalties under the statute law of Kansas for nonobservance.

The Public Service Commission of Missouri is not interfering or threatening to interfere with the receiver in fixing fair rates at the gates of the Missouri cities for gas sold to the distributing companies, nor is it threatening to enforce the old ordinance or franchise rates in said cities. Some of the distributing companies and some of the cities, defendants in this cause, both in Missouri and in Kansas, are abandoning the old supply contracts and the ordinance franchise contracts, either expressly or by tacit implication. While the case has not become moot, and while the issues whether the 28-cent schedule of December 10, 1915, was confiscatory as to the distributing companies, and whether the preliminary injunction was improvidently issued, are, for obvious reasons, still of vital importance, yet under present circumstances it is questionable whether it is necessary or advisable to decree a permanent injunction in the cause in favor of any of the parties to the suit as against any other party.

The form of the decree will, however, not be determined until

the remaining issues are disposed of. Meanwhile the court will retain jurisdiction of the parties and the issues, with a view to the entry of such further orders and such final decree as may be found necessary or advisable.

LANDON et al. v. COURT OF INDUSTRIAL RELATIONS OF STATE OF KANSAS et al.

(District Court, D. Kansas, First Division. November 17, 1920.)

No. 136–N.

1. **Receivers ⇐90—Not bound by contract to supply gas to distributors, unless accepted.**
   Where the orders appointing receivers for a natural gas supply company in no case approved of the contracts between the supply company and the distributing companies, and in some cases expressly withheld approval, those contracts are not binding on the receivers until accepted by them pursuant to the order of the court; it being unnecessary that they disavow them.

2. **Contracts ⇐10(1)—Monopolies ⇐17(2)—Contracts between supply company and distributors held void for illegality, or want of mutuality.**
   Contracts between a natural gas supply company and the several distributing companies for the supply of gas to the latter for their distribution, which contained provisions requiring the distributing companies to purchase gas only from the supply company, or made them its exclusive agents for the sale of gas in their several localities, which provisions were void under the Kansas anti-trust laws, are not binding upon the supply company, since the contracts, with those provisions omitted, lacked mutuality.

3. **Gas ⇐13(1)—Supply contracts held terminated by exhaustion of fields covered thereby.**
   Contracts for the supply of natural gas by a supply company to distributing companies, which were to continue for a stated term, unless the fields within the state from which the company obtained its supply became exhausted, are terminated when the fields referred to become practically exhausted, though the supply company, at greater expense, was able to procure a supply from wells in another state.

4. **Gas ⇐14(1)—Rate contracts are subject to legislative supervision and abrogation, unless right is clearly renounced.**
   The rate contracts of public utilities are subject to legislative supervision and abrogation, except where the renunciation of such right of the state is evidenced by the most clear and unequivocal terms, so that contracts fixing the rates to be paid by natural gas distributing companies to the supply company were abrogated by Laws Kan. 1911, c. 238, § 30, and by the orders of the Public Utilities Commission and of the Court of Industrial Relations of that state, establishing different rates.

Suit by John M. Landon and another, as receivers of the Kansas Natural Gas Company, against the Court of Industrial Relations of the State of Kansas and others. On hearing to determine whether the receivers or the Kansas Natural Gas Company are bound by contracts with the several defendant distributing companies. Decree ordered that the contracts were of no force and effect.

See, also, 269 Fed. 411.

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

Chester I. Long, of Wichita, Kan., John H. Atwood, of Kansas City, Mo., and Robert Stone, of Topeka, Kan., for John M. Landon, receiver.

T. S. Salathiel, of Independence, Kan., and Robert A. Brown, of St. Joseph, Mo., for Kansas Natural Gas Co.

John J. Jones, of Wichita, Kan., for George F. Sharitt, receiver.

Charles Blood Smith, of Topeka, Kan., for Fidelity Title & Trust Co.

Fred S. Jackson, of Topeka, Kan., for Public Utilities Commission of Kansas and its members.

J. W. Dana, of Kansas City, Mo., for Kansas City Gas Co., Wyandotte County Gas Co., and Citizens' Light, Heat & Power Co. of Lawrence.

James D. Lindsay, of Jefferson City, Mo., for Public Service Commission of Missouri.

C. A. Loomis, of Kansas City, Mo., for Jackson County Gas Co., Gardner Gas Co., Edgerton Gas Co., Wellsville Gas Co., Anderson County Light & Heat Co., Richmond & Princeton Gas Co., Baldwin Gas Co., Kansas Farmers' Gas Co., Ottawa Gas & Electric Co., Western Gas & Light Co., Wier Gas Co., and Parsons Gas Co.

T. F. Doran, of Topeka, Kan., for L. G. Treleaven, receiver.

Edward Sapp, of Galena, Kan., for Macon Gas Co.

W. E. Brown, of Atchison, Kan., for Atchison Ry., Light & Power Co.

Floyd Harper, of Leavenworth, Kan., for Leavenworth Light, Heat & Power Co.

H. J. Smith, of Kansas City, Kan., for Kansas City, Kan.

R. B. Caldwell, of Kansas City, Mo., for Kansas Gas & Light Co. and Home Light & Power Co.

E. W. Clausen, of Atchison, Kan., for city of Atchison.

B. F. Bowers, of Ottawa, Kan., for city of Ottawa.

L. V. Stigall and Charles L. Crowley, both of St. Joseph, Mo., for city of St. Joseph.

M. A. Fyke, of Kansas City, Mo., for Kansas City, Mo.

W. E. Ziegler, of Coffeyville, Kan., for Coffeyville Gas & Fuel Co.

H. H. Diechler, of Coffeyville, Kan., for city of Coffeyville.

T. M. Vrady, of Parsons, Kan., for city of Parsons.

George P. Hayden and H. O. Corwine, both of Topeka, Kan., for city of Topeka.

F. S. Jackson, of Topeka, Kan., for all Kansas cities not otherwise represented.

BOOTH, District Judge. Subsequent to the filing of the decision (August 7, 1920) upon the second trial of the issue relative to the 28-cent rate order of the Public Utilities Commission of Kansas, of December 10, 1915, this cause again came on for hearing upon the issues touching the validity and status of the so-called supply contracts, both as to the receiver and as to the Kansas Natural Gas Company.

The contracts in controversy, as set forth in plaintiff's amended and

supplemental bill, are as follows (they have been divided into groups, for convenience of court and counsel in discussing the same upon the trial):

A

Distributing Company.	City or Town.	Date Made.
1. Consumer's Light, Heat & Power Company (L. G. Treleaven, Receiver)	Topeka, Kansas	Jan. 5, 1905
2.	Oakland, Kansas	Oct. 3, 1906
3. American Gas Company	Altamont, Kansas	March 10, 1905
	Oswego, Kansas	March 10, 1905
	Columbus, Kansas	March 10, 1905
	Galena, Kansas	March 10, 1905
	Empire City, Kansas	March 10, 1905
	Scammon, Kansas	March 10, 1905
	Cherokee, Kansas	March 10, 1905
	And Supp. Agreement	July 31, 1905.
4. American Gas Company		
5. Citizens Light, Heat & Power Company	Lawrence, Kansas	Feb. 18, 1905
6. Home Light, Heat & Power Company (Kansas Gas & Electric Co., lessee)	Pittsburg, Kansas	Feb. 18, 1905
7. Union Gas & Traction Co., Weir Gas Company	Weir City, Kansas	Sept. 18, 1905
8. Baldwin Gas Company	Baldwin, Kansas	July 10, 1905
9. Anderson County Light & Heat Company	Colony, Kansas	Feb. 1, 1906
10.	Welda, Kansas	May 29, 1905
11. Richmond & Princeton Gas Company	Richmond, Kansas	May 29, 1905
12.	Princeton, Kansas	May 29, 1905
13. Johnson County Gas Co.	Merriam, Kansas	Feb. 1, 1906
	Shawnee, Kansas	Feb. 1, 1906
	Lenexa, Kansas	Feb. 1, 1906
14. Edgerton Gas Company	Edgerton, Kansas	May 29, 1905
	Wellsville, Kansas	
	LeLoup, Kansas	
15. Kansas Farmers Gas Co.	Rural (Douglas, Johnson and Franklin Counties)	Jan. 16, 1911
16. Leavenworth Light, Heat & Power Company	Leavenworth, Kansas	May 16, 1905
17. Ottawa Gas & Electric Co.	Ottawa, Kansas	Sept. 30, 1905
18. Tonganoxie Gas & Electric Co.	Tonganoxie, Kansas	Nov. 2, 1905
19. Atchison Railway, Light & Power Company	Atchison, Kansas	July 12, 1905
20. Coffeyville Gas & Fuel Company	Coffeyville, Kansas	August 14, 1905
21. Joplin Gas Company	Joplin, Mo.	Jan. 19, 1905
22. Weston Gas & Light Co.	Weston, Mo.	Feb. 1, 1906
23. Gardner Gas Company	Gardner, Kansas	June 27, 1905
24. Baxter Springs Ong. Co.	Thayer, Kansas	Nov. 1, 1901

B

25. Liberty Gas Company	Liberty, Kansas	Oct. 12, 1909
26. Olathe Gas Company	Olathe, Kansas	Nov. 30, 1908
27. Ft. Scott Gas & Electric Co., John C. Cannon, Receiver of Ft. Scott Gas & Electric Co.	Ft. Scott, Kansas	March 13, 1907

28. Ft. Scott & Nevada Light, Heat, Water & Power Co. (Central Gas Company)	Nevada, Missouri Moran, Kansas Bronson, Kansas Deerfield, Missouri	May 1, 1910
29. Ft. Scott & Nevada Light, Heat, Water & Power Co. (Central Gas Company)	Nevada, Missouri	Jan. 16, 1911
30. Carl Junction Gas Co.	Carl Junction, Mo.	Dec. 1, 1905
31. Oronogo Gas Company	Oronogo, Missouri	Dec. 1, 1905
C		
32. Wyandotte County Gas Company.	Kansas City, Kansas Rosedale, Kansas	Feb. 1, 1906 Feb. 1, 1906
33. Kansas City Gas Co.	Kansas City, Mo.	Nov. 16, 1906
34. Kansas City Gas Co.		Dec. 3, 1906
D		
35. St. Joseph Gas Co.	St. Joseph, Mo.	Aug. 30, 1905

To the foregoing list should be added a supplemental contract:

E		
36. Leavenworth Light, Heat & Power Company	Leavenworth, Kansas	Sept., 1912

—made after the judgment and order by the Supreme Court of Kansas, in the case of State of Kansas ex rel. Attorney General v. Kansas Natural Gas Company, No. 17977 (no written opinion filed), prohibiting the carrying out of certain provisions in the original contracts, as being in violation of the anti-trust laws of the state of Kansas.

There are two distinct questions to be considered as to these supply contracts: First, whether the contracts are valid and binding upon the receiver; second, whether they are binding upon the Natural Gas Company.

Taking up the first question, the following facts appear from the files, records and evidence introduced upon the trial:

The original receivers (predecessors of the present receiver) of the Kansas Natural Gas Company were appointed by this court in the case of John L. McKinney v. Kansas Natural Gas Company, No. 1351, Equity, on October 9, 1912. In the original order of appointment is found the following provision:

"Third. That upon the filing and approval of the said bonds, the said receivers (or each of them as fast as his respective bond is filed and approved) be and they are hereby authorized, empowered and directed to take immediate possession of all and singular the pipe lines, compressor stations, leases and other property above described or referred to, wherever the same may be situate or be found and, until the further order of this court, to continue the operation of the present pipe line system and natural gas business of the defendant company and every part or portion thereof, and to run, manage, conduct and operate such pipe lines and property as the defendant company holds, controls or operates under leases, contract arrangements or otherwise. All of which is to be done, until the further order of the court, as heretofore done, run or operated by the defendant company.

"But the court expressly reserves to itself the right to pass upon, approve, disapprove, disavow and cancel any and all leases, arrangements and contracts of every nature, kind and description, under or by virtue of which the

defendant company has been or is now operating any of its leased lines and property, or selling or furnishing any of its gas for distribution and sale, or buying and acquiring any gas for use and transportation through its operated lines; and no such leases, arrangement or contract shall be regarded as binding or taken by the receivers until expressly ordered by this court in these proceedings, and nothing herein contained shall be considered or taken as in any way accepting, approving, satisfying or adopting any such lease, arrangement or contract."

Pursuant to orders of this court, dated January 24, 1914, and September 22, 1914, the actual possession and management of the properties of the Kansas Natural Gas Company were turned over by the then sole receiver of this court to receivers theretofore appointed by a decree of the state court of Montgomery county, Kan., filed February 17, 1913, in the suit entitled State of Kansas v. Kansas Natural Gas Company et al., No. 13476. By that decree it was ordered that the distributing companies on the line of the Kansas Natural Gas Company in Kansas be made parties defendant, and it was further ordered, as to said distributing companies and touching said supply contracts, as follows:

"They and each of them are hereby enjoined and restrained from participating in any combination in restraint of trade in the buying, selling, transporting or distributing of natural gas and from shutting off or limiting their supply of gas and from advancing the price of gas or participating in any attempt to advance the price of gas to the consumers of gas within the state of Kansas, without the express order and permission of the Public Utilities Commission of the state of Kansas, or of this court, until the final disposition of this action or the further order of this court or the judge thereof.

"And it is further ordered that said parties, each and every of them, are enjoined and restrained from appearing in any other court for the determination of any matter in connection with their contracts with the defendant the Kansas Natural Gas Company, for the furnishing of a supply of gas or concerning any of the other matters involved in this action or affecting the corporate property, assets or liabilities of the Kansas Natural Gas Company."

In December, 1915, the present suit, 136–N, was commenced in this court by the receivers of the state court of Montgomery county pursuant to the direction of that court; and the enlarged federal court, sitting upon the hearing for a preliminary injunction, said in reference to the supply contracts (June 3, 1916):

"It has not been and is not necessary for this court as at present constituted to determine the validity of the city ordinances, the contracts between the cities and the distributing companies, the contracts between the distributing companies and the Natural Gas Company and the duties and obligations of the receiver under them in order to adjudicate the issues it was constituted to decide and for that reason no opinion is expressed or adjudication made concerning them."

On October 16, 1916, the receiver filed with the state court of Montgomery county, Kan., in case 13476, an application for instructions in reference to said supply contracts, and that court by its decision upon said application found as follows:

"Neither the receivers of this court, nor of the United States court, appointed for Kansas Natural, have ever adopted any of said contracts, nor have any of said receivers operated under them, but have continued to transport gas to said distributing companies under a method of dealing similar to that employed by the Kansas Natural."

And as a conclusion of law:

"That neither the receiver of this court, nor the receivers of the United States court have by their act or otherwise adopted any of the supply contracts with the various distributing companies."

And the court thereupon ordered as follows:

"It is therefore considered, adjudged and decreed that none of the distributing contracts aforesaid are binding upon, or effective against, said receiver, and that he should not, and is hereby forbidden to, deliver natural gas to any of said distributing companies under the distributing contracts formerly existing between the Kansas Natural Gas Company and said distributing companies, respectively; and he is hereby ordered to deliver natural gas to such of said distributing companies as will receive the same at the rates and prices and on the terms named in the schedule of rates and prices heretofore promulgated by said receiver to said distributing companies, respectively; and the acts of said receiver in promulgating said schedules are hereby approved.

"And this court, recognizing that its power does not extend beyond the state of Kansas, hereby directs said receiver to present to the United States District Court for the District of Kansas, First Division, the foregoing findings of fact and conclusions of law and this order, and to pray said federal court for such orders as will effectuate the law applicable to the Kansas Natural property in Missouri and Oklahoma, and thus bring the same in operative harmony with the Kansas Natural property in Kansas, to the end that the public may be served and said property preserved."

Pursuant to said last-mentioned order said receiver immediately, on the 17th of October, 1916, made application to this court, in case 1351, Equity, for instructions, and this court, in reference to said application, said:

"An order has been entered by the state court of Montgomery county, an administrative order, and an opinion rendered as to the binding force and effect of these supply contracts upon its receiver. That court has given certain directions to the receiver as to what he shall do, and how he shall dispose of gas and at what price. That order is an administrative order made by a court which has control of the administration and operation of the property, and that administrative order will be respected by this court, which appointed the same person ancillary receiver to the receiver of the state court.

"At this time, I do not think it is either necessary or advisable for this court to enter any order in regard to the administrative order which has been entered in the state court of Montgomery county, but this court will retain jurisdiction for such purpose if it becomes necessary."

Some months later, upon the trial of case 136–N, in this court, in passing upon a motion to strike out certain parts of the amended and supplemental answer of Treleaven, as receiver, on the ground that it attempted to inject new issues into the case, this court said:

"Now, as to the other issues, namely, the validity of the contracts made originally by the Kansas Natural Gas Company, or its predecessors, with the distributing companies, and their status both as between the original parties and as to the receiver: * * * It was held by the state court of Montgomery county some time ago that the receivers of that court had never adopted those contracts, and the order of this court appointing the original federal receivers provided expressly that those contracts should not become binding upon the receivers of this court, except by the express order of this court. I think, therefore, it must be taken as settled at this time, at least in this court, that those contracts are not binding upon the receiver."

On June 2, 1917, the district court of Montgomery county approved the report of its receiver, and directed him to turn over all the properties of the Kansas Natural Gas Company in his possession or under his control to this court, and this court thereupon, by order of June 5, 1917, directed its receiver to accept said properties, and ordered:

"That all administrative orders heretofore made by the district court of Montgomery county, Kan., relative to the management and operation of the properties of the Kansas Natural Gas Company by said receivers, and now in force, are hereby adopted and continued in full force and effect until the further order of this court."

No order has ever been made either by the state court of Montgomery county, or by this court, directing or authorizing the adoption of these supply contracts by the receiver, nor has the receiver of either court ever assumed to adopt them, or made application to either court to have them adopted. Such in brief is the history of the supply contracts during the period of the receivership of the Kansas Natural Gas Company in the state court of Montgomery county, Kan., and in this court, so far as relates to the adoption of said contracts by said receivers.

[1] The law applicable to such a state of facts is well settled. In such cases it is not the law that a contract shall be binding upon the receiver until it is disavowed by him, but the law is that it is not binding upon the receiver until it is accepted by him, pursuant to the order of court. Kansas City Pipe Line Co. v. Fidelity Co., 217 Fed. 187, 133 C. C. A. 181; Kansas City Southern Ry. v. Lusk, 224 Fed. 704, 140 C. C. A. 244; Peabody Coal Co. v. Nixon, 226 Fed. 20, 140 C. C. A. 446; Dickinson v. Willis (D. C.) 239 Fed. 171. My conclusion is that the supply contracts are not, and never have been, binding upon the receivers, either of the state court or federal court.

[2] Second. As to the status of the supply contracts, with reference to the Kansas Natural Gas Company, many of the contracts made with the distributing companies in Kansas contained clauses providing for an exclusive sale to the distributing company within its territory, or for an exclusive purchase by said distributing company from the Kansas Natural Gas Company, or for an indirect regulation or control by the Kansas Natural Gas Company of prices to the ultimate consumer, and oftentimes more than one of these provisions were contained in the contract. The following provision from one of the supply contracts may be taken as an example:

"While this agreement shall remain in force, the parties of the second part shall purchase of the party of the first part, all the gas necessary to supply the said city of Pittsburg, and its inhabitants, except that, in the event of the party of the first part failing to supply gas as herein provided, said party of the second part may secure gas from other sources, until the first party shall supply gas as herein provided. The party of the first part shall not supply gas to any other firm, corporation or individual, which may be a competitor of the said second party in selling and distributing gas in the said city of Pittsburg."

These contracts were attacked by the state of Kansas in an ouster proceeding in the Supreme Court of the state of Kansas, entitled "State of Kansas v. Kansas Natural Gas Company, No. 17977" (no written

opinion filed), the ground of said attack being that certain provisions of the contracts were in violation of the anti-trust laws of the state of Kansas. On April 30, 1912, an order was entered in said case by the Supreme Court of the state of Kansas, prohibiting the Kansas Natural Gas Company from carrying out such contracts, and the Kansas Natural Gas Company was ordered to remake and rewrite all of its contracts containing the objectionable clauses. Steps were taken by the Kansas Natural Gas Company to carry out this order, but the only contract in fact remade was one with the Leavenworth Light, Heat & Power Company, in September, 1912. The probable reason for lack of further action was the commencement of the receivership proceedings in both the state and federal courts, and the entry by this court of its order of October 9, 1912, in reference to said contracts, as above set forth, and the entry by the state court of the decree of February 17, 1913.

The new contract with the Leavenworth Company eliminated the exclusive purchase and sale features of the old contract; but the resulting combination contract, being made up of the remaining provisions of the old contract plus provisions of the new contract, was void for lack of mutuality. See Hutchinson Gas, etc., Co. v. Wichita Natural Gas Co. (Circuit Court of Appeals, Eighth Circuit, August 17, 1920) 267 Fed. 35.

It would seem to follow that all of the other old supply contracts in Kansas containing the objectionable clauses above mentioned were unenforceable and void (1) because they violated the anti-trust laws of Kansas (if objectionable clauses be considered as remaining a part of the same); or (2) because they lacked mutuality (if the objectionable clauses be considered as eliminated from them). This conclusion applies to the Kansas contracts in group A.

Certain others of the supply contracts contained clauses substantially as follows:

"The Kansas Company hereby gives and grants unto the agent the sole and exclusive agency to distribute, market and sell its natural gas for domestic and manufacturing purposes within the limits of said city, and said agency shall run and continue until the expiration of the life of this contract, unless sooner determined by mutual consent of the parties hereto or by breach of some of the promises, covenants and agreements of the agent herein set forth and recited; the full and faithful performance of such promises, covenants and agreements being the condition upon which this exclusive agency is granted and is to be exercised, unavoidable casualties excepted. * * *

"In consideration of the exclusive agency for the sale of its gas within the said city limits so granted by the Kansas Company to the agent, the agent covenants and agrees to and with the Kansas Company that it will not during the term of this agency handle, distribute or sell within the said city limits the natural gas of persons, partnerships or corporations other than that of the Kansas Company."

These clauses are subject to the same objections as the clauses contained in the contracts in group A, above considered, and the contracts containing these clauses came within the order of the Supreme Court of Kansas of April 30, 1912, in No. 17977.

What has been said above relative to attempted elimination of the objectionable clauses applies here also; indeed, the clauses now under

consideration are practically identical with the clauses of the contract considered in the case of Hutchinson Gas, etc., Co. v. Wichita Natural Gas Co., supra.

The conclusion as to the contracts in group A is therefore also reached as to those contracts in group B, which were made with distributing companies in the state of Kansas.

[3] All of the original contracts, with one exception, contained a clause or clauses in substance as follows:

"Whereas, the gas company is the owner of a large acreage of gas leases, with a number of gas wells thereon, all situated in the gas belt of Kansas, and desires a market for its product. * * *

"Now, this indenture witnesseth that the said gas company, in consideration of the payments, covenants and agreements hereinafter contained, on the part of the second party to be paid, kept and performed, agrees to lay and complete, or cause to be laid and completed, on or before March 1, 1906, unavoidable delays excepted, a pipe line for conveying natural gas from the said gas field of Kansas to a point at the limits of each of said towns. * * *

"However, as the production of gas from wells and the conveying of it over long distances is subject to accidents, interruptions and failures, the party of the first part does not by this contract undertake to furnish the parties of the second part with an uninterrupted supply of gas for the period named herein but only to furnish such a supply for such a period of time as the wells and pipe lines supplying gas to the parties of the second part (distributing companies) are capable of supplying, and in case of its inability to fully supply all of the cities and towns with which it is connected the gas supplied under this contract shall at all times be a pro rata share of the total deliveries of gas. And it is expressly understood and agreed by the parties of the second part that the party of the first part shall not be liable for any loss, damage or injury to the parties of the second part that may result directly or indirectly from such shortage or interruption, but said party of the first part agrees to use diligence to supply said parties of the second part with a constant and adequate supply of merchantable gas for all consumers that the parties of the second part may secure within the corporate limits of the city of Lawrence, Kansas, as the said limits now exist or may hereafter be established by law."

At the time said supply contracts were entered into the Kansas Natural Gas Company owned gas-producing properties in the state of Kansas, principally in the counties of Allen, Wilson, and Neosho; also certain gas-producing fields in Montgomery county, Kan. It does not appear from any of the contracts, with one exception, No. 28, that it was contemplated to acquire fields in Oklahoma, or to purchase gas there for the purpose of sale. There is no provision in the said contracts requiring the Kansas Natural Gas Company to furnish natural gas under said contracts absolutely and without reference to where it might be possible to obtain the supply. The fields within the contemplation of the parties, as set out in said contracts, became subsequently exhausted, on or about 1912, and it became physically impossible to furnish gas from the field, within the contemplation of the parties at the time such supply contracts were made.

While the properties of the Kansas Natural Gas Company have been operated by receivers under the direction of the courts, extensions from time to time have been made into more and more distant fields. Such extensions, however, were not made because of any provisions contained in said contracts, nor because such extensions were in the contemplation of the original parties to said supply contracts; but

such extensions have been made for the purpose of securing gas, if possible, for the consumers, and for the purpose of preventing the destruction of the value of the property in the hands of the receivers. In the case of Hutchinson, etc., Co. v. Wichita, etc., Co., supra, involving a contract containing similar provisions, the court in its opinion said:

"The contract of the Wichita Company then was that it would furnish gas as long as the Kansas fields and wells and the pipe line were capable of supplying it. By the terms of this agreement their capability to furnish this supply was a condition precedent to the existence of the Wichita Company's obligation to furnish gas at every moment after the original contract was made. If at any time that capability existed, at that time the obligation existed. If at any time the capability did not exist, at that time the obligation did not exist."

The conclusion, therefore, is that the obligations of the Kansas Natural Gas Company under said supply contracts have been discharged and terminated by reason of the failure of gas, as provided for in said supply contracts. This conclusion applies to all of the contracts in controversy excepting No. 28.

The consideration running to the Kansas Natural Gas Company in the supply contracts was dependent upon the rates to be charged to the ultimate consumers. Those rates were therefore a primary inducing cause to the making of the supply contracts, and a nullification of the rates fixed for the ultimate consumer would necessarily affect the obligation of the supply contracts. In some instances these rates for the ultimate consumer were fixed by franchise ordinances, which were claimed to be contracts between the distributing companies and the cities which they served. So far as such contract rates were attempted to be made by cities of the first class in Kansas, they were ultra vires and void. State ex rel. v. Wyandotte County Gas Co., 88 Kan. 165, 127 Pac. 639; Id., 231 U. S. 622, 34 Sup. Ct. 226, 58 L. Ed. 404. These decisions affected unfavorably the supply contracts between the Kansas Natural Gas Company and distributing companies operating in cities of the first class in Kansas and included Nos. 1, 6, 16, 19, 20, 27, and 32 in the above list.

Though cities of the second and third classes retained power to make contract ordinance rates, nevertheless, by chapter 238, Laws of 1911, Kansas, all such powers in those cities were superseded by or made subordinate to the power lodged by said statute in the Public Utilities Commission of Kansas, and since transferred to the Court of Industrial Relations.

[4] That rate contracts of public utilities are subject to legislative supervision and abrogation, except where the renunciation of such right by the state is evidenced by most clear and unequivocal terms, is well settled. State ex rel. v. Wyandotte Co. Gas Co., 88 Kans. 165, 127 Pac. 629, and 231 U. S. 622, 34 Sup. Ct. 226, 58 L. Ed. 404; Freeport Water Co. v. Freeport, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; Mil. Ry. v. Wis. Com., 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 125; City of Pawhuska v. Pawhuska Oil & Gas Co., 250 U. S. 394, 39 Sup. Ct. 526, 63 L. Ed. 105; Producers' Trans. Co. v. R. R. Com., 251 U. S. 228, 40 Sup. Ct. 131, 64 L. Ed. 239; Union Dry Goods Co. v.

Georgia Corp., 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309. Pub. Util. Com. v. Wichita Ry. & Light Co. (C. C. A. 8th Cir., July 15, 1920), 268 Fed. 37; S. W. Mo. Ry. Co. v. Pub. Serv. Com., 219 S. W. 380; Kansas City v. Pub. Serv. Com., 276 Mo. 539, 210 S. W. 381; Ottumwa Ry. Light Co. v. City of Ottumwa (Iowa) 178 N. W. 905.

In view of the foregoing authorities it follows from the evidence in this case that the supply contracts in Kansas have all been superseded and rendered of no force by section 30, chapter 238, Laws 1911 of Kansas, and by orders of the Public Utilities Commission of Kansas and of the Court of Industrial Relations, notably by the orders of said Public Utilities Commission dated July —, 1913, and December 10, 1915, and by the order of said Court of Industrial Relations dated August 18, 1920; and the supply contracts with the Kansas City Gas Company in Missouri, and with the Joplin Gas Company, have likewise been rendered not binding by the orders of the Public Service Commission of that state, dated June 14, 1920, and September 23, 1920.

The summary of the foregoing conclusions is that none of the supply contracts above specified are binding either upon the receiver or upon the Kansas Natural Gas Company. A decree may be prepared embodying the final conclusion reached in the decision of August 7, 1920, relative to the 28-cent rate order of December 10, 1915, and also embodying the final conclusion reached in this decision relative to the supply contracts, and granting injunctive relief against enforcement of the latter.

The issues raised by the supplemental pleadings of several of the distributing companies relative to the order of the Court of Industrial Relations, dated August 18, 1920, are so distinct from the other issues in the case, and so little related thereto, that they will be reserved for separate decision and decree.

LANDON et al. v. COURT OF INDUSTRIAL RELATIONS OF STATE OF KANSAS et al.

(District Court, D. Kansas, First Division. December 24, 1920.)

No. 136–N.

1. **Equity ⟸296—Supplemental bill held proper to determine reasonableness of rates established pending suit.**

Where, pending a suit by the receivers of a natural gas supply company against the Court of Industrial Relations of a state and the several gas distributing companies and municipalities served by them, the Court of Industrial Relations had entered a new order establishing a different rate, the court can entertain in the same proceeding a supplemental bill by the defendant distributing companies to determine the reasonableness of the new rate.

2. **Gas ⟸14(1)—Industrial Relations Court can fix standard of natural gas leakage.**

Under Laws Kan. 1911, c. 238, §§ 10, 13, 14, 16, 22, 41, empowering the Public Utilities Commission to fix reasonable rates for public utilities and to require reasonably efficient service, and sections 2, 4, 6, and 26 of the act creating the Kansas Court of Industrial Relations, giving the court the

powers of the Public Utilities Commission and additional powers, the Court of Industrial Relations has power to fix a standard for leakage in the plants of companies distributing natural gas.

3. Gas ⟸14(1)—**Fixing leakage standard for natural gas not an invasion of companies' rights.**
An order of the Kansas Court of Industrial Relations fixing the standard for leakage in the plants of natural gas distributing companies is a proper exercise of the power of regulation of such companies, not an invasion of their right to manage their own affairs, which right is subject to such regulation.

4. Gas ⟸14(1)—**Companies can be required to maintain higher standard against leakage than is to their interest.**
Since the prevention of leakage of natural gas is a matter of conservation in the interest of the consumers, rather than a matter affecting the distributing companies, the Court of Industrial Relations can require the companies to maintain a more efficient standard for leakage in their plants than it is to the financial interest of the companies to maintain.

5. Public service commissions ⟸7—**Efficiency of plant is prerequisite for reasonable rate.**
The efficiency of the plant of public utility is a prerequisite to a demand for a reasonable rate for its services.

6. Public service commissions ⟸7—**Deferred maintenance not compensated by increased rates.**
As a general rule, deferred maintenance of a public utility should not be paid for by increasing rates to consumers, but should be borne by the utility which is responsible for the expense.

7. Gas ⟸14(1)—**Expense of bringing plant to new efficiency standard compensated by higher rates.**
Where a Court of Industrial Relations required gas distributing companies to bring their plants to a greater standard of efficiency against leakage than had been required in the past, the cost of bringing the plants to that standard is not a matter of deferred maintenance, but can be compensated, in so far as not due to faults of the companies, by increased rates.

8. Gas ⟸14(1)—**Companies can be penalized in rates for diversion of maintenance funds.**
Where a public utility wrongfully diverted funds allowed it for maintenance to other uses, it may be penalized for such diversion by reduction of rates below the amount reasonably necessary to bring the plant up to an efficient standard and to pay reasonable return on investment.

9. Gas ⟸14(1)—**Rate allowed by Court of Industrial Relations held confiscatory.**
The 80-cent rate, which the Kansas Court of Industrial Relations permitted companies distributing natural gas to charge, *held* unreasonable, unjust, and confiscatory, where the evidence showed that the rate would not produce a fair return on the valuation found by the commission, without any allowance for the expense of bringing the distributing plants to a new standard of efficiency required by the same order, and did not show that the rate would be reasonable after the plants were brought to the new standard.

10. Public service commissions ⟸7—**Court, in determining reasonableness of rate, will not fix valuation.**
It is not within the province of the court, in passing on the reasonableness of a rate allowed by a state Court of Industrial Relations, to fix the valuation of the property employed in the public service.

11. Public service commissions ⟸7—**Prevailing price should be considered in valuation.**
The original cost of the plant of a public utility, less theoretical depreciation, is not approved as the controlling basis for determining the

valuation of property employed in the public service, but the cost of reproduction new at prevailing prices should be carefully considered, with other elements, in reaching a reasonable valuation.

12. **Public service commissions ⇐7—Depreciation should be actually determined, not theoretically estimated.**
Depreciation in a public utility plant should not be measured by a theoretical yardstick, but should be determined by a careful consideration of the actual facts touching the physical condition of each plant under consideration.

13. **Gas ⇐14(1)—Funds for repairs to increase efficiency cannot be taken from depreciation reserve.**
A gas company, which is ordered to bring its plant to an increased standard of efficiency, cannot be required to take the funds for that purpose from its accumulated depreciation reserve, which would be in effect confiscatory of the property.

14. **Gas ⇐14(1)—Funds for repairs to increase efficiency should not be raised by borrowing.**
The funds necessary for repairs to bring a gas distributing plant to the new standard of efficiency required by the Court of Industrial Relations should not be raised by borrowing, which would add to the capital valuation of the plant, on which the company would be entitled to reasonable returns during its future operations.

15. **Gas ⇐14(1)—Funds for repairs to increase efficiency can only be taken from companies to extent of deficiency of proper funds.**
Where a gas-distributing plant was deficiently constructed in the first place, or was not kept up to the recognized standard of efficiency, and earnings which might have been devoted to that purpose were diverted, the distributing companies can be penalized to that extent in raising the funds to bring their plants to a new standard of efficiency; but it would be unreasonable, within Laws Kan. 1911, c. 238, § 21, to go beyond that and throw upon them the whole burden of bringing their plants up to the new standard.

16. **Gas ⇐14(1)—Consumers can be reasonably required to pay increased rate for reducing leakage.**
Since the reduction of leakage in a natural gas distributing plant is a matter of conservation in the interest of the consumers, who will be required to use other fuels when the supply of natural gas is exhausted, it is not unreasonable to include in the rate they must pay a charge for bringing the plants to a higher standard of efficiency, and thereby reducing the leakage, so long as natural gas under such rates is still cheaper than any other available fuel.

In Equity. Suit by John M. Landon and another, as receivers of the Kansas Natural Gas Company, against the Court of Industrial Relations of the State of Kansas and others. On hearing on supplemental answers in the nature of applications by the defendant gas distributing companies for a decree setting aside the order of the Court of Industrial Relations, denying the petitions of the distributing companies for an increase in rates, and establishing a standard of leakage. Order held unreasonable and confiscatory, in so far as it denied the increased rates, and the enforcement of that portion enjoined.

See, also, 245 Fed. 950; 269 Fed. 411, 423.

Chester I. Long, of Wichita, Kan., John H. Atwood, of Kansas City, Mo., and Robert Stone, of Topeka, Kan., for John M. Landon, receiver.

T. S. Salathiel, of Independence, Kan., and Robert A. Brown, of St. Joseph, Mo., for Kansas Natural Gas Co.

John J. Jones, of Wichita, Kan., for George F. Sharitt, receiver.

Charles Blood Smith, of Topeka, Kan., for Fidelity Title & Trust Co.

Fred S. Jackson, of Topeka, Kan., for Public Utilities Commission of Kansas and its members.

J. W. Dana, of Kansas City, Mo., for Kansas City Gas Co., Wyandotte County Gas Co., and Citizens' Light, Heat & Power Co. of Lawrence.

James D. Lindsay, of Jefferson City, Mo., for Public Service Commission of Missouri.

C. A. Loomis, of Kansas City, Mo., for Jackson County Gas Co., Gardner Gas Co., Edgerton Gas Co., Wellsville Gas Co., Anderson County Light & Heat Co., Richmond & Princeton Gas Co., Baldwin Gas Co., Kansas Farmers' Gas Co., Ottawa Gas & Electric Co., Western Gas & Light Co., Wier Gas Co., and Parsons Gas Co.

T. F. Doran, of Topeka, Kan., for L. G. Treleaven, receiver.

Edward Sapp, of Galena, Kan., for Macon Gas Co.

W. E. Brown, of Atchison, Kan., for Atchison Ry. Light & Power Co.

Floyd Harper, of Leavenworth, Kan., for Leavenworth Light, Heat & Power Co.

H. J. Smith, of Kansas City, Kan., for Kansas City, Kan.

R. B. Caldwell, of Kansas City, Mo., for Kansas Gas & Light Co. and Home Light & Power Co.

E. W. Clausen, of Atchison, Kan., for city of Atchison.

B. F. Bowers, of Ottawa, Kan., for city of Ottawa.

L. V. Stigall and Charles L. Crowley, both of St. Joseph, Mo., for city of St. Joseph.

M. A. Fyke, of Kansas City, Mo., for Kansas City, Mo.

W. E. Ziegler, of Coffeyville, Kan., for Coffeyville Gas & Fuel Co.

H. H. Diechler, of Coffeyville, Kan., for city of Coffeyville.

T. M. Vrady, of Parsons, Kan., for city of Parsons.

George P. Hayden and H. O. Corwine, both of Topeka, Kan., for city of Topeka.

F. S. Jackson, of Topeka, Kan., for all Kansas cities not otherwise represented.

BOOTH, District Judge. The above cause comes on for hearing upon the supplemental answers in the nature of applications by several distributing companies on the line of the receiver of the Kansas Natural Gas Company for a decree setting aside the order made by the Court of Industrial Relations, dated August 18, 1920, which denied the petitions of said distributing companies for leave to increase the present 80-cent rate for natural gas, and ordered them to reduce the leakage in their respective systems to a standard of 200,000 cubic feet per annum per mile of 3-inch main equivalent. Any objection that might be raised to proceeding by supplemental answer in the pending suit, instead of by original bills in separate suits, as well as all objection to time for pleadings and manner of bringing the matter on for hearing, have been expressly waived by written stipulation between the parties.

[1] When closely analyzed, the controversies involved are found to

be simply a new phase of one of the controversies involved from the first in suit 136–N—a new phase arising subsequent to the commencement of that suit, but during the pendency thereof. In view of the foregoing facts, I am of opinion that the jurisdiction of this court has been properly invoked in the above-entitled suit.

In view of the decision of the Supreme Court in this suit (249 U. S. 236, 39 Sup. Ct. 268, 63 L. Ed. 577), it was deemed necessary for the receiver of the Kansas Natural Gas Company to change the method of charging for gas furnished by him to the several distributing companies on his line from a proportional part of the consumer's price, then 80 cents, to a price fixed at the city gates of the respective cities served by the distributing companies. The change was made by the receiver, under the direction of this court; a 35-cent city gate rate order was made July 14, 1919. That order was suspended before going into effect, but was finally reinstated by order dated January 20, 1920, effective March 25, 1920. The rate to be charged by the distributing companies to the consumer became, consequently, a matter for determination by the Court of Industrial Relations of Kansas and the Public Service Commission of Missouri and the distributing companies themselves in their respective jurisdictions.

Various steps were taken by the several distributing companies. In Ottawa, Kan., the distributing company and the city, with the consent of the Court of Industrial Relations, entered into a contract with the receiver inaugurating in that city the so-called three-part rate, consisting of a customer charge, a charge based upon maximum hourly demand, and a charge for gas actually delivered to the consumer. July 1, 1920, in Kansas City, Mo., with the approval of the Public Service Commission of that state, a schedule was put in having a gas charge of 80 cents, and a service charge of 50 cents minimum, and ranging upwards, dependent on the size of the meter.

Meanwhile, on its own initiative, the Court of Industrial Relations began an "investigation of gas rates of the distributing companies supplying gas at Topeka, Oakland, Kansas City, Kansas, Rosedale, Leavenworth, and other cities obtaining their supply of gas from the pipe lines of the receiver of the Kansas Natural Gas Company and subsidiary companies situated in eastern Kansas." Somewhat later several of the distributing companies on different dates filed applications with said Court of Industrial Relations for increase of rates to be charged consumers, for a determination of the amount which was reasonable for the distributing companies to pay the receiver for gas furnished by him; and for determination, also, of various matters of regulation and practice. The distributing companies so filing applications were the Atchison Railway, Light, Heat & Power Company, the Leavenworth Light, Heat & Power Company, L. G. Treleaven, receiver of the Consumers' Light, Heat & Power Company of Topeka, the Wyandotte County Gas Company, and the Public Utilities Company of Ft. Scott.

Hearings were had before the Court of Industrial Relations, and on August 18, 1920, an order and an opinion were handed down, disposing of all of the cases together. It is this order which the distributing companies have challenged by their supplemental pleadings in the

present suit, and in reference to which the present hearing has been had.

The order in question was of a fourfold character: First, it adopted as a basis of leakage allowance to the various distributing companies 200,000 cubic feet per annum per mile of 3-inch main equivalent, and directed that the distributing companies should immediately take all necessary measures to put their lines in condition to reduce the leakage to that standard; second, it regulated the supplying of industrial gas; third, it approved the rate of 35 cents per 1,000 cubic feet to be paid by the distributing companies to the receiver as a not unreasonable item of operative cost; fourth, it approved the rates then in effect (80 cents for the applicants), and denied the applications of the distributing companies for permission to increase said rates.

The parts of the order providing for the 35-cent city gate rate as an item of operating cost, and regulating the supplying of industrial gas, are not attacked by the distributing companies in their present applications. The first and fourth provisions of the order are both attacked; the first as being beyond the jurisdiction and power of the Court of Industrial Relations to make, and both the first and fourth as being confiscatory of the properties of the several distributing companies, and as being unreasonable.

[2] The powers of the Court of Industrial Relations are defined in chapter 238 of the Laws of 1911 of Kansas, creating the Public Utilities Commission, and also in the act establishing the Kansas Court of Industrial Relations, passed in 1920. Section 10 of chapter 238 provides:

"Every common carrier and public utility governed by the provisions of this act shall be required to furnish *reasonably efficient* and sufficient service, joint service and facilities for the use of any and all products or services rendered, furnished, supplied or produced by such public utility or common carrier. * * *"

Section 13 provides:

"It shall be the duty of the commission, either upon complaint, or upon its own initiative, to investigate all rates, joint rates, fares, tolls, charges and exactions, classifications or schedules of rates, or joint rates and rules and regulations, and if after full hearing and investigation the commission shall find that such rates, joint rates, fares, tolls, charges or exactions, classifications or schedules of rates or joint rates, or rules and regulations, are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates, fares, tolls, charges, exactions, classifications or schedules of rates or joint rates and such rules and regulations as shall be just and reasonable. If upon any investigation it shall be found that any regulation, measurement, *practice, act or service* complained of is unjust, unreasonable, *unreasonably inefficient*, insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this act or of the order of this commission, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts, and to make such order respecting any such charges in such regulations, measurements, practices, service or acts as shall be just and reasonable. * * *"

Section 14 provides for investigations as to whether—

"any regulation, practice or act whatsoever affecting or relating to any service performed or to be performed by such public utility or common carrier for the public, is in any respect unreasonable, unfair, unjust, *unreasonably inefficient*, insufficient," etc., "or that any service performed or to be performed by such public utility or common carrier for the public, is unreasonably inadequate, inefficient, unduly insufficient or cannot be obtained. * * *"

Section 16 provides:

"* * * And if it shall be found that any regulation, practice or act whatsoever, relating to any service performed or to be performed by such public utility or common carrier for the public in any respect unreasonable, unjust, unfair, *unreasonably inefficient*, insufficient * * * the Public Utilities Commission shall have full power, authority and jurisdiction to substitute therefor such other regulations, practice, service or act as they find and determine to be just, reasonable and necessary."

Section 22 provides:

"The commission may ascertain and prescribe for each kind of public utility governed by the provisions of this act, suitable and convenient standard commercial units of products in service."

Section 41 provides:

Rule for Construing Statute.—"The provisions of this act and all grants of power, authority and jurisdiction herein made to the commissioners, shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are hereby expressly granted to and conferred upon the commissioners."

Section 2 of the act creating the Kansas Court of Industrial Relations (Laws Kan. 1920, c. 29) provides:

"The jurisdiction conferred by law upon the Public Utilities Commission of the state of Kansas is hereby conferred upon the Court of Industrial Relations, and the said Court of Industrial Relations is hereby given full power, authority and jurisdiction to supervise and control all public utilities * * * doing business in the State of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction. All laws relating to the powers, authority, jurisdiction and duties of the Public Utilities Commission of this state are hereby adopted and all powers, authority, jurisdiction and duties by said laws imposed and conferred upon the Public Utilities Commission of this state relating to common carriers and public utilities are hereby imposed and conferred upon the Court of Industrial Relations, * * * and in addition thereto said Court of Industrial Relations shall have such further power, authority and jurisdiction and shall perform such further duties as are in this act set forth."

In section 4 of said act it is provided:

"Said court, in addition to the powers and jurisdiction heretofore conferred upon, and exercised by, the Public Utilities Commission, is hereby given full power, authority and jurisdiction to supervise, direct and control the operation of the industries, employments, public utilities, and common carriers in all matters herein specified and in the manner provided herein, and to do all things needful for the proper and expeditious enforcement of all the provisions of this act."

Section 6 of the act provides:

"It is hereby declared and determined to be necessary for the public peace, health and general welfare of the people of this state that the industries, employments, public utilities and common carriers herein specified shall be

operated with *reasonable* continuity and *efficiency* in order that the people of this state may live in peace and security, and be supplied with the necessaries of life."

Section 26 provides:

"The provisions of this act and all grants of power, authority and jurisdiction herein made to said Court of Industrial Relations shall be liberally construed and all incidental powers necessary to carry into effect the provisions of this act are hereby expressly granted to and conferred upon said Court of Industrial Relations."

In view of the provisions of the statutes just cited, I am of the opinion that the Court of Industrial Relations had ample power to make that part of the order of August 18, 1920, which provided for a standard for leakage in the plants of the distributing companies.

[3] Counsel for the distributing companies take the position that this action of the Court of Industrial Relations in respect to a standard of leakage was an invasion of the right of the companies to conduct and manage their own affairs, and cite Kansas City, etc., Ry. Co. v. Barker (D. C.) 242 Fed. 310. That case held that a state commission is not authorized to make orders "which would constitute an invasion of the right of the company to conduct and manage its own affairs, subject to a proper exercise of the power of regulation." In my judgment that part of the order of the Court of Industrial Relations which establishes the standard of leakage comes within the qualifying clause, "subject to a proper exercise of the power of regulation," and is therefore not an invasion of the rights of the distributing companies.

[4] That the plants of the several distributing companies above mentioned were unreasonably inefficient and wasteful at the time of the making of the order of August 18, 1920, by the Court of Industrial Relations is beyond all question. The evidence is overwhelming to that effect, and there is little serious contention to the contrary. The standard of 200,000 cubic feet per mile of 3-inch main per annum is a reasonable and attainable standard, according to testimony given upon the hearing by expert engineers of high standing, both those called on behalf of the distributing companies and those called on behalf of the Court of Industrial Relations. It may be true that a more wasteful standard would result in better financial results to the distributing companies, and it may also be true that, if the matter were left to the distributing companies themselves, they would continue a more wasteful standard.

This change in the standard of leakage is for the purpose of conservation, and the consumers are as a matter of fact more interested in conservation than the distributing companies. When natural gas is exhausted, the companies will be distributing manufactured gas, and will be getting presumably a reasonable return for so doing, so that the change will be of comparatively little moment to them; but when natural gas is exhausted the consumers will suffer a distinct loss, which will never be recovered. The consumers, therefore, are vitally interested in conserving the natural gas as far as possible. The saving is ultimately for their benefit.

The Court of Industrial Relations stands between the distributing company and the consumers, and must act for both. That court was, in my judgment, not confined to taking into consideration the financial results to the distributing companies, but was fully justified in considering, also, the economic results to the general body of consumers, and the conclusion reached by that court as to the standard to be adopted was in my judgment amply supported by the evidence.

There remains to be considered that part of the order of August 18, 1920, which approved the 80-cent rate as fair and reasonable, and denied any increase. That the present 80-cent rate is noncompensatory and confiscatory under present conditions is clearly established by the evidence, and I do not understand that serious contention is made to the contrary. For example, a statement of the income and expenditures and net earnings of the Wyandotte County Gas Company for the year 1920, made up from seven months' actual experience and five months' estimated, and on the basis of paying 35 cents for gas at the gates of the city, shows net earnings for the year of $34,794. The valuation of its property used in the service is conceded by the Court of Industrial Relations to be over $1,750,000. No corrections that could reasonably be made in the figures of gross income and operating expenses would show a return of net earnings that would not characterize the present 80-cent rate as confiscatory. Similar statements of income and expenditures by the other distributing companies reveal similar situations.

But it is claimed by the Court of Industrial Relations that though the present 80-cent rate may be noncompensatory and confiscatory under present conditions, yet that such rate will be compensatory under the improved conditions demanded by the Court of Industrial Relations, and that those conditions are reasonably demanded from the distributing companies, and can be attained by them. This contention raises the broad question: What will be the financial effect upon the distributing companies of the order adopting the designated standard of leakage, combined with the denial of an increase of present rates? The Court of Industrial Relations takes the position (a) that the question is immaterial, or, at least, should not be considered; (b) or, if the question is to be considered, yet that the effect will not be such as to condemn the order as unreasonable or confiscatory. The Court of Industrial Relations contends that the question is immaterial, or is not to be considered, because (1) the distributing companies are in no position to ask any change in rate until their plants are brought to efficient condition; (2) that the bringing of the plants up to the required standard is simply a matter of deferred maintenance, and can properly have no bearing on future rates; (3) that the distributing companies have failed to use the money which they might have used for the purpose of reducing leakage, and therefore are in no position to ask for new funds.

[5, 6] The first and second of these points may be considered together. It is true, as a general rule, that efficiency of plant is a prerequisite to a demand for a reasonable rate. It is also true as a general rule that deferred maintenance should not be paid for by increas-

ing rates to consumers. In the case of Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371, the court said:

"If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon overissues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

In Puget Sound Elec. Ry. Co. v. Com., 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763, it was said:

"A railroad company may properly charge its returns with an annual sum to provide for depreciation and replacement, and have such sum allowed in any determination of what is a proper return upon its investment; * * * but it cannot make the traffic of a future year bear all the burdens of the deterioration of past years, since each year should carry the burden of its own wear and tear, so that, when renewals became necessary, the burden is equally borne by all contributing features."

[7] But both of the rules above mentioned and also the citations above given all presuppose (1) that a standard of efficiency has been adopted, or, at least, recognized, by all the parties, and as a consequence that a standard of maintenance has also been adopted or recognized, to which standard the public utility company can reasonably be expected to conform; (2) that the utility company either had sufficient rates in past years to take care of such standard maintenance, or could have charged sufficient rates to take care of such standard maintenance, but neglected so to do. The evidence shows, however, that neither of these assumptions holds true in the instant case. The standard now ordered for leakage, while in my judgment feasible and proper, is a radical departure from the standard recognized by the Public Utilities Commission of Kansas in their decisions of July and December, 1915. Indeed, it appears quite probable from the evidence that the leakage in the distributing companies' plants for the year 1919 was not materially greater than for the year 1914; comparison being made on a basis of equivalent 3-inch main. It may be said that this change of standard should have been foreseen and provided for by the distributing companies in the early years of natural gas distribution. Quite possibly it was foreseen; nevertheless the distributing companies were not left at liberty to fix such rates as would provide for maintenance on the standard of leakage now ordered. For more than seven years the rates of the distributing companies to consumers have been fixed either by statute or by commissions and courts, and during all that period the rates have been insufficient to provide for operating expenses, depreciation reserve, and a just return upon fair valuation. It would seem, therefore, that the problem of bringing the plants of the distributing companies up to the leakage standard ordered is not so much a matter of deferred maintenance as a matter of deferred standard of maintenance.

[8] As to the diversion by distributing companies of moneys which had been provided them for the purpose of reducing leakage, the Court

of Industrial Relations was unquestionably right in taking this into consideration, and would doubtless be justified in penalizing the distributing companies therefor; but it should be remembered that the moneys so provided were but a fractional part of the amounts necessary to be expended in bringing the plants up to the standard now ordered.

[9] We pass to the consideration of the financial effect upon the distributing companies of the enforcement of the order as to the standard of leakage, coupled with the present 80-cent rate. For the year ending December 31, 1920 (the latter part of the year being estimated), as stated above, the Wyandotte County Gas Company shows net earnings of $34,794:

Total income		$720,409
Operating expenses	$224,186	
Depreciation	50,000	
Cost of Gas	411,429	685,615
Net earnings		$ 34,794

The Court of Industrial Relations offered evidence tending to show that there would have been a saving to the company, if the leakage had been on the basis of the 200,000 standard, of $82,540. This, added to the $34,794, would give $117,334. It seems clear, however, from the evidence, leaving out of consideration for the moment any question of providing moneys with which to reach the 200,000 standard, that after its attainment the maintenance thereof would cost at least $30,000 more than the repair figures given in the statement for the year 1920. This would reduce the net earnings from $117,334 to $87,334.

The cost of bringing the plant up to the standard ordered will, according to the estimate of the expert engineer testifying for the Court of Industrial Relations, amount to $351,000; according to the testimony of the engineer for the Wyandotte County Gas Company, $378,000; and this sum would have to be expended during a period extending over two, and possibly three, years.

The valuation of the properties of the Wyandotte County Gas Company, as given by the engineer of the Court of Industrial Relations, is $1,764,511; as given by the expert engineer testifying on behalf of the company, at from $3,000,000, based upon 10-year period average prices, to $5,250,000, based upon 1920 prices. The capitalization of the Wyandotte County Gas Company, recently approved by the Kansas official authority, is as follows:

Bonds	$1,548,000
Stock	887,500
Total	$2,435,500

[10] It appears that no dividends have been paid during the past seven years. It is not the province of this court to determine what valuation should be placed upon the properties of the Wyandotte County Gas Company, but it should be pointed out that the method used by the engineer of the Court of Industrial Relations in arriving at his figures is not the method generally approved, either by the federal

courts in this circuit or elsewhere. The controlling basis of his valuation is original cost less theoretical accrued depreciation. In the recent case of Joplin & Pittsburg Ry. Co. v. Public Service Commission of Missouri (D. C.) 267 Fed. 584 (three judges, Stone, Circuit Judge, and Wade and Van Valkenburgh, District Judges, sitting), it was said:

"It appears upon the face of the report [of the commission] that great, if not undue, emphasis was laid upon the original cost of the property * * * at a period greatly antedating that with which this investigation must deal; nor can we say that the present period of high prices is so temporary or abnormal that it may practically be disregarded in arriving at the value of complainant's properties. No one can say what degree of depression may ultimately come, but it is reasonably certain that the cost of the properties now under consideration will never again approximate figures prevailing in the years before the World War."

This expression of opinion was doubtless based upon what was said in the case of Lincoln Gas Co. v. Lincoln, 250 U. S. 256, 39 Sup. Ct. 454, 63 L. Ed. 968. In the course of the decision the court used the following language:

"The court notices judicially that, principally owing to the war, costs of labor and supplies have advanced greatly since the ordinance was adopted, and largely since the case was last heard in the court below, and that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper return for capital in gas plants and other public utilities a few years ago furnishes no safe criterion for the present or the future."

In the very recent case of St. Joseph Ry., Light, Heat & Power Co. v. Public Service of Missouri, in the Western District of Missouri, 268 Fed. 267, Judge Van Valkenburgh used the following language:

"The commission took the original cost when obtainable, and, when not obtainable, average prices for a fixed period of five years before war prices prevailed, going back approximately to the year 1910. It also allowed cost price for additions and betterments made since present prices have prevailed, but it appears that no improvements or betterments of consequence have been made since that time. * * * It is my judgment that the great weight of authority is against the adoption of a standard of original cost as a controlling basis for determining present value. The present fair value is the object to be attained. Nor do I think it permissible substantially to restrict the inquiry to a period antedating present cost prices. * * * It follows that the method of valuation adopted by the commission in the case at bar was wrong."

A very clear and able expression of like views, with a keen analysis of the subject, is to be found in the decision of Judge Learned Hand in Consol. Gas Co. of N. Y. v. Newton (D. C.) 267 Fed. 231. It seems from the evidence that the Court of Industrial Relations, in determining what would be a reasonable rate, based its computation upon valuations arrived at by a wrong method, which was sure to result in figures far below fair present value. Rates based upon such valuations would almost certainly be noncompensatory and practically confiscatory.

[11] While, as stated before, it is not the province of this court to fix the valuation, yet it may not be amiss to say that in my judgment cost of reproduction new, at the present time and at prevailing prices, should not be rejected, but carefully considered, together with the other elements, in reaching a "reasonable judgment, having its basis in a proper consideration of all relevant facts." Minn. Rate Cases,

230 U. S. 352, 434, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

[12] It may also not be amiss to say further that in my judgment the element of depreciation should not be measured by a theoretical yardstick, but should be determined by a careful consideration of the actual facts touching the physical condition of each particular plant under consideration. In view of all the evidence, it is my judgment that the valuation of the properties of the Wyandotte County Gas Company, arrived at by a proper method, may be conservatively assumed to be $2,500,000, and, with an 8 per cent. return on the valuation, provision should properly be made for a return of $200,000. If the foregoing figures are even approximately correct, it seems clear that the present 80-cent rate, even with the saving under the new standard of leakage, would still be confiscatory.

In the foregoing discussion the evidence in the case of the Wyandotte County Gas Company, the largest of the applicant companies, has been specifically considered and the results stated. The evidence as to each of the other applicant distributing companies has, however, also been considered, and similar conditions found, and similar conclusions reached. Indeed, in some particulars the results as to the other distributing companies are more pronouncedly in their favor than in the case of the Wyandotte County Gas Company. It is contended, however, by counsel for the Court of Industrial Relations, that in any event the present 80-cent rate, when coupled with the new standard of leakage ordered, is not "unreasonable," within the meaning of that term as used in section 21, chapter 238, Laws Kan. 1911.

The case of Railroad Co. v. Utilities Commission, 95 Kan. 605, 148 Pac. 667, is cited as holding that the term "unreasonable" is not synonymous with "confiscatory." It would seem that counsel wish the inference drawn that the 80-cent rate may not be "unreasonable," even though it be confiscatory. In my opinion the case cited does not authorize such inference, but rather the quite different inference, viz. that the 80-cent rate may be "unreasonable," even though not confiscatory. Without regard, however, to which inference is correct, I am clearly of the opinion that the present 80-cent rate, even when coupled with the new standard of leakage ordered, is "unreasonable." And here, in addition to the matters already discussed, the question of ways and means is proper to be considered.

[13] With what funds shall the distributing companies place their plants upon the standard of leakage required by the order of August 18, 1920? Such funds cannot be derived from an accumulated depreciation reserve, for the reason that the evidence shows that there is no such fund in actual existence; nor, if there were, would it be proper to take the funds accumulated for that purpose to make the repairs necessary. Such a diversion of funds from the depreciation reserve would be in effect confiscatory of the property of the distributing companies. The required funds cannot be taken from net earnings, for, in case of several of the applicants, the net earnings are not sufficient at present for the purpose, even eliminating all question of return upon valuation.

[14] Nor is it reasonable, in my opinion, to demand that the funds to make the required repairs be raised by borrowed capital. Such funds so raised would necessarily have to go into the capital account. But the evidence shows that practically 90 per cent. of the work necessary to be done to bring the distributing plants up to the required standard consists in repairs, and not in new construction. There is no justification, therefore, for putting such expense into capital account, thereby making the public pay a rate indefinitely on such addition to the capital account.

[15] Of course if any plant was deficiently constructed in the first place, to the extent of that deficiency the company must look to itself for financial help. If during the past seven years the distributing companies have not kept their plants up to the standard of leakage tacitly authorized, and if earnings which might have been devoted to such purpose have been diverted, the distributing companies should be penalized to the proper extent therefor. And if money specifically provided to the distributing companies for the purpose of reducing leakage has been by them diverted in whole or in part to other purposes, the distributing companies should be penalized therefor to the proper extent. But to go far beyond this, and throw upon the distributing companies the whole burden of bringing their plants up to the new standard ordered, reasonable and proper though that standard be, is in my judgment "unreasonable," in view of the unusual, but vital, facts of the situation, within the meaning of that term as used in section 21, chapter 238, Laws Kan. 1911.

[16] It will doubtless be said that, if the foregoing views are correct, they point to the conclusion that the new standard of leakage can properly be attained only by some increase in the present rate. Be it so. Such conclusion is in my judgment both just and reasonable. As has been already said, the new standard of leakage is in the interest of conservation of gas—a matter in which the consumers are vitally interested, and it is not unreasonable that they should pay in part at least the cost of effecting the change. It may not be amiss to repeat what was said two years ago, at the time of the entry of the 80-cent rate order:

"It may be said that this increase of rates is really making the public pay the expense of reducing the leakage. In a way this is true, and such a course, under some circumstances, might be open to objections; but such is not the case here. For some years the public has been receiving service from the distributing companies at a rate too low to give these companies a fair, reasonable return, with the natural result that repairs and replacements have not received sufficient attention. Secondly, the rates now established are still much below what the natural gas is intrinsically worth, when compared with other fuel which might be substituted."

My conclusion on the present applications is that that portion of the order of August 18, 1920, of the Court of Industrial Relations which denies the applications of the distributing companies to increase the present rate, and fixes the present 80-cent rate as reasonable, just, and fair is unreasonable and confiscatory, and the enforcement of the same should be enjoined.

Decree may be prepared in accordance with the foregoing views.

ACCARDO v. FONTENOT, Internal Revenue Collector. STRUVE v. SAME. CARLISI v. SAME.

(District Court, E. D. Louisiana, New Orleans Division. December 23, 1920.)

Nos. 16402, 16403, 16406.

1. **Courts ⇐297—District Court has jurisdiction of suits arising under revenue laws.**
Under Judicial Code, § 24, par. 5 (Comp. St. § 991[5]), the District Court has jurisdiction over all suits arising under the revenue laws, regardless of the amount.

2. **Courts ⇐284—Suit "arises under law of the United States" whenever its solution depends on the construction of that law.**
A suit arises under law of the United States whenever its correct solution depends on the construction of that law, and the rights set up by a party may be defeated by one construction or sustained by another.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Arise—Arising.]

3. **Internal revenue ⇐45—Tax provisions in National Prohibition Act are penalties; hence enforcement may be enjoined.**
While Congress may impose taxes for the purposes of regulating any business or occupation, if there is the slightest color of raising revenue, and these taxes may be so excessive as to actually prohibit, the so-called taxes or penalties prescribed by National Prohibition Act, tit. 2, § 35, on account of the sale or manufacture of intoxicants, are merely additional penalties for violation of a criminal statute, as the payment of the tax cannot, as is recognized by the section, legalize the manufacture and sale of intoxicants; hence a suit to enjoin the collection of such penalties does not fall within Rev. St. § 3224 (Comp. St. § 5947), declaring that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

4. **Internal revenue ⇐45—Provisions as to destraint under revenue law do not apply to penal provisions of National Prohibition Act.**
The provisions of internal revenue laws (Rev. St. § 3172 et seq. [Comp. St. § 5895 et seq.]) relative to the assessment and summary collection by distraint of internal revenue taxes, are not applicable to the assessment and collection of the taxes prescribed by National Prohibition Act, tit. 2, § 35, as additional penalties for violation; for otherwise violators would practically be required to file returns showing their violations, and the whole enforcement of the law would have been placed in the hands of executive officers, depriving offenders of the right to jury trial.

5. **Evidence ⇐47—Judicial notice of instructions of Internal Revenue Department.**
The courts will take judicial notice of instructions of the Internal Revenue Department relative to the collection of additional penalties for violation of the National Prohibition Act.

6. **Internal revenue ⇐45—Collection of penalties prescribed by National Prohibition Act should be enjoined, where guilt of defendants was not established.**
In view of the instructions issued by the Internal Revenue Department that no suit for recovery of internal revenue taxes or penalties, including those under the National Prohibition Act, may be maintained until appeal shall have been made to the Commissioner of Internal Revenue, as well as the statement that in prohibition cases the enforcement of the tax may be more effective than the imposition of criminal liabilities, collection of such of the taxes and penalties prescribed by National Prohibition Act, tit. 2, § 35, may be enjoined, where it appeared an appeal or plea of abatement would be unavailing, and there was an attempt to en-

force such taxes and penalties against several defendants, one of whom had been acquitted of the charge of unlawful possession of intoxicants, which carries no penalty, another never brought to trial, and the third not charged with any offense, for it is obvious from the instructions issued that the Internal Revenue Department is seeking to administer the law without reference to the courts.

In Equity. Bills by Tom Accardo, by William Struve, and by Sam M. Carlisi against Rufus W. Fontenot, Collector of Internal Revenue, to enjoin the collection of taxes and penalties assessed by the Commissioner of Internal Revenue under National Prohibition Act, tit. 2, § 35. Preliminary injunctions issued.

Hugh M. Wilkinson, of New Orleans, La., for plaintiffs Accardo and Struve.

Jones T. Prowell, of New Orleans, La., for plaintiff Carlisi.

Henry Mooney, U. S. Atty., of New Orleans, La., for defendant.

FOSTER, District Judge. In these three cases bills in equity were filed against the collector of internal revenue to enjoin the collection of certain taxes and penalties assessed against the plaintiffs by the Commissioner of Internal Revenue under the provisions of section 35, tit. 2, of the National Prohibition Act. With slight differences, they present the same state of facts. On a rule to show cause why a preliminary injunction should not issue they have been submitted on one and the same argument.

The material facts, as appearing by the bills and supplemental bills, and not denied, are these:

Accardo Case.

On August 28, 1920, plaintiff's premises were raided by prohibition officers and a quantity of wine destroyed by them, and other liquors in his possession seized and carried away. An information was subsequently filed against him, charging him with unlawful possession of the said wine and liquors, but not with having made an illegal sale. A tax and penalties were assessed against him by the Commissioner of Internal Revenue, under the provisions of section 35, tit. 2, of the National Prohibition Act, amounting to $557.29, and written demand was made for its payment by the collector on October 29th. On his refusal to pay, after 10 days, a penalty of 5 per cent. was added and a second demand in writing made. On December 2, 1920, he was tried by a jury and acquitted. Notwithstanding his acquittal, the collector is proceeding with a writ of distraint, and proposes to seize his property to enforce collection of the tax and penalties assessed.

Struve Case.

Plaintiff was arrested on a warrant from a United States commissioner, based on an affidavit charging an illegal sale of liquor. He gave bond of $1,000 for his appearance before the commissioner, but no hearing has been held, no indictment returned, and no information has been filed by the district attorney. A tax and penalties were assessed against him, totaling $559.66, practically the same as in the Accardo Case. To prevent a seizure of his property, plaintiff gave

bond in the sum of $1,025, which was accepted by the collector. Thereafter a warrant of distraint was issued by the collector, under which plaintiff's bank account was seized and $34 appropriated, and the collector threatens to proceed against the bond for the balance of the assessment.

Carlisi Case.

There was a seizure of liquor and a subsequent assessment of the tax and penalties, but no criminal charge of any kind has been made, although collection by distraint is threatened.

In none of these cases was the plaintiff required to make, or given the opportunity of making, a return, nor was notice of any kind given before the assessment was made.

The United States attorney has filed motions to dismiss the bills, on the ground they are without equity, and relies on section 3224, R. S. (Comp. St. § 5947), as depriving the court of jurisdiction. No objection to the jurisdiction of the court as such is urged, but that question may be noticed incidentally.

[1, 2] The court has jurisdiction of all suits arising under the revenue laws, regardless of amount. Judicial Code, § 24, par. 5 (Comp. St. § 991[5]); Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088. A suit arises under a law of the United States whenever its correct solution depends on the construction of that law, and the right set up by a party may be defeated by one construction or sustained by the other. Gold Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656.

[3] The correct solution of these cases requires a construction of the internal revenue laws, in connection with section 35, tit. 2, of the National Prohibition Act, which itself must be considered a revenue law, if the contention of the government is to prevail.

Section 3224, R. S., provides:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Section 35 of title 2 of the National Prohibition Act provides:

"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 any one 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 any one from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

"The Commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced."

Serious questions involving the construction of these laws are presented by the cases at bar.

(1) Are the taxes (so called) and the penalties prescribed by section 35, tit. 2, of the National Prohibition Act, taxes within the meaning of R. S. § 3224.

(2) Are the provisions of the internal revenue laws (R. S. § 3172 et seq. [Comp. St. § 5895 et seq.]), relative to the assessment and summary collection of internal revenue taxes applicable to the assessment and collection of the taxes and penalties prescribed by section 35, tit. 2, of the National Prohibition Act.

Taking up the first question, it is well settled that Congress may impose taxes for the purpose of regulating any business or occupation, if there is the slightest color of raising revenue, and these taxes may be so excessive as to actually prohibit. An example of this is found in the Act of January 17, 1914 (Comp. St. §§ 6287a–6287f), imposing a tax of $300 per pound on the manufacture in the United States of smoking opium. Nevertheless, if any one chose to pay the tax, he could indulge in the business. So with the internal revenue taxes. Although one might be guilty of a criminal offense by not paying his taxes promptly, still the tax is primarily intended to raise revenue.

On the other hand, the taxes and penalties provided for by section 35, tit. 2, of the National Prohibition Act, lack every fundamental element of a tax. The manufacture and sale of intoxicating liquor for beverage purposes are absolutely prohibited by the Eighteenth Amendment to the Constitution and the National Prohibition Act. Payment of the so-called taxes could not legalize either transaction, and the section so states. There is not the slightest pretense of raising revenue, and it should not be presumed that Congress intended to levy a tax for the purpose of prohibition on something already prohibited. It is also exceedingly doubtful that it could do so. Cooley on Taxation (3d Ed.) p. 12 et seq., verbo "Maxims of Policy."

It is evident the so-called taxes and penalties provided by section 35, tit. 2, of the National Prohibition Act, are simply additional penalties imposed for the violation of a criminal statute, and section 3224, R. S., is no bar to relief in equity in a proper case. See Dodge v. Brady, 240 U. S. 122, 36 Sup. Ct. 277, 60 L. Ed. 560.

[4] On the second question the material provisions of the internal revenue laws (R. S. § 3172 et seq.) relative to the assessment and summary collection of internal revenue taxes are as follows: The collector is required to canvas his district and make a list of all persons liable to the tax. It is also the duty of all persons so liable to make returns under oath to the collector at stated times. If the person liable fails to make a return, the collector must summon him. If he still refuses, he may be interrogated, and in that event, or if he fails to appear, the collector can make a return for him. All this provides notice before assessment, and makes the subsequent summary collection due process of law. It is only after these proceedings that the assessment is made by the Commissioner on the return made by the party taxed, or by the collector for him.

Manifestly these laws could not be applicable to the collection of

penalties under section 35, tit. 2, of the National Prohibition Act. To compel a man to file a return showing him to be guilty of a crime, or to require him to answer interrogatories to the same effect, would be to compel him to testify against himself, in violation of his constitutional privilege. Formerly, under the revenue laws, he was protected by a liberal construction of R. S. § 860; but that section was repealed by the act of May 7, 1910 (36 Stat. p. 352), and the Commissioner of Internal Revenue evidently so regards them, as the assessment in the cases at bar were made entirely without notice, presumably on the report of the prohibition officers.

It is clear to my mind that Congress did not intend the summary and drastic process of distraint to be used for the collection of the penalties imposed by section 35, tit. 2, of the National Prohibition Act. As well might they have attempted to put the whole enforcement of the law in the hands of executive officers, and so deprive offenders of the right of trial by jury entirely.

[5, 6] There remains the question raised by the United States that the bill is without equity. Under the internal revenue laws it may be conceded even an illegal assessment could not be enjoined, and a party was compelled to pay the tax, appeal to the Commissioner, and then sue at law to recover back the amount paid. Without an appeal, generally, but not always, no action would lie. But he could ask for abatement before payment.

In these cases I am convinced an appeal would have been useless, and a plea for abatement would not have been considered. In instruction No. 12 issued by the Internal Revenue Department October 1, 1920, of which I take notice, at page 21, these instructions are given to United States attorneys:

"No suit for the recovery of internal revenue taxes or penalties, including those collected under section 35 of title 2 of the National Prohibition Act, may be maintained until appeal shall have been made to the Commissioner of Internal Revenue. The ground should be taken that an appeal or claim for refund is necessary, and that a claim for abatement of a tax before payment is insufficient."

And again at page 42, instructions to internal revenue officers:

"In making reports in prohibition cases the tax and assessable penalty imposed by section 35 of title 2 of the National Prohibition Act should not be overlooked. It will often prove more effective to suppress violations of the law than the actual criminal liabilities imposed."

By this it is clear that the policy of the Internal Revenue Department is to take the punishment of offenders into its own hands, in preference to the courts, and the cases before me well illustrate to what extremes of unfairness such a policy may lead. No charge at all against one plaintiff; another charged with only unlawful possession, which carries no penalty, under section 35, tit. 2, and an acquittal shown; the other charged with selling unlawfully, an ample bond given to secure payment of the assessment, but no trial had. Acquittal in all of these cases would be a bar to the collection of the penalties in a civil suit. If an ex parte report of a revenue or prohibition officer is all the evidence required of illegal sale or manufacture,

which is very doubtful, there is a strong presumption in these cases that the prohibition officers were not in possession of sufficient evidence of even probable cause on which to base such report.

Yet payment is demanded in each case, and collection is sought to be enforced by the drastic procedure of distraint. No doubt the Commissioner of Internal Revenue considered himself amply justified in making the assessment, and the collector of internal revenue should not be criticized or censured for attempting to make collection. His duties are purely ministerial, and he is vested with no discretion, once the assessment is placed in his hands. But the system is all wrong, and tends to work great hardship and injustice to the individual, however desirable from an administrative viewpoint it may be.

I think the bills teem with equity, and present such extraordinary facts as to warrant the issuance of preliminary injunctions. It is so ordered.

NEW YORK MUT. GASLIGHT CO. v. NEWTON et al. and eight other cases.

(District Court, S. D. New York. November 26, 1920.)

Nos. 16—110, 16—115, 16—148, 16—311 to 16—314, 17—323, 17—401.

Gas ⇐14(1)—Enforcement of statutory rate may be restrained as confiscatory, and temporary rate fixed.

On a finding in suits by gas companies that, owing to changed conditions, the statutes of New York fixing the sale price of gas furnished by complainants to private consumers had become confiscatory, and the granting of preliminary injunctions restraining their enforcement, complainants permitted to collect a charge of $1.10 per 1,000 feet for gas so furnished until final hearing or the further order of the court, on depositing the difference between the statutory rates and the rate so collected in court, or at their option giving security for its payment when ordered by the court.

In Equity. Separate suits by the New York Mutual Gaslight Company, by the Standard Gaslight Company of the City of New York, by the Northern Union Gas Company, by the Central Union Gas Company, by the New Amsterdam Gas Company, and by the East River Gas Company of Long Island City against Charles D. Newton and others, and by the Brooklyn Union Gas Company, by the Newtown Gas Company and by the Flatbush Gas Company against Lewis Nixon and others. Order fixing gas rates pendente lite.

Motions for injunctions pendente lite, and for modification of the status resulting from injunction orders heretofore entered, in nine suits, all asking a declaration by final decree that the statutes of the state of New York, severally fixing the sale price of gas sold by plaintiffs to private consumers, have by changed conditions become confiscatory, and therefore unconstitutional, under the Fourteenth Amendment of the Constitution of the United States. The Brooklyn Union obtained a preliminary declaration to that effect by an order entered February 25, 1920, and subsequently modified by further order entered March 8, 1920. The Newtown and Flatbush Companies (which may be hereafter spoken of as the Brooklyn Union subsidiaries) have never before applied for similar relief. The remaining six plaintiffs (which may be here-

after spoken of as the Consolidated Gas Company's subsidiaries) severally obtained similar preliminary relief on June 28, 1920, on which date the consolidated Gas Company itself was granted a preliminary injunction, which, however, has become merged in final decree entered on August 11, 1920.

Shearman & Sterling, of New York City (William L. Ransom, of New York City, of counsel), for plaintiffs Consolidated subsidiaries.

Cullen & Dykman, of Brooklyn (William N. Dykman, of Brooklyn, of counsel), for plaintiffs Brooklyn Union Gas Co., and subsidiaries.

Wilber W. Chambers, of New York City, for defendant Newton.

Ely Neumann and Edward M. Deegan, both of New York City, for defendant Nixon.

John P. O'Brien, of New York City (J. P. Donnelly, of counsel), for defendants district attorneys of New York and Kings counties.

Francis Martin, of New York City, district attorney of Bronx county, pro se.

Before WARD, and HOUGH, Circuit Judges, and MAYER, District Judge, sitting pursuant to section 266 of the Judicial Code.

PER CURIAM. We have previously held, in granting the orders above enumerated, that all these plaintiffs (except the Brooklyn subsidiaries) are not now, and so far as can reasonably be foreseen will not be, able in the future to manufacture and sell gas at the statutory rate, except at an actual loss.

We remain of that opinion, and after considering the evidence now submitted, and taking notice of the result of the final hearing in the case of the Consolidated Gas Company, we are now of opinion that none of these nine plaintiffs can make or produce and distribute gas to private consumers for less than, or close to, $1 per 1,000 cubic feet. Indeed, we are convinced that some of them must expend at present in order to make and distribute gas, slightly more than $1 per unit.

How much more than the bare cost of manufacture and distribution should be allowed pending final decree and the action of the rate-making authorities is a question necessarily dependent upon the establishment of a rate base; i. e., the ascertainment of the capital actually invested in making and distributing gas which costs the maker approximately $1 per unit.

This is a question incapable of determination at present; nothing more than an estimate can be made, and we do not feel called upon to intimate any opinion either as to the probable amount of capital so invested or of the proper rate of return or reward thereon, other than as follows: We think it plain that, at any rate of return ultimately declared proper, a profit of 10 cents per unit is reasonable. We therefore find that, pending this suit and until final decree, or the further order of the court, the plaintiffs and all of them should, from December 1, 1920, be permitted, as a condition for the maintaining of injunctions, to charge to and collect from private consumers not exceeding $1.10 per 1,000 cubic feet of gas sold.

The second branch of these motions is that, instead of a deposit with a special master of all excess over the statutory rates, plaintiffs be severally given the option to retain the amounts paid by private

consumers, and apply the same to the necessities of their business upon security being given.

We are convinced that, considering the prevailing rates for money in this community, it is not advisable longer to retain the excess over statutory rates, where it can earn no more than the interest usually allowed by banks and trust companies on such deposits. The plaintiffs therefore (other than the Brooklyn Union subsidiaries) may severally enter orders as follows:

1. On and after December 1, 1920, and during the pendency of this suit, or until the further order of the court, plaintiff is authorized and permitted to charge to and collect from private consumers of gas a price not exceeding $1.10 per 1,000 cubic feet, anything in previous orders of the court to the contrary notwithstanding.

2. The moneys now on deposit to the credit of this cause and in charge of Richard Welling, Esq., special master, may, as soon as is convenient after the entry of this order, be paid over, both as to principal and accrued interest, by such special master to plaintiff herein upon its receipt, but on the following conditions:

3. There shall first be paid to the said Richard Welling on account of his services as special master a sum to be fixed in the order to be entered hereunder.

4. In respect of the moneys so paid by said special master to the plaintiff, said plaintiff on receipt thereof shall give a bond or bonds with sureties to be approved by any judge of the District Court for the Southern District of New York, conditioned to pay in the aggregate the amount received, together with interest thereon at 6 per cent. from December 1, 1920, on the demand of said special master or any successor appointed in his place, and further conditioned, in the event of such payment not being made within ten days after such demand, that judgment shall be forthwith entered both against the plaintiff and the surety or sureties as by confession for the amount secured by said bond with interest as aforesaid and costs of entry. No one surety shall give bond for more than $500,000.

5. On the 15th of January, 1921, and on the 15th of each month thereafter during the pendency of this suit, or until the further order of the court, the plaintiff shall report to the special master herein the amount of the difference between the statutory rate and $1.10 per 1,000 cubic feet collected by it, together with a verified declaration that the said amount is all that has been collected during the preceding month; and the said special master shall file the same in the clerk's office in these suits.

6. Contemporaneously with the report and statement hereinabove required on the 15th of each month, beginning January 15, 1921, the plaintiff may at its option (a) pay in cash the amount so reported to said special master to be by him retained and deposited on the terms of the orders heretofore entered and so held until final decree or the further order of the court; (b) execute and deliver to the said special master a bond with surety or sureties for the payment of the amount stated in said report with 6 per cent. interest annually from date of report to said special master, when and as required by the court and

on demand, substantially in the form hereinabove directed in respect of the moneys now on deposit with said special master; or (c) it may deposit with the special master bonds of the United States, and/or bonds in which savings banks are authorized to invest under the laws of the state of New York, or both, of a value at the market price, plus accrued interest, equal to at least 103 per cent. of the amount so reported month by month. And the special master is hereby required to demand and exact from the plaintiff, as each month's report is made and bonds as aforesaid deposited, further and additional bonds by way of security, to the end that there shall always be on hand in the master's possession bonds equaling at the market, including interest, a value equal to 103 per cent. of all the excess collection so reported, together with interest at 6 per cent. on such excess to a date one month later than the date of such demand.

To the extent above indicated plaintiff's motions are severally granted; and in the cases of the Brooklyn Union subsidiaries similar orders may be entered, including, however, the declaration (not heretofore made) that chapter 125 of the Laws of New York of 1906 has become and is at the present time confiscatory; and defendants are enjoined, until the further order of this court, from enforcing the same.

The terms of the orders heretofore entered shall continue to cover collections down to and including the month of November, 1920, with the additional privilege in plaintiffs of substituting for the deposits surety bonds and/or bonds of the United States, and/or bonds in which savings banks are authorized to invest under the laws of New York. The orders now to be entered will be effective thereafter and until final decree or the further order of the court.

UNITED STATES v. BUSH et al.

(District Court, W. D. New York. December 16, 1920.)

1. **Criminal law ⟸395—Property obtained by illegal search and seizure cannot be used as evidence of crime.**
   The Fourth and Fifth Amendments to the Constitution protect the citizen from the use against him as evidence of crime, not only of private books and papers, but of any article or property obtained by means of an illegal search and seizure.
2. **Indictment and information ⟸10—Indictment cannot be based on evidence obtained by illegal search and seizure.**
   An indictment for receiving stolen property cannot be based on evidence found and seized by government agents while searching defendant's dwelling for intoxicating liquors under an illegal warrant.
3. **Indictment and information ⟸10—Indictment based on evidence illegally obtained held invalid.**
   That a defendant was arrested by a city police officer does not validate a federal indictment based solely on evidence obtained by federal agents through an illegal search and seizure.

Criminal prosecution by the United States against Catherine Bush and another. On motion to quash indictment. Motion sustained.

Stephen T. Lockwood, U. S. Atty., of Buffalo, N. Y. (John T. Walsh, Sp. Asst, U. S. Atty., of Buffalo, N. Y., of counsel), for the United States.

William W. Dickinson, of Buffalo, N. Y., for defendants.

HAZEL, District Judge. The defendant Catherine Bush was indicted for criminally receiving stolen property in violation of the so-called Carlin Act passed by Congress in 1913. At a preliminary hearing before Commissioner Keating she was discharged on the ground that the evidence against her was procured by an unreasonable search and seizure. The conceded facts are that prior to the arrest prohibition enforcement agents with an invalid search warrant searched the premises of the defendants for intoxicating liquors, and in doing so discovered a case of stolen underwear. They arrested the defendants, notified the railroad police, and the underwear was seized. The commissioner decided, not only that the seizure was in violation of the constitutional rights of the accused, but also that the search warrant was invalid.

[1] It is contended by the United States attorney that the search for and seizure of stolen articles is governed by a different principle from that of the seizure of private books and papers; that in Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, the Supreme Court clearly differentiated searches and seizures of one's private papers and of stolen property. But I am of opinion that the principle of law laid down in the Boyd Case applies generally to search and seizure of one's house, property, and effects, and is not limited to the seizure of a man's private papers to be used as evidence against him. There is language found in the opinion from which it may be supposed that a distinction exists between seizure of a man's private papers to be used against him and a search and seizure of stolen goods.

The private papers of an individual cannot be seized at all to incriminate him, while stolen goods are subject to search and seizure on a proper warrant. The Fourth and Fifth Amendments must be read together, and upon doing so it is ascertained, I think, that in the Boyd Case the Supreme Court not only decided the law with reference to unlawful search and seizure of one's books and papers, but also that it was an invasion of the rights of personal security to enter one's home and rummage his boxes and drawers in the search for property, and an extortion "of a man's own testimony or of his private papers to be used as evidence to convict him of crime."

[2] In the present case the seizure consisted not only of taking the underwear in the possession of the accused without a valid search warrant, but the effect of the search and seizure was to compel the defendant Catherine Bush, by reason of her possession, to give evidence against herself without which concededly the indictment would not have been found. It is a general rule that nothing will justify searching a dwelling for stolen property without a warrant for that purpose, unless consented to by the person whose domain is under search. 35 Cyc. 1267. The basis for the issuance of a search warrant to recover

stolen goods has only slightly been changed by statute, since Lord Camden rendered his notable decision in Entick v. Carrington, 19 Howell's State Trials, 1029, wherein he quotes from Lord Coke:

"There must be a full charge upon oath of a theft committed. * * * The owner must swear that the goods are lodged in such a place. * * * He must attend at the execution of the warrant to show them to the officer, who must see that they answer the description."

In Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, the Supreme Court says:

"The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made."

Hence a search for stolen goods upon a valid warrant and seizure is a legal procedure, but a search and seizure is illegal and unreasonable under the Fourth Amendment of the Constitution, when conducted without first obtaining a legal warrant upon probable cause, supported by oath or affirmation, and as the Constitution provides, particularly describing the place to be searched and the person or things to be seized. Evidence obtained by an invalid search and seizure to prove possession is in effect a requirement that the accused be a witness against himself. Silverthorne Lumber Co., Inc., v. U. S., 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; Flagg v. U. S., 233 Fed. 481, 147 C. C. A. 367. Indeed, in the Flagg Case clues, leads, and information developed from an illegal search and seizure were held inadmissible against the defendant. See, also, Edelstein v. U. S., 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236.

[3] The government next contends that the arrest was made by a city police officer, a stranger to the proceedings, and therefore this court should not inquire into the manner in which the evidence was obtained. Adams v. N. Y., 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; Youngblood v. U. S. (C. C. A.) 266 Fed. 795. The facts, however, are not widely different from the Flagg Case, where the evidence was brought to the federal building by a policeman who acted, the court held, as agent of the government. It makes no difference that a city police officer actually made the arrest in the belief that a felony had been committed. Certainly the clues and leads and information necessary to find the indictment were procured by government officials. In People v. Kinney, 185 N. Y. Supp. 645, recently decided by Judge Brown, of the Supreme Court of the state of New York, it was shown that a policeman having a search warrant authorizing a search of the home of the defendant for opium in conducting the search found a concealed loaded revolver, seized it, and later an indictment was found against defendant for having in his possession a revolver without a permit. The indictment on motion was dismissed. So here the officers possessed no proper search warrant for searching the home of the accused and seizing any stolen property, and therefore their discovery or information unlawfully acquired could not be used as a basis for an indictment for criminally receiving stolen property.

Since the evidence before the grand jury was clearly based upon insufficient and incompetent evidence and disregarded the rights of the accused, the indictment must be, and it hereby is, quashed.

UNITED STATES v. CHRISTINE OIL & GAS CO.

(District Court, W. D. Louisiana. September 8, 1920.)

No. 1028.

1. **Internal revenue ⇐7—Deferred payments not taxable as "income."**
Within Revenue Act Oct. 3, 1913, levying a tax on the net income arising or accruing from all sources in the preceding calendar year, section 2G (b) of which requires the income to be ascertained by deducting from the gross amount of income received within the year expenses paid and losses sustained within the year, "income" includes only what has actually been received, so that a corporation which sold property at a profit during the year is not liable to taxation on deferred payments of the property not represented by notes or secured in any way.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

2. **Internal revenue ⇐7—Treasury rulings cannot add to taxable income.**
The regulations and rulings of the Treasury Department, under its authority to make reasonable regulations for the execution of the Income Tax Law, cannot enlarge the net income of a corporation subject to the tax by the terms of the act.

Suit by the United States against the Christine Oil & Gas Company to collect a tax. Verdict directed for defendant.

Joseph Moore, U. S. Atty., of Shreveport, La.
J. D. Wilkinson, of Shreveport, La., for defendant.

GRUBB, District Judge. The question involved in this case is the right of the government to collect from the defendant an income tax on the deferred payments for the sale of oil leases. The deferred payments were the obligations of the Producers' Oil Company, a solvent corporation, not represented by notes or secured in any way. The sale undoubtedly established a profit on the transaction, represented by the difference between the cost, $115,000, and the sale price, $250,000. About $79,000 was paid in cash, and $25,000 thereafter out of the proceeds of oil. The corporation paid income tax only upon the payments actually received and was additionally assessed $1,328.13 on the unpaid part. The dispute arises as to the correctness of the additional assessment on the part that has never been received by the corporation. It may be conceded that the difference between the cost price and the sale price, if received during the tax year for which the additional assessment was made, would be income, subject to the tax.

[1] Section 2G (b) of the Act of October 3, 1913 (38 Stat. 114), prescribed the method of arriving at the income on which the tax against a corporation is to be assessed as follows:

"Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, * * * *received within the year* from

all sources, (first) all the ordinary and necessary expenses *paid within the year* in the maintenance and operation of its business and properties, including rentals, etc., "(second) all losses *actually sustained within the year* and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any."

In the case of Mutual Benefit Insurance Co. v. Herold, 198 Fed. 199, 215, the District Court of the District of New Jersey, speaking of similar language in the Corporation Tax Law of 1909 (36 Stat. 112), which also used the word "received," said:

"This language seems clearly to indicate that the net income, which is the measure of taxation, means what has actually been received, and not that which, although due, has not been received, but its payment for some reason deferred or postponed."

The language of the act of 1913 with respect to deductions for expenses is "all the ordinary and necessary expenses *paid within the year*," and with reference to losses "all losses *actually sustained within the year*." In the case of Mutual Benefit Co. v. Herold, supra, the same court said of corresponding language of the act of 1909:

"Since, then, the language of the act is explicit in permitting only such deductions from the gross income as were *actually paid during the current year*, it would be strange, indeed, if on the opposite side of the account the company were charged with what it *had not received during the current year*. No reason appears or has been suggested for so radical and unwarranted a departure. Furthermore the word 'income' means, as already shown, that which has come in, and not that which might have come in, but did not. If expenditures mean what has been paid out, or outgoes, then income means what has come in, or receipts."

[2] The ruling of the Treasury Department is to the contrary. Treasury Decision 2137, promulgated January 30, 1915. However, the regulations of the Treasury Department could not enlarge the net income made subject to the tax by the terms of the act. The act levies the tax "upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation * * * organized in the United States" (section 2, subd. G [a], Act Oct. 3, 1913), and defines the net income to be that obtained by making certain deductions from "the income of such corporation, * * * received within the year from all sources." (Section 2, subd. G [b], Act Oct. 3, 1913). Actual receipt within the current tax year is a condition to the levy of the tax, by the terms of the act as construed by the courts. The authority of the Treasury Department to make reasonable regulations for the execution of the law would not confer on that department the power to add to the income, subject to the tax, as defined by the law. In the case of Edwards v. Keith, 231 Fed. 110–113, 145 C. C. A. 298–301, the Court of Appeals for the Second Circuit said:

"But no instructions of the Treasury Department can enlarge the scope of this statute, so as to impose the income tax upon unpaid charges for services rendered and which, for aught any one can tell, may never be paid."

What is there said of unpaid services applies with equal force to unpaid purchase money. If a seller accepts the notes of third persons in absolute payment, the rule would be different. But where the ef-

fect of the transaction is a mere promise to pay, and not an actual payment, it cannot be said to be income, until it has been actually received, and is not subject to be taxed as such until its actual receipt.

In United States v. Schillinger, 14 Blatch. 71, Fed. Cas. No. 16,228, the court said that:

"In the absence of any special provision of law to the contrary, income must be taken to mean money, and not the expectation of receiving it, or the right to receive it, at a future time."

In the case of U. S. v. Indianapolis, etc., R. R. Co., 113 U. S. 711–713 (Syl.) 5 Sup. Ct. 716, 28 L. Ed. 1140, the Supreme Court held that:

"Interest on bonds of a * * * corporation earned by the company during the year 1871, but payable by the terms of the coupons January 1, 1872, is not subject to the tax authorized by section 15, Act July 14, 1870 (16 Stat. 260), to be levied and collected for and during the year 1871"

—citing the case of Railroad Co. v. U. S., 101 U. S. 543, 25 L. Ed. 1068.

The general language of the Act of October 3, 1913, is:

"That there shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year."

Upon the authority of the cases quoted from, this language, even though it were not restricted by that of paragraph (b) of subdivision G of the same act, would justify the imposition of the tax only upon income actually received during the tax year, as distinguished from that promised to be paid, but not in fact paid.

This conclusion requires the direction of a verdict for the defendant.

Ex parte GRAVES.

(District Court, D. Massachusetts. December 13, 1920.)

No. 1920.

1. **Habeas corpus ⇐45(5)—Accused should prosecute writ of error to state court's action.**
Where accused, held under a warrant for extradition to another state, instituted habeas corpus proceedings in the state courts, in which he raised or could have raised the questions involving his rights under United States laws and Constitution, he should prosecute a writ of error to review the decision of the highest court in the state, remanding him to custody, before invoking the jurisdiction of the federal courts on new proceedings for habeas corpus.

2. **Extradition ⇐35—Habeas corpus ⇐85(2)—Evidence that accused was at scene of crime is sufficient; petitioner must show he was not in demanding state at any time when he could have committed crime charged.**
Where the indictment charged that accused and other persons entered into a criminal conspiracy to destroy buildings in another state by the unlawful use of explosives, and there was evidence before the Governor of the state, in which the accused was arrested that on the day specified such an explosion took place, and that accused was present at the scene of the crime, the evidence was more than it was necessary for the demanding state to present to secure the extradition of accused and petitioner is not entitled to be discharged on habeas corpus, unless he shows he was not in the demanding state at any time when it was possible for him to have committed the crime charged in the indictment; it is an alibi to possibility.

3. **Habeas corpus ⇐92(2)—Objection that indictment does not state whether it is under common law or statute cannot be raised.**
In habeas corpus proceedings to procure release of accused from custody under award for extradition, the objection that the indictment was defective, because it did not show whether the offense charged was a violation of the common law or of a statute, cannot be raised.

4. **Habeas corpus ⇐92(2)—Accused cannot attack demanding warrant for refusal to pay expenses.**
The objection that the warrant of the demanding state explicitly provides that that state shall not be responsible for the expenses of extradition is a matter for the sole consideration of the Governor of the asylum state and cannot affect an inquiry on habeas corpus proceedings to determine whether the extradition proceedings were in substantial conformity with the Constitution and laws of the United States.

5. **Habeas corpus ⇐113(3)—Appeal not allowed, where questions were authoritatively settled.**
Where all the questions raised in proceedings for habeas corpus to secure discharge from a warrant for extradition had been previously settled by decision of the United States Supreme Court and of the highest court in the state, and there was no doubtful question of fact, so that an appeal would be frivolous, no appeal will be allowed.

Petition by Edwin E. Graves for writ of habeas corpus. Petition dismissed.[1]

[1] The petitioner subsequently applied to Chief Justice Rugg of Massachusetts and to Mr. Justice Holmes of the United States Supreme Court to allow a writ of error to the Supreme Judicial Court of Massachusetts, and the applications were refused. Thereafter he applied to the senior Circuit Judge of the First Circuit (Judge Bingham) to allow an appeal from the foregoing decision, and it was allowed.

Frederick W. Mansfield, of Boston, Mass., for petitioner.
J. Weston Allen, Atty. Gen., for respondent Keating.

MORTON, District Judge. This is a petition for habeas corpus. The petitioner is held by the Massachusetts authorities under a warrant issued by the Governor of Massachusetts for rendition to the state of Illinois. The question is whether the petitioner's rights under the Constitution and laws of the United States have been disregarded. The case was heard upon the petition, motion to dismiss, and answer, and such evidence was introduced as either party desired to offer. The petitioner moved for a jury trial. But the fundamental facts on which the present controversy turns are not in dispute, and I think that the motion should not be granted. It is denied.

[1] The Governor of Illinois made two requests to the Governor of Massachusetts for the extradition of Graves; the second being made in order to avoid and correct certain defects in the first. On both requests the Governor of Massachusetts issued extradition warrants. Graves filed in the Supreme Judicial Court petitions for habeas corpus attacking both warrants, which have been passed upon by the full bench of the court. It was ordered that upon the first warrant Graves be discharged, and that upon the second he be remanded for rendition. After that decision the present petition was filed. It raises the same questions which have been decided adversely to the petitioner by the Massachusetts Supreme Judicial Court, and other questions which might have been presented to that court.

It seems to me that the case comes squarely within the decision in Appleyard v. Massachusetts, 203 U. S. 223, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073, in which, upon a similar state of facts, it is said by the court that, "regularly, the accused should have prosecuted a writ of error to the Supreme Judicial Court of Massachusetts before invoking the jurisdiction of the Circuit Court of the United States upon habeas corpus" (Harlan, J., 203 U. S. 225, 226, 27 Sup. Ct. 122, 123 [51 L. Ed. 161, 7 Ann. Cas. 1073]), and that on this ground the petition must be dismissed.

[2] Upon the merits of the case as presented the same conclusion is reached. The indictment charges that on March 11, 1920, Graves and other persons named therein entered into a criminal conspiracy to injure and destroy buildings in the state of Illinois by the felonious and unlawful use of explosives. There was evidence before the Governor of Massachusetts that on the day specified such an explosion took place and that Graves was present at the scene of the crime. Obviously such an explosion might be the result of a conspiracy existing at the time when it occurred. The indictment alleges there was such a conspiracy and that Graves was one of the conspirators.

This is farther than the demanding state was required to go. The petitioner is not entitled to be discharged on habeas corpus unless he shows that he was not in the demanding state at any time when it was possible for him to have committed the crime charged in the indictment. He must establish an alibi to possibility, as well as to actual presence. In the language of the Supreme Court:

"The case is not to be tried on habeas corpus, and * * * when, as here, it appears that the prisoner was in the state in the neighborhood of the time alleged, it is enough." Holmes, J., Strassheim v. Daily, 221 U. S. 280, 286, 31 Sup. Ct. 558, 560 (55 L. Ed. 735).

See, too, In re Montgomery (D. C.) 244 Fed. 967, affd. 246 U. S. 656, 38 Sup. Ct. 424, 62 L. Ed. 924.

[3, 4] Objections to the formal sufficiency of the indictment—e. g., that it does not inform the defendant whether he is indicted under a statute, and, if so, what statute, or under the common law, cannot be raised on habeas corpus proceedings. The objection that the Illinois warrant explicitly provides that the state of Illinois shall not be responsible for the expenses of extradition, was held in Marbles v. Creecy, 215 U. S. 63, 30 Sup. Ct. 32, 54 L. Ed. 92, to be "a matter for the consideration of the Governor of the former [the asylum] state when he received the official demand for the arrest and delivery of the appellant as a fugitive from justice," and not to be "a matter that could legally affect the inquiry before the Circuit Court on habeas corpus, whether the requisition of the demanding state and the action thereon by the Governor of Missouri were in substantial conformity with the Constitution and the laws of the United States." Harlan, J., 215 U. S. 69, 30 Sup. Ct. 34, 54 L. Ed. 92.

While the formal sufficiency of the Illinois papers is not conceded by the petitioner, no serious argument has been made against them. They appear to be entirely regular.

Certain other matters of Illinois law have been argued, but for the reasons already stated they are not open in these proceedings.

[5] The petition must be dismissed. Inasmuch as all questions of law involved have been settled by decisions of the United States Supreme Court and of the highest court in Massachusetts, and there is no doubtful question of fact, the execution of the extradition warrant ought not to be further interfered with or delayed by these proceedings. I shall therefore follow the practice approved in this circuit by Judges Putnam and Lowell in Storti's Case (C. C.) 109 Fed. 809, although I am aware that some doubt has been expressed about it and refuse to allow an appeal, which in my opinion would be frivolous.

Petition dismissed.

Ex parte LAYNE.

(District Court, D. Massachusetts. December 13, 1920.)

No. 1919.

Habeas corpus ⇐113(3)—Appeal denied, in absence of disputed questions of fact or unsettled questions of law.

Where all questions of law involved in a habeas corpus proceeding by a person in custody under an extradition warrant have been settled by decisions of the United States Supreme Court, and there is no doubtful question of fact, an appeal would be frivolous, and will not be allowed.

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

Petition by John L. Layne for a writ of habeas corpus. Petition dismissed.

Thomas D. Lavelle, of Boston, Mass., for petitioner.
J. Weston Allen, Atty. Gen., for respondent Keating.

MORTON, District Judge. This case was heard on the petition for the writ, the motion to dismiss, and the answer. Such evidence was introduced as either party desired to offer.

The facts are similar to those in the Crowley Case, 268 Fed. 1016, with which this was heard, except that no question is made but what Layne was in the state of Michigan at the time alleged in the complaints. The only points relied on in his behalf are that the provisions of R. S. § 5278 (Comp. St. § 10126), and of the Michigan statutes (Comp. Laws 1915, § 15891), require the expenses of extradition to be paid by the demanding state, and that in this case the demanding state has expressly exempted itself from paying them, and they are in fact being paid by a creditor of Crowley & Co., who was pursuing him.

This same point was raised and argued in the Graves Case, 269 Fed. 461, which I have just decided and is covered by what is said in the opinion in that case and the decision there cited.

The petition must be dismissed. Inasmuch as all questions of law involved have been settled by decisions of the United States Supreme Court, and there is no doubtful question of fact, the execution of the extradition warrant ought not to be further interfered with or delayed by these proceedings. I shall therefore follow the practice approved in this circuit by Judges Putnam and Lowell in Storti's Case (C. C.) 109 Fed. 809, although I am aware that some doubt has been expressed about it, and refuse to allow an appeal, which in my opinion would be frivolous.

Petition dismissed.

In re CUNY.

(District Court, S. D. Texas, at Houston. November 3, 1920.)

Aliens ⊂=62—Effect of registering for foreign military service after declaration of intention.

A German subject, who in 1914, after having made his declaration of intention, registered for military service with a German consul, *held* not entitled to admission to citizenship on such declaration, but under the facts shown entitled to refile or make a new declaration.

Application of John Peter Cuny for naturalization. Dismissed without prejudice.

M. H. Anthoni, U. S. Naturalization Examiner, of San Antonio, Tex., for the United States.

HUTCHESON, District Judge. This is a hearing upon the application of John Peter Cuny to be admitted to citizenship. The government, through the examiner, objects to his admission on the ground

that, in the summer of 1914, the petitioner, having theretofore filed his declaration of intention to become a citizen of the United States, did register for military service with the German consul at Galveston. The contention of the government is that this registration invalidated the declaration of intention, and therefore left the petitioner in the case of one without a declaration of intention, wanting in one of the essential formal requisites for admission.

The petitioner replies that, while it is true that he did register, he did so, not for the purpose of aiding Germany, but in order that, after the war should be over, if he should at any time in his future life have an opportunity to go to Germany to visit his mother, he could not be excluded or imprisoned, and sought to emphasize this position by the proof, uncontradicted, that while he was technically a German subject, because born in Alsace, he was born of French parents, educated in France, and always cherished a lively antipathy toward the Germans; that he knew, when he registered, that it would not be possible for him to return to Germany for service, and he registered, not with the intention of serving, but merely to preserve his standing.

The petitioner is of high moral character, and the only objection to his admission is grounded on the point above stated. The laws that govern naturalization require that, to entitle an applicant to be admitted to citizenship, except in certain specified cases, there must be a declaration of intention, which declaration shall have been made not less than two, nor more than seven, years before the petition for admission is filed. Subdivision 4 of section 4 of the law (Comp. St. § 4352, subd. 4) further provides:

"It shall be made to appear to the satisfaction of the court * * * that immediately preceding the date of his application," the petitioner shall have "resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

Within the seven-year period which the statute contemplates a declaration shall be operative there is no express provision of the law invalidating it, and the applicant stands before this court with a good declaration and a good petition, and, unless the other provisions of the statute quoted prevent his admission, he should be received.

This I think it clear they do, for it is wholly inconsistent with the professions of the declaration, "It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty," and therefore inconsistent with that loyalty which a prospective citizen owes to the country whose citizenship he seeks, for him to attempt, during the period when his right to citizenship in the adopted country is ripening, to reaffirm his allegiance to the country from which he comes. If this were permitted, the very purpose of the five-year probation would be defeated, for it cannot be said that a man who, after professing in his declaration of intention that he intends to forever renounce allegiance to any foreign government, registers with the consul of a

foreign government for its compulsory military service, has conducted himself in the manner of one attached to the principles of our Constitution, or well disposed to the good order and happiness of our country.

I do not agree, however, with the contention of the government that this action of the applicant has invalidated his declaration of intention. As before stated, the statute does not in terms provide for its invalidation upon facts of the kind in question, and the record wholly fails to show any fraud upon the part of applicant at the time of making it which would invalidate it.

In view, therefore, of the fact that at the time of his registration the United States was not at war with Germany, and that the evidence not only fully acquits petitioner of any disloyalty to the United States, but furnishes a record of loyalty and efficient helpfulness in the war work of this government after the United States became a party to the conflict, it is my opinion that the order in this case should be that the petition of the applicant be dismissed without prejudice, with the right to refile, or, if he is so disposed, to withdraw the declaration as a basis for filing the petition in any other district to which he may remove, with the right to the petitioner to be admitted upon showing that for a period of five years prior to the filing of his new petition he conducted himself in the manner which the statute requires this five years to be arrived at, without taking into consideration any time prior to the registration with the German consul; and it will be so ordered.

In re WATKISS.

(District Court, S. D. Texas, at Houston. December 28, 1920.)

Aliens ⇐62—Unsuccessful attempt to volunteer in alien army after declaration does not bar admission.

Where an alien, who had declared his intention to become a citizen, thereafter attempted to volunteer for the military service of his native country, but was rejected, so that he took no oath of allegiance in connection therewith, his act was not a recognition of the claim of his native country to his services, and therefore does not bar his admission to citizenship, as his registration for compulsory service would have done.

Petition by John Walford Watkiss for admission to citizenship. Petitioner ordered admitted.

M. H. Anthoni, U. S. Naturalization Examiner, of San Antonio, Tex., for the United States.

HUTCHESON, District Judge. This is a hearing on the petition for citizenship of John Walford Watkiss, a subject of Great Britain, whose papers are in proper form, and who stands accredited in every respect for the award of citizenship, except for the objection raised by the government, through its examiner, that petitioner did, sub-

sequent to the date of the execution of his declaration of intention, endeavor to enlist in the British armies for service in the World War.

This endeavor took the form, first, before the United States entered the war, of a call at the British consulate at Galveston, with an offer there to enlist in the British army, followed by rejection, on account of applicant's being a married man; and, second, after the United States had entered the war, by an endeavor on the part of petitioner to enlist in the Canadian forces. Neither of these efforts to enlist was successful, and the petitioner did not, in connection with either one of them, take any oath of allegiance, nor register nor otherwise submit himself for compulsory service.

The record containing no proof of a provision for compulsory military service in the British army applicable to petitioner at the time when he undertook to enlist in it, his act must be held to be that of a volunteer, which neither in fact nor in law was a recognition of the authority of the British government, or an act of allegiance thereto. This being true, I find nothing in the conduct of petitioner which could be said to be contrary to the Constitution of the United States, or other than well disposed to the good order and happiness of the same.

In the Case of John Peter Cuny, 269 Fed. 464, opinion filed the 3d day of November, 1920, where the applicant registered with the German consul, I have set out the reasons which induced me to hold that that petition should be denied, and to that opinion I refer for the general considerations controlling here. Applying those considerations to this case, I think it clear that this petition should be granted, and the applicant admitted, for, while the distinction at first blush between this and the Cuny Case may appear narrow, it is none the less clear, resting as it does upon the fact that the act of Cuny was a rendering allegiance to a compulsory requirement, and therefore an attorning or act of fealty to the German government, while the acts of Watkiss were merely voluntary acts of a person who felt the call of a righteous cause, and desired to do his part in it, with no attorning to or recognition of the authority of the British government over him.

It is therefore my judgment, and it will be so ordered, that the petitioner be admitted.

THE MACONA.

(District Court, S. D. New York. May 13, 1920.)

Salvage ⇐18—Seamen not entitled for services to stranded vessel not abandoned.

The seamen of a vessel, which stranded before the voyage was terminated, but which had not been abandoned, are not entitled to salvage for services in getting the vessel afloat, which were arduous and more exacting than the usual work at sea, but which entailed no hardship, and required no labor outside of usual working hours, except that which was paid for as overtime.

In Admiralty. Libel by H. Gjessing and others against the steamship Macona and the Barber Steamship Lines, Incorporated. Libel dismissed.

Isidore A. Rabinow, of New York City, for libelants.
John W. Crandall, of New York City, for respondents.

LEARNED HAND, District Judge. The rule in this circuit applicable to this class of cases was laid down in what for me must be taken as authoritative form in The C. P. Minch, 73 Fed. 859, 20 C. C. A. 70 (C. C. A. 2d). There a schooner on the Lakes had been overtaken by tempestuous weather and was pounding on a bar. Her master and part of the crew left, but the mate and two of the crew, with two passengers, remained. Eventually she was brought to safety through the efforts of the mate. The services were highly meritorious, but, as there had been no definite abandonment, the libel was dismissed, following the decisions in The John Perkins, Fed. Cas. No. 7,360, and The Acorn, Fed. Cas. No. 10,252. In The C. F. Bielman (D. C.) 108 Fed. 878, affirmed Gilbraith v. Stewart Transp. Co., 121 Fed. 540, 57 C. C. A. 602, 64 L. R. A. 193 (C. C. A. 7th), the same rule was applied under circumstances very like the case at bar, except that there was some color to assert that she was abandoned. The vessel completed her voyage as here, and in The C. P. Minch, supra. Very recently, in The Georgiana, 245 Fed. 321, 157 C. C. A. 513, the Circuit Court of Appeals for the First Circuit allowed salvage in a similar case, but precisely for the reason that there had been a final abandonment.

Therefore there is no reason in the later cases to question the rule, laid down by Judge Lacombe in The C. P. Minch, supra, that either the vessel must be a total loss or she must be abandoned by her master. The language of Justice Story, in The Hope, 10 Pet. 108, 122, 9 L. Ed. 363, has at times led to contrary suppositions, but in The C. F. Bielman, supra, it was explained as not inconsistent with the rule. Justice Story, in The Two Catherines, Fed. Cas. No. 14,288, showed, I think, what he meant by his subsequent language in The Hope, supra. While the old and harsh rule obtained which made wages dependent upon freight, courts were glad to snatch at any excuse under the name of salvage to avoid its consequences. But, even in that case,

the vessel was an abandoned wreck, of which only some of the gear was salved.

In the case at bar, with every allowance, I can see no reason to treat the case as one of hardship. There was certainly no danger, not even the usual dangers of the sea; and while the work was more exacting than the usual work at sea, it cannot by any stretch of imagination be considered as comparable to work which seamen are repeatedly called upon to perform in the usual course of their duties. The weather was not cold, and there were no storms; the work was not performed in water, and, while it was monotonous and long, it entailed no hardship or exhaustion, since it was performed only at regular hours, except for the overtime, for which the men were paid extra. A seaman's work is not capable of nice definition, and is notoriously irregular in its demands upon him. When he signs the articles, he accepts obligations which in the long history of the sea have always subjected him to periods of intense, and at times protracted and exhausting, labor, as at other times they permit him long periods of relative ease, at least in modern times. It will not, I think, tend to improve the conditions of his employment to try exactly to parcel out just when his work as seaman ends; certainly it will make difficult that discipline which at sea, if anywhere, must remain a condition of safety. To make an award in the case at bar I must hold that, whenever a ship is upon a strand, the duties of the crew are at an end, and that they are not obliged, by virtue of their duties as such, to do their utmost to lighten her, so that she may proceed upon her voyage.

Libel dismissed, without costs.

POTTER v. PAYNE.

(District Court, E. D. New York. November 24, 1920.)

Salvage ⇐13, 30—Tug, pulling barge off shore and towing to anchorage, held to have rendered salvage worth $1,500.

Where a barge, which was being dragged out to sea in ice with the ebb tide, brought up on Sandy Hook near the turn of the tide, and, though there was no great immediate danger, the captain hoisted a distress signal, a tug, which pulled the barge off shore and took her to the anchorage off Staten Island, *held* to have rendered a salvage service, rather than a mere towage service, and entitled to an award of $1,500, though the difficulties encountered were no more than she would have undertaken in towing a schooner up the harbor at the same time.

In Admiralty. Suit by Leta D. Potter against John Barton Payne, as agent, etc. Decree for libelant.

Foley & Martin, of New York City, for libelant.

Macklin, Brown, Purdy & Van Wyck, of New York City, for respondent.

CHATFIELD, District Judge. Most of the facts entering into the situation are not contradicted. Three barges, anchored in behind Sandy Hook, had been affected by ice floes for a good part of the night, and during an entire afternoon had been dragged with the ebb tide out to sea. The Conewaga happened to bring up on Sandy Hook at a time so near the turn of the tide that no further danger of drifting out to sea until the next ebb tide could have been in the minds of any of the parties. But in the meantime, with deeper water on the flood tide, the Conewaga might have been carried further ashore by the west wind, which not only was working around, but apparently increasing in strength. I think it very likely that during that afternoon, when the wind got up to the velocity of 17 miles movement for an hour, that the boat would have been in a bad situation as the tide rose, even though the ice floes diminished in quantity. The International apparently got back about the time the tide turned again to run out, and there were other towboats in the neighborhood, so that the danger of having to spend the night on the shore does not now seem very great; but it seems to me entirely reasonable that the captain of the Conewaga, not knowing whether the International or some other tug would come to his relief, and not knowing what might happen as the wind increased and the tide came in, sought help.

The reason for showing the distress signal may have been particularly that he wanted to get in communication with some one who could either rescue him or communicate his plight to the Reading Company. But at any rate he was aground on the Sandy Hook shore in a position where he did not drift further, and the court cannot find that his showing a distress signal was solely for the purpose of communicating a message. It is evident from the testimony that the Juno saw the distress signal, so that it could not have been down before they

started to the rescue. If it was taken down after that, it makes little difference whether it was because the Juno was coming or because the captain had no further reason to communicate with the shore.

It appears from the testimony that there was little danger in pulling the boat off shore, and taking her out, so as to get into the Swash Channel, which was probably the shortest as well as the most free from ice route up the bay, so that the difficulties encountered by the Juno were no more than she would have undertaken in towing a schooner up the harbor on that afternoon at ordinary towing rates. There is nothing to indicate that the opening of the Juno's seams came particularly from towing the Conewaga. She must have come in contact with the ice floes substantially as much during that day in cruising around as she did in pulling the Conewaga off, except for the immediate time when she was approaching the Conewaga.

The services rendered by the Juno, therefore, consist principally of a towage service, but under the circumstances there is nothing reprehensible, at least, in taking the Conewaga to the anchorage off Staten Island, instead of leaving her at some unprotected point around Sandy Hook; it being evident that there was too much ice and too much danger to undertake to put her back behind the Hook at that time.

The libelants have asked for a salvage award of $5,000. The claimant considers that the amount which might be charged for bringing the barge from close to shore out into deep water, where she could drop her anchor, which he estimates at $150, should be the limit of the award.

I think the services were in the nature of salvage services, rather than a mere towing of the boat a short distance to anchor, and while there were no elements of danger to the Juno, and no immediate impending disaster to the Conewaga or her cargo, I think that the situation was sufficiently serious, so that the possible stranding of the Conewaga should not be lost sight of. I think that $1,500 would be a fair award, and direct a decree for that amount.

If the amount of the decree is paid, and the apportionment between the boat and the cargo taken care of by the claimant, then no further order is necessary. In case the claimant is unable to arrange this apportionment without further litigation, the decree will be left open, so that the proper party may be brought in.

BRUMBAUGH et al. v. GOMPERS et al.

(Court of Appeals of District of Columbia. Submitted October 13, 1920. Decided November 8, 1920.)

No. 3381.

1. **Adverse possession ⟸66(1)—Possession beyond true line to established boundary is adverse.**
   Possession by a lot owner for 30 years to a boundary clearly defined by a fence and building, which was beyond the true boundary of the lot, is adverse possession to the established boundary.
2. **Adverse possession ⟸43(3)—Transfer of property sustains tacking of possession beyond true boundary.**
   Proof of regular conveyances of the title to a lot is sufficient to sustain a tacking of adverse possession by the lot owners of a strip between the true boundary of the lot and an established fence, to which the owners claimed, though that strip was not included in the description in the conveyances.
3. **Injunction ⟸113—Plaintiff held to have waived right to mandatory injunction for removal of building.**
   Where a lot owner, at the time construction of a building on the adjoining lot was begun, claimed title to a strip beyond the true line by adverse possession, whereupon the work was stopped until the owner wrote a letter, which might have been reasonably construed as a surrender of the right by adverse possession, the right to a mandatory injunction for removal of the building after several stories had been completed, so that the removal would have cost a large sum, was waived.
4. **Injunction ⟸195—After waiver of right to injunction, equity can require compensation for land occupied by building.**
   Where a lot owner had waived his right to a mandatory injunction for the removal of a building which encroached upon his premises, equity can nevertheless require the owner of the building to pay just compensation for the strip taken.

Appeal from the Supreme Court of the District of Columbia.

Suit for mandatory injunction by Catherin E. Brumbaugh and another against Samuel Gompers and others, trustees of the American Federation of Labor, and others. There was a decree dismissing the bill, and complainants appeal. Reversed and remanded.

Andrew Wilson and J. P. Schick, both of Washington, D. C., for appellants.

J. H. Ralston, of Washington, D. C., for appellees.

ROBB, Associate Justice. This is an appeal from a decree in the Supreme Court of the District, dismissing appellants' bill for a mandatory injunction requiring the removal of so much of appellees' building as encroaches upon appellants' premises, known as No. 905 Massachusetts Avenue Northwest, in this city, and "for such other and further relief as to the court may seem proper and the exigencies of the case may require."

Prior to 1873, Marion F. Thompson was the owner of land in this city, which, by subdivision in 1879, became in part lots 11, 12, and 13, in square 370. In 1882 Marion F. Thompson conveyed lot 13 to Fran-

cis G. Middleton, who, by will dated August 18, 1882, devised the lot to his wife, Ida M. Middleton. On June 19, 1906, Mrs. Middleton, then the wife of William O. Shumate, conveyed to the appellant Catherin E. Brumbaugh. Marion F. Thompson died in 1905, and by her will devised above lots 11 and 12, which lots, under partition proceedings, were conveyed to appellees on August 13, 1915. It thus appears that the parties hereto derived their titles from a common source; the purchase by appellants antedating that of the appellees.

Lots 11, 12, and 13 form the northwestern corner at Massachusetts avenue and Ninth Street Northwest; the three lots running back to an alley and lot 13 being west of lot 12. Prior to the erection of appellants' dwelling house in 1883, and before there was any building upon the southern or front part of lot 12, there were two old buildings extending north and south on the rear portion of lot 12—the northerly building being 30 feet long and reaching almost to the alley; the other building being a little more than 20 feet long. Connecting the westerly walls of these two old buildings was a permanent fence. The uncontradicted and convincing evidence is to the effect that, since the erection of appellants' dwelling house on lot 13 in 1883, the owners of that lot have had open, actual, and exclusive possession of the land up to the walls of the two old buildings and the fence connecting them, and thence to a line running in a southerly direction to the northeast corner of the dwelling house. In the rear of lot 13, and along its easterly side, was a brick walk extending to the alley. After appellees had acquired title to lots 11 and 12, lot 12 was surveyed, and the westerly line found to encroach to some extent upon the land that had been in the possession of appellant Catherin E. Brumbaugh and her predecessors in title since 1883, including, of course, a part of the brick walk.

In July of 1915, after appellees had arranged for the purchase of lots 11 and 12, plans were prepared for the erection of a seven-story fireproof structure on those lots. These plans were seen by the appellant Dr. Brumbaugh, who acted for his wife throughout, and he made certain suggestions looking to the safeguarding of his wife's interests, but nothing was said at that time as to any claim by adverse possession. In the early part of November following, when the excavation for the foundation of the new building had reached the rear portion of lot 12, appellants discovered that the excavation extended west of the line of the old buildings and fence already mentioned, and thus encroached to some extent upon the land claimed by the appellants. Thereupon the superintendent of construction was notified that "he must stay on the far side of the dividing line, which had been held since 1883." That this line then was pointed out to the superintendent there can be no doubt. Appellants say the work then was discontinued for several weeks, but the superintendent testifies that in about a week he received orders from his superiors to proceed, and that work then was resumed immediately. We incline to the view that the recollection of the superintendent is correct on this point. A week after the notice had been given the superintendent, appellants wrote the following letter to the architects:

"In consideration of your assurances in our recent conversation at your office, and especially that the building of the A. F. of L. will not cut into or encroach upon the east wall of our residence—that wall and the retaining wall in the rear line of the property having stood intact since 1870; since before 1877 (more than 30 years)—and the further fact that your wall in the rear portion of the lot will be kept away from the line dividing the properties, we have decided to permit the dividing rear wall to be taken down (proper temporary protection to be put up to prevent accident on our side). In this connection it should be borne in mind that this fence has retained a legal right to a little more distance than the D. C. surveyor would seem to give us in his line through the said wall (by reason of adverse possession over 38 years). Every inch of ground in the rear is of importance to us in the way of light and air. The contractor has said that he will take off a foot from the east end of our rear shed, to permit egress and ingress from the alley, and promptly restore everything to its proper condition on our property. The air shaft and dead walls opposite our house are to be whitened, and the chimneys carried up to protect our draft."

Appellants, of course, noted the progress of the work on the new building and testified that they "protested constantly to those connected with the work"; but no written protest was made until March 9, 1916, when the building had progressed to the second or third story. On that date appellees were notified of appellants' claim, and asked "whether these matters can be adjusted amicably, or whether it will be necessary to look to legal protection of our legal rights, which seem to have been wholly overlooked through disregarding 'adverse possession,' " as above noted. On March 20th appellants, in a further communication, suggested that the matter be submitted to arbitration; but, appellees making no response, the present bill was filed April 11th following.

The court below, being of opinion that "a case for equitable relief had not been made out" and "that adverse possession had not been shown," dismissed the bill.

[1] We are unable to accept the finding of the trial court that adverse possession has not been shown. The evidence is uncontradicted that for a period of more than 30 years the eastern boundary of lot 13 was not the line as surveyed for the sale to appellees, but the line claimed by appellants and formed by clearly defined boundaries. In our view, no clearer case of adverse possession could be made. Rudolph v. Peters, 35 App. D. C. 438, Ann. Cas. 1912A, 446; Johnson v. Thomas, 23 App. D. C. 150.

[2] Some suggestion is made that there has been no tacking of possession, within the meaning of the law. This contention may be put out of view by a citation of the following authorities: Reid v. Anderson, 13 App. D. C. 30; Lea v. Polk County Copper Co., 21 How. 493, 16 L. Ed. 203; Ill. Steel Co. v. Paczocha, 139 Wis. 23, 119 N. W. 550; St. Louis S. W. Ry. Co. v. Mulkey, 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339; Viking Co. v. Crawford, 84 Kan. 203, 114 Pac. 240, 35 L. R. A. (N. S.) 498; 2 C. J. 82, 83.

[3] We come now to a more serious question. Appellants knew early in November, that it was the purpose of appellees to follow the surveyor's line, and, while the verbal notice to the superintendent was sufficient to apprise appellees of the adverse claim, appellants'

attitude thereafter was equivocal. The letter of November 11th was susceptible of the interpretation that appellants, under certain conditions, would permit more or less of an encroachment upon their premises. Appellants now say they did not mean to yield any of their rights, and that, in any event, appellees did not fulfill conditions mentioned in the letter. The fact remains, however, that before taking any definite action appellants permitted the erection of the building to proceed up to the third or fourth story, when they must have known that a change in the building wall to conform to their claim would cost thousands of dollars. Having in mind that the encroachment upon appellants' premises was comparatively slight, that the surveyor's line was followed, and that there was no willful disregard of appellants' rights, we are of the view that appellants are in no position to ask a court of equity to have the encroaching portion of the building removed. It will be noted that, upon receipt of appellants' notice by the superintendent, work was discontinued until a time subsequent to the letter of November 11th. Instead, therefore, of adhering to the letter of the notice theretofore given, appellants assumed a less definite attitude, resulting in the resumption of the work. Appellees than may have concluded that, if appellants' claim finally was established, in no event would appellants demand more than compensation for the land taken. If appellants then intended to insist upon their legal right to actual possession of the land in dispute, rather than upon their right to compensation therefor, the situation was such as to require more definite action than was taken by them, and, should a court of equity now grant the relief prayed, an injustice would be done the appellees. Whitney v. Union R. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715; Smith v. Spencer, 81 N. J. Eq. 389, 87 Atl. 158; Roberts v. Nor. Pac. R. Co., 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873.

[4] But appellees have appropriated some of appellants' land, and, while appellants may not recover possession, equity requires that they receive compensatory damages. Indeed, in the argument at bar counsel for appellees conceded that if appellants' claim of adverse possession was sustained, they would be entitled to compensatory damages. While appellants waived their right to have their property restored, it would be an unconscionable thing to rule that they had made a gift of it to the appellees. We are satisfied that they intended no such thing.

The decree must be reversed with costs, and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

MONAHAN v. MURRAY et al.

UNITED STATES ex rel. MURRAY et al. v. DOYLE, Judge.

(Court of Appeals of District of Columbia. Submitted October 11, 1920. Decided November 8, 1920.)

Nos. 3364, 3367.

1. **Courts ⇐190(4)—Hearing for approval of bond on appeal from municipal court must be had within two days after last date for filing.**
   Under Code of Law 1901, § 31, requiring bond on appeal from the municipal court to be given within six days after entry of judgment and the rule of the Supreme Court of the District requiring two days' notice of application for the approval of the bond, the two days' notice of the hearing must expire not more than two clear days after the bond is filed, if it is filed on the fifth or sixth day after judgment.
2. **Courts ⇐190(4)—Approval of bond on appeal from municipal court nunc pro tunc cannot be entered after disapproval and expiration of time.**
   Where a bond on appeal from the municipal court was disapproved at the hearing on the last day on which such hearing could be had, the right of appeal ceased, and the municipal court judgment became final, so that an order approving the bond could not thereafter be entered nunc pro tunc, though the court could have continued the hearing to a subsequent date and then approved the bond.
3. **Courts ⇐190(4)—Bond on appeal from municipal court should be disapproved on reasonable objection.**
   The requirement of a bond on appeal from a municipal court judgment is for the protection of the appellee, and the court, therefore, should not approve any such bond to which there is any reasonable objection.

Appeal from the Supreme Court of the District of Columbia.

Action in the municipal court by George O. Murray and another against Thomas F. Monahan, appealed by defendant to the Supreme Court of the District, consolidated for hearing with an application by the United States, on the relation of George O. Murray and another, against Michael M. Doyle, one of the Judges of the Municipal Court of the District of Columbia for mandamus, requiring the issuance of a writ of restitution. Appeal in the first case dismissed and application for mandamus denied, and the defendant in the first case and relators in second case, appealed. Judgment dismissing appeal affirmed. Judgment denying mandamus reversed and remanded.

W. C. Balderston, of Washington, D. C., for appellant in 3364, and appellee in 3367.

R. B. Dickey, of Washington, D. C., for appellees in 3364, and appellants in 3367.

ROBB, Associate Justice. These cases were consolidated for hearing in the trial court and were heard together here. The first involves the action of the trial court in dismissing the appeal from the municipal court; the trial court being of the view that the municipal court, having disapproved the appeal bond, was without authority, after the expiration of the appeal period, to approve the bond nunc pro tunc. The second appeal is from an order of the trial court, dismissing the petition

of appellant (appellee in the first case) for a writ of mandamus requiring the municipal court to issue a writ of restitution.

The Murrays instituted a suit in the municipal court for the recovery of possession of certain described premises, alleging that they were bona fide purchasers of the same and necessarily required them for their own use and occupancy. On November 5, 1919, judgment for possession was rendered and an appeal noted. On November 10th, which was within the six days allowed by section 31 of the Code for the giving of an appeal undertaking, notice was given appellee, under rule 7 of the Supreme Court of the District, that the appealing party, on the 13th of November following, would "offer Frank Frazanno * * * and Chas. D. Hood * * * as sureties on the undertaking to be entered into herein." On November 13th it developed, during the examination of Frazanno, that he was under some misapprehension as to his liability under the undertaking he had signed. Whereupon Frazanno announced to the court that he did not "care to go on this bond." The cosurety then stated to the court that counsel for appellant had failed to make agreed financial arrangements with the sureties. Thereupon counsel for the appealing party "said he would have the money by 4 o'clock if they (the sureties) would wait. The sureties said they did not care to go on the undertaking anyway." Thereupon the following entry was made by the municipal court judge:

"Within bond disapproved; both sureties appearing and expressing a desire to withdraw."

On November 19th, following, new counsel appeared for the appealing party and moved the court to approve the undertaking theretofore disapproved. A copy of the motion was served upon counsel for the opposite party, but the record fails to show that any notice was given the sureties on the undertaking. On the day named in the motion the court, after hearing counsel for the parties, entered the following order:

"Upon hearing of the motion filed herein to approve the appeal bond, heretofore disapproved, such disapproval being based solely upon the expressed desire of the sureties to withdraw, the sureties being otherwise sufficient, it appearing to the court that it was without authority in law to disapprove said bond, the said appeal bond filed herein is hereby and herewith approved this 29th day of November, 1919, as of and for the 30th day of November, 1919."

The appeal was dismissed in the court below on motion of the plaintiffs, who subsequently filed their petition for mandamus.

Under section 31 of the Code an appeal from a judgment in the municipal court may not be allowed "unless the appellant, with sufficient surety, approved by the justice [now municipal court judge] shall enter into an undertaking to satisfy and pay whatever final judgment may be recovered in the appellate court," and such an undertaking "must be given within six days, exclusive of Sundays and legal holidays, after the entry of judgment."

By a rule of the Supreme Court of the District, which this court sustained in Fowler v. Quigley, 38 App. D. C. 214, two clear days' notice in writing must be given the appellee of the application for the approval of the above bond.

In Beal v. Cox, 14 App. D. C. 368, a justice of the Supreme Court of the District had refused to approve an appeal bond, because not satisfied as to the genuineness of the signature of the surety. After the expiration of the time within which a bond might have been filed, a motion was made for the approval of the disapproved bond, nunc pro tunc. The court overruled this motion, upon the ground that it was "equivalent to an offer of a new bond after the period allowed therefor had expired." This court ruled that, had an application been made at the time of the first hearing for leave to take testimony, it would have been the duty of the court to have granted the motion, and that, had the court, upon hearing, decided to approve the bond a formal entry might have been made, nunc pro tunc. In disposing of the case however, this court said:

"When the justice refused to approve the bond for any reason, it cannot be considered as 'filed,' or any longer before him. The only recourse, then, is to apply for time to prove the genuineness of the bond, or to reoffer it, or a substitute bond, within the time limited by the rule."

The court sustained the action of the trial judge—

"in refusing to consider the bond when offered the second time, because his power to approve an appeal bond in the case had ceased with the expiration of the time allowed in the rule."

In Mulvihill v. Clabaugh, 21 App. D. C. 440, involving an appeal bond in the Supreme Court of the District, this court said:

"The bond is an instrument, in the meaning of the rule, without any effect until it is approved by the court or judge thereof."

[1, 2] We think the above decisions controlling in this case. The statute requires the appeal bond to be filed within six days after the entry of judgment, and the two clear days' notice to the appellee of the hearing for the approval of the bond must expire not more than two clear days after the bond is filed, when that instrument is filed on the fifth or sixth day after judgment. The first hearing in the municipal court for the approval of the bond here involved was on the last day within which such a hearing might have been noted under the rule. When the sureties sought to withdraw, for the reasons stated, the court, as suggested in Beal v. Cox, might have continued the hearing and determined the question later, nunc pro tunc, thus preserving the jurisdiction of the court. But this was not done, nor did the appealing party ask for delay or further opportunity to be heard. The court, as in Beal v. Cox, disapproved the bond and, in the circumstances, terminated the appeal. When, therefore, the second application was made to the judge for the approval of the bond the judgment of the court had become final, and it was beyond the power of the court to allow an appeal therefrom. The attempted appeal was abortive, because supported by no bond.

[3] It is unnecessary to consider whether the municipal court was right or wrong in permitting the sureties to withdraw, but it may be observed that the purpose of the statute is the protection of the appellee, and the court should approve no bond as to which there is any

reasonable objection. Moreover, the hearing required by the rule is for the express purpose of developing any infirmity in the bond.

As to the appeal in No. 3367, no appeal having been perfected from the judgment in the municipal court, it follows that it became the ministerial duty of the judge to issue a writ of restitution. We are quite certain, however, that it will be necessary to do no more than indicate our view of the matter, and, while it will be necessary to reverse the judgment, with costs, in this appeal, no formal order to the municipal court need be made. The judgment is affirmed, with costs, in No. 3364; but in No. 3367 the judgment is reversed, with costs, and the cause remanded for further proceedings.

No. 3364: Affirmed.

No. 3367: Reversed and remanded.

UNITED STATES ex rel. McDUFFIE v. HAWLEY et al.

(Court of Appeals of District of Columbia. Submitted October 6, 1920. Decided November 8, 1920.)

No. 3417.

Mandamus ⇐3(1)—Not issued to require licensing of dentist, where board offers another examination.

Mandamus will not issue to compel the board of dental examiners to issue a certificate authorizing relator to practice dentistry, on the relator's claim that he did not fail in his examination, but that the board willfully and fraudulently refused to issue the certificate, if the relator has a remedy by taking a second examination, which the board offered to give him.

Appeal from the Supreme Court of the District of Columbia.

Mandamus by the United States, on the relation of Charles R. McDuffie against C. A. Hawley and others. Application denied, and relator appeals. Affirmed.

W. G. Gardiner, of Washington, D. C., for appellant.

F. H. Stephens and P. H. Marshall, both of Washington, D. C., for appellees.

SMYTH, Chief Justice. The application of the relator for a writ of mandamus, commanding the board of dental examiners of the District of Columbia to issue a certificate authorizing him to practice dentistry in the District, was denied by the lower court, and he brings the case here for review.

An act of Congress declares:

"That it shall be unlawful for any person to practice dentistry in the District of Columbia unless such person shall register with the health officer in compliance with the requirements hereinafter provided."

It provides for the appointment of a board of dental examiners by the commissioners of the District, directs that they test the fitness and pass on the qualifications of persons desiring to commence the practice

of dentistry in the District, and "certify to the health officer for registration such as prove, under examination in theory and practice of dentistry, qualified in the judgment of the board to practice dentistry in said District." 27 Stat. 42.

Relator applied to the board for leave to take an examination to the end that he might secure a license to practice his profession. He was examined in the practice only of dentistry, and failed, in the judgment of the board. At his request he was given a second examination, and he again failed. Some 14 days afterwards the board wrote him that they had been informed that he was not satisfied with the result of his examination, that they had been advised that it was illegal for them "to waive the theoretical examination," and that they would be willing to give him the "entire examination at as early a date as a sufficient number of other candidates may be available to take the test." It should be noted, in passing, that the statute requires an examination in both theory and practice, but the board waived the theory examination.

Relator declined to submit to another examination, and applied for a mandamus to compel the board to give him a certificate to practice. He claims that he did not fail in his examination; but, notwithstanding this, the board, he says, "wilfully, deliberately, and fraudulently refused to license him." The charge of fraud is based on the assumption that he passed the necessary examination, and he offers to prove to the satisfaction of the court that he is qualified to practice dentistry.

The board is ready and willing to give him another examination. If he takes it, he may succeed. He has open to him, therefore, a means by which he may obtain what he says he is entitled to, without resort to mandamus. It is well settled that the courts will not send forth the extraordinary writ of mandamus, unless there is no other adequate remedy at hand. In Moore v. United States, 33 App. D. C. 597, 602, the late Chief Justice of this court said:

> "Nothing is better settled than that the writ of mandamus cannot be * * * granted in any case where there is another adequate remedy."

To the same effect, see Seymour v. United States, 10 App. D. C. 567; In re Key, 189 U. S. 84, 23 Sup. Ct. 624, 47 L. Ed. 720; In re Pa. Co., 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738, and United States ex rel. Hall v. Lane, 48 App. D. C. 279.

The application for the writ was properly denied by the lower court, and its judgment is affirmed, with costs.

Affirmed.

HARRIS v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted October 5, 1920. Decided November 8, 1920.)

No. 3384.

1. **Rape ⇐48(2)—Fact of subsequent complaint by prosecutrix, but not details, are competent evidence.**
   In a prosecution for carnal knowledge of a female child, the fact that prosecutrix made complaint subsequent to the offense is admissible, though the particular facts stated in the complaint are not admissible, except when elicited in cross-examination, or to confirm her testimony after it has been impeached, or unless the complaint was part of the res gestæ.
2. **Criminal law ⇐1169(2)—Admitting details of complaint by prosecutrix not prejudicial, after another complaint was detailed without objection.**
   Where defendant permitted a witness for the prosecution to relate the details of a complaint made by prosecutrix without objection, the admission of similar details of a subsequent complaint by prosecutrix was not prejudicial.

Appeal from Supreme Court of the District of Columbia.

Daniel E. J. Harris was convicted of having carnally known a female child, and he appeals. Affirmed.

Robert I. Miller and J. A. O'Shea, both of Washington, D. C., for appellant.

J. E. Laskey, U. S. Atty., and L. R. Mason, Asst. U. S. Atty., both of Washington, D. C.

ROBB, Associate Justice. Appeal from a judgment of conviction in the Supreme Court of the District on an indictment charging the appellant with having carnally known a female child 9 years old.

The child testified to the details of a series of improper advances made by appellant, including the occurrence of November 24, 1918, upon which the indictment is based. After she had been taken to the House of Detention, on November 28th following, she "told about those occurrences" to Mrs. Van Winkle, a policewoman. Thereupon, over the objection and exception of the appellant, the mother of the child was permitted to testify as to a disclosure to her of the same occurrences by the child on the evening of the day following the disclosure to the policewoman, and this is assigned as error.

[1] The general rule undoubtedly is that the prosecutrix may testify as to whether she made complaint of the injury, and when and to whom, "yet the particular facts which she stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached." 3 Greenl. on Ev. par. 213; Roney v. U. S., 43 App. D. C. 533; People v. Scattura, 238 Ill. 315, 87 N. E. 332; Parker v. State, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 387. And if the complaint is made under such circumstances, in point of time and surrounding circumstances, as to form part of the res gestæ, the details may be received in evidence. Snowden v. U. S., 2 App. D. C. 89. In that case the complaint was made within

a few hours of the criminal act, while the child was suffering from injuries inflicted, and while there were visible evidences of violence.

[2] In the present case the child was permitted, without objection, to testify in detail as to disclosures made to the policewoman. The testimony of the mother, as to the same disclosures subsequently made to her, cannot be said to have prejudiced the accused. The time to have objected was when the child testified as to those details. Having permitted the child to testify without objection, and thus obtained the privilege of cross-examination, appellant is in no position to seek a reversal of the judgment merely because another witness subsequently testified to similar disclosures.

There were other facts and circumstances tending to prove the guilt of appellant, and, being convinced that he has had a fair trial and suffered no prejudice, we affirm the judgment.

Affirmed.

HOCKMAN v. SHREVE.

(Court of Appeals of District of Columbia. Submitted October 7, 1920. Decided November 8, 1920.)

No. 3344.

Landlord and tenant ⇐94(4)—Delivery of notice to quit to son at tenant's request sufficient.

Where the landlord took a notice to quit to the premises and there delivered it to the tenant's 17 year old son at the request of tenant, who came to the head of the stairs, but stated she was too ill to come down, but to send the paper by her son, and the notice was thereafter immediately delivered to her by her son, there was substantial compliance with the requirement of Code of Law 1901, § 1223, that service be made personally on the tenant.

Appeal from the Supreme Court of the District of Columbia.

Proceeding by Richard S. Shreve, as landlord, against Gertrude K. Hockman, as tenant, to recover possession of premises. Judgment for the landlord in the Supreme Court, on appeal from the municipal court, and the tenant appeals. Affirmed.

J. I. Peyser and Geo. E. Edelin, 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 in a landlord and tenant proceeding originating in the municipal court, and for which judgment for possession was awarded appellee in each court.

Suit was instituted on October 3, 1919; appellee alleging that he was the owner of the premises, in the employ of the United States government, and necessarily required the premises for himself and family. Appellant filed what, in effect, was a general denial, and further contended that the notice to vacate was insufficient. When

the case was reached for trial in the Supreme Court, the Ball Rent Act had been enacted; but the court already had acquired jurisdiction of the case.

Section 1223 of the Code provides that the notice to vacate shall be served upon the tenant personally—

"if he can be found, and if he cannot be found it shall be sufficient service of said notice to deliver the same to some person of proper age upon the premises, and in the absence of such tenant or person to post the same in some conspicuous place upon the leased premises."

In the present case, appellee called at the premises and was admitted by appellant's son, a boy of about 17 years. When appellee inquired for appellant—

"she came to the head of the steps, called down, saying that she was ill, and could not come down stairs, but to send the paper I told her I had for her, by her said son."

This was done, and appellant testified in the municipal court that the son immediately handed her the notice. The objection to this notice is too trivial to receive further consideration. There was a substantial compliance with the statute, and as no defense was made, even under the Ball Act (which this court has declared unconstitutional), the judgment must be affirmed in any event.

Judgment affirmed, with costs.

Affirmed.

HARTMANN et al. v. MASTERS et al.*

(Court of Appeals of District of Columbia. Submitted October 8, 1920. Decided December 6, 1920.)

No. 3362.

1. **Insurance ⇐50—Officers have no authority to transfer assets to another corporation.**
   The officers of an insurance company have no authority as such to transfer the business, assets, and policy holders to another corporation without the consent of the insurance company and its stockholders.
2. **Insurance ⇐46—Reorganization properly refused, where control was equally divided between factions.**
   Where a trustee had been appointed for an insurance company at the suit of one faction of its stockholders, which owned half the corporate stock, the court properly refused to authorize reorganization of the company, which would result again in each faction owning an equal amount of stock and re-establish the difficulties which led to the suit.
3. **Insurance ⇐46—Powers of attorney given by policy holders to organizers pending receivership not recognized.**
   Where, in proceedings for the dissolution of an insurance company, in which a receiver had been appointed and was endeavoring to secure the assets from the officers, the officers formed a new corporation, attempted to transfer the business and assets to it, and secured powers of attorney from the policy holders, such conduct is an attempt to frustrate the receivership proceedings, and the assets will not be delivered to the new corporation, nor the powers of attorney recognized, but the funds will be distributed to the policy holders, without allowance for expenses or services in the reorganization.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 376, 65 L. Ed. —.

4. **Insurance ⟸43—Policies lapsing after receivership reinstated, in absence of reinsurance.**
In adjusting the claims of policy holders of an insurance company, those who had discontinued payment of premiums when the company ceased to function, or thereafter, and did not obtain reinsurance in another company, because of physical condition or otherwise, should be reinstated and protected to the extent of their interests.

5. **Insurance ⟸43—Reinsurance of policy holders of dissolved company should be procured.**
If a reputable insurance company is willing to reinsure as a class the policy holders of a dissolved company, the court which appointed the receiver should approve such reinsurance, and turn over to the reinsurance company so much of the funds in its custody as may be necessary to create a sufficient reserve to secure properly the company which assumes those contracts.

Appeal from the Supreme Court of the District of Columbia.

Suit by Charles A. Hartmann and another against the Royal Insurance Company and others. From a final decree discharging the receiver previously appointed for the insurance company, plaintiffs appeal. Reversed and remanded.

W. Gwynn Gardiner and South Trimble, Jr., both of Washington, D. C., for appellants.

Wilton J. Lambert, of Washington, D. C., and J. K. M. Norton, of Alexandria, Va., for appellees.

VAN ORSDEL, Associate Justice. This appeal is from a final decree entered in the matter of the receivership of the Royal Insurance Company.

The cause originated in a suit by appellants Hartmann and Cohill against the Royal Insurance Company, Samuel J. Masters, John B. Kinnear, and Frank T. Evans for the appointment of a receiver for the Royal Insurance Company, and to recover certain sums of money from Masters and Kinnear; Evans being merely a formal defendant. From an order appointing a trustee for the stockholders of the Royal Insurance Company and for other purposes, the case was appealed to this court. Masters et al. v. Hartmann et al., 45 App. D. C. 253.

From a comprehensive statement in the opinion in that case, it appears that the Royal Insurance Company, with a capital stock of $1,000, held by Hartmann, Cohill, and Evans, was doing an industrial insurance business in the District of Columbia. The Modern Workmen of the World, a Virginia corporation, organized by Masters, Kinnear, and one R. P. Andrews, who were its board of directors and empowered to represent the corporation in all matters, was a mutual company, with no capital stock, engaged in issuing certificates to members entitling them to sick benefits and life insurance. It further appears, as stated in the opinion in the former case (45 App. D. C. 255), that on—

"January 24, 1911, Masters, Kinnear, and Andrews proposed to the Royal Insurance Company to transfer to it all of its liabilities and assets. The assignment was made in writing, and the Royal Insurance Company assumed all of the liabilities of the Modern Workmen of the World, and its obligations to

certificate holders. Notice was given to these certificate holders, and a printed slip, called a rider, was attached to their certificates, showing that the Royal Insurance Company had assumed all liability. By agreement between the parties, one-half of the capital stock of the Royal Insurance Company was assigned to Masters, Kinnear, and Andrews, who became directors of the Royal Insurance Company, with Hartmann, Cohill and Evans. Masters was elected president and Kinnear treasurer. By this arrangement the directors were equally divided and no business could be transacted unless one of the divided forces should co-operate with the others. The Modern Workmen of the World had assets at the time amounting to $42,138.44, which were duly assigned to the Royal Insurance Company, and the possession of which was in Kinnear, as treasurer of the Royal Insurance Company. The certificate holders of the Modern Workmen of the World paid their assessments to the Royal Insurance Company, and claims by them were paid by the Royal Insurance Company, as were also those of the certificate holders of the Royal Insurance Company."

Difficulties arose between the insurance commissioner and the Royal Insurance Company. Masters, Kinnear, and Andrews refused to attend meetings of the directors of the Royal Insurance Company, and proceeded to close the office of the company and dispose of its office furniture. They also held the securities assigned by the Modern Workmen of the World to the Royal Insurance Company, assuming to do so as trustees for the Modern Workmen of the World. This operated to practically suspend the business of the Royal Insurance Company. When it became evident that Hartmann, Cohill, and Evans could not procure a meeting of the stockholders of the Royal Insurance Company, this suit was begun. In the former case, we held that Masters, Kinnear, and Andrews—

"had no right, without the authorization of the Royal Insurance Company, to take the assets formerly assigned by the Modern Workmen of the World and hold the same for the Modern Workmen of the World, as they professed to do. They had come into possession of these assets as directors and officers of the Royal Insurance Company. The Modern Workmen of the World had accepted the transfer, and it had retired from business. They were self-constituted trustees of the supposed interest of the Modern Workmen of the World. * * * The assets of the Royal Insurance Company, including those received from the Modern Workmen of the World, are to be conserved and used for the benefit of the policy holders of the Royal Insurance Company and the Modern Workmen of the World, who have accepted the liability of the Royal Insurance Company, and not for that of the stockholders of the Royal Insurance Company. They are in the nature of a trust for the benefit of the certificate holders in that company." 45 App. D. C. 258, 259.

In this situation we ordered that a receiver be appointed for the Royal Insurance Company, with directions to "take possession of its property and undertake to reorganize and manage its affairs under the supervision of the court."

In compliance with the mandate of this court, the court below appointed a receiver, and finally succeeded in compelling Masters and Kinnear to turn over to the receiver the assets of the Royal Life Insurance Company in their possession. In the decree here appealed from, in which the receiver is discharged, the court found that the reorganization of the Royal Insurance Company was "neither necessary nor practicable," and directed the receiver to pay the costs of the receivership, to cancel all the outstanding certificates of stock of the

Royal Insurance Company, and "to deliver to the clerk of the court all moneys, bonds, notes, and other evidences of indebtedness, and all books, records, papers, and other things in his hands as receiver."

The court referred the cause to the auditor under the following findings and instructions:

"(a) The court finds that the Royal Life Insurance Company discontinued its business on February 19, 1912, and failed to perform its contracts of insurance with its policy holders after that date.

"(b) The auditor will state an account showing the liability of the Royal Life Insurance Company, at the time of filing this report, to each and the total to all of its policy holders, whose policies were in full force and effect on February 19, 1912, including the policy holders of the Modern Workmen of the World who accepted the liability of the Royal Life Insurance Company. The status, claim, and right of each such policy holder shall be settled and stated in accordance with the practice in cases of failed and dissolved insurance corporations.

"(c) The auditor will show in said account, where ascertainable, the names of these policy holders who are living and of those persons entitled to the amounts owing on the policies of those who are dead; and he will show why they are so entitled, whether under the terms of the policy, by assignment, by subrogation, or as next of kin or otherwise.

"(d) The auditor will give such notice of the proceedings before him as he deems adequate, by publication in such paper or papers and for such period, not less than 30 days, as the auditor may deem best; and each party hereto is directed to give to the auditor all pertinent information in his possession or knowledge. The auditor will take such testimony as may be necessary, and will report his findings and make his recommendations to the court with all convenient speed, together with the testimony taken before him.

"(e) The auditor will report the balance to be left from the funds after deducting court costs, the costs of this reference, and other expenses and expenditures authorized by this and prior orders of the court. He will state the distribution of the balance among the claims allowed by him under the policies of the Royal Life Insurance Company."

The court then dismissed the petitions and motions inconsistent with this order and retained the case for further proceedings.

It appears from the answer of Masters and Kinnear that in September, 1913, about two years after the Royal Insurance Company took over the business of the Modern Workmen of the World and that company went out of business, a new corporation, the Modern Workmen of the World Society, was organized under the laws of Delaware by Masters and Kinnear, which assumed to take over all the policy holders in the Modern Workmen of the World who had been originally transferred to the Royal Insurance Company, together with all the assets of said company, and, it is alleged—

"carried on the business and protected the said policy holders, and used its assets and moneys for the benefit of said policy holders, those entitled to receive benefit by reason of their membership, and that all this was done under an agreement between the Modern Workmen of the World and the Modern Workmen of the World Society; that the assets received by the Modern Workmen of the World at the declination of the Royal Life Insurance Company should be used by the Modern Workmen of the World Society for the benefit of said policy holders, subject, however, to any decrees that might be made in this cause; that said Modern Workmen of the World Society is now an existing corporation, and has protected the policy holders of the said Royal Life Insurance Company and the Modern Workmen of the World, and is authorized to do business in Delaware and Maryland, and has been doing the business of protecting the original policy holders of said companies, and in

law and equity should be entitled to receive the assets in the hands of the receiver, in order that the decision of the Court of Appeals may be properly carried out, and said assets held and used for the benefit of the policy holders entitled thereto."

[1] It is clear from the foregoing statement from the answer of Masters and Kinnear that the attempt to thus transfer the business, assets, and policy holders of the consolidated Royal Insurance Company, without the consent of that company or of any one legally authorized to make such a transfer, is totally void. Masters and Kinnear, as officers of the Royal Insurance Company, possessed no such authority, and it does not appear that authority was delegated to them by the stockholders of that company.

Referring to the funds in the hands of the receiver, which the court has now directed to be turned over to the clerk of the court, the following disclaimer appears in the answer of Masters and Kinnear:

"The respondents further say that they claim no right, title, or interest in said fund, and never did have any right, title, or interest, but that whatever comes under them should be for the benefit of the policy holders mentioned aforesaid."

This, of course, eliminates them from any claim, otherwise than as stockholders, to participate in any manner in the final distribution of the funds in the hands of the court derived from the assets of the Royal Insurance Company.

In the present stage of this proceeding, Kinnear testified that he obtained and has in his possession powers of attorney from all of the persons who originally had policies in the Modern Workmen of the World or the Royal Life Insurance Company with the riders of the Royal Life Insurance Company attached thereto, except a very few of them, which are in the possession of Judge Norton; that Judge Norton prepared the powers of attorney, after consulting him and Masters; that in 1913, after this suit was begun, he sent these powers of attorney to the policy holders, together with riders transferring them to the Modern Workmen of the World Society; that the riders were all sent out with the powers of attorney, and there were transferred in this manner about 300 of the original Modern Workmen of the World members. Kinnear further testified:

"That he is now collecting premiums from these policy holders, and has since April 3, 1912, but has not collected anything from the Royal Life Insurance members."

This conduct brings the parties involved therein close to the border line of contempt of court. The affairs of the Royal Insurance Company, including the Modern Workmen of the World, had been taken into the custody of the equity court, and were in custodia legis at the moment of the inception of these transactions, which have been brazenly continued throughout the whole period of this litigation. It could have but one purpose—to frustrate and nullify the orders and decrees of the courts.

[2] The court was clearly right in refusing to attempt to reorganize the Royal Insurance Company, since it would result in re-establishing the same situation in respect of the stockholders as existed at the time

this suit was begun. Masters, Kinnear, and Andrews would own 50 per cent. of the stock, and Hartmann, Cohill, and Evans the other 50 per cent. Hence the difficulties leading to this suit would be re-established. On the other hand, if the court recognizes the powers of attorney from the policy holders held by Kinnear and Norton, it would amount to turning the funds extracted from Masters and Kinnear and here sought to be conserved for the benefit of the policy holders, back into their possession, thus frustrating the whole object of this litigation.

[3] The course which equity will pursue in such a situation is clear. In addition to and in modification of the instructions given the auditor, he should be directed by the court to ascertain the amount of premiums collected by Kinnear and the Modern Workmen of the World Society, and the amount, if any, paid out by them to policy holders; and, after deducting from the respective policy holders the amounts so paid to them, which to that extent should be charged against the amount found to be due such policy holders, the balance so received, together with any further assets of the Modern Workmen of the World, which under the consolidation agreement were transferred to and became the property of the Royal Insurance Company, together with any income or profit derived therefrom, the court should order to be paid forthwith into court. No allowance whatever for services or expenses incurred in these transactions by Masters and Kinnear or the Modern Workmen of the World Society should be made. The whole proceeding is such that the parties are without standing in a court of equity.

When the amounts due the respective policy holders have been ascertained, the court will in each case order that distribution be made direct to the proper claimants, ignoring any claim which Masters and Kinnear, Norton, or the Modern Workmen of the World Society may attempt, directly or indirectly, to assert thereto by way of power of attorney, assignment, or otherwise.

[4] In adjusting claims of policy holders, any policy holder who may have discontinued payment of premiums when the Royal Insurance Company ceased to function, or thereafter, and did not obtain reinsurance in another company because of physical condition, or otherwise, should be reinstated and protected to the extent of his interest as the same may appear.

[5] If, however, a reputable insurance company can be found, willing to accept the policy holders as a class, reinsure all of them, including those reinstated, and guarantee to carry out their contracts, and assume the obligations of the Royal Insurance Company in the premises, the court, for the more complete protection of the policy holders, should approve such action, and to that end so much of the funds in the custody of the court should be turned over to the reinsuring company as may be necessary to create sufficient reserve to properly secure the company in assuming said contracts.

When the expenses of this litigation have been fully paid, and the claims of the policy holders satisfied, any balance remaining may be

divided among the stockholders in such manner or proportion as to the court may seem just and equitable.

The decree is reversed, with costs, and the cause is remanded for modification of the decree in accordance with this opinion.

Reversed and remanded.

HOLMES v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted October 13, 1920. Decided December 6, 1920.)

No. 3371.

Nuisance ⇐65—Guilty knowledge of owner of disorderly house essential to justify abatement.

Act Feb. 7, 1914, to enjoin and abate disorderly houses, which declares such houses to be a nuisance and provides that evidence of general reputation is admissible to establish such nuisance, was not intended to subject owners or lessees to the provisions of that act, unless guilty knowledge was brought home to them, so that an injunction closing a hotel for a year must be reversed on the appeal of the owner, where the bill did not allege any facts showing his knowledge of the unlawful use.

Appeal from the Supreme Court of the District of Columbia.

Suit by the United States against James Ottoway Holmes and another to abate a nuisance. Decree for complainant, and said Holmes appeals. Reversed and remanded.

Alex. H. Bell, Percy H. Marshall, and F. J. Rice, all of Washington, D. C. (Bell, Marshall & Rice, of Washington, D. C., on the brief), for appellant.

J. E. Laskey, U. S. Atty., and L. Randolph Mason, Sp. Asst. U. S. Atty., both of Washington, D. C.

ROBB, Associate Justice. This is an appeal by the owner of a hotel building in this city from a decree in the Supreme Court of the District based upon the Act of February 7, 1914 (38 Stat. 280), "to enjoin and abate houses of lewdness, assignation and prostitution," appellant contending that the bill should have been dismissed as to him, because there was no averment that he had any knowledge, either actual or presumptive, of the alleged immoral acts.

The bill avers that Samuel Blackwell was the keeper of the hotel in question; that, while he "so used and occupied the said building, erection, or place, certain acts of lewdness and prostitution were conducted, permitted, carried on, and did exist in and upon the same, as will more fully hereinafter appear"; that Blackwell "did permit to use and occupy certain rooms of said building, erection, or place certain evil-disposed persons, and the said evil-disposed persons, on the days and at the times aforesaid, in said rooms, did commit acts of lewdness and prostitution"; that Holmes, the appellant, is the owner of the building "so used and occupied as aforesaid as a hotel by the defendant Samuel Blackwell." It is then averred that—

"On account of the acts and conditions hereinbefore set forth, said defendant Samuel Blackwell and said defendant James Ottoway Holmes are guilty

of a nuisance, and the said building, erection, or place is a nuisance, and the said furniture, fixtures, and other movable property used for the purpose aforesaid, in said building, erection, or place, are also a nuisance."

The prayers of the bill are for the issuance of an injunction pendente lite, a permanent injunction against each defendant for the suppression of the nuisance, the removal and sale of all the furniture, fixtures, and other movable property used in conducting the nuisance, and for an order closing the hotel for one year.

A motion to dismiss was interposed by Holmes, upon the ground that the bill states no cause for relief in equity, for the reason that the act of Congress upon which the bill is based is unconstitutional and void, because it provides for the taking of his property without compensation, for the alleged acts of another who was not and is not his agent and which acts "were committed without his knowledge, consent, privity, connivance, or control, and in respect whereof said defendant has omitted no legal duty nor committed any wrong." The sufficiency of the complaint as to him is challenged, because it is not therein alleged that he had any knowledge of or in any way participated in the acts complained of. The motion was overruled, a permanent injunction was issued, closing the premises for a year, and ordering the sale of the "fixtures, furniture, and other movable property" in the hotel, the proceeds to be applied to the payment of the costs.

The act in question provides that whoever shall own or occupy any building or place "used for the purpose of lewdness, assignation or prostitution in the District of Columbia is guilty of a nuisance," and the building or place in which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance. Section 2 provides that an action in equity may be maintained "to enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists"; that the court may issue a temporary injunction on affidavits, depositions, oral testimony, or otherwise after three days' notice in writing to the defendant. Section 3 provides that the action when brought "shall be triable at the first term of court, after due and timely service of the notice has been given, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance." Section 4 provides for the summary trial and punishment of a violator of the injunction. Section 5 provides:

"That if the existence of the nuisance be established in an action as provided in this act, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released."

Section 6 provides that the proceeds of sale shall be applied to the payment of costs; the balance, if any, to be paid the defendant. Sec-

tion 7 permits the owner to file an approved bond in the full value of the property that he will immediately abate the nuisance and prevent the same from being established or kept within a period of one year, and the court, if satisfied of his good faith, may cancel the order of abatement as to the property. If, in an equity action, the bond is filed before judgment and order of abatement, "the action shall be thereby abated as to said building only." Section 8 provides that upon the issuance of a permanent injunction against any person for maintaining such a nuisance as the act denounces, or against any owner or agent of the building kept or used for the prohibited purpose, there shall be assessed against the building and ground and against the person or persons maintaining the nuisance and the owner or agent of the premises, a tax of $300.

The bill in this case does not allege that Holmes either knew or had reason to know that "certain evil-disposed persons * * * did commit acts of lewdness and prostitution" in the hotel owned by him and leased to Blackwell, nor are any facts averred from which such an inference reasonably might be drawn. It is alleged merely that Blackwell kept the premises *as a hotel,* and that he permitted certain evil-disposed persons to occupy and use certain rooms therein, where acts of lewdness and prostitution were committed. It is not even alleged that Blackwell knew or had reason to know that these persons were evil-disposed, or that they sought accommodations at his hotel for the purpose of committing acts of lewdness and prostitution. Certainly there is nothing in the complaint that would charge Holmes with knowledge of what was going on. If the act in question is susceptible of such a construction, then every hotel and apartment house in Washington is liable to be closed for a year, if it is made to appear that sporadic acts of lewdness and prostitution occurred therein, although without the knowledge of either the owner or lessee. Such an interpretation ought not to be placed upon the act unless its language is susceptible of no other construction.

The purpose of the act, as set forth in its title, is "to enjoin and abate houses of lewdness, assignation and prostitution; to declare the same to be nuisances," etc. Having in mind that the keeping of a bawdyhouse is an indictable nuisance at common law (De Forest v. U. S., 11 App. D. C. 458), and that the intent of Congress, as expressed in the title to this act, was to abate houses of that character, let us briefly scrutinize the language employed to effectuate that intent. The first paragraph in effect declares that to be a nuisance which already was such, for the building or place must be "used *for the purpose* of lewdness, assignation, or prostitution" to constitute a nuisance, and under section 3 *"evidence of the general reputation of the place"* is admissible at the trial to prove the existence of the nuisance. Certainly those provisions are inconsistent with the view that Congress intended to subject a citizen to the provisions of the act, unless he possessed a guilty knowledge of the acts relied upon, or was fixed with presumptive knowledge because of the general reputation of the place. Under such an interpretation, the act is reasonable and free from constitutional infirmities. Hodge v. Muscatine County, 196 U. S. 276, 25 Sup.

Ct. 237, 49 L. Ed. 477; Marvin v. Trout, 199 U. S. 212, 26 Sup. Ct. 31, 50 L. Ed. 157.

In the Hodge Case a tax had been assessed upon the property and the owner thereof, where cigarettes had been sold by the lessee in violation of law and without the knowledge of the owner. The court sustained the tax, "conceding that the landowner is entitled to notice before he can be personally liable, or before his property can be impressed with a lien." The court found that the owner had failed to take advantage of the provision of the law under which she might have raised the question she sought to raise in the Supreme Court. That court therefore declined to "determine whether the defense be a valid one, since, having opportunity to make it, she [appellant] declined so to do." In the Marvin Case the court sustained a statute of Ohio for the suppression of gambling, which made a judgment against those winning money a lien upon property owned by another and in which gambling was conducted with his knowledge and consent.

The so-called Red Light Abatement Act of California does not differ materially from the act under review. In Ex parte Selowsky, 38 Cal. App. 569, 177 Pac. 301, the District Court of Appeal of California (1918) said:

"We do not believe that it was intended by the Legislature that in all cases, regardless of the particular circumstances thereof, the judgment, to be valid, so far as its injunctive feature is concerned, should contain a direction that the personal property should be sold or that the building or place where the nuisance was maintained should be closed to all use or for any purpose for the period of one year. Cases under the act may arise which are not so flagrant in the law's violation as in others. As, for instance, a building may be used by a tenant for the immoral purposes denounced by the statute without the knowledge of the owner thereof and in defiance of his wishes or sentiments regarding such a business. In such a case, it would, indeed, be manifestly unjust to deprive the owner of the building of its use for the period of a year for a lawful and decent purpose."

In Gregg v. People, 65 Colo. 390, 176 Pac. 483, the Supreme Court of Colorado (1918), in interpreting the Red Light Abatement Act of that state, which is substantially the same as ours, said:

"The fact that a building is used or resorted to as a public or private place of lewdness, assignation, or prostitution embraces the definition of a 'bawdy-house.' Therefore, to sustain the judgment, it was necessary for the people to show, to the satisfaction of the court, by a preponderance of the evidence, that such a house existed or was kept at the premises that the defendant was the owner of the premises, and that he knowingly permitted the place to be used and occupied for such purposes."

In State v. Fanning, 96 Neb. 123, 147 N. W. 215 (Nebraska, May 4, 1914), the court sustained a permanent injunction against the landowner because the granting of the temporary injunction was notice to him that "illegal practices were charged to be carried on in the building" and that he then should have taken steps to abate the nuisance.

In State v. Ross, 173 N. W. 66, decided by the Supreme Court of Iowa July 2, 1919, the court directed attention to the provision in the statute making evidence of the general reputation of the place "competent for the purpose of proving the existence of said nuisance" and

"prima facie evidence of such nuisance and of knowledge thereof, and of acquiescence and participation therein on the part of the owner," and ruled that a case against the owner had been made under it.

In State v. Gilbert, 126 Minn. 95, 147 N. W. 953, 5 A. L. R. 1449, the Supreme Court of Minnesota interpreted a statute similar to ours as not applying to "any one not proved to be a participant, either active or by consent or acquiescence." See, also, Raymond v. Warden of City Prison, 82 Misc. Rep. 525, 143 N. Y. Supp. 912, Tenement House Department v. Whitney, 84 Misc. Rep. 54, 145 N. Y. Supp. 1011, and Tenement House Department v. McDevitt, 85 Misc. Rep. 429, 147 N. Y. Supp. 941 (affirmed in 165 App. Div. 367, 150 N. Y. Supp. 583), where the court refused to give effect to a provision in the New York Tenement Act (Consol. Laws, c. 61) imposing liability upon a landlord for acts committed without his knowledge, and which were beyond his power to control.

We conclude, therefore, that the intent of Congress, as expressed in the act under review, was "to enjoin and abate houses of lewdness, assignation and prostitution" as therein defined, but to subject owners or lessees to the provisions of the act only when guilty knowledge was brought home to them. Such an interpretation will fully effectuate the purposes of the act and at the same time accord the citizen due process of law. In other words, under this interpretation the guilty may not escape, nor the innocent suffer. The decree must be reversed, and the cause remanded, with directions to permit an amendment of the bill, if the complainant is so advised.

Reversed and remanded.

HUTCHINS v. HUTCHINS et al.

(Court of Appeals of District of Columbia. Submitted October 7, 1920. Decided December 6, 1920.)

No. 3424.

1. **Wills ⇐277—Reply held to raise jury question whether caveator's dealings estopped attack on capacity.**

Where the answer to a caveat, contesting a will on the ground of want of capacity, alleged dealings by the caveator with testator during the period in which he charged the testator was of unsound mind, a reply, alleging that the transactions were the result of a family agreement concurred in by the caveatee and the other members of the family, raised an issue which, if supported by a proof, was competent to go to the jury as affecting the good faith of caveator in attacking the will.

2. **Wills ⇐392—Reversal of judgment against will for incompetency held to reopen all issues for retrial.**

Where the jury at the first trial of a will contest found testator incompetent, but found there was no undue influence or fraud, and a decree was rendered thereon, setting aside the probate of the will, from which the caveatees appealed, there was no decree on the verdict as to the issues of undue influence and fraud, from which the caveator could have appealed, so that the reversal of the decree setting aside the will reopens the case for trial on all the original issues.

Appeal from the Supreme Court of the District of Columbia.

Caveat by Lee Hutchins against Walter Stilson Hutchins and another, to set aside the last will and testament of Stilson Hutchins, deceased. From an order dismissing the caveat, caveator appeals. Reversed and remanded.

Wm. G. Johnson and Frank J. Hogan, both of Washington, D. C. (Myer Cohen, of Washington, D. C., of counsel), for appellant.

C. H. Merillat and Henry E. Davis, both of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. This is a continuation of the litigation growing out of a verdict and judgment setting aside the last will and testament of Stilson Hutchins, deceased. In the original appeal (48 App. D. C. 495) the judgment was reversed, and the cause remanded for further proceedings. The court below refused to grant a new trial, and entered an order vacating the former judgment and admitting the will to probate. On appeal from that order this court reversed the judgment and directed a new trial. Hutchins v. Hutchins, 49 App. D. C. 118, 261 Fed. 460.

On remand to the court below, an order was made vacating the order for probate of the will, with leave to the caveatees to file an amended answer to the caveat, in which they might "set up such matters and things as they may be advised constitute a bar or foreclosure of the right of the said caveator to question the testamentary capacity" of testator, and reserving the right to the caveator to act thereafter "by way of plea, answer, motion to strike out, or otherwise," with leave to caveatees "thereafter to act thereon as they may be advised."

In the amended answer, caveatees set up in detail the business transactions between Lee Hutchins and his father during the period he now alleges Stilson Hutchins was mentally incompetent to make a valid deed or contract, and which, in the light of the abstract of the record brought to this court in the original appeal, were held to have barred Lee Hutchins of the right to be heard. To this a reply was filed by caveator, in which he explained the transactions, showing that they were, in effect, the result of a family agreement and were concurred in by caveatee Walter Stilson Hutchins and the other members of the family. The court, however, held that in respect of the issue of mental incompetency, in the light of our opinion in the original appeal, "the additional facts set out in the replication are not sufficient * * * to avoid the effect of the admitted facts," and further found "that the language of the decisions of the Court of Appeals in reversing this case indicates that the view of that court is that the verdict of the jury upon the issues of undue influence and misrepresentation is final." Accordingly an order was entered dismissing the caveat, from which this appeal is prosecuted.

The reply furnishes an explanation of the conduct of Lee Hutchins, which, in the former case, so far as the record disclosed, did not appear. On the contrary, it appeared from the record that he brazenly admitted the transactions, without explanation or defense. In that case, we held his conduct barred him, not from caveating the will,

but from being heard on his own testimony to assail the mental capacity of his father. It still left the validity of the will open to attack from other sources.

[1] The reply of the caveator, however, presents a different issue of fact than was disclosed in the original record, and one which, if supported by proof, we think is competent to go to the jury as affecting the good faith of the caveator. In determining the weight to be given to the explanation of caveator, the jury will be entitled to consider the transactions which caveator had with his father. Independent of this feature of the case, our order in the second appeal was to grant a new trial, and to that position we still adhere.

When the caveat was filed in the probate court, that court framed the following issues for trial by jury:

"(1) Was the said Stilson Hutchins, at the time of executing said paper writing bearing date October 26, 1910, of sound and disposing mind, and capable of executing a valid deed or contract?

"(2) Was the execution by said Stilson Hutchins of said paper writing bearing date October 26, 1910, procured by undue influence of any person or persons, exercised over or practiced upon the said Stilson Hutchins?

"(3) Was the execution by said Stilson Hutchins of said paper writing bearing date October 26, 1910, procured by misrepresentations of any person or persons made to the said Stilson Hutchins?"

The jury found against the caveator on the second and third issues, and in his favor on the first. A general judgment was entered upon the verdict, in which the court, after stating the verdict reached by the jury on each issue, said:

"And it further appearing to the court that a motion to set aside said verdict and to grant a new trial of said issues has been submitted to and overruled by the justice presiding at the trial of said issues, it is by the court, this 16th day of July, A. D. 1915, adjudged, ordered, and decreed that the said paper writing bearing date October 26, 1910, purporting to be the last will and testament of Stilson Hutchins, deceased, is not a valid will or testament, and that probate thereof be and is hereby denied."

No exceptions were taken by caveator to the verdicts on the second and third issues, nor was any order requested or judgment taken thereon. In our opinion in the original appeal, in the statement of the case, we said:

"The jury, by their verdict, answered each of the issues in the negative. The caveator is not here by way of cross-appeal; hence our inquiry is limited to the assignments of error affecting the verdict and judgment on the single issue of mental incapacity."

It will be observed that this statement, which it now seems was inaccurately phrased, merely limited the appeal to a consideration of the issue of mental incapacity, since the other issues were not before us. On the second appeal we remanded the cause for a new trial on the issue of mental incapacity. Again that was the only issue before the court. It is now contended by caveatees that a new trial must be limited to the first issue, and that our statements in the former opinions amounted to a direction to the lower court to that effect, while counsel for caveator insist that the reversal reopens the whole case for a new trial. This is the first instance in which the question of the

status of issues 2 and 3 has been presented formally to this court. The former expressions with reference to these issues were made merely for the purpose of distinguishing the limitations of the issue before us. Issues 2 and 3 were not, therefore, presented for adjudication in those appeals.

[2] No final judgment was entered upon the issues of misrepresentation or undue influence. Appeal cannot be taken from a verdict, but from a judgment, and, no judgment having been entered upon the verdicts as to the second and third issues, there was nothing from which an appeal would lie.

It is clear that the judgment entered amounts to a judgment only upon the verdict of the jury on the first issue, inasmuch as it is in conflict with, and not responsive to, the verdicts upon the second and third issues. No orders or judgments having been made in respect of issues 2 and 3 from which appeal would lie, we are of opinion that the vacation of the judgment as to issue 1 restores the original case for a new trial.

The judgment is reversed, with costs, and the cause remanded, with directions to grant a new trial upon the issues as originally framed.

Reversed and remanded.

UNITED STATES MORTGAGE & TRUST CO. et al. v. MISSOURI, K. & T. RY. CO. OF TEXAS et al.

(Circuit Court of Appeals, Fifth Circuit. January 14, 1921.)

No. 3568.

1. **Receivers ⟸69—Have no title to property in their custody.**
A receiver has no title or right of property vested in him, but is merely an indifferent person appointed to hold the property subject to further orders of the court.

2. **Receivers ⟸178—Not proper parties to action affecting property rights, but not possession.**
A receiver is a proper party to litigation to take property out of his possession, or seeking relief against his acts; but he is not a proper party, much less an indispensable party, to litigation affecting property not in his hands, or asserting rights to property in his hands without disturbing his possession thereof.

3. **Receivers ⟸178—Held unnecessary party to suit to cancel lease between railroad corporations the stock of which is owned by his corporation.**
In a suit by trustees under a railway company's mortgage to cancel leases by subsidiary companies, stock in which, owned by the mortgagor, was pledged to pay the mortgage, a receiver appointed for another railroad corporation, which owned the majority of the stock of both the lessor and lessee companies, is not an indispensable party, even though the value of the stock owned by the corporation of which he is receiver would be affected by cancellation, since none of the property in his possession would be taken therefrom by the litigation.

4. **Receivers ⟸69—Do not represent justiciable rights of parties to litigation.**
A receiver does not represent the justiciable rights of the parties to the litigation of which he is a receiver, but only the protection of the property in his hands as such, or the collection of that to whose possession he is entitled.

5. **Corporations ⟸506—Represent stockholders in suit to cancel lease, though dividends paid direct to stockholders.**
A corporation represents its stockholders in a suit to cancel a lease of its property, and the stockholders are not necessary parties to such suit, though the lease provided for the payment of dividends direct to the stockholders.

Appeal from the District Court of the United States for the Northern District of Texas; James Clifton Wilson, Judge.

Suit by the United States Mortgage & Trust Company and another against the Missouri, Kansas & Texas Railway Company of Texas and others. From a decree dismissing the bill, after denying complainants' petition to make other parties defendants, plaintiffs appeal. Reversed and remanded.

Francis Marion Etheridge, of Dallas, Tex., and Frederick F. Greenman, of New York City, for appellants.

Alex S. Coke, Charles C. Huff, and A. H. McKnight, all of Dallas, Tex., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. A bill was filed by the United States Mortgage & Trust Company and Calvert Brewer, each a citizen of New

York, as trustees of a mortgage executed by the Wichita Falls & Northwestern Railway Company, a corporation and citizen of Oklahoma (hereinafter styled the Oklahoma Corporation), to cancel three leases made, respectively, by the Wichita Falls Railway Company, the Wichita Falls & Northwestern Railway Company of Texas, and the Wichita Falls & Wellington Railway Company of Texas (hereinafter styled the Wichita Falls Companies), to the Missouri, Kansas & Texas Railway Company of Texas (hereinafter styled the Texas Company); said Wichita Falls Companies and said Texas Company being each a corporation and citizen of the state of Texas. Said bill was brought originally against said last-named four companies.

It appeared by said bill that each of said Wichita Falls Companies had been organized by the Wichita Falls & Northwestern Railway Company, a corporation of the state of Oklahoma (hereinafter styled the Oklahoma Corporation), and that said Oklahoma Corporation owned originally all of the capital stock of each of said Wichita Falls Companies; that said Oklahoma Corporation had executed three mortgages, the first mortgage being dated January 1, 1909, executed to the First Trust & Savings Bank, a corporation of Illinois, and to Emile K. Boisot, each being a citizen of Illinois, as trustees, and by said mortgage, in addition to mortgaging other property, pledged to secure the issue of bonds named therein, all of the stocks and bonds of said Wichita Falls Railway Company and said Wichita Falls & Northwestern Railway Company of Texas; that further, on January 1, 1910, it executed another mortgage to said First Trust & Savings Bank and said Boisot, as trustees, to secure another issue of bonds, by which second mortgage it also pledged all of the stocks and bonds of said three Wichita Falls Companies; that on August 19, 1911, said Oklahoma Corporation executed to plaintiffs, said United States Mortgage & Trust Company and said Brewer, a third mortgage to secure an issue of bonds, by which said mortgage it pledged to said plaintiffs, as such trustees, said stocks and bonds of said three Wichita Falls Companies, subject to the pledges thereof made by said two other mortgages executed to said First Trust & Savings Bank and said Boisot (hereinafter styled the Chicago Trustees).

Said bill further alleged that, prior to the time each of said three mortgages were issued, said three Wichita Falls Companies were all being operated by said Missouri, Kansas & Texas Railway Company of Texas (styled the Texas Company), under operating agreements which gave to said Wichita Falls companies net earnings of a large sum, and which paid large sums to the Oklahoma Corporation upon the stock of said three Wichita Falls Companies, which it owned, and greatly enhanced the value of said bonds of said Oklahoma Corporation secured by said mortgages, and greatly added to the security afforded by said mortgages; that among the covenants of the mortgage executed to the plaintiff was one that the mortgagor, the Oklahoma Corporation, would not sanction or permit any company, the greater part of whose capital stock should be pledged or assigned thereunder, to lease its railway property or any part thereof, except to the Oklahoma Corporation, or to some other company of whose capital stock the greater

part should then be pledged or assigned under said mortgage; that the stock both of the Oklahoma Corporation and of the Texas Company was controlled by the Missouri, Kansas & Texas Pacific Railway Company, a corporation of Kansas (hereinafter styled the Kansas Corporation), and that said Kansas Corporation, wishing to get rid of the operating agreements between the Texas Company and the Wichita Falls Companies, caused the Oklahoma Corporation to vote the stock of the Wichita Falls Companies to make leases of the railways of these Wichita Falls Companies to the Texas Company for a rental of 6 per cent. on the stock of said Wichita Falls Companies, and the payment of interest on the Wichita Falls Companies' bonds; the total of said stock only aggregated $55,000; that this change was made and these leases entered into, effective May 1, 1914, in violation of the above covenant in plaintiffs' mortgage, the Texas Company not being a company whose stock was pledged under the plaintiffs' mortgage,

The plaintiffs alleged that the aggregate of the annual rentals payable under these leases is the sum of $39,890, whereas for the three years preceding the execution of the leases the average annual net earnings of the Wichita Falls Companies under the operating agreements with the Texas Company amounted to $223,296.54. They alleged that the leases were made with intent to defraud plaintiffs, and that all parties had full knowledge of the rights of plaintiffs under the above covenant; that, thus deprived of the earnings of the Wichita Falls Companies, the Oklahoma Corporation became insolvent, and was forced to default in the payment of interest under all three of its mortgages.

The plaintiffs prayed that the leases made by said Wichita Falls Companies to said Texas Company be canceled as having been fraudulently entered into by the parties thereto, through complicity of the Oklahoma Corporation in violation of the covenant made in said mortgage, and further in violation of the trust relation which the Kansas Corporation bore to the plaintiffs, because of its ownership and control of all of the stock of the Oklahoma Corporation. They further prayed that the leases be canceled upon the ground that the leases themselves gave to the plaintiffs the right to terminate them upon default made by the Oklahoma Corporation; further, that they had the election under their said mortgage to terminate said leases upon the happening of some one or more of the events of default provided for in said mortgage; that each of said leases provided that they were executed subject to the plaintiffs' mortgage; that the Oklahoma Corporation had defaulted under said mortgages, and that the plaintiffs, therefore, elected to terminate the leases, and prayed that they be canceled and the property restored to the lessors.

It was alleged, also, that the Oklahoma Corporation's properties were in the hands of C. E. Schaff, as receiver, under a bill in equity filed in the United States District Court for the Western District of Oklahoma; that the Texas Company's properties were in the hands of said Schaff, as receiver, under a bill in equity filed in the United States District Court for the Northern District of Texas; that the Kansas Corporation's property was also in the hands of Schaff, as receiver, under a bill in equity filed in the United States District Court for the

Eastern District of Missouri. All of said stocks of said Wichita Falls Companies had been transferred into the name of the Chicago Trustees, and the rentals due by said Texas Company to said Wichita Falls Companies under said leases were being paid to and received by said Chicago Trustees.

The defendants, said Texas Company and said Wichita Falls Companies, and also C. E. Schaff, as receiver of said Texas Company, all answered said bill. The Texas Company and the Wichita Falls Companies in their answers also pleaded the nonjoinder of said Kansas Corporation and the receiver of its railway and properties, of the Oklahoma Corporation and the receiver of its railway and property, and also of the First Trust & Savings Bank and Emile K. Boisot, as trustees under the above-mentioned mortgages executed to them by the Oklahoma Corporation, as necessary parties defendant. The plaintiffs thereupon asked leave to amend their bill by making as parties (1) the Oklahoma Corporation, the original mortgagor of their mortgage, and as such the owner of the final equity of redemption of the stock in the Wichita Falls Companies; (2) the Chicago Trustees, the prior pledgees of said stock, who have actual possession and control thereof; (3) the Kansas Corporation, who is made a party solely because it is charged with having been a party to the original lease transactions, and whose interest as a stockholder of said Texas Company and of the Oklahoma Corporation may be indirectly affected.

The plaintiffs also applied to the United States District Courts for the Eastern District of Missouri and the Western District of Oklahoma, respectively, in the litigations in which said Schaff had been appointed as receiver, respectively, of the railway and properties of said Kansas Corporation and said Oklahoma Corporation, for leave to make him a party defendant to said suit filed by said plaintiffs in said United States District Court for said Northern District of Texas. Said leave was denied, and said judge of said United States District Court for the Northern District of Texas thereupon denied the motion to make the Kansas Corporation, the Oklahoma Corporation, and the Chicago Trustees parties defendant, upon the sole ground that it was futile to do so, as, in the opinion of said court, said Schaff, as receiver of said Oklahoma Corporation and said Kansas Corporation, appointed by said United States District Courts for the Western District of Oklahoma and the Eastern District of Missouri, respectively, was an indispensable party to the litigation, and could not be sued without leave of the courts appointing him.

The merits of the controversy are not in issue on this appeal. The sole question is: Is C. E. Schaff, as receiver of said Oklahoma Corporation and said Kansas Corporation, an indispensable party?

The only relief sought in this case is the cancellation of the leases between the Texas Company and the Wichita Falls Companies. There is no purpose, or prayer, to change the holding, title, or interest in the stock of the Wichita Falls Companies. Neither the receiver of the Oklahoma Corporation, nor of the Kansas Corporation, has possession of the property of either the lessor or lessee company, and no possession, or right of possession, of the receiver of these companies, will

be affected by the decree. The only receiver whose rights of possession may be affected—i. e., receiver of the Texas Company—is a party, and has appeared and answered.

[1] The receiver of the Oklahoma and Kansas Corporations has no title or right of property of any of the parties vested in him. He is an indifferent person, appointed as custodian to hold the property of said corporations, subject to the further order of the court. Quincy, M. & P. R. R. Co. v. Humphreys, 145 U. S. 82, 98, 12 Sup. Ct. 787, 36 L. Ed. 632; Great Western Mining Co. v. Harris, 198 U. S. 561, 576, 25 Sup. Ct. 770, 49 L. Ed. 1163.

[2] Where an attempt is made to take property out of his possession, then he is a proper party to litigation, and where relief is sought against *his acts* as such receiver he is the proper party litigant. But where the litigation affects the rights of parties in property not in his hands, or asserts rights in such property without disturbing his possession thereof, he is not a proper party, much less an indispensable party, to such litigation. Continental Trust Co. v. Toledo & C. Ry. Co. (C. C.) 82 Fed. 642, 646.

[3] The result of this litigation, if successful, would not disturb the possession of any receiver save that of the Texas receiver of the Texas Company, under the leases of the railways of the Wichita Falls Companies. It might have an effect on the value of the stock of these Wichita Falls Companies, or of the stockholding interest of the owners of the stocks of these and other corporations; but no decree in any way altering their possession or ownership or the rights of any present holder in said stocks is asked. The accounting sought for is wholly between the Texas Company and the Wichita Falls Companies.

[4] A receiver does not represent the justiciable rights of the parties to the litigation of which he is receiver, but only the protection of the property in his hands as such, or the collection of that to the possession of which, as receiver, he is entitled.

[5] The Wichita Falls Companies, as lessors, represent all of their stockholders in a litigation to set aside said leases. The Texas Company, as lessee, in like manner represents its stockholders. Godchaux v. Morris, 121 Fed. 482, 484, 57 C. C. A. 434. That the leases provide for the payment of dividends direct to the stockholders does not make it less a contract made directly with the corporation, nor prevent the corporation from representing its stockholders in an action to enforce or cancel the same. Pacific R. Co. v. Atlantic & Pac. R. Co. (C. C.) 20 Fed. 277.

The judge of the United States District Courts of Oklahoma and Missouri, in denying the application for leave to make the receiver of the Oklahoma and Kansas Corporations a party defendant to this cause, provided that the denial was without prejudice of the right of plaintiffs to make said Oklahoma and Kansas Corporations parties defendant. The court below declined to allow these corporations and the Chicago Trustees to be made defendants solely on the ground that Schaff, as receiver of the Oklahoma and Kansas Corporations, was an indispensable party, and the granting leave to make the other persons parties would be futile, and dismissed the plaintiffs' bill, because of the

inability to make said Schaff, as receiver of the United States District Court of Oklahoma and Missouri, a party defendant; the court of his appointment declining to permit him to be sued.

We consider that this is the sole question before us on this appeal. We have not considered the merits of the controversy, not deeming it properly before us. Concluding, as we do, that Schaff, as receiver under the proceedings against the Oklahoma Corporation in Oklahoma, and of the Kansas Corporation in Missouri, is not a necessary party, we reverse the decree dismissing this bill because of the failure to make him such a party, and remand the case for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MICHIGAN COPPER & BRASS CO. v. CHICAGO SCREW CO.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1920.)

No. 3433.

1. **Trial ⊜177—Case submitted to court by requests of both parties for directed verdict.**
   Where both parties request a directed verdict on all the issues without reservation, they thereby assume that there is no dispute of fact, and submit the whole case to the court for its determination.
2. **Trial ⊜176—Requesting peremptory instruction on particular issue does not preclude going to jury.**
   A party requesting a peremptory instruction on particular issues which he believes to be controlling, regardless of how other issues are determined, is not precluded, if such request is refused, from insisting that the case shall be submitted to the jury, where there is a substantial conflict in the evidence, or where different inferences may be drawn from undisputed evidence.
3. **Sales ⊜73—Contract does not require conformity to sample, where specifications are otherwise.**
   A contract for sale of bronze rods to be manufactured cannot be construed to require the rods to conform to samples submitted by seller, where the samples did not correspond with the specifications of the contract.
4. **Sales ⊜420—Breach of contract, held for jury.**
   Evidence in an action for breach of a contract to manufacture bronze rods *held* such as to require submission of the case to the jury.

In Error to the District Court of the United States for the Eastern District of Michigan; John M. Killits, Judge.

Action at law by the Chicago Screw Company against the Michigan Copper & Brass Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hal H. Smith, of Detroit, Mich. (Beaumont, Smith & Harris, of Detroit, Mich., on the brief), for plaintiff in error.

Howard Streeter, of Detroit, Mich. (Millis, Griffin, Seely & Streeter, of Detroit, Mich., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The Chicago Screw Company brought an action in the United States District Court, Eastern District of Mich-

igan, to recover damages from the Michigan Copper & Brass Company, for the failure of that company to deliver a quantity of special bronze rod, which by the terms of the contract entered into between these two companies on the 27th day of November, 1914, the defendant agreed to deliver to plaintiff within the time specified therein. This contract reads in the words and figures following:

"November 27, 1914.

"The Michigan Copper & Brass Company, Detroit, Mich.—Gentlemen: Please enter our order for one million three hundred and fifty thousand pounds (1,350,000) special bronze rod to be shipped inside of the next nine months, in as near equal monthly shipments as possible, or about one hundred fifty thousand pounds (150,000) per month.

"Rods to be made of as follows: 90% copper; 9% zinc; 1% lead.

"Size: .335" to .337" diameter, about ten (10) feet long. Drawn to size and of the same temper as screw machine rods and as per sample submitted by us.

"Prices: December, January, and February shipments to be billed at 16¼c net.

"March 16⅜c, April 16½c, May 16⅝c, June 16¾c, July 16⅞c, August 17c.

"F. o. b. Detroit, freight allowed to your associate factories, namely:
Detroit Screw Works, Detroit.
Western Automatic Machine Screw Co., Elyria, O.
Hartford Machine Screw Co., Hartford, Conn.
Worcester Machine Screw Co., Worcester, Mass.

"Not over 25% to be shipped to Eastern plants.

"Scrap: Scrap ends subject to return at ten one-half cents (10½c) net per pound. F. o. b. Detroit.

"Submitted by, Chicago Screw Company,
"W. E. Cooper, V. P. and Treas."

"Accepted by Michigan Copper & Brass Company,
"A. L. Simmons, Asst. Secretary."

It appears from the record that both parties to this action understood from the terms of this contract that the samples named therein were to be submitted by the Michigan Copper & Brass Company, instead of the Chicago Screw Company, as the contract seems to provide; that in pursuance of this understanding the defendant made up a number of samples and delivered 25 lengths to the Chicago Screw Company and 5 lengths to the Detroit Screw Works. The defendant then shipped five cars of this rod to the plaintiff at Chicago and two cars to the Detroit Screw Works, which shipment aggregated about 150,000 pounds, for which payment was made by the plaintiff for all cars shipped except one. The plaintiff avers that the rods shipped by the defendant upon this contract were of a kind, quality, and description different from and inferior to the bronze rod specified in the contract, and not suited to the use and purpose for which these rods were to be used, or to the use specified in the contract, and that the rods so delivered were not of the diameter of .335 to .337 of an inch, drawn to size and of the same temper as screw machine rods, and were not of the composition named in the contract; that plaintiff, relying upon and trusting to the promise and undertaking of the defendant, paid for the rods so delivered the sum of $30,000, but that by reason of their inferior quality they were returned, and accepted by the defendant company; that the defendant failed to furnish or deliver any other bronze rod whatever, although plaintiff was ready, willing, and able to receive

and pay for the same; that by reason of the defendant's failure in this respect the plaintiff was damaged in the sum of $150,000. To this the defendant pleaded the general issue.

At the close of all the evidence the plaintiff orally moved the court to direct a verdict in its favor, on the ground that the undisputed evidence showed that the defendant failed to perform its obligation under the contract. The defendant also moved the court to direct a verdict in its favor. This motion it appears was in writing, but not filed at that time, for the reason that counsel for plaintiff had not yet reduced his request to writing. Later it was filed by the defendant, but the record shows that it was tendered after the court had directed the jury to return a verdict for the plaintiff in the sum of $99,426.97.

[1] However, it does not seem to be important when this written motion to direct a verdict for defendant was filed, for it fully appears that the court predicated its action on the oral motions of both plaintiff and defendant for a directed verdict. It is undoubtedly the law that, where both parties request a peremptory instruction upon all the issues in the case without reservation, they thereby assume that there is no dispute of facts and submit the whole case to the court for its determination. Buetell v. Magone, 157 U. S. 154–160, 15 Sup. Ct. 589, 39 L. Ed. 654; Williams v. Vreeland, 250 U. S. 295–298, 39 Sup. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038.

[2] This does not prevent a party, making such request for a peremptory instruction upon particular issues that he believes to be controlling, regardless of how other issues might be determined from insisting, if the court refuses to give such limited and qualified request, that it shall submit the case to the jury, where there is a substantial conflict in the evidence, or where different inferences may be drawn from the undisputed evidence. Cattle Co. v. Railway Co., 210 U. S. 1, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70; Minahan v. Gd. Trunk & Western Ry. Co. (C. C. A. 6) 138 Fed. 37, 41, 70 C. C. A. 463; La Crosse Plow Co. v. Pagenstecher (C. C. A. 8) 253 Fed. 46, 165 C. C. A. 644; Bank v. Maines (C. C. A. 6) 183 Fed. 37, 41, 105 C. C. A. 329; C. & O. Ry. Co. v. McKell (C. C. A. 6) 209 Fed. 514, 516, 126 C. C. A. 336; Breakwater Co. v. Donovan (C. C. A. 6) 218 Fed. 340, 134 C. C. A. 148. It is clear from the record in this case that the defendant did not ask an instructed verdict upon all of the issues in this case, but rather upon certain issues thought by him to be controlling, and to entitle him, under the state of the evidence, to such peremptory instruction.

When the oral motions for peremptory instructions were argued, the court suggested that, in view of these motions being made, it was probably its duty to decide the case without reference to the jury; thereupon counsel for defendant immediately objected, calling the court's attention to the fact that the rule only absolutely applies when peremptory instructions are asked on all questions, and that he, as counsel for defendant, was asking to direct a verdict on particular questions only, and called the attention of the court to issues of fact that should be submitted to the jury, if in the opinion of the court his request for peremptory instructions upon particular questions was not

sustained. This statement of counsel is of too great length to reproduce in this opinion, but upon page 338 of the record this appears:

"I do not want to go too far afield, because I want to leave some of these questions to argue to the jury, of course."

As shown by the record, these motions were argued by counsel on Friday afternoon. Court then adjourned until the following Wednesday morning. Wednesday morning, the court, without further argument of counsel, overruled the motion of the defendant and sustained the motion of the plaintiff. In doing this the court stated that:

"There were no qualifications whatever on either side on the motion. I am not prepared to say that thereafter, after the submission, it was competent for either side to modify its requests without the consent of the other, in such a way as to raise the question for the jury."

When counsel for defendant tendered his written motion, and sought to refresh the recollection of the court in reference to his argument upon the oral motion on the preceding Friday, in which argument he had insisted that, if the court overruled his motion for a directed verdict, there were other issues of fact that should be submitted to the jury, the court then made the further statement that it was the duty of counsel to have interrupted the court while it was delivering its opinion in reference to these motions, and call attention to the fact that this motion for a directed verdict did not cover all the issues in the case, and that it was not the purpose and intent of the defendant by making such motion to waive a jury as to these other issues.

It does not appear, however, that there had been anything said by the court, prior to the time it directed a verdict for the plaintiff, to indicate that it had forgotten the argument of the preceding Friday in reference to the scope and purpose of defendant's motion for a directed verdict; but in any event counsel had a right to rely upon the court's recollection of his repeated statements made in oral argument of this motion as to the effect and scope of it, and it would have been wholly improper and unseemly for counsel to have interrupted the court while it was delivering its opinion upon the questions presented thereby. It is therefore apparent that whether it was or was not error on the part of the court to direct a verdict for the plaintiff depends wholly upon the merits of that motion, unaided by any presumption that the defendant's motion for a directed verdict, upon particular issues in the case, waived the submission to the jury of other issues presented by the pleadings and the evidence. The rule is well settled that it is the duty of the court to direct a verdict where, from the whole evidence, a court would be required to set aside a verdict for the opposing party to the suit. Cattle Co. v. Railway Co., supra; Zilsbersher v. Railroad Co., 208 Fed. 280, 125 C. C. A. 480 (C. C. A. 3).

The trial court, however, did not proceed upon the theory that there was no evidence offered that would sustain a verdict for the defendant; but, on the contrary, it proceeded upon the theory that the request by both parties for a peremptory instruction was upon all the issues in the case and without reservation, and that the effect of such requests was to submit to the court for its determination the whole case

upon the law and the facts. That being the situation, this court would necessarily hesitate to affirm this judgment, if upon any phase of the evidence the jury could have properly returned a verdict for the defendant.

In determining that question, however, it is not necessary for this court to review the evidence in detail, and, in view of the fact that the case must be remanded for a new trial, it ought not to do this, for the reason that anything this court might now say touching the effect that should be given to any particular part of the evidence might seriously prejudice the defendant upon such retrial. It does, however, appear from the record that there was a sharp conflict in the evidence touching the following vital issues in this case upon which the trial court made separate findings of fact, and which issues of fact the defendant, notwithstanding its motion for a directed verdict, was entitled to have submitted to the jury.

There is perhaps little conflict, if any, in the evidence as to the extent to which the samples were tested by the plaintiff before directions were given for delivery; but from this evidence it was clearly a question for the jury to determine whether the plaintiff had given a sufficient test to all these samples to determine the quality and fitness of the entire lot as a standard of comparison for further deliveries, if in fact it was intended that these samples should constitute the standard.

In this connection it further appears from the evidence that the plaintiff made a test of these samples upon a screw machine, but nothing appears to show the nature of the steel in the tools of that machine or the velocity at which it was operated. The defendant caused a test to be made by Brown & MacLaren on some of the rejected rods. This test was made on an ordinary screw machine with tools manufactured of high-speed steel, instead of carbon steel, and the machine was operated at slower speed. The result of this test indicated that the rod could be cut successfully in a screw machine properly tooled and operated. It was, therefore, a question for the jury to determine from this evidence whether the test made by the plaintiff in a screw machine was sufficient to demonstrate whether the sample rod would operate equally successfully in a bullet machine, of the character used by plaintiff in the manufacture of bullets from the rod later delivered to it by defendant.

Nor is there material conflict in the evidence as to the efforts made by the plaintiff to determine the quality of the rods in each or all of the shipments. It was a question for the jury to determine whether the result of the attempt made by the plaintiff to use some of these rods was sufficient to justify it in rejecting the entire shipment.

Another question of vital importance in this case is whether or not a rod of this character, containing .34 of 1 per cent. of lead, as it appears these samples did contain, or even 1 per cent. of lead, as called for by the specification, could be produced by a person skilled in the art, free from the defects complained of by the plaintiff. The plaintiff offered the evidence of an expert witness to prove the affirmative of this proposition. This evidence was admitted by the court, but evidence of the expert witness, Searle, offered by defendant, tending to

prove the contrary, was rejected. The rejection of this evidence was prejudicial error.

It appears from a letter written by the plaintiff to the defendant, after it had caused an analysis to be made of the sample rods, that the presence of lead in the mixture was of considerable importance in machining the material. The statement is made in this letter that "the nearer you come to 1 per cent. of lead in the mixture the easier we can machine the material." It further appears from the evidence that the material actually purchased by this plaintiff to take the place of the material that the defendant had agreed to furnish contained 1½ per cent. of lead, and this, in the opinion of the jury, might easily account for the difference in the rod. It also further appears that no opportunity was given to the defendant to manufacture rods containing 1½ per cent. of lead. On the contrary, it was strictly held to 1 per cent. It is also a question of fact for the determination of a jury whether the plaintiff, in view of all the evidence, acted promptly in rejection of the material furnished by the defendant under this contract. The court found as a conclusion of law that it was the duty of the plaintiff to minimize defendant's damages, and that that duty was fulfilled. The finding by the court that the plaintiff had fulfilled its duty in that regard was a question of fact for the jury.

[3] The court also found as a conclusion of law that the obligation on the part of the defendant was to bring goods to the plaintiff which were according to the samples. In this conclusion we think the court was in error. There are certain specifications in this contract that the sample does not control. It is evident that these sample rods did not conform to the specifications in the contract. For instance, the plaintiff's analysis showed they contained .34 of 1 per cent. of lead. They were less than the minimum size specified in the contract. Notwithstanding, the plaintiff accepted these rods as satisfactory, and could not be heard to complain if rods of similar manufacture and size were furnished by the defendant; yet the defendant was not thereby required to furnish rods under this contract less than the minimum size, or containing less than the amount of lead specified in the contract, and although the samples differed from the specifications in these particulars, the plaintiff could not reject material of proper manufacture in conformity with the specifications written in the contract. The plaintiff, while accepting the samples as a substantial performance of the contract, nevertheless insisted that they should be drawn to the proper size. It also appears that the sample rods were wavy, and this defect in the sample the plaintiff asked to have remedied, so that a departure from the samples in these respects was apparently within the contemplation of both parties.

It is insisted upon the part of the defendant that the samples submitted would control only as to temper. This court, however, is of the opinion that a proper construction of this contract would require a much broader interpretation of this provision. Clearly, however, the sample to be submitted could not change, alter, or vary in any degree the specific requirements of the contract. If the defendant in the production of this sample had followed exactly the formula for its com-

position, provided in the contract, drawn them to the exact size required, with the same temper as screw machine rods, the plaintiff, except for reasons hereinafter stated, could not have rejected these samples or refused to carry out its contract, for this was not a sale by sample, but the sale of a rod to be of specific composition, specific size, and of specific temper. The sample could have no further purpose or intent than to evidence the skill and ability of the defendant to meet the specifications and the state of the art in the manufacure of such rods. If in the production of these samples it had met the specific requirements of the contract, but failed in this latter particular, the plaintiff, of course, could have rejected the sample as defective in manufacture. Otherwise, the plaintiff would have been compelled to take this rod according to the terms of its contract, regardless of whether it was or was not suitable for its purposes, for this contract contains no provision in reference thereto, and, in view of the fact that it instructs the plaintiff how to make the rod, no such provision could be implied.

It was, however, necessarily within the contemplation of both parties that this rod should be properly manufactured and substantially free from all defects that, under the state of the art, could be avoided. This question was one for the jury to determine upon all the evidence in the case, including, of course, the evidence touching the quality and manufacture of the sample rods.

[4] This court is of the opinion that the evidence introduced in the trial of this case is sufficient to sustain a verdict of the jury, either for plaintiff or defendant, and therefore for error of the court in directing a verdict, for error of the court in its construction of this contract in reference to the provision as to samples, and for error of the court in the rejection of the evidence of witness Searle as to the impossibility of producing rod of this composition, free from the defects complained of, the judgment of the District Court is reversed, and cause remanded for a new trial, in conformity with this opinion.

STAR FIRE CLAY CO. v. BUDNO.

(Circuit Court of Appeals, Sixth Circuit. December 13, 1920.)

No. 3413.

1. **Master and servant ⟸230(1)—Contributory negligence of child unlawfully employed no defense.**
   An employer of a boy under 15 years of age in a mill or factory in violation of Gen. Code Ohio, § 12993, prohibiting such employment, cannot avoid liability for the injury or death of the boy, of which such employment was the proximate cause, on the ground of contributory negligence of the child.

2. **Death ⟸24—Parent cannot recover for death of child unlawfully employed with his consent.**
   Gen. Code Ohio, § 12993, prohibits employment of a boy under 15 years of age in any mill, factory, etc., and section 13007—9 makes a violation of such provision a penal offense on the part of both the employer and a

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

parent or guardian who permits such employment. Section 10772 of such Code gives a right of action for death caused by negligence, which would have entitled the deceased to recover if he had survived the injury, for the benefit of next of kin. *Held*, under the law of the state as established by its courts, that an action against the employer for the death of a boy under 15, killed while employed in a mill or factory in violation of the statute, cannot be maintained for the benefit of a parent who consented to such employment.

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

Action at law by Michael Budno, Sr., administrator of the estate of Michael Budno, Jr., deceased, against the Star Fire Clay Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

P. M. Smith, of East Liverpool, Ohio, for plaintiff in error.

W. A. O'Grady, of Wellsville, Ohio, for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. This proceeding in error is brought to reverse the judgment of the United States District Court, Northern District of Ohio, Eastern Division, in an action in which Michael Budno, Sr., as administrator of the estate of Michael Budno, Jr., deceased, sought to recover damages for the benefit of next of kin of decedent. The petition filed in the District Court avers that the death of Michael Budno, Jr., was caused by and through the negligence of the defendant, the Star Fire Clay Company; that the decedent left surviving him his father and mother, Michael Budno, Sr., and Mary Budno, who sustained a pecuniary damage by his death, and two brothers and five sisters, who sustained a nominal pecuniary loss and damage by the wrongful death of the decedent.

The petition further avers that the Star Fire Clay Company was negligent in several particulars, but the trial court, in view of the fact that defendant was protected under the Workmen's Compensation Law of Ohio (102 Ohio Laws, p. 524), confined the issue submitted to the jury to the question of unlawful employment of Michael Budno, Jr., at the time of the injury resulting in his death. In respect to this the petition averred that he was then under the age of 14 years and was employed by the defendant in violation of section 12993 of the General Code of Ohio, which provides that:

"No male child under fifteen years * * * of age shall be employed, permitted or suffered to work in, about or in connection with any mill, factory, workshop, mercantile or mechanical establishment," etc.

The answer averred, among other things, that Michael Budno, Jr., deceased, was employed at the request of his parents and brother. The reply denied this allegation in the answer. On the trial of the case evidence was introduced directed to the issue so joined. The jury was instructed by the court to disregard, for all practical purposes, the brothers and sisters of Michael Budno, Jr., in assessing damages, if the jury should find upon the evidence for the plaintiff.

The defendant requested the following charge to be given:

"(3) If you should find the parents of Michael Budno, Jr., knew of his employment by the defendant in its factory, and consented thereto, and knew their son was under 16 years of age, these facts would prevent you from finding any verdict in this case for the benefit of the consenting parent or parents to the employment of their son in the manufactory of the defendant, would bar them from recovering any sum whatever because of his death."

The court refused to give this charge, but, on the contrary, charged as follows:

"You will also disregard any defense urged upon you on the theory that the parents of the decedent were negligent, and that their negligence is to be imputed to the deceased boy, in suffering or permitting him to be employed or to work in or about that factory. The law forbidding the employment of or the suffering or permitting infants under the age of 15 years to work in or about forbidden employment cannot be nullified, or the effect thereof obviated, by charging the parents or next of kin with the responsibility for permitting them to be so employed. The burden is upon the employer or the owner of a factory, mill, or workshop of the forbidden character to see that they are not so employed or suffered or permitted to work there."

The defendant excepted to the refusal of the court to give in charge to the jury its request No. 3 and also to the foregoing portion of the charge as given. Several other special exceptions and a general exception were also taken to the charge as given; but the principal question presented for the consideration of this court by this proceeding in error is the correctness of the charge given by the court touching the negligence, if any, of the parents of the deceased, for whose benefit this action was brought in the name of the administrator.

[1] The plaintiff in error, however, insists that the contributory negligence of Michael Budno, Jr., as shown by the evidence in this case, also bars a recovery. Section 12993 of the General Code of Ohio is for the benefit of infants under the age of 15 years. One of the principal reasons, if not the sole reason, for the enactment of this statute, was undoubtedly the fact that a child of less age than 15 years is incapable of protecting itself from the dangers necessarily incident to employment in mill, factory, workshop, or other places named therein. The plaintiff in error cannot avail itself of contributory negligence on the part of a child for whose protection and benefit this act was passed, to avoid its liability for violation of its provisions.

It is urged in the brief and oral argument of counsel for plaintiff in error that there is no evidence tending to show that the violation of this statute by the Star Fire Clay Company in the employment of a minor under 15 years of age was the proximate cause of the injury, but it is evident that by reason of this employment this child was exposed to the danger from which this statute sought to protect him. The fact that he may have disobeyed the superintendent, and was playing about others parts of the factory at the time he received his injury, is no defense whatever. That is just what a child of this age might have been expected to do, so that the approximate cause of this injury was the negligence of the defendant in placing this immature child in proximity to dangerous machinery, in defiance of the purpose and intent of the statute to protect him and all other children under 15 years of age from dangers of this character.

[2] If the plaintiff in error violated the provisions of this section,

such violation was negligence per se, and if such negligence was the approximate cause of the injuries to Michael Budno, Jr., which injuries resulted in his death, the administrator is entitled to recover for and on behalf of the beneficiaries named in the statute, unless for other reasons such beneficiaries are not entitled to recover. Variety Iron & Steel Co. v. Poak, 89 Ohio St. 297, 106 N. E. 24; Railroad Co. v. Van Horne, 69 Fed. 139, 16 C. C. A. 182; Narramore v. Railway Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.

Section 13007—9 of the General Code of Ohio provides in substance, that any person, firm, or corporation who employs any child, and whoever having under his control, as parent, guardian, custodian, or otherwise, any child, permits such child to be employed or to work in violation of any of the provisions of chapter 11, title 1, of General Code of Ohio, shall upon the first offense be punished by a fine, etc.

The right to recover in this action is based solely upon the violation by the defendant of the provisions of section 12993. However, it is not the intention or purpose of that section to create a right of action for damages for its violation, either in favor of the person injured or in favor of his administrator for the benefit of next of kin, where the injury results in death. That right is based upon other provisions of the Ohio General Code, and upon the construction by the Supreme Court of that state, that the violation of penal statute of this character is negligent per se.

Where the injury, occasioned by negligence, results in the death of the injured person, section 10772 of the General Code of Ohio provides that the action shall be brought in the name of the personal representative of the deceased person, but that:

"Such action shall be for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then the parents and next of kin of the person whose death was so caused."

It has been held by the Supreme Court of Ohio that in such action—

"The administrator is a mere nominal party, having no interest in the case for himself or the estate he represents, and such actions are for the exclusive benefit of the beneficiaries in said sections named." Wolf, Adm'r, v. Railway Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812; Steel v. Kurtz, 28 Ohio St. 191.

It is therefore apparent that the beneficiaries are in no better position to secure a judgment for damages by and through an action in the name of the administrator than if action had in fact been brought in their own names. If Michael Budno, Jr., was a child under 15 years of age, under the control of his parents, and his parents requested, permitted, or suffered him to be employed in violation of the provisions of section 12993 of the General Code of Ohio, they were equally guilty with his employer, the Star Fire Clay Company, of an offense under this statute, and liable to the same punishment in a criminal prosecution under the provision of section 13007—9 as the corporation employing him.

Section 12993 expressly declares a wise public policy for the protection of children as against, not only the cupidity of employers, but also as against the cupidity of parents, guardians, and others having cus-

tody and control of such children. Therefore, if a violation of this statute is negligence per se on the part of the employer, it is equally negligence per se on the part of parents, guardians, or others having control of male children under 15 years of age. Nor would it add anything to the maintenance and enforcement of this wise and salutary public policy to permit one who violates this provision to recover from another equally guilty of the same offense. On the contrary, the effect of such a construction would tend to encourage rather than discourage parents in permitting their children to be employed in violation of the terms of this statute.

It is true that section 10770 of the Ohio Code provides that:

"When the death of a person is caused by wrongful act, negligence or default, such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, the corporation which, or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured."

It is also undoubtedly true that, if Michael Budno, Jr., had survived his injuries, he would have been entitled to recover damages from the defendant, the Star Fire Clay Company, for and on account of the violation of this statute by that corporation. Variety Iron & Steel Co. v. Poak, supra. But, no matter how this court would be inclined to construe this statute of Ohio, it is required to follow the construction given it by the court of last resort of that state, and from an examination of these decisions it would appear that the right of these beneficiaries to recover is no longer an open question in Ohio. These decisions seem to establish another public policy of equal importance, and that is that no person may profit by his own wrong.

So far as we have been able to investigate these authorities, it would appear that this question was first discussed and considered by the Supreme Court in the case of Railway Co. v. Snyder, 18 Ohio St. 400, 98 Am. Dec. 175. That was an action by Mary Snyder, an infant, by her next friend, to recover damages for injuries she sustained through the negligence of the railway company while she was crossing its track on her way to school. In that case the court affirmed the judgment in favor of Mary Snyder, notwithstanding it was urged on the part of the company that she was in the custody of an older child, who was guilty of negligence contributing to the injury. In the opinion in that case the court quotes with approval the following language from Railway Co. v. Mahoney, 57 Pa. 187:

"If, however, this was an action by the father to recover damage for the death of the child, a very different question would be presented. It would * * * probably be held that it was negligence to suffer such an infant to be on the streets without a caretaker, and he could not hold the defendants responsible, whether he had appointed a caretaker who was negligent or left the child to roam at large without one."

This was followed by the case of Railway Co. v. Snyder in 24 Ohio St. 670. Daniel Snyder was the father of Mary Snyder, who had recovered in the case reported in 18 Ohio St. 400, above cited. Daniel Snyder, as father, sought to recover damages that he had sustained by

reason of the injury to his infant daughter Mary, but the Supreme Court of Ohio held in that case that:

"Where an infant child, intrusted to the care and custody of another by the father, is injured through the negligence of a railroad company, the custodian of the child also being guilty of negligence contributing to the result, although the infant may maintain an action for such injury, the father cannot; the negligence of his agent, the custodian of the child, being in law the negligence of the father."

In the same volume, however, in the case of Railway Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. 633, it was held that where the death of an intestate is caused by the wrongful act of a defendant—

"it is not competent for the defendant, in order to defeat the action, to prove that some of the next of kin of the intestate, for whose benefit the action is prosecuted, were guilty of negligence which contributed to the injury that resulted in the death."

In the opinion, on page 641 of 24 Ohio St. (15 Am. Rep. 633), it is said that because of the fact that—

"the amount recovered in such cases is a gross sum, which the statute directs to be distributed to the next of kin, in the proportions provided by law in relation to the distribution of personal estates, if contributory negligence on the part of some of the next of kin would defeat a recovery as to them, it would also defeat a recovery for the benefit of those who in no wise contributed to the injury."

Sections 6134 and 6135 of the Revised Statutes, upon which plaintiff in the case of Railway v. Crawford, supra, relied for recovery have been materially amended, and as amended authorize the jury to determine the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought, so that the reason given by the court in its opinion affirming the judgment in that case no longer obtains.

The case of Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548, was under the amended statute, but as, the Supreme Court of Ohio said, in the case of Wolf, Adm'r, v. Railway Co., 55 Ohio St. 517–537, 45 N. E. 708, 36 L. R. A. 812, the question of contributory negligence of one of the beneficiaries was not raised by the pleading, although it seemed that "it lurked in the record", that, on the contrary, the defense sought to avoid all liability to any of the beneficiaries by imputing the negligence of the husband to the wife, instead of reducing the recovery by withholding damages from the husband and awarding damages to the child only. This case also discusses Railway v. Crawford, supra, calling attention to the difference in the statute as amended and as it read when the cause of action arose in that case, and, further commenting upon the opinion in that case, says: "The conclusion reached was correct as the statute then stood" —and again, that case came "within the principle that the rights of the innocent must be protected, even though thereby the guilty reap some benefit."

Wolf, Adm'r, v. Railway Co., supra, however, fully disposes of the question presented by the record in this case under the statute as it now reads. The opinion reviews all the cases upon that subject, and in

the third paragraph of the syllabus announces the law of Ohio to be that:

"In such actions the defense of contributory negligence is available as against such beneficiaries as, by their negligence, contributed to the death of the deceased, but the contributory negligence of some of the beneficiaries will not defeat the action as to others, who were not guilty of such negligence."

At page 531 of 55 Ohio St., at page 710 of 45 N. E. (36 L. R. A. 812) it is said:

"To award damages to a parent guilty of contributory negligence in such case would permit him to profit by his own wrong, and besides it would be in direct conflict with the universal rule as to contributory negligence."

In the opinion the court reviews the provisions of the statute in reference to the right of the administrator to recover for the benefit of next of kin, in cases where, if the injured party had survived the injury, he might have maintained an action for damages, but, notwithstanding this provision of the statute, denies recovery to any beneficiary guilty of contributory negligence. The court also cited with approval from section 391 of Booth on Street Railways, in which it is said:

"If the action is for the benefit of those relatives only who were guilty of negligence, their failure of duty should constitute a complete defense; for it would be unreasonable and unjust to permit them by an action of that kind, to recover damages for the loss of services of one whose life they had negligently sacrificed."

Also section 69, Tiffany on Death by Wrongful Act, and section 131, Beach on Contributory Negligence, to the same effect.

In the case of Railway Co. v. Workman, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602, the Supreme Court of Ohio held that:

"It was error to refuse to charge the jury, as requested, that if they should find that the father of the deceased was guilty of negligence directly contributing to the death of his son, the parent could not recover for any pecuniary loss suffered by the father for the death of his son, citing with approval Wolf, Adm'r, v. Railway Company, supra."

This would appear to be the last expression of the court of last resort of Ohio upon this question.

It is clear from these decisions that no recovery can be had in that state by an administrator under the death benefit statute on behalf of any beneficiary guilty of negligence contributing to the injury causing the death of deceased. As the right of the administrator to recover in this action depends upon the Ohio statute, the decisions of the Ohio Supreme Court construing these statutes must necessarily be followed by this court.

The fact that the negligence upon which the administrator relies for a recovery consisted of a violation of a criminal statute designed and intended to protect children of immature age from being exposed to dangerous machinery cannot change or alter the effect of these decisions. He must recover, if at all, on the theory of negligence, and this statute, notwithstanding it declares a wise public policy, can have no application to this action further than in the determination of the question of negligence on the part of the defendant. This case differs

in no respect from other cases of negligence, other than in the means of proving the negligence of the defendant. When that was accomplished by proving that defendant had violated the provisions of this statute, the statute so far as this case is concerned had expended its full force, and the defendant was entitled to every available defense under the law of negligence, except, perhaps, that it could not be permitted to show in opposition to the purpose and intent of the statute that this child was himself guilty of contributory negligence. It would certainly aid nothing in the enforcement of the public policy declared by this statute to permit one equally guilty of the violation of its terms to recover from an accomplice in the commission of this crime against this child. On the contrary, it would be putting a premium upon the violation of this statute by the parent, although the statute declares that the parent is equally guilty and subject to the same penalties as the employer, so that all of the argument advanced in favor of permitting a recovery to be had against the plaintiff applies with equal force to a denial of such recovery in favor of a parent who wantonly violated a statute enacted for the protection of his own child.

The question as to contributory negligence of the parents of Michael Budno, Jr., or either of them, should have been submitted to the jury under proper instructions by the court.

Defendant's request 3 was perhaps properly refused by the court, because the age stated therein is 16 years, instead of 15 years; otherwise, the request properly states the law of Ohio in reference to the issue involved. It was, however, prejudicial error for the trial court to charge the jury that the parents could recover, notwithstanding that one or both of them may have been equally guilty with the defendant in violating the provisions of section 12993 of the General Code of Ohio.

For this reason the judgment of the District Court is reversed, and cause is remanded for further proceeding and trial, in accordance with this opinion.

In re PINE TREE LUMBER CO.

BOYLE v. GOOD-HOPKINS LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1920.)

No. 3524.

Bankruptcy ⊜184(1)—Chattel mortgage on lumber subsequently sawed valid against trustee.

Under the law of Oregon a chattel mortgage given by a sawmill company and duly recorded on lumber to be thereafter sawed by the mortgagor and piled on land described *held* valid as against the trustee in bankruptcy of the mortgagor as to lumber which had been sawed and piled as designated and the piles marked with the name of the mortgagee, although the mortgagee had not taken actual possession.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

In the matter of the Pine Tree Lumber Company, bankrupt. From an order sustaining the validity of a chattel mortgage given by the bankrupt to the Good-Hopkins Lumber Company, W. R. Boyle, trustee, appeals. Affirmed.

Plowden Stott, of Portland, Or., for appellant.

Lantry & Merritt, of Spokane, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This appeal presents the question whether a chattel mortgage given by the bankrupt, Pine Tree Lumber Company, to Good-Hopkins Lumber Company, has validity and created a lien superior to any lien of the trustee in bankruptcy of Pine Tree Lumber Company.

The trustee, while receiver of the bankrupt company, petitioned the District Court for leave to sell 1,000,000 feet of lumber, more or less, upon which Good-Hopkins Lumber Company claimed a lien. Upon a hearing the referee in bankruptcy disallowed the claim as a preferred and secured one and allowed it as a general claim, and thereafter the lumber was sold free of lien. The District Court reversed the order of the referee and allowed the claim as a preferred one, and the trustee appealed.

The claim of Good-Hopkins Lumber Company is founded upon a chattel mortgage, duly recorded, made by the bankrupt on June 20, 1918. The mortgage provides that the Pine Tree Lumber Company, in consideration of sums "to be loaned as hereinafter specified," grants, bargains, transfers, and sets over unto Good-Hopkins Lumber Company, a Washington corporation, "all of the lumber of every kind and character which shall be sawn by the mortgagor at its mill, beginning June 1, 1918, and put in pile upon a certain piling ground in the north half of the southeast quarter (N. ½ S. E. ¼) of section 17, township 17 S., range 11 E., W. M., in Deschutes county, Oregon, which piling ground is located near said mill, up to the full amount of six million feet." Other provisions of the mortgage make it a security for all notes given during the continuance of the mortgage, and provide that if the mortgagor shall pay unto the mortgagee sums which may be secured by the mortgage in accordance with the conditions of the notes, and in any event before June 1, 1919, and shall comply with the terms of a certain contract between the parties, executed February 7, 1918, then the mortgage shall be of no effect; otherwise, to remain in full force. There are further references to advances made in accordance with the terms of the contract referred to between the parties, dated February 7, 1918.

There was testimony to the effect that the bankrupt owned by a contract of purchase the standing timber from which the lumber referred to in the chattel mortgage was sawn. About December 1, 1918, Good-Hopkins Company gave its permission for the Pine Tree Company to make a contract for sawing lumber with another company, and it appears that after that time the Pine Tree Company did nothing for the Good-Hopkins Company. On August 29, 1919, the Pine Tree Lumber Company was adjudged a bankrupt. Boyle, now

trustee, was appointed receiver, and found 1,000,000 feet of lumber, more or less, on hand. The Pine Tree Lumber Company had sawed this lumber and placed it in its lumber yards near its mill in Deschutes county. The lumber so piled never was in the actual, manual possession of Good-Hopkins Lumber Company, but was in the possession of the bankrupt corporation, and passed from its possession into the hands of the receiver on August 29, 1919, and was retained by the receiver until sold pursuant to an order of court. It also appeared that the money loaned, and which the mortgage was given to secure, was all used in the production of the lumber covered by the mortgage, and all the lumber covered by the mortgage was produced and put in piles prior to December 1, 1918, and each pile was stenciled "Good-Hopkins Lumber Company."

It is conceded that rights of the parties are to be determined under the law of Oregon. So far as the record advises us, no attaching creditor appears to have filed a claim or to have held an attachment lien. The rights of the trustee as defined under the amendment of 1910 (Act June 25, 1910, c. 412, 36 Stat. 840 [U. S. Comp. Stat. Supp. 1911, p. 1500]) to section 47a of the Bankruptcy Act are:

"(2) Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." In re Flatland, et ux, 196 Fed. 310, 116 C. C. A. 130.

In equity the mortgage is valid as against the mortgagor and all persons claiming through him with notice, and we think it is valid in the adjustment of the rights in bankruptcy, even though the mortgagee did not take actual, manual possession of the property. The effect of the mortgage was to operate as a contract to assign as soon as the mortgagor acquired the property, and thus there was created a lien capable of enforcement in equity as a lien attaching to the property. The lumber was all sawed and put in piles several months before the date of the appointment of the trustee, and a circumstance in favor of the validity of the mortgage is the fact that after the production of the lumber the mortgagor marked and numbered each pile with the name of the mortgagee, appellee herein. In Coates v. Smith, 81 Or. 556, 160 Pac. 517, the Supreme Court of the state assumed that the rights of a trustee are equal to those of an attaching creditor under the statutes of Oregon, and held that it was the settled law of that state:

"That a trustee having the right of an attaching creditor, is not ipso facto a bona fide purchaser for value. That one is such a purchaser and not affected by outstanding equities is an affirmative defense, and must be pleaded and proved. Before an attaching creditor, or one standing in an equal position, can be deemed a purchaser in good faith, he must allege and prove all the facts necessary to establish that character of his ownership."

In support of this rule many earlier Oregon decisions are cited.

In the earlier case of Flanigan v. Graham, 42 Or. 403, 71 Pac. 137, 790 (decided in 1903), the court, speaking through Justice Wolverton,

recognized that the general principle that a mortgage intended to cover property not in existence or after-acquired seems to be that at law such a mortgage is ineffectual and void, but that in equity it is regarded as an executory agreement which, though not effectual per se to transfer the present legal title, yet operates to impress a lien according to the agreement of the parties when the property comes into existence. The court continued:

"The instrument called a 'mortgage,' under such conditions, is construed as operating by way of a present contract to give a lien, which, as between the parties and all others having notice or knowledge thereof, takes effect or attaches to the subject as soon as it comes into the ownership of the mortgaging party."

The doctrine of the case is approved in Jones on Chattel Mortgages, § 170.

Kenny v. Hurlburt, 88 Or. 688, 172 Pac. 490, 173 Pac. 158, L. R. A. 1918E, 652, Ann. Cas. 1918E, 737, is relied upon by the appellant as supporting the proposition that, actual possession not having passed to the mortgagee, the mortgage is invalid. That case arose between a trustee in bankruptcy and the holder of a chattel mortgage covering a stock of goods in a retail mercantile house. The trustee was appointed in the bankruptcy of Pulfer Mercantile Company. Upon the facts it was found that one Pulfer was the owner at the time of the execution of the mortgage, and the court held that the trustee had no standing in court and that the mortgage held by the plaintiff was not enforceable. In the course of the opinion the court said that a chattel mortgage upon future-acquired personal property or a fluctuating stock of goods was valid as between mortgagor and mortgagee, citing Flanigan Bank v. Graham, already referred to, and that, while the chattel mortgage made by Pulfer to Kenny in good faith was invalid as against the creditors of the mortgagor, for the reason that it was on a fluctuating stock of goods, nevertheless, the lien was perfected when the mortgagee, Kenny, was put in possession of the merchandise by the mortgagor. The court said:

"The mortgage operated as an executory agreement, which subjected the after-acquired goods to the lien of the mortgage upon the mortgagee taking possession of the goods before the rights of third persons intervening. The existence of claims of creditors without attachment or seizure upon execution was not such an intervention."

Appellant argues that it should be deduced from the opinion just cited that such a mortgage as that described in the instant case is invalid as against all persons except the mortgagor and the mortgagee, who took possession. But we think the cases are distinguishable. There is a difference between a stock of retail merchandise left in the possession of the mortgagor in his store being sold in the usual course of business, and lumber piled in piles on a described piece of ground and marked with the name of the mortgagee, and removed from the control of the mortgagor, except to deliver to the carrier for transport to the mortgagee. The learned District Judge in his opinion commented upon Kenny v. Pulfer, supra, and said:

"The general question as to the validity of such a mortgage was, however, not before the court or necessary to a decision of the case in hand, and I do not think the court intended to lay down any general rule on the subject. It was dealing with a mortgage on a stock of merchandise left in the possession of the mortgagor with authority to sell and replenish in the usual course of business. There were no visible means by which the purchaser or attaching creditor could distinguish the goods acquired after the execution of the mortgage from those on hand at the time. No such case is here presented. Here the lumber, as fast as sawed, was piled and kept separate and apart from other lumber and marked with the name of the mortgagee. There was no difficulty for an intending purchaser or attaching creditor to identify the actual property claimed under the mortgage and there was sufficient, in my judgment, to impart notice and knowledge to anyone dealing with the property and to render the mortgage valid."

In the case of First National Bank v. Wegener, 94 Or. 318, 181 Pac. 990, 186 Pac. 41, it was held that it is not necessary for a mortgagee to take possession of lumber covered by a mortgage. Taking possession would give no greater protection than that given by recording the mortgage in accordance with the statute of the state. Of course, possession by a mortgagee is held to be essential to give notice where the mortgage has not been recorded, in order that the holder of the mortgage may be put in as strong a position as he would occupy were his security put upon the record.

The contention that the property was not sufficiently well described in the mortgage cannot be sustained. It would have been very simple to identify the property. Sommer v. Island Mercantile Co., 24 Or. 214, 33 Pac. 559; Elwert v. Hansen, 89 Or. 399, 173 Pac. 939.

Parol evidence may be resorted to to apply the description to the subject-matter intended to be embraced in the mortgage, but not to contradict its terms, nor to bring within its operation property not fairly included within the mortgage. It is well established that evidence may be introduced to show that the mortgagor was in fact the owner of the property at the time of the mortgage. Jones on Chattel Mortgages, § 53.

Holding that the order of the District Court allowing the claim of the petitioner creditor was correct, the decree is affirmed, with costs in favor of appellee.

Affirmed.

L. LAZARUS LIQUOR CO. v. JULIUS KESSLER & CO.

(Circuit Court of Appeals, Sixth Circuit. December 13, 1920.)

No. 3391.

1. **Payment ⟸82(4)—No recovery of excessive price paid voluntarily.**
   Plaintiff, which under a contract for purchase of whisky from defendant at a stated price, to be shipped as ordered, received and paid for, without protest, successive shipments made after the additional war tax had been imposed, with knowledge that such tax was added to the contract price, *held* barred by estoppel from recovering the amount on the ground that the payments were compulsory.
2. **Sales ⟸202(6)—Shipment subject to payment of draft not delivery to purchaser.**
   Where a seller of whisky, although the contract contemplated delivery f. o. b. railroad, on making shipments, forwarded for collection a draft for the price of the shipment, to which it attached the bill of lading, delivery to the carrier did not vest title to the whisky in the purchaser.
3. **Corporations ⟸666—Corporation held estopped to deny that contract of sale was to be performed in certain county, so that it might be sued there.**
   Although a contract of sale provided for delivery of the goods f. o. b. cars at the point of shipment in another state, where the seller did not there make such delivery, but on each shipment forwarded for collection a sight draft for the price, to which it attached the bill of lading, and the purchaser paid the drafts and received delivery at point of distination, the seller is estopped to deny that the contract was to be there performed, and may be sued thereon in that county, under Civ. Code Prac. Ky., § 72.

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action at law by the L. Lazarus Liquor Company against Julius Kessler & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

J. M. York, of Catlettsburg, Ky. (J. M. York, of Catlettsburg, Ky., on the brief), for plaintiff in error.

Wm. Marshall Bullitt, of Louisville, Ky. (Levy Mayer, of Chicago, Ill., and Wm. Marshall Bullitt and Bruce & Bullitt, all of Louisville, Ky., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The Lazarus Liquor Company brought an action in the circuit court of Boyd county, Ky., against Julius Kessler & Co., to recover $4,095, money paid by it under protest to the defendant in excess of the contract price of a large amount of whisky, purchased by plaintiff from defendant, which sum of money it avers it was unjustly compelled to pay in order to secure possession of its property.

This action was later removed, by order of court, to the United States District Court, Eastern District of Kentucky, in which court an amended petition was filed. Issue was joined upon this amended petition, and upon the trial of the case, at the close of plaintiff's evi-

dence, the court on motion directed a verdict in favor of the defendant.

It appears from the record that the L. Lazarus Liquor Company, hereafter called the Lazarus Company, is a Kentucky corporation, located at Catlettsburg, Boyd county, Ky.; that Julius Kessler & Co. is a West Virginia corporation, having a place of business and a resident agent in Louisville, Jefferson county, Ky. The summons in this case was served upon this resident agent of Kessler & Co. in Jefferson county, Ky.

It further appears that on January 5, 1917, the Lazarus Company signed two written instruments. By the terms of one of these written instruments, it agreed to purchase from Kessler & Co. 1,000 cases of a certain brand of whisky, at a price named therein. This written instrument contained the further provision: "Send us contract to this effect. Subject to the approval of your home office." By the terms of the other written instrument, the Lazarus Company agreed to purchase from Kessler & Co. 300 cases of another brand of whisky, at a price named therein, which written instrument contained the following provision: "Subject to approval of your home office." These written instruments were signed by J. G. Leonard, a salesman of Kessler & Co., and were immediately forwarded by him to the Chicago office of that company. On the 10th day of the same month Kessler & Co. wrote and mailed at Chicago a letter directed to the Lazarus Company, Catlettsburg, Ky., accepting the order, which letter reached that company in due course of mail.

These written instruments further provided that the whisky would be shipped as ordered from time to time within one year from date thereof. On January 19, 1917, Kessler & Co. shipped to the Lazarus Company fifty cases of this whisky, which was received by the Lazarus Company, and for which it paid the price named in the contract. On July 2, 1917, Kessler & Co. wrote the Lazarus Company a letter in which it stated that Mr. Leonard had reported to it that the Lazarus Company would notify Kessler & Co. before July 15th what portion, if any, of the case goods contracted for early in January it would require, the balance to be canceled on July 15th by mutual consent; and again on July 10, 1917, Kessler & Co. wrote the following letter to the Lazarus Company:

"Owing to the changed conditions in the liquor business, we do not consider ourselves bound to hold or deliver any case goods purchased on contract for future delivery, unless the full amount is paid.

"We have, therefore, canceled the undelivered portion of your contract of last January covering 1,000 cases of Old Lewis Hunter Rye and 300 cases of Old Log Cabin."

To this letter the Lazarus Company replied under date of July 12, 1917, refusing to agree to the canceling of the contract or to the imposing of any new conditions, and demanding performance of the contract as written. To this letter Kessler & Co. sent a lengthy reply under date of July 13, 1917, calling attention to the adverse liquor legislation; that it expected to be out of business in 30 or 60 days; that it could not perform, and ought not to be expected to perform, this contract. The last paragraph of this letter is as follows:

"We repeat that this contract must be terminated, and you will either take the goods now and pay for them or delivery cannot be made. Under present conditions we cannot advance any moneys and it will be necessary for you to send us at least the amount of internal revenue involved in the tax payment of sufficient goods to take care of your order."

It does not appear that the Lazarus Company replied to this letter, but on July 23d it sent Kessler & Co. an order for 600 cases and New York exchange for $2,000 to cover the amount of internal revenue tax on the quantity of liquor ordered, and directed Kessler & Co. to draw on it for the balance. This shipment was made pursuant to order, credit given for $2,000 advance payment, and a draft forwarded upon the Lazarus Company for the balance of the contract price, which draft was paid.

On August 22d, Kessler & Co. wrote the Lazarus Company, calling attention to the fact that there were still 275 cases of Old Log Cabin and 375 cases of Old Lewis Hunter, 650 cases in all, yet undelivered and covered by the contract, and further said:

"We have stated to you in previous letters that we consider this contract canceled, but, to again show our good intent, we now tender you these goods for immediate bottling and shipment. In other words, we are ready to deliver to you the 650 cases providing your order is received at once and you send remittance at the rate of $3.30 a case for tax with the order. This offer is made to you for immediate acceptance only, and we do not consider ourselves bound to deliver you any more goods unless you place the order for bottling with us by return mail."

The Lazarus Company did not reply to this letter, but on September 29, 1917, it wrote to Kessler & Co., inclosing a check for $2,145 "to cover the balance of order of Lewis Hunter and Log Cabin as per our contract," and ordered 650 cases shipped at once in carload lot. In this letter it requested to have all Lewis Hunter and no Log Cabin, but, if that was not satisfactory to Kessler & Co., then to ship the balance due on the contract for Log Cabin and the balance due on the contract for Lewis Hunter, specifying the amounts of each still due it under the contract.

On October 1st, Kessler & Co. replied to this letter, acknowledging receipt of the $2,145, refusing to exchange the Lewis Hunter for Log Cabin, and further stating:

"Neither can we bottle these goods before the new tax goes into effect, which is liable to happen at any moment within the next two or three days. * * * We will bottle these 650 cases as soon as we can. Under the new tax, which will be $3.20, it will require $6.30 a case additional for tax, which on 650 cases amounts to $4,095 more. Please let us know whether to proceed with the bottling of the 650 cases under these conditions, and if so please send us additional remittance for $4,095. As soon after receipt of this remittance as possible we will bottle these goods for you and then draw on you for the balance due."

To this letter Lazarus Company replied under date of October 15th:

"Please cancel the car order for the 650 cases that we sent you on the 29th ult., and kindly send us instead 218 cases of Old Lewis Hunter, all quarts, by local freight shipment and you will mail us your check for the remainder of the $2,145 after deducting the tax for the above shipment."

On October 19, 1917, Kessler & Co., in pursuance of this order, shipped 218 cases, and credited the remittance of $2,145 forwarded upon September 29th on the purchase price, including war tax. The invoice of this shipment forwarded to the Lazarus Company showed a charge in addition to the contract price of $6.30 per case to cover "additional internal revenue tax," amounting to $1,373.40 in the aggregate, which with the contract price of $1,635 amounted to $3,008.40, leaving a balance of $863.40, for which amount a draft with bill of lading attached was forwarded. This draft was paid by the Lazarus Company.

On December 1, 1917, the Lazarus Company wrote Kessler & Co., inclosing check for $1,747.20, with order for 182 cases, "being a part of the order yet due us on our contract heretofore made with you," and advising that there were still 250 cases of whisky yet to be shipped after this 182 cases. Kessler & Co. shipped these 182 cases, applied the $1,747.20 as a credit upon the purchase price, and forwarded with the shipment a draft with bill of lading attached for the balance thereof, amounting to $866.40. In the invoice accompanying this shipment the additional internal revenue of $6.30 per case was charged as a part of the purchase price. Lazarus Company paid the draft and received the shipment. On December 21, 1917, Lazarus Company forwarded $2,500, "per your request," in advance, with an order for 250 cases. This number of cases was shipped by Kessler & Co. and a draft with bill of lading attached was forwarded. The invoice, contained in the letter advising shipment had been made, charged as part of the purchase price the additional war tax of $6.30 per case, amounting to $1,575, aggregating $3,630, upon which amount it credited the $2,500 and forwarded draft with bill of lading attached for $1,130 balance, which draft was paid by the Lazarus Company. This completed the shipment of 1,300 cases covered by the contracts.

[1] Upon these undisputed facts the plaintiff seeks to recover from Kessler & Co. the amount paid by it covering the increase in the internal revenue tax of $2.10 a gallon, which was imposed by the act of Congress of October 4, 1917, on the 650 cases taken out after that tax went into effect, which amount it claims was paid under compulsion and in order to secure possession of its property unlawfully withheld from it by Kessler & Co. until such payment was made. The answer of the defendant recites the history of the different transactions and denies the plaintiff's right to recover any money paid by it on account thereof, for the reasons that said payments were made with the full knowledge that said war tax was being paid by it in accordance with Kessler & Co.'s construction of the contract; that all of said payments were voluntary, and without protest, and without any duress or compulsion; that by reason of such payments Kessler & Co. was induced to withdraw this whisky from bond and become liable to the United States government for the amount of these taxes, and that the plaintiff by its conduct misled Kessler & Co. to its prejudice in that respect. By amended answer it avers that at the time of the making of the contract there existed a custom and usage in the whisky trade in the United States, known to all persons engaged in the whisky business,

and known to the plaintiff and defendant herein, that in sales or contracts for sales of whisky at a price which included the internal revenue tax then in effect, if there were any reduction in said internal revenue tax thereafter before delivery of the whisky the purchase price would be reduced by the amount of such reduction in tax, and in the event of an increase in such tax the purchaser would pay such increased tax to the distiller and seller; that such custom and usage was a part of the contract between plaintiff and defendant herein as if written in full therein. It also denies the jurisdiction of the circuit court of Boyd county, Ky., over the person of this defendant, or that it acquired any such jurisdiction by reason of the serving of summons upon its resident agent in Jefferson county, Ky., for the reason that the contract was not made in Boyd county and was not to be performed therein.

In the determination of the question presented by this record, it is unnecessary to review this evidence in detail. The facts above stated are fully established by the uncontradicted evidence, and the conclusion necessary to be drawn from these facts is that Kessler & Co. on October 1, 1917, repudiated this contract and absolutely and emphatically refused to make any further shipments unless the Lazarus Company would pay this additional tax imposed by the act of Congress of October 4, 1917, and further required, before making any shipment whatever, that the Lazarus Company should pay, not only this additional tax, but also the revenue tax in force at the time the contract was made; and it further required, in direct violation of the terms of the contract, that the Lazarus Company should pay the balance of the purchase price of each shipment before any deliveries were made to it whatever, and to this end it forwarded with each shipment draft with bill of lading attached.

If the first shipment made by Kessler & Co., after the dispute had arisen, were the only one under consideration here, there would be force in the contention of the plaintiff that it had not consented to or acquiesced in this additional charge and had not voluntarily made such payment. Before that shipment was made it apparently acquiesced in the demand of Kessler & Co., and forwarded to it a check for $2,145, to be applied upon the internal revenue tax in force at the time this order for shipment was given. But no presumption arises from this payment that it intended to acquiesce in the defendant's demand that it should pay the additional tax. However, when the defendant notified plaintiff that it could not make the shipment before the additional tax attached, it then canceled the larger order and gave a smaller one, still insisting, however, that the remainder of this payment "after deducting the tax for the above shipment, should be returned to it."

Kessler & Co. could not by any strong-arm methods credit that payment to any other purpose than as directed by plaintiff in its letter of October 15th; but when the defendant refused to do this, and forwarded its draft with bill of lading attached for the balance of the purchase price, including the additional tax, and also forwarded an invoice showing that this tax had been charged as a part of the purchase price, it then became the duty of the Lazarus Company, if it

desired or intended to repudiate defendant's terms, to reject this invoice and demand the return of the money that it had evidently paid in good faith, relying upon the terms of its contract with the defendant. This it did not do, but it continued from time to time to send further orders, and make further advance payments, and pay drafts with bill of lading attached, and receive further invoices including this additional tax, without any protest of any kind or character whatever. The plaintiff, therefore, cannot recover upon the theory that payment by it of the money demanded by Kessler & Co. was compulsory and made under protest. Flower v. Lance, 59 N. Y. 603; Regan v. Baldwin, 126 Mass. 485, 30 Am. Rep. 689; Aultman & Taylor Co. v. Mead, 109 Ky. 583, 68 S. W. 294; Railroad Co. v. Commissioners, 98 U. S. 541, 25 L. Ed. 196.

[2] The further claim that it made these payments for the purpose of securing possession of its own property wrongfully withheld from it is not tenable. While the contract is silent in that respect, yet, undoubtedly, it contemplated the delivery of this whisky f. o. b. cars at point of shipment. That the parties so construed it is evidenced by the first shipments made under this contract, about which there is no dispute; but later Kessler & Co. refused to make any such shipments, but forwarded draft with bill of lading attached for all of the 650 cases, and this was acquiesced in by plaintiff. This was not such an unconditional delivery to the carrier as would transfer title to the purchaser before the acceptance and payment of the draft and the delivery of the bill of lading to it. United States v. R. P. Andrews & Co., 207 U. S. 229, 28 Sup. Ct. 100, 52 L. Ed. 185; Bergeman v. Railway Co., 104 Mo. 77, 15 S. W. 992; Emery & Sons v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299. Brick Co. v. Machinery Co., 89 Ohio St. 366, 106 N. E. 33, L. R. A. 1915B, 536.

Under no phase of the evidence, however, could the claim of the Lazarus Company that it had paid under protest and compulsion, and for the purpose of securing possession of its own property wrongfully withheld from it, apply to the payment of the $2,500 forwarded by it to the defendant on the 21st of December, 1917, when shipment of the remaining 250 cases was ordered. At that time it had already paid to Kessler & Co. almost $500 more than the full amount of the contract price for the entire 1,300 cases; that is to say, it had paid for the 1,050 cases already received by it, not only the full price it had agreed to pay, but had paid in addition thereto $2,520 increased revenue tax demanded by the defendant. The contract price of the 250 cases constituting the final order amounted to $2,055, so that the Lazarus Company was on the 21st of December, 1917, entitled, under the terms of the original contract, to this last shipment of 250 cases without the payment of any further sum or amount whatever, and in addition thereto it was entitled under the terms of the original contract to the return to it of about $465, but with full knowledge of these facts it sent with this order for 250 cases a remittance of $2,500. Clearly this $2,500 was not paid under compulsion, fraud, or mistake of fact, nor by any stretch of the imagination could it be said to have been paid for the purpose of securing possession of its own property

wrongfully withheld from it by the defendant, for at that time the whisky was not even bottled or withdrawn from the bonded warehouse. So that it did not, and could not, have had any property interest therein whatever. It is also equally clear that this payment was not made under protest of any kind or character, but beyond all question was a voluntary unconditional payment. This is equally true of the further payment of $1,130 made by the Lazarus Company to cover the balance of the purchase price of this shipment, the invoice of which, on its face, included this additional tax.

When Kessler & Co. first repudiated its contract and refused to make further shipments, except upon price, terms, and conditions entirely different from the price, terms, and conditions written in the contract, the courts were open to the Lazarus Company, and undoubtedly they would have fully protected it in its legal rights, and have afforded it a full and adequate remedy for this breach of contract on the part of Kessler & Co.; but the defendant was not then ready to invoke the aid of a court. Its course of conduct from that time on indicates either that it had receded from the position it had taken in its letter of July 12th, and had concluded to accept the construction placed upon this contract by Kessler & Co. that it should pay the additional tax, or that, in its eagerness to secure speedy shipment of the balance of the whisky covered by the contract, it pretended to acquiesce in these demands as an inducement to the defendant to make such shipments; but no matter what may have been the secret intent and purpose of the Lazarus Company when it complied with these demands, the courts are now powerless to afford it the relief to which it was entitled when Kessler & Co. repudiated this contract and made these demands as a condition precedent to further shipments.

[3] Under section 72 of the Kentucky Code, an action against a corporation upon a contract must be brought in the county in which such corporation has an office or place of business or where its agent resides, or in the county in which the contract is made or is to be performed. The plaintiff in its letter of July 21st refers to it as the contract "of January 10, 1917, as confirmed by you at this date referred to." It is clear that this was not a completed contract until the letter of Kessler & Co. was mailed in Chicago to the plaintiff; therefore the contract was not made in Boyd county, Ky. Baird et al. v. Pratt et al., 148 Fed. 825, 78 C. C. A. 515, 10 L. R. A. (N. S.) 1116 (C. C. A. 8).

No matter what may have been the original intention of the parties as to the places of performance, Kessler & Co., in view of the fact that it forwarded with each shipment of goods a sight draft with bill of lading attached, is in no position now to claim that the contract was not to be performed in Boyd county. There is where, under its construction of the contract, it did deliver these 650 cases, and this performance on the part of defendant at Catlettsburg, Boyd county, Ky., was accepted by the Lazarus Company without protest or complaint that the contract originally contemplated performance by delivering this merchandise f. o. b. cars at point of shipment.

This court is therefore of the opinion that Kessler & Co. is estopped

to deny that this contract was a contract to be performed in Boyd couny, Ky., and that, therefore, this action was properly commenced in that county; but nevertheless, for the reasons above stated, the court properly directed a verdict for the defendant.

The judgment of the District Court is affirmed.

HANNAN, County Auditor, et al. v. FIRST NAT. BANK OF COUNCIL BLUFFS, IOWA.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1920.)

No. 5537.

1. **Courts ⇐328(2)—Taxation ⇐611(4)—National bank may sue to contest validity of tax against shareholders and amount in controversy is amount of tax on all shares.**
   A national bank required by the laws of the state to pay the tax assessed against its shareholders on their stock may maintain a suit to test the validity of the tax and the total amount of the tax on all its shares determines the amount in controversy for the purpose of federal court jurisdiction.

2. **Taxation ⇐10—Tax on shares of national banks not invalidated by provision that assessor shall make valuation from bank's statement of its capital.**
   Code Supp. Iowa 1913, § 1322, providing for the assessment of shares of national and state banks, savings banks, and loan and trust companies to the stockholders, *held* not invalid as to national banks as a taxation of their corporate property, because it provides that the assessor shall make his valuation of the shares from the bank's statement of its capital, surplus, and undivided profits.

3. **Taxation ⇐12—Tax on national bank shares invalidated by omitting to similarly tax other moneyed capital.**
   A systematic and intentional omission to tax a material portion of other moneyed capital in the state may render invalid a taxation of national bank shares, under Rev. St. § 5219 (Comp. St. § 9784), equally with a similar omission to tax by legislative enactment.

4. **Taxation ⇐386(2)—Shareholder in national bank not entitled to deduction on account of government bonds owned by bank.**
   The fact that a part or all of the capital of a national bank is invested in United States bonds, or securities which are exempt from taxation, does not entitle a shareholder to any deduction from an assessment on the full value of his shares.

5. **Taxation ⇐12—Deduction of government securities by private bankers not discrimination against national banks.**
   The fact that under a state statute individuals, such as private bankers, may deduct from the amount of their property for assessment purposes the amount of United States securities held by them is not a discrimination against the owners of national bank shares, forbidden by Rev. St. § 5219 (Comp. St. § 9784), which, in requiring other moneyed capital to be assessed at an equal rate, refers only to such moneyed capital as the state has power to tax.

6. **Taxation ⇐433—Failure to physically attach oath does not invalidate assessment.**
   Under Code Iowa 1897, § 1365, requiring the assessor to attach his oath to the assessment rolls, a failure to make such oath invalidates the assessment; but the essential requirement is that he should make the oath, and if it is taken, it is not necessary to the validity of the assessment that it

should be physically attached to the papers constituting the assessment roll, provided it is in some way reasonably connected therewith.

7. Courts ⇐366(1)—Decision of state court sustaining state statute binding on federal court.

The decision of the highest court of a state, sustaining the validity of a state statute under its Constitution, is binding on the federal courts.

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

Suit in equity by the First National Bank of Council Bluffs, Iowa, against J. D. Hannan, County Auditor, and others. Decree for complainant, and defendants appeal. Reversed.

C. E. Swanson, of Council Bluffs, Iowa (V. A. Morgan, of Council Bluffs, Iowa, on the brief), for appellants.

Addison G. Kistle, of Council Bluffs, Iowa (Tinley, Mitchell, Pryor, Ross & Mitchell, on the brief), for appellee.

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

MUNGER, District Judge. This case presents an appeal from a decree enjoining the collection of taxes. The appellee, a national bank at Council Bluffs, Iowa, alleged that an attempted assessment for the years 1914 and 1915 had been made against its shareholders, based on the entire value of such shares, and without deducting from the value of the shares the amount of bonds of the United States which the bank owned. It further alleged that the tax was void, because no tax could be levied against the shares of stock in the state and savings banks, under the Iowa statutes. There was a denial of the allegations and a trial to the court.

[1] A preliminary question of the jurisdiction of the court arises, inasmuch as the tax assessed to any one shareholder does not amount to the sum of over $3,000. The statutes of Iowa in reference to taxation of banks and bank shares are in part as follows (Code Supp. Iowa 1907, and Code Supp. Iowa 1913, §§ 1321, 1322, 1325):

Section 1321: "*Private Bankers.* Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from real estate, and liabilities of such bank or banker on January 1st of the current year, as follows:

"1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;

"2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due;

"3. The amount of all deposits made with them by others, and also the amount of bills payable;

"4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;

"5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof;

"The aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits, and the aggregate actual value of bonds and stocks, after deducting the portion thereof otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed at twenty-five per cent. of the actual value of the same, not including real estate, which shall be listed and assessed as other real estate."

Section 1322: "Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. At the time the assessment is made the officers of national banks and state and savings banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matter provided in section thirteen hundred and twenty-one [1321], of the Supplement to the Code, 1907, which shall also show separately the amount of the capital stock and the surplus and undivided earnings, and the assessor from such statement shall fix the value of such stock based upon the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any), on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed."

Section 1325: "*Corporation Liable.* The corporations described in the preceding sections shall be liable for the payment of the taxes assessed to the stockholders of such corporations, and such tax shall be payable by the corporation in the same manner and under the same penalties as in case of taxes due from an individual taxpayer, and may be collected in the same manner as other taxes, or by action in the name of the county. Such corporations may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If the unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same, to be made by the sheriff at the principal office of such corporation in this state, after giving the stockholders thirty days' notice of the amount of such tax and the time and place of sale, such notices to be by registered letter addressed to the stockholder at his post-office address, as the same appears upon the books of the company, or is known by its secretary."

It will be observed that by the last section quoted the bank is made liable for the payment of the taxes assessed to its stockholders under penalties, and that it may be collected as other taxes, or by action in the name of the county. The bank may recover such payments from the stockholders and is given a lien on the stock and unpaid dividends for the amount paid. The validity of statutes imposing such liability on national banks for the taxes levied against their shareholders is beyond question. National Bank v. Commonwealth, 9 Wall. 353, 362, 19 L. Ed. 701; Aberdeen Bank v. Chehalis County, 166 U. S. 440, 444, 17 Sup. Ct. 629, 41 L. Ed. 1069; Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 451, 30 Sup. Ct. 532, 54 L. Ed. 832. As a pecuniary liability is imposed on the bank for the payment of the total amount of the tax imposed on all its stockholders, it is the real party in interest in a suit to enjoin the collection from the assets, a collection which is in effect an enforced declaration of a dividend. Redhead v. Iowa Nat. Bank, 127 Iowa, 572, 103 N. W. 796.

In the case of Cummings v. National Bank, 101 U. S. 153, 156 (25 L. Ed. 903), the same claim of the incapacity of the bank to sue because only the shareholders were interested was considered, and it was decided that the bank might maintain such a suit as this under a similar statute of Ohio, but less burdensome on the bank because it declared that the bank might pay the tax, whereas this statute declares that the bank must pay it. In that case the court said:

"But the Ohio statute, by the remedies it provides, places the bank in a condition where it must pay the tax, or encounter other evils of a character which create a right to avoid them by instituting legal proceedings to ascertain the extent of its responsibility before it does the acts demanded by the statute."

The bank, therefore, had the right to maintain the suit, and as the total amount due from it far exceeded the sum of $3,000, exclusive of interest and costs, the court had jurisdiction of the controversy.

[2] It was shown that appellee was the owner of a large amount of bonds of the United States at the time of the assessments and that no deduction was allowed from the value of the shares because of that fact. One of the principal questions that is presented goes beyond the relationship of these bonds to the asserted tax, as the appellee denies the authority of the state to levy any tax against the bank or the shares of stock therein. The statute of the United States which relates to the taxation of national banks is section 5219 of the Revised Statutes (section 9784, U. S. Comp. Stats. Ann.). It is contained in the chapter relating to the creation and regulation of these banks and is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the Legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

It is contended by appellee that section 1322 of the Iowa statutes requires the taxation of the property of incorporated banks and not of the shares of stock therein. Undoubtedly national banks are governmental agencies of the United States and are not subject to taxation by the states on their general property (McCulloch v. Maryland, 4 Wheat. 316, 436, 4 L. Ed. 579; Farmers' & Mechanics' National Bank v. Dearing, 91 U. S. 29, 34, 23 L. Ed. 196; Bank of California v. Richardson, 248 U. S. 476, 483, 39 Sup. Ct. 165, 63 L. Ed. 372), and if this tax is levied on the bank's general property it is invalid.

The trial court filed an opinion in the case, accepting the appellee's construction of the Iowa statutes as imposing a tax on the value of the bank's property, but the decree did not cancel the entire tax for lack of power to tax any of the national bank's property, but reduced the amount of taxes levied for 1914, because United States bonds owned

by the bank had been included in the valuation for assessment. Does the Iowa statute tax the property of the bank? It said that it does because section 1322 of the Iowa statutes, heretofore quoted, is the same in effect as the former statute which it displaced (section 1322, Code Supplement of Iowa 1907), and which was declared in Home Savings Bank v. Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901, to tax the property of the state banks. The former section read as follows:

"Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to the individual stockholders. At the time the assessment is made, the officers of national banks shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and he shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the corporations shall furnish him a verified statement of all the matters provided in the preceding section, which shall also show, separately, the amount of capital stock, and the surplus and undivided earnings, and the assessor, from such statement and other information he can obtain, including any statement furnished to and information obtained by the auditor of state, which shall be furnished him on request, shall fix the value of such stock, taking into account the capital, surplus and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them * * * shall be assessed as other real estate, and the property of such corporations shall not be otherwise assessed."

In the Home Savings Bank Case the decision as to state banks was placed upon the grounds (1) that the statute specifically stated that the shares were to be assessed to the bank and not to the individual stockholders; (2) that while national banks were required to pay the taxes and were given a lien, by section 1324, on the stock and dividends as security for repayment of the taxes, the state banks were not required to make such payment, because their stockholders were not assessed; (3) that the assessor in making his valuation was directed to require a verified statement from the bank showing its assets but not the value of the good will and franchise; and (4) that the property of the corporation was not otherwise to be taxed. Considering these provisions of the statute the court held that it imposed a tax on the bank's property. The essential reason for that construction was that the statute plainly directed the assessment to be to the bank, and the two cases that were cited as controlling (Bank of Commerce v. New York City, 2 Black, 620, 628, 17 L. Ed. 451, and Bank Tax Case, 2 Wall. 200, 206, 209, 17 L. Ed. 793), were founded on similar statutes expressly directing the assessment of the corporate property. See Hager v. American Nat. Bank, 159 Fed. 396, 401, 86 C. C. A. 334; In re First Nat. Bank of Aurora, 103 Neb. 280, 171 N. W. 912.

The amendment of section 1322 was made after the decision in the Home Savings Bank Case and after the effect of that decision on the taxation of national bank shares had been called to the attention of the Iowa Legislature by a decision of the state Supreme Court. First Nat. Bank v. City Council of Estherville, 150 Iowa, 95, 129 N. W. 475. The amended section was intended to remedy the situation thus pointed

out. Security Sav. Bank v. Board of Review (Iowa) 178 N. W. 562. By apt words it repealed the former provision that the value of the shares of state banks were to be assessed to the banks, and not to the stockholders, and the provision that state banks were not to be taxed otherwise than on their shares. It also abolished the former rule that only national banks were required to pay the tax for the stockholders, and placed the same obligation on the state banks. In view of its history and purpose, the portions of the former statute omitted and the direct language employed in the amended section, the only interpretation that can be placed on the later statute is that it directs the assessment of the shares of stock to the individual stockholders in both state and national banks. It purports to tax the shares and it cannot be assumed unless the language used plainly requires it, that the Legislature intended to tax the property generally of national banks, which it could not do, and not to tax the shares of national banks, which was the only thing it could tax, apart from the real estate of the banks. It must be assumed that the Legislature was familiar with the United States statutes creating national banks and granting and limiting the power of the state in taxing them. It is the more to be assumed because the Legislature of the state has constantly recognized this limitation of the taxing power over national banks, and its statutes have directed the taxing of national bank shares and not the taxing the general property of such banks. Laws of Iowa, 1868, c. 153, p. 213; Code of Iowa 1873, § 818; Code Supplement of Iowa 1907, § 1322; Code Supplement Iowa 1913, § 1322.

The trial court based his conclusion that the corporate property was taxed upon the theory which he had expressed in the case of Iowa Loan & Trust Co. v. Fairweather (D. C.) 252 Fed. 605, 610, 611, that a tax which is based on a corporate bank's capital, surplus, and undivided profits as the measure of value of the capital stock, is necessarily a tax on the corporation's assets, as the shares are merely representation of partial ownership of such assets.

The fact that the assessor is bound to make his valuation of the shares from the bank's statement of its capital, surplus, and undivided profits (First Nat. Bank v. Hayes [Iowa] 171 N. W. 715), does not prove that he is thereby assessing the bank's property. In fixing any proper valuation of corporate shares, the amount of the actual capital, surplus, and undivided profits are essential elements. There may also be additional values in the good will and franchise (Home Savings Bank v. Des Moines, 205 U. S. 503, 512, 27 Sup. Ct. 571, 51 L. Ed. 901), but such values are so indefinite and so much a matter of opinion that the Legislature could properly direct the assessors, usually unskilled in the ascertainment of such values, to omit them as elements of assessable value. In Stanley v. Supervisors of Albany, 121 U. S. 535, 548, 549, 7 Sup. Ct. 1234, 1238 (30 L. Ed. 1000), a valuation by the assessor of the shares of the Bank of Albany at par, thus ignoring the value of the surplus, undivided profits, good will, and franchise, and although the real value of the shares exceeded the par value by from 10 to 70 per cent., was treated as an assessment of the shares, and not of the bank's property. The method was applied to all the banks, as the

Iowa statute attempts to apply the same method to both state and national banks, and of this the court said:

"A different method might have led to perplexing difficulties, owing to the great fluctuations to which shares in banking institutions are subject; their value depending very much on the skill and wisdom of the managers of those institutions. Intelligent men constantly differ in their estimate of the value of such property, and the stock market shows almost daily changes. Presumptively, the nominal value is the true value; any increase from profits going, in the natural course of things, in dividends to the stockholders. This method, applied to all banks, national and state, comes as near as practicable, considering the nature of the property, to securing, as between them, uniformity and equality of taxation; it cannot be considered as discriminating against either. Both are placed on the same footing. * * * The method pursued could in no respect be considered as adopted in hostility to the national banks. It must sometimes place the estimated value of their shares below their real value; but such a result is not one of which the holders of national bank shares can complain. It must sometimes lead also to overvaluation of the shares; but, if so, no ground is thereby furnished for the recovery of the taxes collected thereon."

It is undoubtedly true that, in practical effect, a taxation of shares of stock results in much the same financial loss to the individual owners as if the corporation had been taxed on its property, but in legal contemplation the shares and the corporate capital are separate things. It was said in Owensboro National Bank v. Owensboro, 173 U. S. 664, 680, 681, 19 Sup. Ct. 537, 542 (43 L. Ed. 850), with a full review of the cases, in which that court had so held:

"It cannot be doubted that, as a general principle, it is settled that the taxation of the property, franchises, and rights of a corporation is one thing, and the taxation of the shares of stock in the names of the shareholders is another and different one. This doctrine has been applied to sanction the taxation of the one, where the other was covered by a contract of exemption."

And in reply to a claim that there was an identity of result, if the capital or if the shares were taxed, it was further said:

"If the postulate [of cases cited] upon which they necessarily rest be overthrown by saying that there is an equivalency between the taxation of the property of the bank and the shares of stock in the names of the stockholders, it would follow that the principles upheld by the cases would disappear with the destruction of the reasons upon which they were placed. It would then necessarily follow that the grant by Congress of authority to tax the shares of stock in the names of the shareholders could not be exercised where the bank held bonds of the United States exempt from taxation; that, the two things being the same, the shareholders would be entitled to deduct the property of the bank from the sum of the taxation of the shares; in other words, that the right to tax the shareholders would be a vain thing." Van Allen v. Assessors, 3 Wall. 573, 583, 18 L. Ed. 229.

The conclusion which we have reached, that the amended Iowa statute taxes only the shares of state and national banks, is also the construction placed upon the statutes by the Supreme Court of Iowa. Head v. Board of Review, 170 Iowa, 300, 152 N. W. 600; First Nat. Bank v. City of Council Bluffs, 182 Iowa, 107, 161 N. W. 706.

Notwithstanding these decisions, appellee contends that section 1322 cannot be construed to impose a tax upon the shares in a state bank for another reason and that therefore national bank shares may not be assessed, because it would tax them at a higher rate than moneyed

capital invested in state bank shares, and that this would be forbidden by section 5219, Rev. Stats. (Comp. St. § 9784). The reason assigned is that, if it is held that state bank shares are taxed, the closing sentence of section 1322, providing that the property of the banks shall not be otherwise assessed, violates section 2 of article 8 of the Iowa Constitution, whereby the property of all corporations for pecuniary profit must be subject to taxation the same as individuals. But if this be the true application of the Constitution to this statute, the portion providing for the taxation of the shares is not invalid, but only the portion exempting the property of the state banks from taxation. It is said that a construction should be favored by which the shares are not held to be taxable, in order that the clause exempting the bank's property may be upheld, and also that, if the latter clause must be declared invalid, the whole section should fail, as the exemption clause was the inducement to its passage. It is not clear that such an interpretation should be given, or that the Legislature would not have passed this section, even if it had realized that its exemption of the bank's property was ineffectual. It has the power to tax both the shares of stock in, and the property of, the same corporation (Cook v. City of Burlington, 59 Iowa, 251, 13 N. W. 113, 44 Am. Rep. 679; Hawkeye Ins. Co. v. French, 109 Iowa, 585, 80 N. W. 660), and such taxation is not double taxation (Owensboro National Bank v. Owensboro, 173 U. S. 664, 681, 19 Sup. Ct. 537, 43 L. Ed. 850). The problem before the Legislature was this: The statute taxing state banks on their property had been held not to be a tax on their shareholders by the decision in the Home Savings Bank Case; thereupon the Supreme Court of Iowa had held that any taxation of national bank shares was invalid, because of this construction of the state statute. First Nat. Bank v. City Council of Estherville, 150 Iowa, 95, 129 N. W. 475. The very large amount of taxable property represented by the national banks was thus released from taxation. The only method by which it could be subjected to taxation was to tax its shareholders on their shares, but in that event it was necessary to impose a like tax on state bank shares, representing similar moneyed capital. It cannot be said that the Legislature would rather have exempted national bank shares from taxation than to have imposed a tax on state bank shares and to have left state banks' corporate property subject to taxation also, if the Constitution required it. It is also apparent that there is no discrimination, within the meaning of section 5219, Rev. Stats., in the mode of taxing national and state bank shares. Head v. Board of Review, 170 Iowa, 300, 152 N. W. 600; Security Sav. Bank v. Board of Review (Iowa) 178 N. W. 562.

[3] The appellee claims that the decree enjoining the collection of taxes levied against its shareholders should be sustained, even if the Iowa statute be held valid, because in the administration of the law, the four other banks in the city where it was located, two of them being national banks, and two being state banks, were not assessed or taxed for the years 1914 and 1915. A systematic and intentional omission to tax a material portion of other moneyed capital of the kind designated in section 5219 Rev. Stats., may be a violation of that section equally with a similar omission to tax by legislative enactment.

Pelton v. National Bank, 101 U. S. 143, 146, 25 L. Ed. 901; Cummings v. National Bank, 101 U. S. 153, 157, 25 L. Ed. 903.

Plaintiff below offered no direct proof of a failure to assess or to tax the shareholders of these other banks. There was no endeavor to prove that they were not so assessed and taxed for 1915. The claim of a failure to make an assessment in 1914 is based on evidence of the deputy county auditor that he did not find in that office the assessment roll sheets showing an assessment of the bank shares. But he further testified that the assessment sheets for that year were bound together by him in a loose leaf volume and that any such sheet could readily be torn out. The volume was before the trial court, but is not in the record on appeal. He also testified that the volume was kept for two months in the county treasurer's office, and no one from that office was called to testify to any search. There was an assessment spread upon the books of the assessor against these shares. There is a presumption that the taxing officers duly assessed all who were subject to taxation, and this evidence was not sufficient to overthrow it, and the court properly found that an assessment and levy had been made.

[4, 5] It is further maintained that section 1322 of the Iowa statutes as amended must be struck down as authority for taxation of national bank shares, because private bankers in Iowa are not assessed upon an equivalent basis, for the reason that private bankers are allowed to deduct the amount of United States securities owned by them from the amount of their assessable property, while national bank shares are assessable at their full value, although a part or all of the capital of the bank may be invested in such securities of the United States. This is asserted to be a violation of section 5219 of the Revised Statutes in that it discriminates between the two classes of moneyed capital. Shares in a national bank are subject to taxation by the states, in accordance with the grant of power conferred by section 5219, Rev. Stats., and the fact that a part or all of the capital of the national bank is invested in United States bonds or securities, which are exempt from taxation, does not entitle the shareholder to any deduction from an assessment upon the full value of his shares. Van Allen v. Assessors, 3 Wall. 573, 583, 588, 18 L. Ed. 229; National Bank v. Commonwealth, 9 Wall. 353, 359, 19 L. Ed. 701; Tennessee v. Whitworth, 117 U. S. 129, 136, 6 Sup. Ct. 645, 29 L. Ed. 830; Mercantile Bank v. New York, 121 U. S. 138, 148, 7 Sup. Ct. 826, 30 L. Ed. 895; Aberdeen Bank v. Chehalis County, 166 U. S. 440, 449, 17 Sup. Ct. 629, 41 L. Ed. 1069; Home Savings Bank v. Des Moines, 205 U. S. 503, 516, 27 Sup. Ct. 571, 51 L. Ed. 901; 37 Cyc. 838. The fact that individuals, such as private bankers, may deduct from the amount of their assessable property the amount of United States securities held by them, is not a discrimination forbidden by section 5219, as against the owners of national bank shares, assessed at their full value, because section 5219, in requiring other moneyed capital to be assessed at an equal rate, only refers to such moneyed capital as the state has the power to tax, and not to that property which the national power has exempted from taxation. People v. The Commissioners, 4 Wall. 244, 256, 18 L. Ed. 344; Exchange Nat. Bank v. Miller (C. C.) 19

red. 372, 380; Head v. Board of Review, 170 Iowa, 300, 152 N. W. 600.

[6] Appellee insists that it was the duty of the assessor to attach his oath to the assessment rolls, and that there was a failure to do so, and that these omissions rendered the assessment void. As the decree sustained the tax of 1914 (although reducing it in amount), and no cross-appeal was taken by appellee, the question is not now open as to that assessment. It may be considered in relation to the tax of 1915, as the court canceled the assessment and enjoined the collection of any tax for that year, because that portion of the decree of the court should be sustained, if the assessment and levy were void for this reason, even if the court assigned another reason for entering the decree. Section 1365 of the Iowa Code of 1897 requires the assessor to attach to the assessment rolls his oath that the values of the property listed are truly set forth in his opinion and that he has not omitted to demand a list from any person having taxable property. A failure of the assessor to make his oath invalidates the assessment. Warfield-Pratt-Howell Co. v. Averill Grocery Co., 119 Iowa, 75, 93 N. W. 80; Woodbine Sav. Bank v. Tyler, 181 Iowa, 1389, 162 N. W. 590. But in the first of these cases it is said that mere informalities not involving a departure from the statutory requirements will not defeat the tax, and in support of this is cited the case of Twinting v. Finlay, 55 Neb. 152, 75 N. W. 548, with the comment:

"In this last case the evidence showed the oath not to be attached to the assessment roll, and this was held a mere irregularity, as it was presumed, in fact, to have been taken."

We think this was intended to be and is the construction that should be given to this statute and that it is not necessary that the oath be physically attached to the papers constituting the assessment roll, provided the oath is taken and is in some way reasonably connected with the assessment roll. The essential requirements were that the assessor should make the oath and return it with the assessment roll, so that it may be known whether he has complied with the statutes or otherwise. The evidence shows that the assessment lists for 1915 were placed in the county auditor's office, where they were kept in a cabinet case containing a number of drawers. The assessment lists were alphabetically arranged, and a separate cover was placed over those embraced under each letter, and then they were placed in the drawers of this cabinet. The oath of the assessor was pasted on the inside of each drawer. The assessor also returned his book, containing a statement of these assessments, and his oath was attached to this book. We think this was a sufficient attachment of the oath to the rolls to comply with the statute.

There is also a claim, not strongly urged, that the assessor did not include the shares of stock in the assessment of the personal property of the owners thereof, as required by section 5219 of the Revised Statutes of the United States and by the laws of Iowa. This contention, also, can only be considered with reference to the tax of 1915, because of the failure of appellee to take a cross-appeal. It was stipulated that a separate tax list was made out in the name of each stockholder in

appellee's bank, and it is shown that a separate valuation was made for each of such stockholders. This was a compliance with the United States statutes permitting, and with the state statutes requiring, the assessment to be made against the shareholders.

[7] There is a further contention that section 1322 was not in fact amended by the act of 1911 purporting to amend it, because it was not passed by a two-thirds vote of each branch of the legislative assembly and that section 12 of article 8 of the Constitution of Iowa required such a vote. The section of the Constitution is as follows:

"Subject to the provision of this article, the General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the General Assembly; and no exclusive privileges, except as in this article provided, shall ever be granted."

The same question was presented to the Supreme Court of Iowa, and that court decided (First National Bank v. City of Council Bluffs, 182 Iowa, 107, 161 N. W. 706) that the act violated no provision of that section of the Constitution, and that decision is controlling.

The decree will be reversed, with directions to enter a decree dismissing plaintiff's bill.

HAVNER, Atty. Gen. of Iowa, et al. v. HEGNES.*

(Circuit Court of Appeals, Eighth Circuit. November 22, 1920.)

No. 5643.

1. Courts ⇐493(3), 497—Priority of jurisdiction, as dependent on identity of controversy, stated.

Where the controversy or the parties are the same in different actions pending in courts of concurrent jurisdiction, the court first acquiring jurisdiction of the controversy will retain it, to the exclusion of the other, though possession of the res be not taken; but where the controversy is not the same, the issues being different and the subject-matter not identical, the court which first acquires the actual or constructive possession of property is entitled to retain it.

2. Corporations ⇐189(11)—Federal equity rule held not to apply to suit by stockholder against corporation for fraud of officers and agents.

Equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv), relating to stockholders' suits on causes of action enforceable on behalf of the corporation, does not apply to a suit against the corporation for fraud of its officers and agents in selling stock.

3. Courts ⇐508(2)—Federal court may restrain interference with property in possession of court.

Judicial Code, § 265 (Comp. St. § 1242), prohibiting federal courts from granting injunctions to stay proceedings in a state court, does not deprive a federal court of power to enjoin parties litigant or other persons from proceeding by judicial proceedings or otherwise to interfere with property of which the court has the actual or constructive possession.

4. Action ⇐64—Courts ⇐498—Filing of bill for receiver vests court with constructive possession of property.

The filing of a bill against a corporation and the issuance of process, subsequently served, constitutes the beginning of the suit and where an order to show cause why a receiver should not be appointed is issued at the same time, the appointment of a receiver on return day of the order,

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

*Rehearing denied March 30, 1921.

after due service of the subpœna, relates back to the filing of the bill, and the court is vested with constructive possession of defendant's property from that date, to the exclusion of any other court in a suit subsequently commenced.

5. Courts ⇐508(2)—**Injunction to protect possession of receiver of federal court should not be directed to state court judge.**

An injunction issued by a federal court to restrain interference with the possession of property by its receiver by a receiver appointed by a state court should be directed only to the state receiver, and not extended to the judge who appointed him.

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

Suit in equity by Peter J. Hegnes against the Midland Packing Company. H. M. Havner, Attorney General of the State of Iowa, and others, appeal from an order granting an injunction. Modified and affirmed.

Frederick F. Faville, of Ft. Dodge, Iowa (H. M. Havner, of Des Moines, Iowa, and Robert Healy, of Ft. Dodge, Iowa, on the brief), for appellants.

E. E. Wagner, of Sioux City, Iowa (A. B. Carlson, of Canton, S. D., and G. M. Caster, of Lake Andes, S. D., on the brief), for appellee.

C. M. Stilwill, of Sioux City, Iowa, amicus curiæ.

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

CARLAND, Circuit Judge. On April 26, 1920, appellee, hereafter called plaintiff, a citizen of South Dakota, commenced this action against the Midland Packing Company, hereafter called defendant, a corporation organized and existing under the laws of Iowa, by filing a complaint in the United States District Court for the Northern District of Iowa, wherein it was alleged in substance that the defendant, through its agents and officers, had by fraud and false representations, the particulars of which were set forth and duly negatived, obtained from plaintiff his negotiable promissory notes in the sum of $110,000 in payment of shares of the capital stock of said defendant; that four of said promissory notes, of $6,250 each, had been sold to innocent purchasers; that defendant held $3,000,000 or $4,000,000 par value of notes of other citizens of South Dakota, Iowa, and Nebraska, all obtained in a manner similar to those obtained of plaintiff; that plaintiff commenced his action, not only in his own behalf, but in behalf of all other creditors and stockholders of said defendant, similarly situated; that plaintiff was the owner of 30 shares of the capital stock of said defendant; that said capital stock, which aggregated $8,000,000, had all been largely sold pursuant to the same scheme of fraud as has been described; that the officers of defendant, under whose management said alleged frauds had been carried on, were in possession and control of its property and assets, and were threatening to dispose of all said promissory notes to innocent purchasers; that

defendant was either insolvent or in imminent danger of insolvency; that defendant had expended over $3,000,000 in the construction of a packing plant, and had collected money and taken notes for the sale of stock in the sum of $8,000,000 or $9,000,000; that said defendant had no funds on hand for a working capital. This last allegation was contained in an amendment to the complaint filed May 25, 1920, which the trial court had a right to consider, as well as the intervening petition of 32 citizens of South Dakota, Iowa, and Nebraska, filed on the same date, in which said citizens asked to join with the plaintiff in obtaining the relief prayed for. The court had the right to consider the amendment referred to, and also the intervening petition, for the same reason that it had the right to consider affidavits or any other facts presented to it bearing upon the question whether a receiver should be appointed or not. The complaint also charged in substance that the officers of defendant, under a pretense of constructing a packing plant, had procured promissory notes in the amount specified from the citizens of South Dakota, Iowa, and Nebraska, with the intention of converting the proceeds thereof to their own use, without in good faith intending to carry on the business of buying and killing live stock, and preserving, curing, storing, and selling meats and other products usually manufactured by packing houses.

The complaint filed on April 26, 1920, prayed for a rescission of the contract wherein plaintiff had agreed to purchase the shares of stock therein mentioned; that the notes be canceled, and that, if any of the notes above mentioned should be found to have been transferred or placed beyond control of defendant, the plaintiff should have judgment for the face value of the same, together with interest according to the terms thereof; that an injunction be issued restraining the sale of the notes, and that defendant be ordered to show cause why a receiver should not be appointed to take exclusive charge of the property and assets of defendant and for general relief. On the same date that the complaint was filed, said federal court issued a subpœna and made and issued an order requiring the defendant to show cause on May 25, 1920, why a receiver should not be appointed as prayed. This order and subpœna, with copy of complaint, were served on R. M. Stokes, general auditor of defendant, April 27, 1920, and on B. I. Salinger, Jr., vice president thereof, on May 8, 1920.

On May 7, 1920, H. M. Havner, Attorney General of the state of Iowa, one of the appellants, commenced an action in the district court of Woodbury county, Iowa, entitled "State of Iowa ex. rel. H. M. Havner, Attorney General, v. Midland Packing Company." The object of this action was to dissolve the defendant as a corporation and wind up its affairs for alleged violations of the laws of Iowa. It was pleaded in the petition in said action that it was necessary that immediate action be taken to appoint a temporary receiver and a permanent receiver as soon as might be thereafter. On the same date J. A. Johnson, clerk of said state court and one of the appellants, was appointed temporary receiver to take charge of the property and assets of the defendant, the order of appointment being signed by Hon. John W. Anderson, one of the judges of said state court, and also one of the

appellants. The receiver so appointed, on the date of his appointment, took actual custody and control of the property and assets of defendant. On May 11, 1920, the plaintiff in the present action applied to the court below for an order requiring the appellants to show cause on May 25, 1920, why they should not be enjoined from proceeding further in the case pending in the state court. A show-cause order with a meantime restraining clause was duly issued as prayed. On May 18, 1920, the complaint in the present action was taken as confessed. On May 25, 1920, the federal court made an order enjoining appellants from proceeding further in the action in the state court, and ordered the receiver appointed by that court to turn over the property and assets of the defendant to the receivers then and there appointed by the federal court. Appellants have appealed from said order.

[1] The arguments at the bar have taken a somewhat wider range than the question involved warrants. The question is: Who is entitled to the possession of the property and assets of defendant, the receiver appointed by the state court or the receivers appointed by the federal court? The appeal does not present a case where the controversy or the parties are the same in different actions pending in courts of concurrent jurisdiction. In such a case the weight of authority seems to be that the court first acquiring jurisdiction of the controversy will retain it, to the exclusion of the other, though possession of the res be not taken. In re Lasserot, 240 Fed. 325, 153 C. C. A. 251; Gluck & Becker on Receivers, 67, 68 (2d Ed., 89, 91); Empire Trust Co. v. Brooks, 232 Fed. 641, 146 C. C. A. 567; Knudsen v. First Trust & Savings Bank, 245 Fed. 81, 157 C. C. A. 377; In re Chetwood, 165 U. S. loc. cit. 460, 17 Sup. Ct. 385, 41 L. Ed. 782; Moran v. Sturges, 154 U. S. loc. cit. 273, 14 Sup. Ct. 1019, 38 L. Ed. 981. Where the controversy, however, is not the same, the issues being different in one suit from those involved in another, and the subject-matter is not identical, there can be no infringement of jurisdiction as between the courts maintaining cognizance of the cases. This rule rests on the ground that in such a case there is no conflict of jurisdiction as to the question or cause. In such cases the court which first acquires the actual or constructive possession of property is entitled to retain the same. Empire Trust Co. v. Brooks, supra; De La Vergne Refrig. Mach. Co. v. Palmetto Brewing Co. (C. C.) 72 Fed. 579; Gluck & Becker on Receivers, supra; Knudsen v. First Trust & Savings Bank, supra; Corpus Juris, vol. 15, p. 1169, where cases almost without number are cited in support of the rule stated. This court said in Mound City v. Castleman, 187 Fed. loc. cit. 924, 110 C. C. A. loc. cit. 58:

"The court which first acquires the lawful jurisdiction of specific property by the seizure thereof or by the due commencement of a suit, from which it appears that it is or will become necessary to a determination of the controversy involved or to the enforcement of its judgment or decree therein for the court to seize, to charge with a lien, to sell, or to exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court so far as necessary to accomplish the purpose of the suit, and entitles that court to retain control of it requisite to effectuate its final judgment or decree therein free from the interference of every other tribunal"—citing many cases.

The issues and parties not being the same in the present action and the one pending in the state court, the rule last above stated applies. There is no conflict of jurisdiction as to the causes of action, but simply as to the possession of property, and the court which first acquired actual or constructive possession of the property and assets of defendant has a right to retain the same to the exclusion of all other courts. The question is, therefore: Which court, the federal or state, first acquired actual or constructive possession of the property of defendant? It is conceded that the latter first acquired actual possession; but did the federal court, at the time the receiver appointed by the state court took actual possession, have lawful constructive possession of the same? If it did, the receiver appointed by the state court had no authority to take possession. The solution of the question involved requires a consideration of the exact status of the case pending in the federal court, and, before considering that status, it is well to bear in mind, that, assuming the federal court to have jurisdiction of the question as to whether a receiver should be appointed or not, no mere erroneous conclusion reached in considering that question can effect the validity of its action so far as the question before the court is concerned. In this connection we quote the language used by Justice Grier, in Peck v. Jenness, 7 How. 612, 624, 12 L. Ed. 841:

"It is a doctrine of law, too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court, and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

[2] The objection that equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv) was not complied with so far as plaintiff's complaint is concerned is not well taken. The rule referred to provides that where a corporation has a cause of action against third parties, and it refuses to enforce such cause of action in order to protect the rights of the corporation, a stockholder, if he seeks to enforce this cause of action which might have been asserted by the corporation, must plead the matters stated in rule 27, and in such cases the corporation by necessity is made defendant, because it has refused to be plaintiff. The rule is not applicable to the present case. The plaintiff is both a creditor and a stockholder, and the proceeding is directly against the corporation, asserting no right which the corporation could assert in the sense of the rule. Again, the objection that the complaint filed by the plaintiff would not constitute a lis pendens is of no particular importance, as there is no party before the court who is claiming that he is an innocent purchaser of any of the property of the defendant without notice. The receiver appointed by the state court occupies no such position.

[3] The objection that plaintiff did not comply with rule 23 of the Rules of Practice of the federal court in failing to serve copies of the moving papers, including affidavits or other evidence relied upon, did not affect the jurisdiction of the federal court to act. Section 265, Judicial Code (Comp. St. § 1242), did not deprive the federal court of the power to enjoin parties litigant or other persons from proceeding by judicial proceedings or otherwise to interfere with property of which said court had the actual or constructive possession. Marshall v. Holmes, 142 U. S. 589, 596, 599, 12 Sup. Ct. 62, 35 L. Ed. 870; Simon v. Southern Railway, 236 U. S. 115, 124, 129, 35 Sup. Ct. 255, 59 L. Ed. 492; National Surety Co. v. State Bank, 120 Fed. 593, 600, 602, 56 C. C. A. 657, 61 L. R. A. 394; Schultz v. Highland Gold Mines Co. (C. C.) 158 Fed. 337, 340. See long list of cases to the same effect in 15 C. J. p. 1179.

[4] The complaint filed by the plaintiff certainly authorized the federal court, it having jurisdiction of the parties and subject-matter, to enter upon an inquiry as to whether a receiver should be appointed or not. In entering upon such inquiry it did not seem to it that a heroic remedy was necessary; but it proceeded in an orderly manner, and at once upon the filing of the complaint issued an order wherein the defendant was required to show cause why a receiver should not be appointed. This proceeding to appoint a receiver was of the same nature, in regard to the same issues, and for the same purpose, as the proceeding in the state court to appoint a receiver. The federal court had a right to proceed in the way it did. It had the question of receiver or no receiver before it. It ought not to be the law that in such circumstances another court of concurrent jurisdiction should be able, on account of immediate necessity, to so interfere with the process of the federal court as to render its final conclusion as to the appointment of a receiver of no avail to the parties before it. If the action on the part of the state court as shown by the present record can be sustained, then any court that is proceeding according to due process of law and in an orderly manner may have its action defeated by a court which is more expeditious.

The objection is made that R. M. Stokes was not a proper officer of the defendant upon whom the show-cause order and subpœna could be served, and that therefore the federal court obtained no jurisdiction until after May 7, 1920, the date upon which the receiver in the state court was appointed. The filing of the complaint and the issuance of process, with intent that the process should be served, was the commencement of the action. The court had the right to issue the order to show cause, even before service upon the defendant. Valid service was made upon the vice president of defendant on May 8, 1920; no other officer than Stokes upon whom to make service having been found prior to that date. This service was 17 days prior to the date that the federal court acted in appointing a receiver. So at the time the federal receiver was appointed the court had unquestioned jurisdiction, and the appointment relates back and should be considered as of the date the complaint was filed and the show-cause order issued. Any other conclusion would render the time between the issuance of

the show-cause order and the hearing of the same a period during which the whole proceeding could be frustrated by the action of some other court. The following cases support in principle the conclusions above reached: Farmers' Loan & Trust Co. v. Lake St. Elevated Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435; Gaylord v. Ft. Wayne, etc., 10 Fed. Cas. No. 5284, page 121; M'Kinney v. Landon, 209 Fed. 300, 126 C. C. A. 226; Stirling v. Seattle Co., 198 Fed. 913; Martin v. Oliver, 260 Fed. 89, 171 C. C. A. 125; Swift v. Black Panther Oil & Gas Co., 244 Fed. 20, 156 C. C. A. 448; Adams v. M. T. Co., 66 Fed. 617, 15 C. C. A. 1.

The facts in the present case bring it far within the rule established by the cases of Farmers' Loan & Trust Co. v. Lake St. Elevated Co., supra, and Mound City Co. v. Castleman, supra, for the reason that immediately upon filing the complaint a show-cause order was issued requiring defendant to show cause why a receiver should not be appointed. The court went so far in the case referred to as to apply the rule—

"in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected."

On this branch of the case, we are of the opinion that, by the filing of the plaintiff's complaint, the issuance of the show-cause order, and the final appointment of a receiver, the federal court obtained constructive possession of the property and assets of the defendant, and that it was beyond the power of the state court to interfere with such possession by the appointment of a receiver. If we are correct in so deciding, then the federal court had jurisdiction and authority to restrain any person or officer who should attempt to interfere with its possession of the property.

[5] We are of the opinion, however, that the injunction issued by the federal court was too broad in its terms. The judge of the state court ought not to have been enjoined. Courts only move in pursuance to the request and contentions of parties litigant. They have no interest in a controversy, other than to see that justice is administered; therefore an injunction, where necessary and proper, against parties litigant, is sufficient for all purposes. The Attorney General ought not to have been enjoined from proceeding in the action in the state court for the purpose of dissolving the corporation, as this could be legally done regardless of its assets. Robinson v. Mutual Res. Life Ins. Co. (C. C.) 162 Fed. 794; Scovill v. Same (C. C.) 162 Fed. 794.

An orderly way to have proceeded would have been for the receivers appointed in the federal court to have applied to the state court for an order instructing its receiver to turn the assets and property of the corporation over to the receivers appointed by the federal court; this proceeding, of course, being subject to the right of the federal court to protect the property from unauthorized acts. It results from the foregoing that the order appointing the receivers in the federal court should be affirmed, and the injunction should be modified, so as to enjoin the receiver of the state court only, and, as so modified, af-

firmed. We leave the injunction in force as to the receiver of the state court, as we are not informed as to the present status of the property, but presume that an amicable arrangement may settle the question of possession.

It is so ordered.

BLYTHE v. GOODE et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

No. 1787.

1. **Deeds ⟸128—Tendency is to restrict application of rule in Shelley's Case.**
   Though the rule in Shelley's Case was originally based on public policy, and intended to hasten vesting of estates and facilitate alienation, its effect is frequently to enforce a technical construction contrary to the intent of the grantor or testator, and the tendency of courts is to restrict its application.
2. **Deeds ⟸128—Rule in Shelley's Case applies only where technical expression is used.**
   The rule in Shelley's Case, according to the decisions in South Carolina applies only where the language is directly within its terms, and not where the words of inheritance are limited or qualified by additional words, varying or contradicting the construction necessarily placed upon those words by the rule.
3. **Deeds ⟸128—Rule in Shelley's Case does not apply to remainder to heirs of one of two life tenants.**
   The rule in Shelley's Case does not apply to a deed conveying the estate to two persons for life, with remainder to the heirs of the body of one.
4. **Deeds ⟸128—Conveyance subject to charge held not within rule in Shelley's Case.**
   A conveyance, subject to a charge thereon for the support of grantor's father for his life, to grantor's brother for his life, and after his death to the heirs of his body and their heirs and assigns forever, is a variation from the technical language to which the rule in Shelley's Case applies, and indicates an intention that the heirs of the brother should take as purchasers, so that the rule in Shelley's Case does not apply, and the conveyance gives the brother only a life estate, not a fee conditional on the birth of issue.

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville; Charles A. Woods, Judge.

Suit for partition by Minnie L. Goode and others against E. M. Blythe and others. From a decree finding the defendant Blythe the owner of a one thirty-sixth undivided interest in the tract of which he claimed entire ownership, that defendant appeals. Affirmed.

The opinion of Woods, Circuit Judge, in the court below, was as follows:

In this suit for partition the facts are agreed on. In 1887 O. Norman Good conveyed to his brother, V. G. Good, a tract of land containing 34½ acres, more or less, in and near the town of Marietta, county of Greenville, S. C. The granting clause was to V. G. Good simply. The habendum was "to V. G. Good for and during his natural life, and after his death to the heirs of his body, their heirs, and assigns forever." Subsequently V. G. Good, after having children, conveyed part of the land to the defend-

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

ant Nannie J. Good, and later the remainder to his wife, Susan C. Good. Susan C. Good conveyed to C. F. Dill, who conveyed by quitclaim deed to the defendant E. M. Blythe. On the 16th day of July, A. D. 1915, V. G. Good died, leaving as the heirs of his body the plaintiffs, Minnie L. Goode and Alma G. Turner, and the defendants Flora Wade, Tweedie Good, B. H. Good, May Good, and V. G. Good, Jr.

The plaintiffs and the defendants named claim that under the terms of the deed of O. Norman Good to their father, V. G. Good, he took a life estate with remainder to them and his other children. The defendants Nannie J. Good and E. M. Blythe contend that V. G. Good took a fee conditional under the deed of O. Norman Good, and that, having children at the time, his conveyance to Nannie J. Good and Susan C. Good conveyed the absolute fee simple to his grantees.

The sole question, therefore, is whether the deed falls under the rule in Shelley's Case as applied by the courts of South Carolina. "The rule is that where an estate of freehold, legal or equitable, is limited by deed or will or other writing to a person, and the same instrument contains a limitation by way of remainder of the same legal or equitable character, either mediate or immediate, with or without the interposition of another estate, to his heirs, his issue or the heirs of his body, as a class of persons to take in succession from generation to generation, the word 'heirs' or 'issue' is a word of limitation; i. e., the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee conditional; if to his heirs general, a fee simple." Carr v. Porter, 1 McCord, Eq. 83; Daniel v. Whartenby, 17 Wall. 639, 21 L. Ed. 661.

Had this grant been to Valentine G. Good for his natural life, and after his death to the heirs of his body, it would have been a typical case for the application of the rule. The plaintiffs' contention is that the additional words, "their heirs and assigns forever," express an intention of the grantor to make the heirs of the body of the first taker a new stock of inheritance—the stock of a new descent, thus breaking the line of inheritance from the first taker. In England, under grants and wills in the exact words of this conveyance, the distinction stated has been held to have no foundation. But there the added words do not constitute a new stock of inheritance, because under the rule of primogeniture there would be only one heir of any ancestor—if there were sons, the eldest was the sole heir; if daughters only, they took collectively as one heir. Hence a grant to A. for life, and then in the plural to the heirs of his body, would not designate any particular person or persons as the heir or heirs, but must necessarily mean indefinite succession of heirs of the body from generation to generation, and the added words, "their heirs and assigns," could not have the effect of limiting this indefinite succession of heirs of the body. 2 Fearne, 230; Jarman on Wills, 1177.

In England the rule applies also to a devise to A. for life and at his death to the *heir* of his body, because heir is nomen collectum, equivalent to heirs, and may mean the heir who from time to time answers that description, and not that person alone who shall first answer that description. 2 Fearne, 230. But in 1 Preston on Estates, 282, it is said: "That all possible heirs of the given description are to take in succession from generation to generation under the name of heirs of the ancestor is to bring the case immediately within the rule. That only one individual or several individuals is or are to take in the character of heirs, or, rather, as particular persons described by that name, either for their lives only, or *for an estate or inheritance to be deducted from them as the stock or ancestor, and that their heirs are described by superadded words of limitation and as their descendants, is to exclude the rule.*" 4 Kent, 221. The italicized limitation was applied to take the case out of the rule in Archer's Case, 1 Coke, 65. There the devise was to Robert Archer for life, "and afterwards to the next heir male of Robert and to the heirs male of the body of such heir male." It was held that Robert took a life estate only, with contingent remainder to the next heir male. The reasoning was that the testator had ingrafted such words of limitation on the devise to the next heir male as indicated an intention to use the word "heir" as descriptive merely of the individual who should fill

the character of the heir male at the ancestor's decease; the superadded words had the effect of starting a new line of inheritance, the indefinite succession from generation to generation not being from Robert, but from the person who at his death answered the description of the heir male of his body. 2 Jarman on Wills, 326; 1 Fearne, 197; 2 Fearne, 240; Willis v. Hiscox, 4 M. & C. 197. So, also, it was held, if a devise be to A. for life, and then to the heirs male of his body and their heirs female, the rule does not apply, because what would have been an indefinite succession in the heirs male without the added words was broken by a new succession in the heirs female. 2 Fearne, 240.

Having in view the law of inheritance in South Carolina, where primogeniture is absent, the reasoning of the English courts would result in holding that V. G. Good did not take a fee conditional, but a life estate, with remainder to those who answered the description of heirs of his body at the time of his death. If it were otherwise, the words "their heirs and assigns" would have no meaning. The heirs of his body would be his children or grandchildren, to the exclusion of his wife; their heirs would be their children and husbands or wives. Thus applying the reasoning of the English cases there is no indefinite succession of heirs of the body of V. G. Good; for that succession is broken by the indefinite succession of their heirs. As in England, under the rule of primogeniture, a devise for life to the heir male of the body and then to his heirs, "heir male" means the particular person who answered to the description of heir male of the ancestor at the time of his death, to the exclusion from the succession of the collective heir female and then to heirs of such heir male in indefinite succession, so in South Carolina and the other states of the Union where primogeniture does not obtain, the words "heirs of the body" in such a limitation mean the particular persons who answered to the description of heirs of the body at the time of the death of the ancestor, to the exclusion of husband and wife of the first taker and then in indefinite succession to the heirs generally of the heir of the body of the first taker.

While inconsistent dicta will be found, the adjudications in South Carolina clearly maintain this doctrine. McIntyre v. McIntyre, 16 S. C. 290, must be regarded the leading case, because it reviews the previous decisions and decides the express point. The authority of this case has been generally recognized, not only in the courts of South Carolina, but in courts of other states. There the devise was "to S. for life, and from and immediately after her decease to my children now living (naming them), likewise for the term of their natural lives and to be divided amongst them share and share alike, the children of deceased parents representing such deceased parents and taking his or their share only, and, finally, upon the decease of my said children now living, and that now in process of being, to the issue of them and their heirs forever." The court uses this language: "'To the issue of them and their heirs forever.' Now, what does this language mean? It cannot mean that the issue of the children are to take by descent, because, if that construction is placed upon it, then the result would be that the issue, if they could take at all, would take an estate in fee conditional, while the language declares that the issue are to take in fee simple, for it is clear that no more appropriate language could be used to create an estate in fee simple in the issue than the language employed—"to them and their heirs forever." Hence, to apply the rule in Shelley's Case to the devise under consideration would defeat both the intentions of the testator, declared in express terms: (1) That the children should take estate, for their lives only. (2) That their issue should take estate in fee simple."

Without quoting the exact language under consideration in each case, it is safe to say this statement of the law is supported by the following South Carolina authorities: Dott v. Willson, 1 Bay, 457; McLure v. Young, 3 Rich. Eq. 559; Lemacks v. Glover, 1 Rich. Eq. 141; Myers v. Anderson, 1 Strob. Eq. 344, 47 Am. Dec. 537. It is significant that Boykin v. Ancrum, 28 S. C. 495, 6 S. E. 305, 13 Am. St. Rep. 698, and the latter cases of Williams v. Gause, 83 S. C. 265, 65 S. E. 241, and Adams v. Verner, 102 S. C. 17, 86 S. E. 217, recognize and reaffirm McIntyre v. McIntyre. It is true that some of these

cases involved bequests of personal property, but the basis of the ruling, as stated by the court, was that because such language in a devise of real property would not create a fee conditional, but only a life estate in the first taker, therefore it would have a like effect in a bequest of personal property; that is, it would not create an absolute property in the first taker, but only a life estate with remainder to the heirs of the body. It is true that the word "issue," and not "heirs of the body," was used in a will in McIntyre v. McIntyre; but in Williams v. Gause, supra, the court says: "Our conclusion is that the correct rule is stated in the cases first mentioned, and that 'issue' is a word of limitation, except when the language of the deed shows that it was intended as a word of purchase." Hence it follows that in McIntyre v. McIntyre the word "issue" in the will was equivalent to "heirs of the body" in a deed, and if the court had been construing a deed, instead of a will, the words "heirs of the body," the result would have been the same. It is true in Williams v. Gause the court says: "In the case of Clark v. Neves, Mr. Justice (now Chief Justice) Jones, after discussing the case of Miller v. Graham, 47 S. C. 288, 25 S. E. 165, and others, says: * * * 'As the office of the habendum in a deed is to determine what interest or estate is granted by the deed, the foregoing cases would appear to be conclusive that, if the deed in the present case had been to 'A. for life, and at her death to her lineal heirs, their heirs and assigns, forever,' A. would take a fee conditional, and that no greater effect could be given the superadded words 'in fee simple forever.'" But as the point stated was not involved in either Clark v. Neves, 76 S. C. 484, 57 S. E. 614, 12 L. R. A. (N. S.) 298, or Williams v. Gause, we must follow the actual adjudications rather than the dicta in these two cases.

Turning to the other relevant cases relied on to support the position that Good took a fee conditional, we think none of them decide the point involved, except Warnock v. Wightman, 1 Brev. 331, decided in 1804. In Danner v. Trescot, 5 Rich. Eq. 356, the devise was in trust for the use of S. P. during her life, and after her death to and for the right heirs of S. P., their heirs and assigns. The break in the succession of inheritance from the heirs of the body of S. P. to the general heirs of the heirs of the body was absent. In Miller v. Graham, 47 S. C. 288, 25 S. E. 165, a grant was to A. and the heirs of her body; habendum to her and the heirs of her body, to her and their heirs and assigns forever. The case is distinguished by the feature, noted by the court, that the general heirs of the first taker were put along with the heirs of the heirs of her body.

In Warnock v. Wightman, 1 Brev. 331, decided in 1804, a conveyance to "said E. W. and the heirs of the body of said E. W. and the survivors of them, their heirs and assigns forever," was held to convey a fee conditional. There was no reference to Archer's Case, and it was held, contrary to the later South Carolina cases cited, that the general word "heirs" must be construed to mean the same kind of heirs first mentioned, namely, heirs of the body. We think there is no escape from the conclusion that under the South Carolina authorities a grant or devise to A. for life, and at his death to the heirs of his body and their heirs, gives to A., not a fee conditional, but a life estate with remainder in fee to the heirs of his body as purchasers.

The Supreme Court of the United States has clearly so held. De Vaughn v. Hutchinson, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. Ed. 827; Daniel v. Whartenby, 17 Wall. 639, 21 L. Ed. 661. And if there were doubt as to the South Carolina adjudications, that view of them should be taken by this court which accords with the decisions of the Supreme Court and the manifest intention of the parties. The conclusion we have reached was stated with convincing force in Ætna Life Ins. Co. v. Hoppins, 214 Fed. 928, 131 C. C. A. 224; Id., 249 Ill. 406, 94 N. E. 669.

The decree will be entered accordingly.

E. M. Blythe, of Greenville, S. C. (Martin & Blythe, of Greenville, S. C., on the brief), for appellant.

Ernest F. Cochran, of Anderson, S. C. (J. H. Heyward, of Greenville, S. C., on the brief), for appellees.

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

SMITH, District Judge. A bill in equity was filed by some of the appellees as complainants in the court below against the appellant E. M. Blythe and others as defendants for the partition and sale of the lands described in the complaint and the division of the proceeds thereof among the parties entitled according to their interests. The defendant E. M. Blythe filed an answer, setting up a title in himself in severalty to the larger part of the property sought to be partitioned, and by stipulation of counsel for all parties below the cause was to be heard upon the pleadings; the allegations of fact in the complaint and answers being taken as true.

The cause was heard in the court below upon the pleadings under this stipulation, and a decree rendered excluding the defendant E. M. Blythe from any title in severalty in fee, but allowing him a one thirty-sixth undivided interest in the part (23 acres) claimed by him, and directing the property to be sold for partition. From this decree the defendant E. M. Blythe has taken this appeal, and, his codefendants failing and refusing to join with him in the appeal, an order of severance has been made, and the defendant E. M. Blythe is the sole appellant before the court.

The facts are as follows:

On the 30th of March, 1887, one O. N. Good, for natural love and affection, executed a deed of conveyance whereby he granted and conveyed to his brother, Valentine G. Good, a tract of land described in the bill of complaint below, and in the deed, containing 34½ acres, more or less, reserving one-fourth of the annual crops therefrom to the comfort and support of his father, Henderson Good, during his natural life, with the following habendum:

"To have and to hold, all and singular, the said premises before mentioned, subject to the reservation and charges hereinbefore set forth, unto the said Valentine G. Good, for and during his natural life, and after his death to the heirs of his body, their heirs and assigns forever."

On the 26th of September, 1892, the said Valentine G. Good executed to his wife, Mrs. S. C. Good, a deed of conveyance, purporting to be a deed of conveyance in fee simple with warranty, conveying the entire 34½ acres, more or less. Later, viz. on the 19th of September, 1894, the said Mrs. S. C. Good executed and delivered to Mrs. Nannie J. Good a deed of conveyance, purporting to be a deed of conveyance in fee simple with warranty, of a part of the land, and also later, on April 20, 1899, Mrs. S. C. Good executed a deed of conveyance, purporting to be a deed of conveyance in fee simple with warranty, of the remainder of the land, containing about 23 acres, to one C. F. Dill, who later, on May 11, 1907, conveyed in fee simple the 23 acres to the appellant, E. M. Blythe.

The whole question in the case turns upon what estate the defendant Valentine G. Good took under the deed of gift from his brother to himself. If, under the deed, Valentine G. Good took a life estate, with remainders to the heirs of his body as purchasers, in the sense of chil-

dren, then the decree should be affirmed. If, however, under that deed he took a fee conditional—that is to say, a fee which became absolute upon the birth of issue, he then obtaining a fee simple absolute—his deed to his wife, Mrs. S. C. Good, conveyed a good estate in fee simple, and the appellant, E. M. Blythe, who derives his title thereunder, is entitled to the land thereby conveyed to him, and the decree should be reversed, so far as E. M. Blythe is concerned.

In considering the deed, it is to be noted, first, that the general atmosphere of the deed is that of a provision by one brother for his father and his brother and his brother's children. The deed is, on the face of it, for natural love and affection, and is a donation. While giving by the habendum a life estate in express terms to his brother, Valentine G. Good, the deed, taken as a whole, reserves a life estate, certainly as to one-fourth of the annual crops or the income therefrom, to the support of the grantor's father, Henderson Good, for his natural life. This charge or reservation in favor of his father, Henderson Good, would continue until the death of Henderson Good, whether he survived his son, Valentine G. Good, or not. Subject to this reservation and charge, the estate is conveyed to Valentine G. Good, for and during his natural life, and after his death to the heirs of his body, *their* heirs and assigns, forever.

Did Valentine G. Good take an estate in fee conditional under the language of this deed? If he did, it was by virtue of the rule in Shelly's Case, as applied, construed, and enforced in the state of South Carolina, and the inference must be, from the language of this deed, that it gave to Valentine G. Good an estate in freehold for life, with a limitation by way of remainder to his heirs generally or the heirs of his body. In that case, Valentine G. Good would be in as of an estate in fee conditional, and upon the birth of issue, under the law of South Carolina, if he held the land under a fee conditional, the estate in him would have become absolute.

[1] The rule in Shelley's Case is adjudged in the state of South Carolina to be a wise and salutary rule, one to be enforced in all cases in which it is applicable. The rule is generally supposed to have had its origin in the application of a policy of law; the policy of the law being to favor descents as much as possible, from which arose the aversion that the common law is said to have had to the inheritance being in abeyance. The rule was also supposed to have been adopted, and has been enforced on the theory of facilitating the vesting of the inheritance without uncertainty, and thereby facilitating the alienation of land, and preventing its being, as it were, locked up by indefinite limitations, depending upon the uncertain birth or failure of issue.

Inasmuch, however, as the rule gave to technical words a technical and fixed construction, conflicts arose when it would appear, upon the face of the deed or will, that the technical wording leading to a fixed construction was really an arbitrary or artificial construction, as frequently to interfere with what appeared to be the expressed intention of the grantor or testator. From thence followed a leaning of courts away from the rule, upon the supposition that it too frequently interfered with the giving effect to the real intention of the grantor or

testator; and from the supposition that this was too often the effect of the artificial construction given to instruments under the rule in Shelley's Case, that rule has fallen, as it were, into disrepute, as being one that operated to defeat the intention of a testator.

The consequence has been that in some states of the American Union the rule has been abolished, and generally in others the trend of the adjudicated cases has been to lay hold of anything in the language used which would allow the court to abstain from the enforcement of the rule, and give effect to what appeared to the court to be the real intent of the grantor or testator upon the face of the deed or will.

[2] It is not to be denied that the large number of cases in the courts of South Carolina, more or less dealing with the application of the rule in Shelley's Case, appear to be hard to reconcile. The general effect of those decisions, however, is that the courts in South Carolina will not give effect to the rule in Shelley's Case, unless it is strictly a case in which the language is directly within the purview of the rule. Wherever, according to the decisions in South Carolina, it appears on the face of the instrument that the words "heirs," or "heirs of the body," or "issue," or such words of inheritance, are limited or qualified by additional words varying or contradicting the construction necessarily placed upon those words by the application of the rule in Shelley's Case, then the rule will not be applied, and the court will lay hold of the varied language of the instrument, to give effect to what it finds on the face of the instrument to have been the true intent of the grantor or testator.

If a grant were to A. for life, and after his death to his heirs, or the heirs of his body, under the language of the decisions in the courts of South Carolina, the rule in Shelley's Case would apply. If, however, there is any variation from this language, the court has held itself open to avail itself of the variation to give effect to what upon the face of the deed or will appears to be the intent of the testator.

[3] It is to be observed, also, in the instant case, that, if the effect upon the face of the instrument of the reservation in favor of the father of the grantor for life of one-fourth of the products of the property was to vest in him an undivided interest in the same for life as a freehold undivided interest, the rule would not apply. In the case of Shaw v. Robinson, 42 S. C. 342, 20 S. E. 161, it is expressly decided by the Supreme Court of South Carolina that, for the rule to apply, subsequent limitations to the heirs must be to the heirs of the ancestor who takes the particular estate, and that where the prior estate is limited to more than one, with remainder to the heirs of the body of one, the limitation over would be a remainder, and the rule would not operate, and the heirs of that one would take as purchasers.

The reason of this is apparent: If the grant be to A. and B. for their joint and several lives, and after the death of the survivor to the heirs of the body of A., then, in case A. had issue, what became of the estate of B? So in the instant case: If, on the birth of issue, the estate to Valentine G. Good became one absolute in fee simple, then the provision for Henderson Good would have been nullified. It would

not appear to be an answer to this to say that on the birth of issue to Valentine G. Good he took an estate in fee simple, subject to a charge in the nature of a lien in favor of Henderson Good, for his life, for the object of the rule in Shelley's Case was to avoid just such postponements of the absolute vesting and consequent deferring of the facility for alienation.

[4] Assuming, however, for the sake of the argument, that the effect of this reservation to Henderson Good was not to make a prior life estate to two persons, to wit, Valentine G. Good and Henderson Good, but to make it a life estate for Valentine G. Good alone, subject only to the charge to Henderson Good, it would still appear upon the face of the deed that the intention of the grantor was not that the limitation over should be one which inured to the benefit of his brother, Valentine G. Good. It appears upon the face of the deed that the conveyance was a donation made by O. N. Good for the benefit of his brother and of his father and of his brother's children, and *their* heirs and *assigns*; and to give the deed, therefore, the effect of a deed in fee simple vesting in Valentine G. Good upon the birth of issue, would be to defeat the provision from the annual crops for the support of his father, Henderson Good, as well as any provision intended for the nephews or nieces of the grantor who might be children of his brother.

To the ordinary mind the very express declaration—as in the instant case—that the grant was for life, would in itself convey the inference that that was all that it was intended to bestow, and nothing but the artificial construction given by the rule of law to that grant, when followed by words of limitation to heirs or heirs of the body, would induce an inference that a larger estate than one for life was given. In the opinion of the court, under the language of the deed in the present case, where the grant is to A. for life, with a reservation to B. for B.'s life of one-fourth of the product of the estate, and a limitation after the death of A. to the heirs of his body, their heirs and assigns, forever, the rule in Shelley's Case is not, under the laws of South Carolina, applicable, but that the heirs of the body of A. take a remainder in fee as purchasers.

There have been a number of cases in the state courts of South Carolina upon the application of the rule in Shelley's Case. These are stated in full in the printed arguments of counsel, and were well commented on at the time of the hearing in this court, and have been carefully compared and considered. To go over them all at any length in this opinion would not be profitable, in view of the fully reasoned opinion of the learned judge who delivered the opinion and decree below. This court concurs with the learned judge below that the instant case is controlled by the principles laid down in McIntyre v. McIntyre, 16 S. C. 290, recognized and reaffirmed in Williams v. Gause, 83 S. C. 265, 65 S. E. 241, and Adams v. Verner, 102 S. C. 17, 86 S. E. 211.

The decree below is accordingly affirmed.

Affirmed.

UNITED STATES DIRECTOR GENERAL OF RAILROADS v. ZANZINGER.

(Circuit Court of Appeals, Fourth Circuit. November 16, 1920.)

No. 1801.

1. **Railroads ⟸301—Rights of travelers and trains at crossings are reciprocal.**
   The obligations, rights, and duties of travelers on a highway and of railroad trains to the use of crossings is mutual and reciprocal, and no greater care is required of one than of the other.
2. **Railroads ⟸346(5)—Traveler entitled to presumption of due care.**
   The presumption is in favor of due care by a traveler at a railroad crossing; his safety being involved.
3. **Railroads ⟸312(1)—Dominant right at crossing conditioned on duty to give warning.**
   While railroad trains have the dominant right to pass at a crossing, because of the necessity that they should run rapidly, without stopping at crossings, this preference is conditioned on the duty of the railroad to give due and timely warning of the approach of its trains.
4. **Railroads ⟸330(3)—Duty of stopping, listening, and looking dependent on circumstances, including expectation of signal.**
   Whether a traveler should stop to listen and look at a railroad crossing, and how intently, how constantly, and how often he should listen and look in the exercise of the prudence of a reasonably careful man, depends on all the circumstances, and one of such circumstances is his rightful expectation that the railroad will sound the bell or whistle on approaching the crossing.
5. **Railroads ⟸350(16)—Sufficiency of looking and listening ordinarily question for jury.**
   Whether a traveler on the highway has looked and listened for trains as a man of ordinary prudence would is generally a question for the jury.
6. **Railroads ⟸332—Standing engine not signal of danger as a matter of law.**
   A standing engine, that has given no signal of movement is not such a signal of danger as to require a traveler as a matter of law to have it under observation every moment as he approaches a public railroad crossing.
7. **Railroads ⟸350(22)—Negligence of traveler with view obstructed held question for jury.**
   Where a pedestrian's view of a standing engine was obstructed for 25 feet before reaching the railroad track, and he saw the engine standing 100 feet from the crossing before reaching such obstruction, it was a question for the jury whether he was negligent in undertaking to cross after such obstruction of his view, relying upon hearing a signal before the movement of the engine.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action by John Zanzinger against the United States Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert M. Hughes, Jr., of Norfolk, Va., and F. M. Rivinus, of Philadelphia, Pa. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for plaintiff in error.

John W. Eggleston, of Norfolk, Va., and W. F. Purdy, of New York City (James M. Gorman, of New York City, Hughes, Vandeventer & Eggleston, of Norfolk, Va., and Macklin, Brown, Purdy & Van Wyck, of New York City, on the brief), for defendant in error.

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

WOODS, Circuit Judge. Six tracks of the Norfolk & Western Railroad run along Twenty-Third street in the city of Norfolk, where they intersect at right angles with Parker avenue. On July 6, 1918, plaintiff, a Russian longshoreman, walking along Parker avenue, was struck as he was about to cross the sixth track by a locomotive and lost both legs. He recovered judgment in this action for $17,000.

Conceding that there was evidence from which the jury might find the defendant negligent in failing to comply with an ordinance of the city of Norfolk requiring the bell of a locomotive to be rung when approaching a street crossing, defendant asks for a reversal, contending that the District Judge should have directed a verdict on the ground that the evidence showed conclusively contributory negligence of the plaintiff.

The general circumstances of the accident are not in dispute. Parker avenue, at its intersection with Twenty-Third street, is not paved and is traveled only by pedestrians along well-defined footpaths made by constant use. The tracks on Twenty-Third street lead into defendant's coal yards, and many trains pass over them every day in both directions. The tracks of the Virginia Railway & Power Company run above Twenty-Third street on stanchions set in the street. Plaintiff was walking in the path on the east side of the street leading from his home north of the railroad tracks to his place of business south of the tracks. When he reached the northernmost track, after two moving trains had passed, he saw an engine standing and headed east on the southernmost or sixth track at the switch west of him, about 100 feet from the place of the accident. He had clear view of the engine until he reached the fifth track, about 60 feet from the first track crossed by him. From the fifth to the sixth track, a distance of 25 feet, his view was obstructed by the stanchions.

The plaintiff testified that he saw the engine standing still when he crossed the fifth track; that from that point his view of it was so cut off by the stanchions that he could not see it; that he listened, but did not hear the engine, and did not know it was moving until too late to escape. The finding of the jury that the defendant's engineer and fireman were guilty of one or both of two acts of negligence, failing to ring the bell of the locomotive and failing to keep a lookout on approaching the street, has abundant support in the testimony.

The defendant relies upon the photographs taken after the accident as showing conclusively that there was enough open view between the stanchions for the plaintiff to have seen the engine, if he had looked while walking from track 5 to track 6. The argument is that plaintiff's statement that he could not see the engine while walking by the stanchions was demonstrated to be untrue by the photographs, and

therefore that the conclusion is inevitable, either that the plaintiff did not look at that point or that he saw the engine moving toward the crossing and took no heed of it.

Defendant also contends that plaintiff's testimony that he listened and did not hear the approaching engine is untrue, because if he had listened so near the engine he must have heard the noise of its movement and disregarded it.

We think the photographs do prove that it was possible for the plaintiff, if standing still, to see the engine by close and intent observation through the interstices. They also show the probability, but we cannot say the certainty, that he could have seen the engine while walking at an ordinary gait, although very close to the stanchions. It is highly probable, also, that the plaintiff could have heard the approaching engine, if listening intently for its approach.

But the degree of intentness of looking and listening requisite to constitute due care depends upon circumstances. For example, a man of ordinary prudence, in crossing a straight railroad track at night, would hardly make more than one casual observation each way, because that would be sufficient for him to see the headlight which he would assume an approaching train to show. Again, a man of ordinary prudence would hardly hesitate to go over a crossing near to a passenger train stopped at a station, relying upon his attention being arrested by the invariable bell signal of starting. The presumption that an engine of a standing train will give warning before going over a crossing is greater than if the train were running, because a moving train, if seen, is itself a warning.

The great weight of the leading and best-considered authorities recognizes these rules:

[1] The obligations, rights, and duties of travelers on the highway and railroad trains to the use of crossings are mutual and reciprocal, and no greater care is required of one than of the other.

[2] The presumption is in favor of due care by the traveler, because his safety is involved.

[3] While railroad trains have the dominant right to pass at a crossing of the public highway, because of the necessity that they should run rapidly without stopping at crossings, this preference is conditioned upon the duty of the railroad to give due and timely warning of the approach of its trains.

[4] The question whether a traveler should stop to listen and look, how intently and how constantly, or how often he should listen and look in the exercise of the prudence of a reasonably careful man, depends upon all the circumstances; and one of the circumstances is the rightful expectation of the traveler that the railroad will perform the duty required by law and by ordinary care of warning him by sounding a locomotive bell or whistle on approaching a crossing.

[5] Whether a traveler on the highway has looked and listened as a man of ordinary prudence would is generally a question for the jury.

In the application of these rules to particular facts, courts have often held the traveler precluded from recovery, on the ground that all reasonable men would agree that he did not look and listen as due

care, in view of the danger, required. Types of these cases are Neininger v. Cowan et al., 101 Fed. 787, 42 C. C. A. 20, Dernberger v. Baltimore & O. R. Co., 243 Fed. 21, 155 C. C. A. 551, decided by this court, Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542, and numerous like cases decided under the Houston Case, cited in Rose's Notes.

In many cases where the evidence of the negligence of the traveler was at least as strong as that of the plaintiff, Zanzinger, and in some of them much stronger, the Supreme Court, in applying the rules above stated, has held the question of the negligence of the traveler to be one of fact for the jury. Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403; Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Richmond & Danville Railroad Co. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; Baltimore & Ohio Railroad Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; Texas & Pacific Railway Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132; Baltimore & Potomac Railroad Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262; Flannelly v. Delaware & Hudson Co., 225 U. S. 597, 32 Sup. Ct. 783, 56 L. Ed. 1221, 44 L. R. A. (N. S.) 154; Texas & Pacific Railway Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186.

[6, 7] A standing engine, that has given no signal of movement, is not such a signal of danger that a court should hold as a matter of law that a traveler must have it under observation every moment as he approaches a public crossing. Surely all reasonable men would not agree that a reasonably prudent man, seeing an engine at rest, with no sign of movement, might not with a sense of safety undertake to go over a crossing after an obstruction of his view of only 25 feet, relying upon hearing a signal before the movement of the engine.

Affirmed.

JOHNSTON MFG. CO. v. WILSON THREAD CO.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

No. 1809.

1. Sales ⇐179(4)—**Buyer can recover for defects not discoverable until after acceptance.**

   Notwithstanding the general rule that a buyer, who accepts goods which materially vary from the quality contracted for, waives the variance, if it is so obvious that he has observed it, or could have observed it by reasonable inspection, he can, after acceptance of the goods, claim damages for defects which were not discoverable by ordinary inspection, and of which he had no knowledge when he accepted.

2. Sales ⇐182(4)—**Evidence held to raise jury question whether buyer rejected within reasonable time.**

   Evidence that the defect in yarn was discoverable only on rewinding the yarn, which was not done by the buyer for three months after receiving the goods, *held* sufficient to take to the jury the question whether the buyer used due diligence in inspecting the goods.

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

3. Sales ⟸417—Evidence held insufficient to show damages from defects in goods sold.
Evidence that the goods bought by defendant did not conform to sample as required by the contract, but which did not show the quantity which was defective, the price at which it was sold, or the amount returned by subsequent buyers, *held* insufficient to sustain a verdict awarding the buyer damages for the defect.

4. Sales ⟸418(2)—Measure for breach of contract as to quality of goods stated.
For a breach of contract as to the quality of goods sold, the measure of damages that the buyer may recover is the difference between the actual value of the article sold and of the article delivered, at the time and place of delivery.

5. Sales ⟸418(3)—Agreed price establishes value, in absence of other evidence.
The agreed price for the sale of a specified article establishes the value of the article sold for the purpose of measuring damages for defective quality, in the absence of other evidence on the subject.

6. Sales ⟸418(9)—Best evidence of value of defective yarn is sale price after due effort.
The best evidence of the value of defective yarn, to establish the measure of the buyer's damage for the defect, is the price at which the defective article was resold by the buyer after due effort, or, in the absence of such resale, evidence of the quantity defective and the nature of the defects, from which an intelligent conclusion as to the value can be drawn.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Henry H. Watkins, Judge.

Action by the Johnston Manufacturing Company against the Wilson Thread Company to recover the balance due on a contract for the sale of yarn. From a judgment for plaintiff for only the amount due after deducting defendant's claim for damages for defective quality, plaintiff brings error. Reversed.

Charles W. Tillett, of Charlotte, N. C. (Thos. C. Guthrie, of Charlotte, N. C., on the brief), for plaintiff in error.

H. J. Haynsworth, of Greenville, S. C. (C. F. Haynsworth, of Greenville, S. C., on the brief), for defendant in error.

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

WOODS, Circuit Judge. Johnston Manufacturing Company brought this action against Wilson Thread Company to recover $3,010.74, the purchase price of 5,282 pounds of yarn furnished under a contract calling for a total of 15,000 pounds of "8/3 carded peeler yarn at 57 cents per pound, * * * color and twist equal sample." The answer thus states the defense:

"That the contract between the plaintiff and the defendant provided that the yarns should be put up in tubes, color and twist equal to sample; that the sample was of that class of yarn known as No. 8 3-ply, smooth and even running first-class; that the yarn delivered this defendant, aggregating 9,732 pounds, was not of the kind called for by the contract, but, on the contrary, it consisted of defective and imperfect yarns, known as seconds, the same tube containing 1-ply, 2-ply and 3-ply yarns, rendering it unfit for the

purposes for which the defendant purchased said yarns, and worth 17 cents per pound less than the yarns which the plaintiff agreed to deliver to the defendant.

"That the said yarns were shipped on tubes wrapped in burlap, so that the condition of said yarns could not be, and was not, discovered until the packages were opened and the yarn unwound and rewound in small balls for reselling by this defendant; that, relying upon plaintiff's contract to furnish even-running first-class 3-ply yarn, this defendant, who was engaged in the business of selling yarns, agreed to resell said yarns to his customers, but most of the yarns which the plaintiff shipped were rejected by defendant's customers, involving the defendant in considerable expense."

The entire claim of the defendant was allowed, and a verdict in favor of the plaintiff was rendered for only $1,443.20. The first question here is: Should a verdict have been directed in favor of the plaintiff for the whole amount claimed?

[1] The contention that the defendant had accepted the yarn after opportunity to inspect and discover the defect was for the jury and not the judge. "The general rule is that, if before acceptance of goods material variance from the quality contracted for is so obvious that the purchaser has observed it, or by ordinary inspection would have observed it, and nevertheless accepted the goods, he will be held to have waived the variance from the quality he was entitled to demand." Supply Co. v. Jones, 87 S. C. 428, 69 S. E. 881; Woods v. Cramer, 34 S. C. 508, 13 S. E. 660; Brooke v. Milling Co., 78 S. C. 200, 58 S. E. 806, 125 Am. St. Rep. 780; Thornton v. Wynn, 12 Wheat. 183, 6 L. Ed. 595; Miller v. Tiffany, 1 Wall. 298, 309, 17 L. Ed. 540; Dewey v. West Fairmount Gas Coal Co., 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179; 23 R. C. L. 263, 264, and cases cited. But if the defect is not discoverable by ordinary inspection and the goods are accepted without knowledge of the defect, the buyer may return them, and afterwards assert a claim for damages for the defect. 23 R. C. L. 265; North Alaska Salmon Co. v. Hobbs, Wall & Co., 159 Cal. 380, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 504, 509.

[2] Whether the purchaser has had reasonable time for inspection is usually a question of fact for the jury. The evidence on behalf of defendant was to the effect that the yarns were delivered late in November, 1918, to defendant, wound on tubes, in packages about four feet wide, wrapped in burlap; the packages were placed in a warehouse and not opened until late in February, when they were to be used in due course of business; the tubes were then taken out and rewound in small balls for sale and delivery to wholesale merchants in boxes each containing 300 pounds; the difference between the sample and yarn received could not be discovered until so wound off the tubes and rewound into balls. It seems evident that the court could not say as a matter of law that the defendant should have immediately unwound all the tubes to discover whether the plaintiff's representation that they were up to sample was true. The plaintiff could ask nothing more favorable than that the issue of whether the defendant used due diligence in inspection and whether he should have offered to return the yarn be submitted to the jury. On this point there was no exception to the charge.

The evidence on part of plaintiff that the custom of the trade required the return of the goods if they were not up to sample was not contradicted, but it was very vague, and certainly did not prove a custom that goods must always be taken from their packages, immediately examined, and returned if not up to sample.

[3] The strongest ground urged here against defendant's claim of 17 cents a pound allowed for failure of the yarn to come up to sample is the very unsatisfactory testimony as to the quantity of the defective yarn, and the entire absence of testimony as to the price for which it was sold or the resulting loss. Kerr Wilson, who was the head of defendant's business, and upon whose evidence the defense chiefly depends, testified: He wound some of it, used some, and the rest went to waste; he had to take back some of the goods; the very first were the only ones that he took back; he used or sold practically every pound of the yarn—some as waste, and some was rewound and sold in due course of business; he had to sell some of it at 25 cents a pound; hundreds of the tubes were like the yarn exhibited as seconds; he wound a great deal of it as 8/3; he could not tell what amount he had lost on the yarn; had no books from which he could tell; half of the lot of yarn complained of was defective; he could not tell how many pounds in the lot complained of was 8/2, nor what percentage was 2-ply, 3-ply and 4-ply; a deduction from the price of 17 cents a pound would be reasonable. There was no evidence of the quantity sold at 25 cents, nor of the price at which defendant sold the remainder of the defective yarn, nor other proof of its market value, nor proof of the quantity returned by customers.

[4] A verdict for substantial damages cannot stand on mere proof of a breach of contract and a vague estimate by claimant of the damage, when the damage is of such a nature that the amount is susceptible of definite proof, and that proof is in possession of the claimant. For breach of contract as to quality the measure of damages that the buyer may recover is the difference between the actual value of the article sold and the article delivered at the time and place of delivery. Gibbons v. United States, 8 Wall. 269, 19 L. Ed. 453; Parish v. United States, 8 Wall. 489, 19 L. Ed. 472; Id., 100 U. S. 500, 25 L. Ed. 763; Huguenot Mills v. Jempson, 68 S. C. 363, 47 S. E. 687, 102 Am. St. Rep. 673; Ellison v. Johnson, 74 S. C. 202, 54 S. E. 202, 5 L. R. A. (N. S.) 1151; 24 R. C. L. 348, 532.

[5, 6] As there was no other evidence on the subject, the price agreed on will represent the value of the quality of yarn sold to defendant. The best evidence of the value of the defective yarn, a staple article of trade, was the price obtained for it on the market by due effort. The sale by the buyer having been made some time after it received the goods, proof should have been made of the price received by the buyer and of the difference in the market on the date the goods were received by the buyer and the time of the sale by it. 24 R. C. L. §§ 337, 376, 533; note, 42 L. R. A. (N. S.) 671. Having sold the defective yarn, defendant was bound to account to plaintiff for it, by showing what it brought and the intervening change in the market as the best test of its value. If it could not do that,

it should have shown a good reason why, and offered the next best proof—a reasonably accurate description of the nature and extent of the defects, and a statement of the quantity defective, ascertained with such degree of accuracy as would have resulted from reasonable effort, and the opinion of those qualified to judge of the market value of such a product at the time of delivery. The defendant knew he was going to demand of plaintiff a deduction for loss on the yarn, yet he took no steps to ascertain with definiteness the amount that was defective; he kept no account of the persons to whom he sold or the prices obtained; he could not tell whether the market price went up or down; he failed to produce on request the order of Loeb, who had returned some of the yarn, showing the price at which Loeb had bought.

The record discloses no reason for defendant's failure to show the price for which the defective yarn was sold, nor for this failure to show what quantity of yarn was returned to defendant by its customers. Thus it appears that the sole basis of the measure of damages was the loose estimate of defendant's manager expressed without definite knowledge of the quantity of defective yarn or of its market price, or of the price at which he sold, or of the loss on it, and the estimate of another witness based on defendant's statements. We cannot think defendant should have been allowed credit for 17 cents a pound damages on testimony so vague and uncertain. For failure of evidence which it was defendant's duty to furnish, we think the jury should have been instructed to find a verdict for the amount claimed by plaintiff. Doubtless the defendant is entitled to some allowance for defect in the quality of the yarn, and it is to be regretted that it failed to offer proof from which its damage could be justly and definitely ascertained.

Reversed.

NORFOLK & W. RY. CO. v. AMICON FRUIT CO.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1920.)

No. 1815.

1. **Waters and water courses ⊜172—Owner of pipe line held liable for damages from leakage, though without negligence.**
   Though a pipe line, built by a railroad company on its right of way in its private capacity and without legislative authority, was built in the best manner and at all times maintained with due care, where, to the company's knowledge, it often leaked to such an extent as to materially damage an adjoining owner, it was liable for the damages.
2. **Waters and water courses ⊜179(6)—Though part of damage was from surface water, extent of injury from pipe line held question for jury.**
   Where water from defendant's pipe line escaped into plaintiff's basement and caused damage, though some portion of the damage was caused by surface water, it was for the jury to say how much plaintiff was injured by the water from the pipe line.
3. **Damages ⊜62(3)—Party injured by water from pipe line not bound to minimize damages by construction of drain.**
   Where, to defendant's knowledge, waters from its pipe line escaped into plaintiff's basement and caused damage, plaintiff was not bound to

minimize the damages by constructing a drain from its basement to a public sewer at a cost of $250, especially where defendant repeatedly promised to prevent further damage and pay for that which had been inflicted.

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 the Amicon Fruit Company against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. W. Reynolds, of Princeton, W. Va. (Albert W. Reynolds, Jr., of Princeton, W. Va., and F. M. Rivinus, of Philadelphia, Pa., on the brief), for plaintiff in error.

D. E. French, of Bluefield, W. Va. (French & Easley, of Bluefield, W. Va., on the brief), for defendant in error.

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

KNAPP, Circuit Judge. The business district of the city of Bluefield, W. Va., is located in a narrow valley, running in an easterly and westerly direction, through which extends the right of way of plaintiff in error, hereinafter referred to as defendant. Bluefield is a divisional point of the railway company, where it maintains extensive yards and repair shops. To provide an adequate supply of water for its operations at that point, defendant about ten years ago constructed a pipe line some 4 miles in length through which water is pumped from the Bluestone river. This pipe line is 16 inches in diameter, made of cast iron, of the bell and spigot type, with oakum and lead joints; it is laid on defendant's lands alongside its railway tracks, and approximately 3½ feet below the surface.

The Amicon Fruit Company, herein called plaintiff, is the owner of a building, erected in 1909, upon a lot abutting defendant's right of way, which it uses in its business of a wholesale dealer in fruits and vegetables, and in which its stock of goods is carried. It is a substantial structure, built for the uses to which it is devoted, and having in the basement a specially prepared storage room. Immediately in front, and extending along the fronts of a number of wholesale houses, is a side track for handling the carload traffic shipped to and by the plaintiff and other dealers. Beyond this siding are the main line tracks of the railway.

The suit is brought to recover damages, alleged to aggregate $20,000, which plaintiff claims to have suffered by reason of water in large quantities getting into its basement from leaks in defendant's pipe line. This injury is said to have begun in 1910, soon after the pipe line was constructed, and to have happened frequently thereafter, resulting in great damage to plaintiff's stock of fruits and preventing the use of its expensive storage room. In its bill of particulars for the five years preceding the commencement of the action—prior injuries being barred by the statute of limitations—the items amount

to $13,403.14, of which $9,000 is for loss of the rental value of the storage room. The jury rendered a verdict for $7,000, and defendant brings the case here on writ of error.

[1] On the question of defendant's liability, which is the principal question here, the opposing claims of the parties will appear by comparing the instruction given to the jury at plaintiff's instance with the instructions asked for by defendant which were refused altogether or so modified as to reject its contention. For plaintiff, this was charged:

"The court instructs the jury that if you believe from the evidence in this case that water escaped from the pipe line of the defendant and flowed into the basement of the plaintiff, during the five years next preceding the time of the institution of this suit, and that it was in such quantity as to damage the plaintiff, and did cause it damage, then you will find for the plaintiff such damages as you believe from the evidence in this case it is entitled to."

The rejected requests of defendant, putting its contention in various forms which need not be reproduced, all embody the proposition that it cannot be held liable if the pipe line was properly constructed and proper diligence used in its inspection, maintenance, and repair, and that this was the case will for present purposes be assumed. The issue is thus clearly defined.

At the outset it may be observed, as is understood to be conceded, that the defendant quoad this pipe line has the status and liability of a private individual. Moreover, the injuries complained of were not caused by a mere accident, which could not reasonably have been foreseen; they were rather the result of a continuing condition, or at least an incident of frequent occurrence for a series of years, of which the defendant was all along fully aware. Granted that the pipe line was built in the best manner and maintained at all times with due care, so that defendant was not negligent in those respects; nevertheless the fact is, as the jury were warranted in finding, that quite often it did leak, as defendant well knew, and to such an extent as to materially damage the plaintiff.

This being so, we are of opinion that defendant cannot escape liability by showing that its pipe line was well built and carefully maintained, and the rulings in question are therefore correct. The governing principal in such case is stated by contrast in Sutton v. Clark, 6 Taun. 28, quoted with approval in Transportation Co. v. Chicago, 99 U. S. 635, 644 (25 L. Ed. 336) as follows:

"This case * * * is totally unlike that of the individual who for his own benefit makes an improvement on his own land according to his best skill and diligence, not foreseeing it will produce injury to his neighbor; if he thereby, though unwittingly, injure his neighbor, he is liable."

The case thus described seems precisely the case here. Defendant built this pipe line on its own land and for its own benefit, acting thereby in a private capacity and without legislative authority. However skillfully the work was done and whatever the diligence since exercised, it must be held responsible, not perhaps for a purely accidental occurrence, but for those injuries to an adjoining owner which

actually and repeatedly and as it were inevitably resulted, despite the care with which the pipe line was maintained and used. This is the doctrine of Rylands v. Fletcher, L. R. 1 Exch. 265, long regarded as a leading case, and of the following, among many, authorities: Brennan Construction Co. v. Cumberland, 29 App. D. C. 554, 15 L. R. A. (N. S.) 535; Pumpelly v. Green Bay Co., 80 U. S. (13 Wall.) 166, 20 L. Ed. 557; Transportation Co. v. Chicago, supra; B. & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739; Costigan v. Penn. R. Co., 54 N. J. Law, 233, 23 Atl. 810; Weaver Mercantile Co. v. Thurmond, 68 W. Va. 530, 70 S. E. 126, 33 L. R. A. (N. S.) 1061; T. & P. Ry. Co. v. O'Mahoney, 24 Tex. Civ. App. 631, 60 S. W. 902; Wood on Nuisances (2d Ed.) § 116.

The case of Jennings v. Davis, 187 Fed. 703, 109 C. C. A. 451, apparently relied on by defendant, is clearly distinguishable. That was the case of an accident, the blowing out of a gasket from a pipe joint, claimed to have been caused by the negligence of defendant in respect of that particular appliance; and this court said:

"The record does not present the question discussed and decided in Rylands v. Fletcher, L. R. 3 H. L. 330, as modified by Nichols v. Marsland, L. R. 10 Exch. 255, because no damage resulted from the fact that the oil escaped and ran upon the plaintiff's premises. The action is not for damage sustained by the trespass, but for the injury which resulted from the ignition of the oil on the premises. * * * Liability is therefore dependent upon the existence of negligence, which may arise either by defective construction of the pipe and connections or failure to make a proper inspection."

The distinction is manifest. We are not here dealing with an accident, an unexpected and unlikely happening, but with the continuous or frequently recurring results of what may be called the normal operation of this pipe line, though properly constructed and carefully maintained. It is not a question of negligence, in the ordinary sense of that term. Defendant in effect says that it cannot keep its pipe line from leaking and therefore is not liable for the consequences. In our judgment the position is plainly untenable.

[2] The remaining contentions of defendant, based on other instructions asked for and rejected, need but a word of comment. Without reviewing the testimony, we hold that enough was shown by plaintiff to take the case to the jury, and the court was clearly right in refusing to direct a verdict for defendant. Even if it be true that some portion of the damage was caused by the inflowing of surface water, it was still for the jury to say how much the plaintiff was injured by water from the pipe line. Upon this point it is enough to quote the following from C. & N. W. Ry. Co. v. Hoag, 90 Ill. 339, 346:

"The evidence justified the belief that the water came mainly from the tank, and the plaintiff was entitled to recover for all damages from that source; and if the jury could not separate and distinguish between the several amounts of the damage caused by the water from the tank and the surface water respectively, they should have been left at liberty to estimate as best they might, from the evidence, how much of the whole damage was occasioned by the water from the tank."

[3] It further contended that the judgment should not stand because plaintiff, at a cost of some $250, could have constructed a drain

from its basement to a public sewer in an adjacent street, and thereby avoided in the main the injury of which complaint is made. We are not prepared to hold that plaintiff was bound to take this means, or any similar means, of protecting its property. The rule of minimizing damages. when one is suffering from the wrongful acts of another, does not to us seem applicable to the situation here disclosed, which rather is like that dealt with in Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72, where the court says:

"The defendants also insist that the injury might be remedied by the plaintiff at small cost by digging a drain along the embankment. If this were true, he is not bound to do it. As the defendants caused the damage without authority, and for their own benefit, they should find the remedy at their own expense."

Moreover, as the jury might have found from the testimony, the plaintiff was absolved from any duty to construct such a drain, or to otherwise safeguard its premises, by repeated promises of defendant that it would itself prevent further damage and also pay for that which had been inflicted. The contention cannot be sustained.

We have examined the other questions raised by defendant, but find none of sufficient merit to require discussion. The case appears to be a close one on the facts, but the record shows no error which calls for reversal.

Affirmed.

BATES v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. December 10, 1920.)

No. 3423.

1. **Criminal law ⟸936(5)—Evidence surprising defendant held not ground for new trial, where no objection.**
   That a defendant was taken by surprise by testimony introduced in rebuttal *held* not ground for new trial, where it was not objected to, and no attempt was made to contradict it, although witnesses, who necessarily knew the facts and could have contradicted it, if untrue, were either in the courtroom or could have been brought in without delay.

2. **Criminal law ⟸938(1)—New trial for alleged newly discovered evidence held properly refused.**
   In a prosecution for operating an unbonded distillery, in violation of Rev. St. § 3281 (Comp. St. § 6021), and using food products therein contrary to the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¼–3115⅛kk, 3115⅛l–3115⅛r), *held*, that the court did not abuse its discretion in denying a new trial for alleged newly discovered evidence.

3. **Criminal law ⟸911—Granting new trial discretionary.**
   A motion for new trial is addressed to the discretion of the trial court.

In Error to the District Court of the United States for the Eastern District of Tennessee; John E. McCall, Judge.

Criminal prosecution by the United States against E. R. Bates. Judgment of conviction, and defendant brings error. Affirmed.

Thos. L. Carty, of Knoxville, Tenn., for plaintiff in error.
W. T. Kennerly, U. S. Atty., of Knoxville, Tenn.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. Plaintiff in error was indicted in the United States District Court for the Eastern District of Tennessee jointly with A. M. Blackwell and John Wilson. The first count of this indictment charged the defendants with operating an unbonded and unregistered distillery in violation of R. S. § 3281 (Comp. St. § 6021); the second count, with working in an unregistered distillery; the third count, with using food products to make whisky for beverage purposes, in violation of the Lever Act of August 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛e–3115⅛kk, 3115⅛*l*–3115⅛r).

To this indictment all of the defendants pleaded not guilty. They were jointly tried, and found guilty upon the first and third counts of the indictment. The defendants Blackwell and Wilson made no motion for new trial and are not parties to this error proceeding. Four errors were assigned in the trial court by the defendant Bates in his motion for new trial. The court overruled this motion and sentenced him to a term of one year and one day in the United States penitentiary at Atlanta, Ga., that he pay a fine of $250 and the cost of prosecution.

[1] Plaintiff in error now relies, in this court, upon the third assignment of error only, which assignment reads as follows:

"The defendant was surprised by the evidence of the witness Satterfield, in the testimony given by him upon his recall by the government."

It appears from the evidence introduced in the trial of this case that the defendant Bates resided at Knoxville, Tenn., about 80 miles from the distillery described in the indictment; that he was engaged in operating a butcher stall in the city market house; that his codefendant, A. M. Blackwell, was employed by him from time to time in connection with the operation of this meat stall; that on August 27, 1919, Bates gave to Blackwell at his butcher stall a large amount of money in paper currency; that Blackwell immediately purchased 1,200 pounds of "Dixie Crystal" granulated sugar, paying therefor $120 in bills, and directed that the sugar be consigned to F. L. Phillips at Tellico Plains, Tenn.; that the clerk in the store of C. D. Kenny & Co., gave Blackwell a receipted bill for this purchase; that shortly after this, during the months of August and September, Blackwell was frequently seen in the neighborhood where this still was operated; that he stayed for a week or two at the house of Hoyt Nichols, who was afterwards employed to haul this sugar from the depot at Tellico Plains to a point near the distillery; that early in September Bates left Knoxville in his automobile and drove into the mountains of Monroe county, in the vicinity of this still, where he spent the night with John Wilson, his codefendant; that on that night he visited the store of F. L. Phillips. The next day he went to the house of Bill Smith, who lived near this distillery, which was at a remote and sparsely settled section of the

Smoky Mountains near the North Carolina line; that he left Smith's house for Knoxville on the afternoon of September 4th, and was arrested before reaching Tellico Plains by a deputy United States marshal, for carrying concealed weapons in violation of a state law; that shortly before Bates was arrested the deputy marshal, accompanied by a deputy collector of internal revenue, located, seized, and destroyed an illicit distillery on Ball Play creek in Monroe county, Tenn.; that this still had been in recent operation; that the rock furnace in which the still boiler was set was warm when the officers found it, and there was an accumulation of ashes; that there was also from 600 to 800 gallons of still beer then in process of fermentation; that they then went to the house of Bill Smith, but he was not at home. They searched his house and found several kegs that had had some moonshine whisky in them; that in the woods near the distillery were found some kegs that also had contained moonshine whisky; that at the distillery itself were found four 100-pound empty bags, which had theretofore contained sugar. These bags were branded "Dixie Crystal, C. D. Kenny & Co., Knoxville, Tenn." About a mile from the distillery they found eight similar bags full of sugar. It also further appears from the evidence that after Bates had reached John Wilson's home on the night of September 3d that he and Wilson went to the store of F. L. Phillips; that Phillips spoke to some one who said his name was Bates, about this sugar that had been shipped in his name to Tellico Plains. Phillips said:

"I brought it up to see if he knowed something about it. I named the sugar, and said I didn't want anything like that to come in there. * * * When I named the sugar, Mr. Bates, I believe, says to me, that the sugar cost him $120, and that is the conversation I had with Mr. Bates; and it is like I tell you, there were two men in the crowd."

It appears from the record that Satterfield was called as a witness on the part of the government and testified in effect that on August 27, 1919, he had seen the defendant Bates give to his codefendant Blackwell a considerable amount of money; that Blackwell put this money in his pocket and went directly from Bates to the store of C. D. Kenny & Co., and there bought 1,200 pounds of sugar, telling the clerk to ship the sugar to F. L. Phillips, Tellico Plains, Tenn.; that Blackwell then paid for the sugar, $120 in bills. He was then asked by the district attorney if he knew any other facts material to the litigation, to which he would like to testify, and answered, "That is all I can think of." The witness was then cross-examined by counsel for Bates, in reference only to the several matters about which he had already testified.

After the close of the evidence for the defense, Satterfield was recalled to the stand and further testified as follows:

"After Blackwell left C. D. Kenny & Co.'s store on the occasion of buying that $120 worth of sugar, he carried away with him a paper which had been given to him by Mr. Weaver. That paper was a receipted bill. When he got to the stall in the market house, he gave that paper to Mr. Bates. I saw him hand it to Mr. Bates."

This is the evidence of Satterfield, to which the third assignment of error in the motion for new trial relates, and is the error now relied

upon for the reversal of this judgment. In support of his motion for new trial Bates filed his own affidavit, in which, among other things, he states that he was acquainted with Satterfield, and had talked with him before the trial in regard to the evidence he would give against him on the trial of the case, and that the witness had told him then that he knew nothing about the matter, except that he had seen Bates give Blackwell some money, and that for this reason Bates was taken wholly by surprise by the testimony given by Satterfield upon recall.

Several other affidavits were exhibited to the court, in which the affiant stated that Satterfield was of bad character and that he was not entitled to full faith and credit upon oath in a court of justice. The plaintiff in error also filed in support of his motion for new trial the affidavits of Wm. Smith, J. E. Bates, and A. M. Blackwell, his codefendant. Blackwell's affidavit contained the statement that he did not go back to E. R. Bates' stall in the market house, where he had received the money from him, from the C. D. Kenny store, and that he did not see him again that day after he had purchased the sugar. The affidavit of J. C. Bates, father of this plaintiff in error, contains the statement that he was present when plaintiff in error gave the money to Blackwell; that plaintiff in error, immediately after paying the money to Blackwell, went out of the market house in company with two other men; that affiant stayed in the stall for at least two hours after Bates left and until his return; that he was in and out of the stall during the whole of that day, but that Blackwell did not return to the stall at any time that affiant was there.

It is claimed by the plaintiff in error that the statements contained in the affidavits relating to the character of Satterfield is newly discovered evidence, and that the evidence of J. C. Bates and A. M. Blackwell directly refutes and disproves the evidence given by Satterfield when he was recalled at the close of the evidence for the defense. In view of the other evidence in the case, the testimony of Satterfield in reference to the delivery by Blackwell of this receipted bill for sugar to Bates is a very strong circumstance in the chain of circumstances connecting Bates with the operation of this illicit still; but it is by no means determinative of this case. There is other evidence in this record sufficient to sustain the conviction of the plaintiff in error. However, when Satterfield was recalled to the stand, no objection was made on the part of the defendant, and, if there had been such objection, it was a matter wholly within the discretion of the court to permit its introduction at that time.

Nor was there any objection to the evidence, or any request, or any statement then made by Bates or his counsel, that he was taken by surprise and desired further time to secure other witnesses to disprove Satterfield's statement. Blackwell, his codefendant, whose affidavit is now offered to contradict Satterfield's testimony, was then present in court; his father, J. C. Bates, if not present in court, was in easy reach of process. If his father had been in charge of this stall in the meat market for two hours after he gave the money to Blackwell, the defendant knew it at the time of the trial, and, if he had asked the court for time to procure the testimony of J. C. Bates, undoubtedly it

would have been granted him. He also knew at that time that Blackwell had personal knowledge of all the facts in relation to this transaction. While he may have thought at that time that he ought not to force his codefendant upon the stand, yet that was a question solely for him to determine. If he decided to take the chances without Blackwell's evidence, and the evidence of J. C. Bates, in disproof of Satterfield's testimony, he cannot now be heard to complain of his own mistake of judgment, nor can he be permitted, after an adverse verdict, to take up the time of a court in a new trial, merely for the purpose of introducing further evidence, of which he then had knowledge, and which was in his power to produce at the trial, had he desired to do so. McLeod v. New Albany, 66 Fed. 378, 13 C. C. A. 525 (C. C. A. 7).

This applies equally to the evidence of Satterfield's reputation for truth and veracity. It does not appear from his affidavit that he did not know Satterfield's reputation in that regard just as well before, and at the time of, the trial, as when he made this motion for a new trial, or that he had used any diligence whatever in an effort to obtain such knowledge, or secure evidence in reference thereto. His diligence along these lines since the trial cannot be taken into consideration upon the hearing of this motion, except to show the fact that, if he had been diligent, in due time he might easily have obtained this information and proof. He knew that Satterfield had been called as a witness by the government, and he should have prepared to meet any phase of his testimony. Satterfield was not required to divulge to him the nature of the evidence he expected to give, and Bates had no right to rely upon his statement in that regard. Satterfield may have forgotten this part of the transaction when he was first upon the witness stand. It is also possible that he had forgotten it when Bates interviewed him in reference to what he knew about this case. The affidavit of William Smith can in no sense be considered newly discovered evidence. If his testimony was important to the defendant, he should have been produced at the trial.

The claim of counsel for plaintiff in error that the testimony of F. L. Phillips does not clearly show that the conversation he had was in fact with Bates cannot be sustained. Bates denies this conversation, but he admits that he was at the Phillips store, and that he did talk with him, and that he may have said to him that "I went down there to get fried chicken and whisky," but disputes that it was that night. It does not appear from the evidence in this case that Bates was there any other night, or that Phillips ever had any other conversation with him, except the one narrated in his testimony.

[2] A motion for a new trial is directed to the discretion of the trial court. Haws v. Mining Co., 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436; Van Stone v. Stillwell & B. M. Co., 142 U. S. 138, 12 Sup. Ct. 181, 35 L. Ed. 961. The verdict of the jury is fully sustained by evidence, and it is clear that the trial court has not abused its discretion in overruling the motion of plaintiff in error for a new trial either upon the ground that the defendant was taken by surprise by the evidence of Satterfield upon recall, or upon the ground of newly discovered evidence.

Judgment affirmed.

WAGMAN v. UNITED STATES.*

(Circuit Court of Appeals, Sixth Circuit. December 10, 1920.)

No. 3460.

1. **Indictment and information ⊜34(3)—Erroneous designation of statute in indorsement not fatal defect.**
The indorsement on an indictment is no part of the indictment; and that it erroneously designates the statute on which it is based is not a fatal defect, where the indictment charges an offense under the applicable statute.

2. **Statutes ⊜118(6)—Amendment to federal act making it an offense to transport liquor into prohibition state, held not invalid because subject not included in title; "other purposes."**
The so-called Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), making it an offense to transport liquor into a prohibition state, is not invalid on the ground that its subject-matter is not included in the title of the act, which is "An act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1918, and for other purposes," since "other purposes" includes every possible subject of legislation.

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

3. **Intoxicating liquors ⊜132—Reed Amendment did not expire with appropriation act.**
The Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), making it an offense to transport liquor into a prohibition state, did not cease to be effective with the expiration of the period covered by the appropriation act.

4. **Criminal law ⊜372(2)—Evidence of continuing traffic admissible in prosecution for illegal transportation.**
On trial of defendant for illegal transportation of liquor into a prohibition state evidence of facts and circumstances tending to show that he was then engaged in a continuing traffic of the kind *held* competent as affecting the question of intent, although it tended to show guilt of other offenses.

5. **Criminal law ⊜510—Conviction may rest on testimony of accomplices alone.**
Federal courts recognize no rule of law forbidding convictions on the testimony of accomplices alone if believed by the jury.

6. **Witnesses ⊜361(2)—Impeached witness may explain his conviction and assert innocence.**
Where it was shown on cross-examination of a witness that he was then undergoing imprisonment for larceny, it was not error on re-direct to permit him to explain his conviction and to assert his innocence.

7. **Criminal law ⊜1059(2)—General exception to charge ineffective.**
A general exception to the charge of the court as a whole is ineffective as the basis of an assignment of error to any particular part, or to the omission to charge on a point not requested.

8. **Criminal law ⊜1153(4)—Permitting leading questions discretionary.**
The extent to which leading questions may be permitted is largely a matter of discretion in the trial court, which cannot be reviewed, in the absence of clear abuse thereof.

9. **Criminal law ⊜1036(1)—Rebuttal testimony cannot be first objected to on appeal.**
A defendant cannot raise for the first time in the appellate court the objection that improper testimony was introduced in rebuttal.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 376, 65 L. Ed. —.

10. Criminal law ⊜711—Court, in discretion, may limit time for arguments.
Limiting the time for argument to the jury *held* not an abuse of discretion.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Criminal prosecution by the United States against Max Wagman. Judgment of conviction, and defendant brings error. Affirmed.

W. E. Baubie, of Detroit, Mich. (Baubie & Baubie, of Detroit, Mich., on the brief), for plaintiff in error.

Fred L. Eaton, Asst. U. S. Atty., of Detroit, Mich. (John E. Kinnane, U. S. Atty., and Frank Murphy, Asst. U. S. Atty., both of Detroit, Mich., on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error (whom we shall call defendant) was indicted on April 24, 1919, under the so-called "Reed Amendment," charged with having, on January 30, 1919, transported intoxicating liquor from the state of Ohio into the state of Michigan. This writ is to review a judgment of conviction thereunder. Numerous assignments of error are presented.

[1] 1. The indictment is indorsed "Violation of Reed Amendment to Diplomatic and Consular Service Act of March 3, 1917." The indictment is assailed as invalid for the reason that the Reed Amendment is not a part of the Diplomatic and Consular Service Act. It is, in fact, a part of section 5 of the Post Office Appropriation Act of the same date (39 Stat. c. 162, pp. 1058–1069 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a]). The criticism is that "defendant was convicted under a so-called law which did not exist." The criticism is without merit. The indorsement is no part of the indictment, which sufficiently sets out the offense by stating the facts which bring it within the applicable law. But, even were the indorsement a part of the indictment, the mistaken reference to the appropriate act could not have misled or prejudiced defendant. It is too technical and unsubstantial to work a reversal of the judgment. U. S. Comp. Stat. 1916, § 1691; Judicial Code, § 269, as amended February 26, 1919 (40 Stat. 1181, c. 48 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1246]); West v. United States (C. C. A. 6) 258 Fed. 413, 415, 416, 169 C. C. A. 429; Grandi v. United States (C. C. A. 6) 262 Fed. 123.

[2, 3] 2. The Reed Amendment is assailed as unconstitutional, for the reason that its subject-matter is not included within the title to the Post Office Appropriation Act of March 3, 1917 (39 Stat. 1058) which is "an act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1918, and for other purposes." There is no force in this objection. The federal Constitution does not require that the object or purposes of a congressional act be indicated by the title, which accordingly "cannot be used to extend or restrain any positive provisions contained in the body of the act." Hadden v. Collector, 5 Wall. 107, 110, 18 L. Ed. 518; Goodlett v. Louis-

ville R. R., 122 U. S. 391, 408, 409, 7 Sup. Ct. 1254, 30 L. Ed. 1230. Moreover, the words "for other purposes," found in the title of the act in question, are "considered as covering every possible subject of legislation." Hadden v. Collector, supra, 5 Wall. at page 111, 18 L. Ed. 518. Within common knowledge, it is not unusual congressional practice to include in appropriation bills riders whose subject-matter has no relation to the appropriation features of the act. The Hadden Case, supra, cites two conspicuous instances of such established practice. Nor is there anything in the point that the so-called Reed Amendment is invalid, in that its title does not indicate the subject of the amendment by reference to the act or title of the act to be amended. The Reed Amendment is not an amendment of an existing statute, but of a pending bill. The suggestion that the provision of the Reed Amendment expired with the termination of the period covered by the appropriation act in question is too unsubstantial to justify discussion. It has no dependence whatever upon the post office service. It has been held constitutional, and a conviction affirmed, in a case where the liquor was carried on the defendant's person. United States v. Hill, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. 337.

3. Consideration of the remaining assignments requires a reference to testimony. The transportation in question is alleged to have been made on the early morning of January 30, 1919; 300 quarts of liquor being carried in a Chandler car, owned by plaintiff in error, and 300 quarts in a King car, which was supposed to belong to one Somers—the Chandler car being driven by Gill, and the King car by Dotson, both of whom were jointly indicted with Wagman, who alone was tried. Gill testified that the Chandler car was loaded at Wagman's place of business in Toledo, with the assistance of both Wagman and Somers. Dotson and Gill testified in effect that Wagman rode ahead of the liquor cars in a taxicab, and that at Wyandotte, Mich., they were told by him (he is said to have gone on ahead from there) to await instructions before they should go on through. Gill says that in the taxicab (driven by Weed) were also Somers and another person, said to be a friend of Wagman. The latter was arrested in Detroit on the morning of January 30th. There was testimony of the finding on his person of official identification cards both for the Chandler car (in his own name) and for a King car in the name of "Dave Samsht," as printed in the record here; also two liquor bills, one indicating the purchase of $1,925 worth of liquor on December 31, 1918, from one Belmont, and the other for $2,475, for liquor purporting to have been purchased from the Webber firm in Toledo, the purchaser's name, as recollected by the witness, being given as "Sam Immer." Webber testified to the sale to Wagman in January, 1919, of liquors which, on the basis of his testimony, would amount to more than 590 quarts. He says: "The name of Sam Ember was given in this sale. Wagman bought the whisky." One Goldstein, a liquor dealer at Detroit, also testified to the sale to Wagman of whisky "last January and February in considerable quantities" (this naturally means 1919). Goldstein's books were said to have been destroyed "since the state went dry," which was

May 1, 1918. There was also testimony by Gill that he had made for Wagman a similar trip to Detroit on January 29, 1919.

There was also testimony of a settlement by Wagman with the government (presumably after his arrest in this case) by the payment of $831 "due as wholesale liquor dealer, and a violator of section 601 of the act of 1918, for failure to pay taxes on" a certain amount of liquor, together with penalties on that account; the tax as wholesale liquor dealer "on January 1, 1919, to and including June 30, 1919," with delinquency penalty on that account. There was also testimony that Wagman ordered, for use in a Dodge truck owned by him in Toledo, a copper tank of about 30 gallons capacity; the tank being delivered on January 14, 1919. Wagman admitted on the trial that he went from Toledo to Detroit on the morning in question (on what he asserted was a legitimate business trip) in a taxicab hired by him and driven by Weed, and for the asserted reason that his Chandler car was out of commission. He also admitted that the Chandler identification card was his. He denied all knowledge of the King card, or of that car, or of the copper tank, or that he had anything to do with or knew of the alleged transportation of liquor in question here, or that he was at any time engaged in bringing liquor into Michigan, or dealing in liquors, or that he had liquor in his Toledo store; denied that he had ever gone under the name of "Ember"; denied that he knew Dotson, or that he bought in January the liquor claimed to have been sold him by Webber. He neither admitted nor denied making the Belmont purchase, stating, however, that he bought in January, 1919, 45 cases (540 quarts) from Belmont "for our own use," in anticipation of Ohio's becoming dry. He denied that he had authorized his attorney to make the settlement with the government before mentioned. He made no reference to Somers or the alleged fourth occupant of the taxicab. Neither such fourth occupant nor Weed nor Somers testified in the case.[1] There was thus abundant testimony warranting the submission of the case to the jury.

[4] 4. It was not error to receive evidence of defendant's trip to Detroit on January 29, 1919, the settlement with the government, and the purchase of the copper tank. These transactions, so close in point of time to the act here charged, and open to inference that they were the outgrowth of a continuing clandestine liquor traffic, were competent evidence, at least by way of showing the intent of defendant's taxicab trip to Detroit, including knowledge or ignorance of the fact that his own car, laden with whisky, was following him. Being thus competent, it was not made incompetent because of a tendency to show guilt of another offense. Tucker v. United States (C. C. A. 6) 224 Fed. 833, 840, 140 C. C. A. 279.

[5] 5. Plaintiff in error urges that his conviction was had largely upon the testimony of Dotson and Gill, and complains that the trial court did not, upon its own motion, instruct the jury that the testimony of these witnesses should be carefully scrutinized, and believed only when corroborated by other testimony in the case. The failure to so instruct would not be reversible error, even had it been excepted to, as

[1] It seems likely that Weed is the person jointly indicted as "Reed."

it was not. While it would have been better practice to caution the jury against relying too greatly upon the testimony of these accomplices, and to require corroborating testimony before giving it credence, the federal courts recognize no rule of law forbidding convictions on the testimony of accomplices alone, if believed by the jury. Holmgren v. United States, 217 U. S. 509 523, 524, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Caminetti v. United States, 242 U. S. 470, 495, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; Ray v. United States (C. C. A. 6) 265 Fed. 257, 258.

[6] 6. Dotson testified, on cross-examination, in answer to questions evidently intended to discredit him, that he was then an inmate of a prison upon conviction of larceny. On redirect examination he was allowed to explain his conviction and to assert his innocence of guilt. There was no error in this, nor in allowing him to state in that connection that he was "innocently implicated" in the offense charged here, in that he was driving the car for Wagman under instructions from his own employer, and that he "did not get any pay for it."

[7] 7. The Reed Amendment excepts from its prohibition liquors intended for "scientific, sacramental, medicinal and mechanical purposes." The indictment in terms negatived the exception. There was no express proof in support of the negative. The charge did not mention the exception, and made defendant's guilt or innocence turn upon whether he caused the whisky to be brought from Ohio into Michigan, in the two certain automobiles which had been made the subject of testimony. This action did not involve reversible error. As the record stands, it is unnecessary to determine whether the government had the burden of proving this negative.[2] Defendant neither moved for directed verdict, nor did he request an instruction upon the subject of the excepted uses, nor was there any exception taken to the charge on this subject. The "general exception to the whole charge of the court" was ineffective. Anthony v. Louisville R. R. Co., 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301. The defendant is thus not entitled to complain of the charge or of its omissions in this respect. Nor is a case presented for the exercise of indulgence in overlooking lack of exception to prevent miscarriage of justice. The circumstances as exhibited by the testimony were such as expressly to repel any implication that the liquor was intended for scientific, mechanical, medicinal, or sacramental purposes. The jury could not, without perverseness, have found such excepted use intended.

8. Gill testified that while he and Dotson were in a garage at Wyandotte, under instructions from Wagman to wait there until he telephoned them to follow, the proprietor of the garage, who he afterwards learned by the newspapers was named Gianola, told him it was "unnecessary to wait for Wagman; that the road was clear; that we should drive through by the River Rouge bridge." They were arrested at that

[2] See upon this question what is said by this court in Breitmayer v. United States, 249 Fed. 929, 934, 162 C. C. A. 127, and Stetson v. United States, 257 Fed. 689, 692, 168 C. C. A. 639. In United States v. Simpson (D. C.) 257 Fed. 860, it has been held that the excepted uses are matter of defense, and need not be negatived by the government.

bridge by the state constabulary. Gill further testified that he and defendant had the day before been at this same garage, that Gianola and defendant were then "kidding amongst themselves," and that the witness took Gianola's order, "because I thought he had something to do with it." Defendant's brief states that "it was then, and now is, a matter of common knowledge that this man, Sam Gianola, a notorious character, died before the trial in this cause, making a contradiction of the dangerous hearsay impossible." Our attention is not called to anything in the record to that effect, and defendant's testimony makes no mention of Gianola. We are unable to say that Gill had no reason to think that Gianola "had something to do with it"; at any rate, the testimony was given in the course of a narrative of the transaction, and as explaining how it happened that the cars were overhauled and captured at the River Rouge. The court was not requested to caution the jury with respect to this item of testimony. We are not satisfied that reversible error was committed.

[8] 9. Defendant complains of the frequent admission of leading questions on the part of the government's counsel. The extent to which leading questions may be permitted is largely matter of discretion in the trial court, which cannot be reviewed in the absence of clear abuse thereof. Upon a careful consideration of the entire record, we are unable to find such abuse.

[9] 10. Complaint is made that the testimony of Goldstein, as well as of a witness to the making of the copper tank, was introduced after defendant had rested his case, and that the testimony of neither of those witnesses was proper rebuttal. On the trial no objection was made to the testimony on that score. Following defendant's testimony (the record contains no announcement that his case was rested), the government introduced two new witnesses besides recalling one of its own for further redirect, and recalling defendant for recross-examination. Defendant then introduced two witnesses as to his reputation. The government then presented five witnesses (on other matters), after which defendant recalled one of his witnesses and the government did the same, all this without objection as to order of proof. That subject was, generally speaking, within the judicial discretion of the trial court, always subject, of course, to reasonable limitations to prevent prejudice, by way of surprise or otherwise. We must presume that had defendant objected to the testimony his rights would not have been overridden. As the case stood, the court was not called upon to exercise his discretion, and there could thus be no abuse in that respect. Defendant is not entitled to raise here, for the first time, the objection that the testimony was not proper rebuttal. Bates v. United States, 269 Fed. 563, decided this day by this court.

[10] 11. The court limited the argument to the jury to fifteen minutes on a side. Defendant complains that this time was insufficient; also that, when counsel so stated, he was told, "You have been too long putting it [the case] in." While it may well be that a somewhat longer allowance would have been better, we are not convinced that defendant was prejudiced by this limitation, and thus that reversible error was committed. The court has undoubted right to limit argument with-

in the bounds of a reasonable discretion. There is much to be said in favor of the court's action. That the whisky was illegally transported from Toledo to Detroit was not reasonably open to question; nor was the fact that defendant preceded the liquor-laden cars by a comparatively short distance. The case necessarily turned upon the simple question whether, under all the evidence in the case, it was proven beyond a reasonable doubt that defendant hired Gill and Dotson and furnished the two automobiles to haul the whisky, going ahead to keep the way clear. A short limitation of time was clearly justifiable. To draw the line between 15 minutes and say 30 minutes is impossible upon this record. In fact, as appears by the record, the government's counsel used 15 minutes and defendant's counsel 22 minutes. We are unable to say that the court abused its discretion.

We have not found it necessary to discuss all of the criticisms made upon the proceedings below. We have, however, considered them all, and have discussed all that seem fairly to call for such action.

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

JOHN L. ROPER LUMBER CO. v. HINTON et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

No. 1835.

1. **Deeds ⟸114(1)—Tracts of grantor, acquired from different sources within boundaries of conveyance, held excepted.**
   Where the owner of two tracts of land subsequently acquired a larger tract, originally granted subsequent to the grants of the first tracts, but including them within its boundaries, a deed thereafter executed by him, conveying the tract last acquired, which expressly stated that it was a conveyance of the property acquired by the designated deed to him, did not convey the included tracts.

2. **Vendor and purchaser ⟸230(1)—Recitals in former conveyances of exception of certain tracts held notice to purchaser.**
   Conveyances contained in a chain of title to a larger tract of land, expressly excepting therefrom two smaller tracts included within its boundaries, are notice to subsequent purchasers of the larger tract of such exception, so they cannot claim that the two smaller tracts were included in a conveyance of the larger tract by one who also owned the two excepted tracts, where the conveyance was expressly limited to the property acquired by the conveyance of the larger tract.

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Elizabeth City; H. G. Connor, Judge.

Suit to quiet title by the John L. Roper Lumber Company against R. L. Hinton and others. Decree for defendants (260 Fed. 996), and complainant appeals. Affirmed.

A. D. MacLean, of Washington, N. C. (J. Kenyon Wilson, of Elizabeth City, N. C., on the brief), for appellant.

E. F. Aydlett, of Elizabeth City, N. C. (C. E. Thompson, of Elizabeth City, N. C., on the brief), for appellees.

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

SMITH, District Judge. The appellant, John L. Roper Lumber Company, filed a bill in equity in the District Court of the United States for the Eastern District of North Carolina against Charles L. Hinton and others, heirs at law and devisees of one John L. Hinton, to quiet the title claimed by the complainant to, and enjoin trespassing by the defendants upon, a tract of land in the Eastern District of North Carolina, known and called by the name of the Old Lebanon juniper swamp. The cause being at issue, testimony was taken, and it came on for trial before the District Judge for the Eastern District of North Carolina, who filed a decree that the complainant is the owner of a tract of swamp land called Old Lebanon juniper swamp, supposed to contain 5,000 acres, more or less, and that the defendants are the owners in fee of two tracts of land called Thornton's or Stanley's Island, containing 85 acres, and Gales, containing 281 acres, and adjudged that the plaintiff therefore took nothing by this proceeding, and that the defendants go without day and recover their costs.

The complainant appealed from this decree upon several grounds, involving substantially that the decree was erroneous in finding that the defendants were entitled to, and the owners in fee of the two tracts of land known as Thornton's or Stanley's Island, containing 85 acres, and Gales, containing 281 acres, or 366 acres in all, whereas, the court should have held that the complainant was entitled to those two tracts as parts of the Old Lebanon juniper swamp; and it is upon this appeal that the case is now heard. The opinion of the learned judge below upon which he based his finding and decree, is not printed in the transcript, but is to be found printed in 260 Fed. 996.

It appears that the common ancestor or original common holder of all the land claimed by the complainant and the defendants was one John L. Hinton. The tract of land referred to in the decree of the learned judge as the Gales tract seems to have been composed of 281 acres granted to Samuel Edney, February 15, 1785. This tract seems to have eventually vested in one Hollowell Old, and in the division of the property of Hollowell Old this piece of land was allotted to his grandson, John L. Hinton. The tract of land referred to in the decree of the District Judge as the Thornton's or Stanley's Island tract seems to have been composed of a tract of 85 acres granted to Samuel Edney, March, 19, 1762, and which after sundry descents and mesne conveyances was on December 16, 1850, conveyed by the heirs of one John Stanley to John L. Hinton.

John L. Hinton, therefore, in December, 1850, was the owner of these two tracts of land, one containing 281 acres and the other containing 85 acres, which he acquired in the way above mentioned. Subsequently thereto, viz. on the 20th of February, 1851, Hamlin L. Epps, as the administrator of Admiral Brinkley, conveyed to John L. Hinton, under decree of the county court of Gates county, the tract of land known as the—

"Old Lebanon juniper swamp, lying in the counties of Gates and Camden, and supposed to contain 5,000 acres, more or less, and is the same tract of juniper swamp land that the said Brinkley and Edward C. Riddick purchased of Thos. G. Benton."

This 5,000 acres of juniper swamp land appears to have been part of a larger grant for 19,200 acres of land made to Benjamin Jones on July 10, 1788, later in date than either of the grants to the two first-mentioned tracts. About three years after he acquired this tract of 5,000 acres, viz. on March 1, 1854, John L. Hinton conveyed to James B. Norfleet—

"a certain tract of swamp land called and known as the Old Lebanon juniper swamp, lying in the counties of Camden and Gates, and supposed to contain five thousand acres, more or less, and is the same tract of juniper swamp land to which I derived title from Hamlin L. Epps, administrator and commissioner of Admiral Brinkley, deceased, reference to the records of the register's office, Camden County, North Carolina, will at large and more fully appear."

This James B. Norfleet is the ancestor under whom the complainant claims, and the complainant's claim is that the description of the property conveyed in this deed from John L. Hinton to James B. Norfleet covers and includes the two previous tracts known as Thornton's and Gales, and that, John L. Hinton having been in 1854 the owner of all three tracts, when this description covers and includes all three, all three passed, and the complainant, through the original transfer to its ancestor, James B. Norfleet, is entitled to all three of these tracts.

The conveyance from John L. Hinton to James B. Norfleet, however, made March 1, 1854, conveyed only the Old Lebanon juniper swamp, lying in the counties of Camden and Gates, supposed to contain 5,000 acres, more or less, and—

"is the same tract of juniper swamp land to which I derived title from Hamlin L. Epps, administrator and commissioner of Admiral Brinkley, deceased, reference to the records of the register's office, Camden county, North Carolina, will at large and more fully appear."

[1] This conveyance expressly limits the tract of land conveyed by Hinton to the tract of land which he had received from Epps, administrator. The language of the deed as expressed is such as under which would pass only such tract of land as he received from Hamlin L. Epps, administrator; the facts as recited show positively that he never received from Epps, as administrator, the two tracts of land that he previously owned, viz. the Thornton tract, containing 85 acres, and Gales, containing 281 acres. Both those tracts he owned and possessed, before he acquired the property from Epps, administrator, and when his deed to Norfleet limited what he sold to Norfleet to the tract of land that he had acquired from Epps, administrator, necessarily it was exclusive of the two other separate and distinct tracts that he previously owned, and title to which he derived from other sources.

[2] The appellants claim, however, that the general description of the tract of land, as conveyed to Hinton by Epps, in the deed of March 1, 1854, was sufficient to cover the two smaller tracts within its boundaries, and that Hinton being at the time the owner of all three tracts, if all his metes and bounds, when he sold to Norfleet, included all three tracts, having then title to all three. necessarily they would all pass to Norfleet, and that any intending purchaser examining the record was justified in inferring from the record from the description of the lands in the deed that it covered all three tracts.

Such, however, does not appear on the record by an examination of the title of the land as conveyed to and owned by Admiral Brinkley. The conveyance from Exum Newby to Ann Scott, in 1810, which is one of the links in the title to Admiral Brinkley, expressly recognizes the existence of and excepts the two tracts "called Gales and Thornton's," containing 365 acres or thereabouts; and so the deed from Thomas Fitt to Exum Newby, in 1801, being another link in the Brinkley chain, and covering the property conveyed by Hinton to Norfleet, also in the description expressly excepts from the tract conveyed the two tracts containing 365 acres or thereabouts, "called Gales and Thornton's." An examination of the recorded title, therefore, to Brinkley, from whom Hinton acquired, through Brinkley's administrator, in itself shows upon the record that the property owned and held by Brinkley was exclusive of the two smaller tracts known as Thornton's and Gales.

When, therefore, Hinton conveyed to Norfleet, limiting his conveyance to what he had received from the estate of Brinkley, an examination of the records shows that Hinton had only received from the estate of Brinkley, and therefore only conveyed to Norfleet, the tract of land that Brinkley owned, which was exclusive of the two smaller tracts, and no purchaser who examined the record with any degree of care could be misled.

It appears from the testimony that the two tracts of land have been located with sufficient accuracy, and the District Judge, in his final decree locating them, as appears by the map used on the trial, made his decree in pursuance of and supported by the testimony before him.

The decree below is accordingly affirmed.

THE SEABOARD.

THE J. A. ROE.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 67.

1. **Collision ⇐71(3)—Mooring barges in tandem behind stakeboat, so as to impede navigation, held negligence.**
   Where a stakeboat fastened barges in tandem to its stern, so that they extended into the channel, impeding navigation, and a steamer collided with one of them, *held* that the stakeboat was at fault.
2. **Collision ⇐71(2)—Steamer not checking speed on seeing light held at fault.**
   Where a steamer saw a light displayed by a moored barge, but mistook it for the signal of another boat, and proceeded at hooked-up speed with the light directly in front of her, *held*, that steamer was at fault for colliding with barge.
3. **Collision ⇐71(3)—Barge moored by stakeboat so as to drift into channel not at fault.**
   Where a barge was moored to the stern of a stakeboat, so as to drift with the wind into the channel, *held*, that she was not at fault for a resulting collision with a steamer, and that her faulty position was due entirely to the stakeboat.

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4. Collision ⇐144—Damages divided between joint tort-feasors.
Where a stakeboat and a steamer were joint tort-feasors in injuries sustained by a barge, which the steamer collided with, *held*, that barge's damages should be divided equally between the tort-feasors.

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

Libel by the Connecticut Transportation Company against the steamer Seaboard, claimed by the Hartford & New York Transportation Company, in which the barge J. A. Roe, owned by Cleary Bros., and Charles H. McWilliams and B. F. Kellers, as owners of the Blue Line stakeboat, were interpleaded under the fifty-ninth rule. Decree for libelant against the stakeboat owners, and they appeal. Affirmed, as modified.

Herbert Green, of New York City, for appellants.

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

Haight, Sandford, Smith & Griffin, of New York City (Herbert K. Stockton, of New York City, of counsel), for claimant appellee.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for other appellees.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The Blue Line stakeboat, a tug which had been dismantled, except that the deckhouse was retained, owned by McWilliams and Kellers, was used for mooring barges in the Bridgeport Harbor on and prior to October 26, 1916. On the night in question, which was dark, after 3 a. m., the barge Donald was tied up astern of the stakeboat, with the barge J. A. Roe astern of her. The Donald had a light, and the Roe showed a light on a pole at her stern. This tandem was stretched out across the channel. The Donald was about 116.5 feet long, and the Roe was about 112.9 feet long. Both were light. A southwest wind drifted the stakeboat near the west edge of the channel, and the barges with their fasts drifted across the channel. The tide was ebb and tended to carry them somewhat down against the wind. It is claimed that there was a light on the stern of the Donald, but that this was not burning at the time of the collision. The channel was 17 feet deep and 200 feet wide, and runs southeast from a point above the Seaboard's pier to a point below the place of collision. The stakeboat's location was on the west side of the channel, about a quarter of a mile below Fairest Point. The Seaboard left her pier on the Poquonock river, Bridgeport, about 3 a. m., and proceeded down through the channel. The lights of the stakeboat on her starboard hand and the white light on her port hand were seen, and the navigator took the latter to be that of a vessel anchored on the east side of the channel.

The captain of the Seaboard was in the pilot house directing navigation. His pilot and the man at the wheel were also there, and the

lookout forward. They testified that they expected the stakeboat to be very near the westerly edge of the channel. The captain testified that he had frequently seen two or more boats trailing out from the stakeboat into the channel, and that occasionally he had put his stem up against them and shoved them out of the way, so as to permit of his going by. He was going under one bell until he got about 200 feet from Fairest Point. This was about half a mile from the place of collision. He then hooked up. He had the stakeboat on the starboard hand, and a bright light on the east side of the channel further down. He says he mistook this to be an anchored schooner, and, with his boat in midchannel, he ported not over half a point, and, proceeding at increased speed, then discovered the presence of the barge Donald. He immediately stopped and rang to go back, and says these orders were executed as quickly as they could be. He estimates his distance, when this occurred, as 800 feet away from the barges. When he actually saw the Donald, he was but 4 or 5 feet away from her, with his own vessel going at his estimated speed of 4 knots. He says he could not stop, and therefore could not avoid striking the barge Donald, which he did with a very heavy blow.

On these facts, the court below entered a decree against the owners of the stakeboat and against the owners of the Roe, and in favor of the barge Donald for half damages in the order named. The court below held that the privileges of the stakeboat were regulated by the harbor master of Bridgeport; that the Donald was at fault for not carrying a light; and that, since the stakeboat owners so moored the boats as to permit them to stretch across the channel obstructing navigation, they are primarily liable for the damage sustained. The court found that the captain of the stakeboat placed the barges in this position.

[1] We agree with the court below that so placing the two boats tandem behind the stakeboat was an impediment to navigation in the channel. We think this was a fault for which the stakeboat owners should be held responsible. In the absence of federal or state legislation in relation to the anchorage of the stakeboat, the local authorities are controlling. But it appears that the Donald was made fast alongside the starboard side of the stakeboat, and later in the day she was moved from alongside the stakeboat and made fast to the stern of the stakeboat by direction of the master of the stakeboat. The scow Roe was likewise made fast under the stern of the Donald. For thus mooring these boats, the captain of the stakeboat is responsible.

[2, 3] The court below found the Donald exhibited a while light on her pole on the stern up to 2:30 a. m., but it went out before the Seaboard came down the channel. The Donald was less than 150 feet in length. But she was at anchor and came within the requirement of Inland Rule 11 (Comp. St. § 7849), which reads:

"A vessel under 150 feet in length, when at anchor, shall carry forward, where it can be best seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile."

The master and quartermaster of the Seaboard, who were in the pilot house, state that at the time of the collision there was a light burning on the bow of the Donald. This we find as a fact, and it was all that was required of her owners. If the Inland Rule 11 applied to a vessel of this type, exhibiting such a light complied with the rule; and we think she did so.

We think the Seaboard, in navigating as she did, was also at fault in bringing about the collision. The claim is that she was unable to stop her headway in time to avoid the collision. She struck the Donald a hard blow, and this must have been due to the fact that, after being hooked up, she was going at considerable speed. It is conceded that the navigator saw the light, but the claim that he mistook the signal for another boat on the opposite side of the channel does not excuse the vessel from fault. We think the Seaboard was at fault in undertaking to go at hooked up speed, with a light directly in front of her. Due care and caution would have avoided the collision. The Yucatan, 226 Fed. 437, 141 C. C. A. 267; The New York, 167 Fed. 315, 92 C. C. A. 627. On the testimony of her own master, she saw the light in ample time to have avoided the collision. We likewise think that the Donald, placed as she was by the captain of the stakeboat, in such a position as to drift with the wind into the channel, was not at fault, and that her faulty position was due solely to the captain of the stakeboat. John G. McCullough (D. C.) 232 Fed. 637; Pocohontas (D. C.) 217 Fed. 135. For the reasons which absolve the Donald from liability, we also think no liability attaches to the Roe.

[4] The stakeboat was a joint tort-feasor with the Seaboard and full damages should be divided between both vessels. McWilliams v. S. S. Sif (C. C. A., Second Circuit, decided April 14, 1920) 266 Fed. 166; Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600.

The court below is directed to modify the decree by awarding full damages to the Donald against the Seaboard and the stakeboat owners, but without costs in this court.

THE WINTHROP.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 84.

Towage ⇐11(10)—Tug not liable for mooring barge overnight in sheltered spot.

Where a tug was unable to complete a trip before night, and moored the barge in a sheltered spot, and proceeded on its way, intending to return in the morning, *held*, there was no negligence, rendering tug liable for the loss of the barge's anchor, when an ice floe unexpectedly swept it from its mooring during the night.

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

Libel by McWilliams Bros., Incorporated, against the steam tug Winthrop, her engines, etc.; the Staples Transportation Company, claimant. Decree for claimant, and libelant appeals. Affirmed.

Herbert Green, of New York City, for appellant.

Harrington, Bigham & Englar, of New York City (L. J. Matteson, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The barge Liberty, a wooden vessel of 1,586 registered tons, length 246 feet, and beam 43 feet, drawing about 19½ feet, with a cargo of 28 tons, consigned to the New York, New Haven & Hartford Railroad at Providence, was towed by the steam tug Winthrop on the afternoon of February 15, 1920, on the voyage to Providence. After being taken in tow at Newport, the tug proceeded to Providence. The barge was towing with a hawser of about 50 fathoms. At about 6 o'clock in the evening, the barge was anchored pursuant to the orders of the tug master, and the tug went on to Fall River. Later the man on the barge hauled the hawser in. The anchor was dropped at about 30 fathoms of chain. The night was dark, the wind was light from the northwest. A watch was kept during the night and about 12:30 a. m. ice was observed coming down. The northwest wind had increased to about 25 miles an hour, and this brought the ice striking the barge across her bow, causing the barge to drag, and thereupon the captain let out more chain; but she kept on dragging, and finally packed-up ice created such a strain on the chain that it parted. This floe came from the direction of Providence and proved to be the width of the stream. A spare anchor was put out, weighing amout 4,500 pounds; but the barge was caught in the floe and kept going down stream until the ends of the floe caught and the floe was held stationary. When the tug returned the next morning, the ice pack was found as described; but the tug succeeded in making her way to the barge, using a passage which a naval vessel from the government station had broken. The result was, the Liberty lost her anchor, and seeks to recover $2,314.78 for such loss. The barge was thereafter towed to her destination. When anchor was dropped by the barge, she had reached Hog Island, and she was on an anchorage ground much used. The captain of the tug then proceeded to Fall River, where he remained for the night. He stated that he left the barge overnight at this anchorage because he had run over his time and that he was only allowed 13 hours a day, and said that, if he had gone to Providence, he would have run over his time and the inspectors "would have been after me." It appears from his statement that his 13 hours would have expired at 8 o'clock, and this was not sufficient time for the vessel to make the point of destination of the barge. Further, he says that the safety of towing the barge through the narrow channel to Providence and at night was influential in causing him to direct the anchoring of the barge as he did.

The contention of the libelant is that the loss of the anchor was caused by anchoring the barge in an unsafe place and in not proceeding to Providence the same evening. On the other hand, the appellee contends that the anchorage grounds used were well known, and that it was customary to anchor barges under conditions similar to those that obtained that night; that there was nothing in the condition of the

water or tide which indicated danger of an ice floe, and that therefore there was no negligence in the navigation.

There are some physical conditions about the spot where the Liberty was anchored which make good the claim of the appellee that it was a sheltered spot. Upon the chart, the place of anchorage is given as about a quarter of a mile above Sandy Point light on Prudence Island and a few hundred yards from the shore. The point is below the junction of the narrow channels which lead from the eastern passage northeasterly to Fall River, and northwesterly to Providence. This spot is perhaps a mile of navigable water between sharply descending shores of Prudence Island and Rhode Island. The water extends in width from the buoy above Coggeshell Point about a mile and three-quarters northerly to the buoy below Hog Island, and to the east of Hog Island is the narrow channel to Providence about 300 yards wide. On the west of Hog Island is the entrance to Providence Bay, about three-fourths of a mile wide. The barge was anchored well below the entrance to Providence Bay, which is sheltered on the west and northwest by Prudence Island, with heights rising to about 160 feet; on the east by Rhode Island, with heights of about 180 feet. On the north there is a shelter from Bristol Hook and Hog Island, and on the south by Dyer Island.

A vessel of the size indicated by the foregoing description indicates a sea-going craft capable of weathering any ordinary weather conditions. To anchor a vessel of this type in such a spot would indicate sufficient caution on the part of the navigator. It appears to have been a customary practice by other careful and prudent navigators to do so. Nor was there anything in the weather conditions which indicated that danger of an ice floe should have been anticipated. There was no wind, or any indication of any, at the time the barge was anchored, and the fact is that the wind which did come up later was of but 25 miles an hour. Although there were frozen waters for a few days before, the evidence indicates that the ice was thoroughly broken up, and about the anchorage grounds there was no ice. It further appears that, during the trip from Newport to Hog Island, no large floes of ice were encountered, and a vessel of this type should have been able, under ordinary circumstances, to withstand ordinary floating ice. For the master to have done, on this occasion, what he had done on many other occasions before, and what other barge captains before him did with safety, was all that could be expected of a reasonably prudent navigator. He exercised his best judgment, and there is no reason why, at the time he directed anchoring the vessel, he committed a negligent act. Nor do the authorities relied upon by the appellant, when applied, impose a liability here.

In The Thomas Purcell, 92 Fed. 406, 34 C. C. A. 419, the court found that it was not customary for boats to anchor off Stamford in stormy weather, and that when a barge was anchored with a storm threatening, the tug ignored the danger immediately at hand, which could and should have been avoided.

In Teddy Roosevelt (D. C.) 192 Fed. 997, a pile driver mounted on a scow was moored at the end of a pier under weather conditions

which indicated that a storm was to be anticipated. The storm came, as indications pointed it would, and the damage to the barge was sustained.

In Roney v. N. Y. Susquehanna R. (D. C.) 132 Fed. 321, a small schooner was anchored off Edgewater when large quantities of ice were plainly to be seen in the river. The ice was driven from the New York shore by a northwest wind, which should have been known might result in driving the ice against the schooner.

A mere mistake of judgment is not enough to impose liability upon the owner of the tug. The tug master must use reasonable skill and judgment, and the tug owners are liable for damages sustained through his failure to possess or exert these qualities. Inability to cope with an emergency which could not ordinarily be anticipated will not impose liability. The Battler, 72 Fed. 537, 19 C. C. A. 6. The tug master exercises ordinary skill and care if he anchors when there is no reason to apprehend danger and displays reasonable skill and judgment in arriving at this determination. McWilliams v. Phila. & Reading R. Co., 203 Fed. 859, 122 C. C. A. 84; The Willie, 184 Fed. 279, 106 C. C. A. 421.

The evidence here warranted the conclusion below that the master of the tug was a competent man of long experience, and that he had no reason to anticipate the unusual floe of ice which occurred on the night in question, and which came down the channel intact, striking the barge, and carrying the barge with it.

We find nothing in the evidence which condemns his care of the barge, and the decree is therefore affirmed.

SCHOONMAKER-CONNERS CO., Inc., v. LAMBERT TRANSP. CO.

(Circuit Court of Appeals, Second Circuit. November 17, 1920.)

No. 42.

1. **Shipping ⊜40—Term of time charter of lighters not extended by their unavoidable detention.**
Where lighters were chartered in December for one month for use in and about New York Harbor, the fact that at the end of the month some of them were in Passaic river, where they were held for several weeks by ice, *held* not to operate to extend the charter term, in the absence of any provision therefor in the contract or any custom to that effect.

2. **Shipping ⊜58(3)—Damages for detention beyond term of time charter.**
Notification by the owner of chartered lighters, at the end of the charter term, that a higher rate of hire would be charged thereafter, *held* not to make such rate the measure of damages for their unavoidable detention, where not agreed to by the charterer.

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

Suit in admiralty by the Schoonmaker-Conners Company, Incorporated, against the Lambert Transportation Company. Decree for respondent, and libelant appeals. Reversed, and cause remanded.

On December 4, 1917, the Schoonmaker Company chartered to Lambert Company two lighters. The agreement was in writing and declared that the charter was "for the term of one month, * * * time to commence December 3, 1917." It further provided that "these lighters, when light, will be returned to us in the towing limits of New York Harbor." On December 6, two other lighters were the subject of a similar written charter agreement. The language of this second agreement was identical with the first, except that charter time was to begin December 7, 1917. On December 29, 1917, Schoonmaker Company advised Lambert Company that on the expiration of the charter parties in question the lighters would be required in Schoonmaker's own work and therefore they must be returned. On January 4, 1918, none of the lighters having been returned, Schoonmaker Company wrote to Lambert Company that after the expiration of the stipulated period of one month the rate of compensation would be materially raised.

On receiving all four lighters, Lambert Company had subchartered them, and the subcharterer actually used them in the transportation of goods. The winter of 1917–1918 was, if not the most severe, as severe as any since 1815, when weather records began to be kept at Governor's Island, New York Harbor. At and shortly before the expiration of the charter period three of the lighters were lying loaded and awaiting discharge at a wharf on the Passaic river, egress from which was possible only by passage through Newark Bay, and both that bay and the river were frozen to such depth that navigation ceased for upwards of a month after the expiration of the charter period.

The fourth lighter was at the same time at a pier in Brooklyn in the possession of the subcharterer, and laden with the subcharterer's goods apparently destined for the Passaic river, access to which was impossible for the reasons above stated. It does not appear that there existed any physical impediment to the unlading of this fourth lighter where she lay, nor although it is said that New York Harbor "was in a terrible condition with ice that year," is it proven that harbor navigation was not going on.

Lambert Company did not return any of these chartered boats until February 18, and one of them was retained until March 6, 1918. February 18 was approximately the date when navigation of Newark Bay and the lower Passaic was resumed as a result of work with dynamite and by icebreakers. No reason appears why any lighter should have been kept as late as March 6, and none why the fourth lighter should have been kept until February 18, except that she was laden with subcharterer's cargo, and was kept by that charterer for his own purposes.

Lambert Company having refused to pay the advance rate demanded by Schoonmaker Company, this libel was brought to recover the same. Respondent admitted liability for, and asserted willingness to pay, the charter rate during the entire period of detention. The trial court dismissed the libel; libelant appeals.

Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant.

Foley & Martin, of New York City (George V. A. McCloskey, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] It is urged that the facts presented bring this cause within what are generally known as the "underlap and overlap" decisions relating to charter parties (Prebensons v. Munson, 258 Fed. 227, 169 C. C. A. 295, and cases cited: The Herm, 170 Fed. 60, 95 C. C. A. 336), and that respondent should therefore be charged with nothing more than the charter hire for the period of detention. But these cases all rest on the finding of fact that the extended or reduced period of service was within the contemplation of the parties, that the contract was meant

to cover a period of time measured rather by voyages than the exact length of months or days stated in the general words of the charter party. As was pointed out by Brown, District Judge, in The Straits of Dover (D. C.) 95 Fed. 690:

"The general purpose of the charter must be understood in accordance with common usage;" but (added the learned court) "had the charter been an absolute agreement to return the vessel at a fixed day, the result would have been quite different."

While maritime contracts or their interpretation are probably more subject to the influence of usage or general custom than most other agreements, yet they are and a charter is a contract like another, subject to the same general rules and leading to the same liabilities. We must take these contract writing as they were made; and since neither by pleading nor evidence is any usage or custom, maritime or otherwise, invoked to control construction, we find the words plain and requiring for their comprehension nothing beyond themselves.

To a charter for harbor use only the whole doctrine of voyages is inapplicable; to speak of the trips from pier to pier made by harbor craft as voyages is an absurdity, recognized by the decisions marshaling maritime liens. The Gratitude (D. C.) 42 Fed. 299. Voyages in any proper sense were not within the contemplation of the parties; they did not think in terms of voyages; and for this fundamental reason the overlap cases have no application. Nor do the written contracts contain any words modifying the obligation to return at the expiration of a month. That the boats were to be returned light covers merely the condition on return; the word cannot be construed as an extension of the time of return.

As to the lighter which was at a Brooklyn pier when the charter period ended, no reason is shown for not redelivering her, except the inconvenience and expense of taking off the subcharterer's cargo. In respect of the three lighters frozen up in the Passaic river, they were doubtless kept there by the act of God; but the charter party contains no reservation, and winters rendering navigation of the still and shallow waters of Newark Bay and Passaic river difficult, if not impossible, are by no means unknown. Such a contingency might, of course, have been anticipated and guarded against. It is held by controlling authority that—

"A party may by an absolute contract bind himself to perform things which subsequently become impossible, or pay damages for the nonperformance; and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract."

It is only "where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made that they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency" which afterwards happened. Chicago, etc., Ry. v. Hoyt, 149 U. S. 14, 13 Sup. Ct. 779, 37 L. Ed. 625. Cf. Rowe v. Peabody, 207 Mass. 232, 93 N. E. 604.

This rule applies, there having been no termination of contract by an impossibility of performance recognized by law or by frustration of adventure, as in the Claveresk (C. C. A.) 264 Fed. 276, or Texas Co. v. Hogarth Shipping Co. (C. C. A., Oct. T., 1919) 267 Fed. 1023. It follows that the decree must be reversed, and the cause remanded, with instructions to take evidence as to libelant's damages.

[2] The bald fact that libelant notified respondent that a higher rate would be charged if the lighters were kept after the charter period is unimportant. No contract resulted, and this action cannot lie to recover in the manner and form pleaded by libelant. Schoonmaker Company is entitled to damages for breach of the original contract of charter; the breach being failure to return at the expiration of the stipulated period.

It may be, as we held in Atlantic, etc., Co. v. A Cargo of Sugar, 249 Fed. 871, 162 C. C. A. 105, that the measure of damages will turn out to be the current rate of hire; but this depends on the inquiry whether, considering the then condition of New York Harbor and the difficulties of traffic, there was any actual employment available for these lighters during the period of greatest cold, or some portion of it. As to this we offer no opinion, further than to point out that the existence of real damage depends upon the existence of a real chance for profitable employment.

Decree reversed, with costs, and cause remanded for further proceedings not inconsistent with this opinion.

PORTSMOUTH FISHERIES CO. v. JOHN L. ROPER LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

No. 1812.

1. **Shipping ⟸42—Owner ordinarily bound to have vessel seaworthy, but not if charterer undertakes to determine seaworthiness.**
   As a general rule the owner of a vessel is bound to the charterer to see that she is seaworthy and suitable for the service in which she is employed; but the rule does not apply when the charterer expressly or impliedly undertakes to inspect the vessel and ascertain her seaworthiness and fitness for himself.

2. **Shipping ⟸42—Charterer held to have undertaken to inspect dredge and determine fitness and seaworthiness.**
   Correspondence between the owner and charterer of a dredge *held* to show that the charterer took upon itself the burden of inspecting the vessel and ascertaining for itself whether it was seaworthy and suitable for the service.

3. **Shipping ⟸54—Loss of hired dredge held due to charterer's negligence.**
   Where the charterer of a dredge undertook to determine its seaworthiness for itself and leaks could have been discovered by hauling the dredge out on the ways, but the charterer's agent, though knowing that mud probably attached to the hull, so as to prevent leakage would eventually fall away, made no examination, and left the dredge at anchor and unguarded, with its deck only a few inches above the water line, the sinking of the dredge was due to the charterer's negligence.

4. Shipping ⇐54—Charterer not relieved of liability for negligence because loss was not within its liability as insurer.

Where the owner of a dredge required the charterer to insure the dredge, and the charterer replied that it did not believe it could get insurance, but would assume such responsibility itself, the fact that the loss of the vessel due to unseaworthiness was not within its liability as an insurer did not defeat its liability as charterer for the loss of the vessel by its negligence in inspection and navigation.

5. Subrogation ⇐21—Charterer of dredge not entitled to subrogation against insurer until payment by it.

A charterer of a dredge, sued for its loss through its negligence, was not entitled to credit for the amount of outstanding insurance, as it had no right of subrogation until it paid its liability to the owner.

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

Suit by the John L. Roper Lumber Company against the Portsmouth Fisheries Company. Decree for plaintiff (260 Fed. 1008), and defendant appeals. Affirmed.

John A. Guion, of New Bern, N. C. (Guion & Guion, of New Bern, N. C., on the brief), for appellant.

A. D. MacLean, of Washington, N. C. (W. B. Rodman, of Norfolk, Va., on the brief), for appellee.

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

WOODS, Circuit Judge. The dredge Sandwich owned by libelant, Roper Lumber Company, sank on November 2, 1917, while in the possession of respondent, Portsmouth Fisheries Company. The District Court entered a decree in favor of libelant for $6,000, the value of the vessel and interest from date of the loss. Two questions are involved: What was the undertaking of the respondent with respect to the boat? Was the loss due to the negligence of the respondent's agents?

In answer to a written application of respondent to hire the dredge, libelant wrote that respondent would have to go to Bellhaven, where the boat was, and find out if it would suit; that, if it did suit respondent, the charges would be $25 a day; that respondent must insure for $6,000 against both fire and marine risk; that the boat would have to be accepted and returned in first-class condition, wear and tear excepted. On October 24th respondent replied it had sent a man to look at the dredge, and, upon his report, thought it would do the work. As to insurance respondent wrote:

"We do not believe that we can get insurance on the boat, but, if we take it, we will assume the responsibility to the amount of $6,000. However, if you have any connection that will insure it, and you will place it, we will pay the premium. We presume you can get term insurance, and in our case 30 days will more than cover the time it will be in our possession."

Libelant's answer of October 29th states that it understands respondent to accept all the conditions and—

"if insurance of $6,000 cannot be obtained your proposition of assumption of liability of $6,000 will be substituted. Your representative to deliver your order and to sign receipt for boat being in satisfactory condition when taken."

Respondent's agent gave the following receipt:

"Received of the John L. Roper Lumber Company the suction dredge Sandwich for account of the Portsmouth Fisheries Company on their contract with the Lumber Company. Said boat being accepted as being in a satisfactory condition to us."

When Piner, respondent's agent, received the dredge it was lying on a mud bank. He made an examination of so much of the boat as was visible, including the engine and pumps, but did not examine the portion of the hull that was under water. This could have been done by hauling the boat out on the ways. Fosken, master of one of the towing tugs, warned Piner it was not safe to take her out without such examination. Piner himself testified that ordinary care required such an examination, but he did not make it because he was in a hurry. He also testified:

"You can take a leaky boat and put it on a mud bottom; it will tighten the seams, still will have no lasting power to it. It is liable to drop out any time, especially in moving the boat. Towing a boat would have a tendency to hold the seams together and hold what was in them together. After the towing stopped and the boat was anchored, it would have a tendency to open the wood."

Piner and his crew left Bellhaven with the dredge in tow at 12 o'clock m. They proceeded about 25 miles down the river and anchored at Judith's Point for the night. The stop was made because it was regarded unsafe to cross Pamlico sound at night. The dredge was examined about 7 o'clock in the evening and no evidence of a leak was discovered. No one was left on the dredge and no watch was kept. During the night the dredge sank. The pumps were in order and there is no dispute that the loss could have been prevented by their use. The deck of the vessel was in a few inches of the water line, and the wind may have driven the waves in. On the other hand, the evidence clearly shows that leaks were to be expected. The peril of the vessel from wind and leaks was obvious.

[1] The general rule is that the owner of a vessel is bound to the charterer to see that she is seaworthy and suitable for the service in which she is employed. But the rule does not apply when the charterer undertakes by contract, either express or implied, to inspect the vessel and ascertain for himself her seaworthiness and fitness. Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012; Sanford & Brooks Co. v. Columbia Dredging Co., 177 Fed. 878, 101 C. C. A. 92 (4th Circuit).

[2, 3] It is evident from the correspondence that the charterer took upon itself this burden, and from the parol evidence that, if its agent had inspected with due care, the liability of the vessel to the leaks which resulted in her loss would have been discovered. The agent of respondent was negligent in failing to haul the vessel on the ways and examine her hull when he knew that mud probably attached to the hull, so as to prevent leakage for a time, would eventually fall away in the open water. Still greater was the negligence of the re-

spondent's agent in leaving the vessel entirely unguarded, when he had reason to anticipate leaks and over wash of the sea, and when upon discovery of either the vessel could have been saved by the use of the pumps. It follows that the respondent as charterer is liable to the libelant as owner because the loss was due to the negligence of the respondent.

[4] The contract of insurance does not affect this conclusion. Assume that an insurer is not ordinarily liable for the loss of a vessel due to unseaworthiness, and that the dredge was unseaworthy, and it would follow that merely as insurer respondent would not be liable for the loss of the vessel had it been under the navigation of the libelant, the insured. But respondent was not only insurer against the perils of the sea not due to unseaworthiness, but it was also a charterer liable for the loss which was due to its own negligence in inspection and navigation. Obviously it could not escape on the ground that its liability for its own negligence as charterer was merged in its liability as insurer against the perils of the sea.

[5] The claim that libelant should be required to give credit to respondent for an outstanding policy of insurance on the dredge for $3,500 cannot be sustained. Nor did the District Judge err in denying the motion to make British & Foreign Marine Insurance Company, Limited, a party to the action. The respondent being liable to the libelant can have no right of subrogation until it has paid the liability. Ætna Life Insurance Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537. As the insurance company is not a party, we express no opinion as to the right of the respondent to subrogation after it has paid the decree against it.

Affirmed.

HUGHES v. CHESAPEAKE & OHIO COAL & COKE CO.

(Circuit Court of Appeals, Third Circuit. February 1, 1921.)

No. 2576.

1. **Damages ⇐59—Damages from breach of transportation contract, causing breach of contract of sale, not reduced because market price had increased.**

Where plaintiff, engaged in mining and selling coal, contracted to sell 8,000 tons to an electric company, by reference to quantity and grade, and without reserving or setting apart any particular coal, and contracted with defendant to transport the coal, the damages from defendant's breach, causing plaintiff to break its contract with the electric company, could not be reduced because plaintiff sold coal to other parties at a price higher than the contract price, since, if defendant had performed, it would doubtless have sold that much more coal.

2. **Appeal and error ⇐1033(5)—Measure of damages for breach of transportation contract selected by court held not prejudicial to defendant.**

Where defendant's breach of his contract to transport coal for plaintiff caused plaintiff to break its contract of sale with a third person, for which plaintiff was held liable to the third person, an instruction that the measure of damages was the difference between the contract rate for transportation and the increased market rates for the same period

did not prejudice defendant; the theory of damages selected imposing the lowest damages of any theory conceivably applicable.

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Action by the Chesapeake & Ohio Coal & Coke Company against James Hughes, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

Russell E. Watson, of New Brunswick, N. J., for plaintiff in error.

Treacy & Milton, of Jersey City, N. J. (John Milton, of Jersey City, N. J., of counsel), for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and BODINE, District Judge.

WOOLLEY, Circuit Judge. The one question under review concerns the measure of damages for breach of the contract in suit. Speaking of the parties as they stood in the court below, the defendant, a charterer of boats and barges, was engaged in the business of furnishing and selling water transportation. The plaintiff was a coal mining company with storage and loading facilities at Norfolk, Virginia, engaged in the sale and transportation of coal along the Atlantic seaboard.

The defendant contracted to furnish the plaintiff transportation from Norfolk, Virginia, to the dock of the General Electric Company at West Lynn, Massachusetts, for monthly cargoes of coal of different tonnage, amounting for the period in question to 8,000 tons, at the rate of $1.05 per ton. After supplying transportation for 1,628 tons, the defendant defaulted,—whether because of greatly increased coastwise freights or inability to charter barges,—leaving unfurnished transportation for the remaining 6,372 tons. The defendant's breach of his undertaking brought about a corresponding breach on the part of the plaintiff of its coal contract with the General Electric Company, for which later the plaintiff was required to pay that concern $9,276.52 in damages. Contemporaneously with the scarcity of water transportation and the increase of freight rates, there was an increase in the market price of coal.

The plaintiff sued. At the trial, breach being admitted by the defendant and no pertinent fact being disputed, the court submitted the case to the jury, charging with reference to the measure of damages that the plaintiff was entitled to recover, not the amount of damages it was compelled to pay the General Electric Company, but the difference between the contract rate for transportation for the named months and the increased market rates for the same periods. On judgment being entered upon verdict for the plaintiff in the sum of $7,956.55, the defendant prosecuted this writ of error.

[1] The plaintiff in error (defendant below) specifies as error the refusal of the trial court to charge his several points, which, when compressed, were to the effect that if the jury found from the evidence that the coal undelivered by the plaintiff to the General Electric Company was sold elsewhere at a price in excess of the price at which it

was agreed to be sold to the General Electric Company, (a) the damages sustained by the plaintiff should be diminished to the extent of such excess; (b) there devolved upon the plaintiff the duty affirmatively to establish by evidence the amount of such excess; and (c) failing so to do, the plaintiff can have a verdict only for nominal damages.

Laying aside the question on which party rests the burden of proving elements in diminution of damages as a matter not pertinent to this issue as we shall decide it, we are of opinion that the serious fault in the defendant's contention—that the plaintiff's sale of coal on the market at a price higher than its contract price with the General Electric Company diminished its damages—arises from the defendant's failure properly to apprehend or to state all the facts in the case. The rule of damages for which the defendant insisted—and still insists—was based on the hypothesis that the 6,372 tons of coal, not shipped because of the defendant's failure to furnish transportation, were afterwards sold by the plaintiff at a price higher than that at which it would have sold it to the General Electric Company if the defendant had not breached the contract. This contention was based on the further suppositions that the plaintiff had allocated to the General Electric Company and held for its use alone a particular body of coal in the amount of the contract tonnage, and that after the defendant's breach of the contract the plaintiff sold this particular coal on the market at a price higher than it would have gotten if it had been able to make deliveries to the General Electric Company. This premise—on which alone the defendant's contention for diminished damages was based—we regard as false in view of the character of the plaintiff's business and its manner of carrying it on.

The plaintiff was engaged in the business of mining coal. That was its main operation. It was engaged also in the business of selling and shipping the coal it mined. It moved coal from its mines in West Virginia to its dock at Norfolk, Virginia, where at all times it kept as nearly as may be a reservoir of 10,000 to 12,000 tons from which it drew indiscriminately to meet its contracts as transportation was available. In contracting for the sale of coal it contracted with reference to quantity and grade, not with reference to coal by description or designation. No particular coal or body of coal was reserved or set apart to fill any of its contracts.

It is readily seen that this is not a case where a vendor, who, after refusal by the vendee to accept specific goods contracted for, disposed of them to someone else at the market, and where, accordingly, his damages would be the difference between the contract price and the resale price. It is a case where the plaintiff vendor was prevented by the defendant's breach from selling this quantity of coal to anyone else. If the defendant had supplied the plaintiff with barges sufficient to carry the tonnage contracted for, the plaintiff—remembering always that it was a miner, dealing not in specific coal but with its mine output on a tonnage basis—would, doubtless, have sold just 6,372 tons of coal more than it did. The plaintiff's supply of coal was not limited, except, of course, by the contents of its mine; its coal deliveries were distinctly limited by transportation facilities. Its

concern at the time was not with mine production or with coal sales but with facilities for transportation. It was with reference to these that it contracted with the defendant. Its loss from lack of such facilities, occasioned by the defendant's failure to supply them as he had contracted to do, was not diminished by the sale of coal elsewhere at a higher price by resort to such other facilities of transportation as it could obtain.

[2] We are of opinion that of the several theories of damages—other than the one of nominal damages—conceivably applicable to this case, the court, if it erred at all in selecting for its instructions to the jury that one which, imposing the lowest damages, embraced the difference betwen the stipulated rate of freight and the current rates at the periods when according to the contract the transportation should have been ready (Higginson v. Weld, 80 Mass. [14 Gray] 165; The Oregon v. Pittsburgh & L. A. Iron Co., 55 Fed. 666, 5 C. C. A. 229; Ogden v. Marshall, 8 N. Y. 340, 59 Am. Dec. 497), did not prejudice the defendant.

The judgment below is affirmed.

RADER v. NORTHRUP-WILLIAMS CO.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

No. 1814.

1. **Sales ⇐117—Delay of shipments of installments held to entitle buyer to rescind.**

   In contracts between merchants, time is of the essence as to the delivery of specified installments as well as to delivery of the total amount, so that where the seller, who had agreed to deliver barrel staves in equal proportions during six months, failed without excuse to make any deliveries during the first three months, the buyer was entitled to rescind.

2. **Sales ⇐172—Seller, not ready to ship, cannot rely on failure to get permits.**

   A seller, who had not manufactured any of the goods during the first three of the six months in which they were to be delivered, cannot defeat the buyer's right to rescind for the delay in delivery by claiming that it could not ship the goods until the buyer obtained a permit from the Director General of Railroads.

3. **Sales ⇐150(1)—Seller held required to notify buyer of necessity for shipping permits.**

   Where the contract for the sale of barrel staves delivered in monthly installments was accompanied by the buyer's letter requesting immediate notice of difficulty in getting cars loaded or forwarded, and the buyer thereafter again requested the seller to give notice of delay in securing cars or making shipments, it was the seller's duty to notify the buyer to procure permits for the shipments from the Director General of Railroads, if such permits were found to be necessary.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Charles A. Woods, Judge.

Action by Ott Rader against the Northrup-Williams Company. Judgment for defendant, and plaintiff brings error. Affirmed.

L. H. Kelly, W. E. Hines, Van B. Hall, and B. P. Hall, all of Sutton, W. Va., for plaintiff in error.

Haymond & Fox, of Sutton, W. Va., for defendant in error.

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

KNAPP, Circuit Judge. Rader, plaintiff in error, a citizen of West Virginia, sued the Northrup-Williams Company, a New York corporation, for breach of contract. The defense set up at the trial under plea of non assumpsit, was that plaintiff had failed to perform the contract on his part. This defense prevailed, a verdict for defendant was directed, and plaintiff brings the case here on writ of error.

The contract in form is a letter from defendant to plaintiff, dated September 19, 1918, confirming the purchase from the latter of 200,000 barrel staves at $80 per thousand, to be delivered f. o. b. at Little Otter, W. Va., "shipment in equal proportion between October 1, 1918, and April 1, 1919." In the letter transmitting the confirmation and requesting plaintiff to sign and return the duplicate, which he did, defendant writes:

"If you have any difficulty in getting cars for loading, or in getting the cars forwarded after you have them ready, please wire us, and we will handle the matter immediately."

With this letter were sent two orders or shipping directions, each for a carload of staves, to be shipped "as soon as possible"; and in each of these orders defendant says: "Advise promptly if you are experiencing trouble in securing empty cars to load our shipments." And on September 27th, acknowledging receipt of the signed duplicate, defendant again says: "Kindly advise when you will be ready to commence shipment." On October 23d plaintiff writes, "I am cutting timber on two different tracts on your contract," and goes on to solicit another contract for "three to eight hundred thousand staves at the same price," to be delivered in nine months. On December 30th, no staves having been shipped by plaintiff and nothing further heard from him in relation thereto, defendant canceled the contract by letter of that date. In the meantime the market price of staves had materially declined, and such decline continued for several months thereafter. Some correspondence followed the cancellation, and in July, 1919, this suit was brought.

[1] It seems not doubtful that time was of the essence of the contract in question. In this respect the facts here admitted are less favorable to plaintiff than those considered in Norrington v. Wright, 115 U. S. 188, in which the Supreme Court says, at page 203, 6 Sup. Ct. 12, 14 (29 L. Ed. 366):

"In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time and place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance

and maritime law, that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract."

And particularly applicable to the case in hand is the further statement (115 U. S. 204, 6 Sup. Ct. 15, 29 L. Ed. 366):

"The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once."

Plaintiff undertook to ship the 200,000 staves "in equal proportion" during the six months named; that is to say, approximately 33,000 each month, beginning in October. This he wholly failed to do, and when three months or more had passed without the shipment of any staves, and without a word of excuse for the delay, defendant had the undoubted right to rescind the contract. Its agreement to purchase was conditioned upon monthly deliveries as promised, and plaintiff's disregard of that promise operated to relieve defendant from obligation. Upon this branch of the case nothing further needs be said.

[2] But plaintiff alleges, and this appears to be his main reliance, that during the entire contract period the railroads of the country were under government control; that such commodities as staves could not be shipped without permits from the Director General of Railroads or issued by his authority; that such permits could be obtained only by the parties to whom shipments were to be made; that it was defendant's duty to procure the necessary permits; and that it was impossible for him to ship the staves until permits therefor were furnished.

Answers to this contention are not far to seek. In the first place, there is no proof that such a requirement was in force at the times when plaintiff should have made shipments of "equal proportion" in the three months following the date of the contract. The testimony indicates, though in a rather indefinite way, that sometimes permits had to be obtained, while at other times shipments were made without them. It does appear, however, that permits, when necessary, were furnished only to those who were actually ready to ship, and plaintiff was never in that position. In point of fact he did not begin the manufacture of staves for this contract until some time in January. During the preceding months there were plenty of staves in the local market which he could have bought, and enough were offered him to make the agreed deliveries, but he declined to purchase even the two carloads for which defendant had sent shipping directions in September. In short, at no time in the next three months was he prepared to load a car, or had any staves on hand, and it is idle to say that he was prevented from filling his contract by defendant's failure to furnish him with permits.

[3] In the second place, if plaintiff had been prepared to make shipments as promised, and any difficulty had arisen about getting cars or permits, it would have been his duty to give the defendant

prompt notice. This duty was put upon him by the nature of the case, as well as by explicit instructions in the letter transmitting the contract and in the orders sent therewith for the shipment of two carloads of staves. And failure to notify defendant, in the circumstances assumed, would have been an obvious breach of contract obligation. But admittedly plaintiff never asked for an empty car, or made any inquiry as to whether permits were necessary, or called upon defendant for any aid he might have needed in that regard, and for the simple reason that he never had any staves to ship.

On the undisputed facts of record plaintiff is without legal excuse for failing to perform the contract on his part, and the trial court was clearly right in directing a verdict for defendant.

Affirmed.

SHERER-GILLETT CO. v. PILSBURY et al.

In re BENTZ.

(Circuit Court of Appeals, Fifth Circuit. January 13, 1921.)

No. 3596.

Sales ⇐456—Instrument in form of lease, with option to purchase, held not "conditional sale."

An instrument in the form of a lease of a display counter for 20 months, for $5 paid at the time and $6 a month thereafter, under which the lessee was to keep the property insured and pay taxes thereon, and surrender the property on the expiration of the term, and on such surrender had an option to purchase it for $10, was a lease, and not a "conditional sale," under the law of Louisiana, especially Rev. Civ. Code, arts. 2670, 2676, which permit the leasing of movable property.

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

Petition to Superintend and Revise from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Proceeding by the Sherer-Gillett Company against A. L. Pilsbury, trustee in bankruptcy of Henry C. Bentz, and others. A petition for an order requiring a surrender by the trustee of certain property was denied (267 Fed. 606), and the claimant brings a petition to superintend and revise the order. Petition granted, and decree reversed.

Walter J. Suthon, Jr., of New Orleans, La. (Hall, Monroe & Lemann, of New Orleans, La., and James G. Elsdon, of Chicago, Ill., on the brief), for petitioner.

St. Clair Adams, of New Orleans, La., for respondents.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. Under a written instrument executed in April, 1919, Henry C. Bentz acquired from the petitioner, Sherer-Gillett Company, a display counter, which was in the possession of Bentz when he was adjudged bankrupt on July 2, 1919. The counter

was not listed by the bankrupt on his schedules as an asset of his estate, and the petitioner was not listed as a creditor. The trustee in bankrupty took possession of the counter, and undertook to sell it as a part of the assets of the bankrupt estate, without giving any notice to the petitioner of the pendency of the bankruptcy proceeding or of the application for an order to sell the counter. Thereafter the petitioner demanded of the purchaser at such sale the delivery of the counter to it. That demand not being complied with, the petitioner, by a petition filed in the bankruptcy proceedings against the trustee and the purchaser at such sale, sought an order requiring the delivery of the counter to it. Thereupon the person claiming as purchaser filed in the bankruptcy proceeding a petition asking for the return of the sum he had paid for the counter, in the event of the court holding that it was not an asset of the bankrupt estate; the trustee then having in hand ample funds to enable him to comply with such an order. The court decided against the claim of the petitioner that it was entitled to the counter.

The instrument under which the bankrupt acquired the counter was in the form of an order given at New Orleans, La., addressed by him to the petitioner and accepted by the latter. By the terms of that instrument the petitioner leased the counter to the bankrupt for the term of 20 months; the bankrupt promising to pay therefor, as rent, the sum of $125 in installments, $5 being payable when the contract was entered into, and $6 on the 10th day of each of the succeeding 20 months. The bankrupt made no payment, except the initial one of $5. He agreed upon the expiration of said term to surrender the counter to the petitioner in good condition, ordinary wear and tear excepted. The instrument contained the following provision:

"It is an express condition of this lease, provided said leased property has been duly surrendered to you, that I (or we) shall have the privilege, for thirty days after the expiration of the same, of purchasing said counter for the price of $10 to be paid at the time such privilege is exercised, provided, further, I shall have fully and duly performed my (or our) part of the lease."

It also contained provisions to the following effect: The whole hire for the whole of said term was to become due and payable upon the breach of any covenant by the bankrupt, and in that event petitioner was to have the right to retake possession of the counter, without notice or previous demand. The filing of any petition in bankruptcy by or against the bankrupt shall be considered a breach of the contract. The bankrupt agreed to keep the property fully insured for the benefit of the petitioner and without expense to the latter, and to pay all taxes on the property while in the former's possession.

In behalf of the respondents it is contended that the contract was a conditional sale, disguised as a lease, and that the title to the property passed to the bankrupt, notwithstanding the stipulation undertaking to reserve title to the petitioner. Under the law of Louisiana such would be the result, if the contract was a conditional sale, and not a lease. Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 South. 193. Under the contract the bankrupt had an option to purchase. So long as that option was unexercised, he was not obligated, unconditionally or conditionally, to pay the price re-

quired to be paid to make him the owner. In the absence of an exercise of the option and the payment of the stated price, the extent of the right acquired by the bankrupt by his complying with the obligations imposed upon him by the contract was to possess and use the counter for the stated period of 20 months. The law of Louisiana permits the leasing of movable property. Revised Civil Code of Louisiana, arts. 2670, 2676. Controlling decisions support the contention that the presence in the contract here in question of the unexercised option to purchase did not keep it from being a valid one of lease, and not one of sale. Doullut v. Rush, 142 La. 443, 77 South. 110; Stevens v. Older & Chandler, 26 La. Ann. 634; Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 South. 193. In the opinion in the last-cited case it was recognized that the distinction between a contract of sale and such a contract as the one in question is that the former creates an obligation to pay the agreed price, while the latter imposes no such obligation prior to the exercise of the option to buy.

In the light of the state of facts disclosed in the first-cited case, the decision therein supports the proposition that such a contract as the one in question is not kept from being one of lease by the circumstance that the price to be paid in the event of the exercise of the option to buy was only $10 in addition to the amount the bankrupt obligated himself to pay as rent. It was disclosed in that case that the amount payable as rent was considerably more than it might have been expected to be if the option to buy had not been given. Without paying the sum stated in the option provision, which was payable only in the event of the exercise of the option, a compliance by the bankrupt with all obligations imposed upon him by the contract would have left him without right to the counter upon the expiration of the term for which he was to have the possession and use of it. As a result of his defaults his right ceased to exist prior to his bankruptcy. The petitioner never acquired the right to be paid the only price at which it agreed to sell. There is no law to prevent a lessee paying taxes on, and the cost of insuring, leased property as the whole or a part of the consideration for the use and enjoyment of it. We are of opinion that the bankrupt's relation to the counter was that of a lessee, who by his defaults had lost any right to retain possession, and was not that of a purchaser; he not having either paid or obligated himself, unconditionally or conditionally, to pay the price stated in the unexercised option to buy. It follows that the trustee was without right to sell the counter as an asset of the bankrupt estate. The court erred in ruling otherwise.

The petition is granted, and the decree under review is reversed.

JACKSON v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals, Fifth Circuit. January 11, 1921.)

No. 3588.

1. **Telegraphs and telephones ⊂=53—Nondelivery of telegram, creating void contract, does not cause damage.**
   Plaintiff was not damaged by nondelivery of a telegram sent him by a Texas corporation, accepting his offer to exchange land in Texas for property of the corporation, where, under the laws of Texas, the executory contract thereby created would have been wholly void.

2. **Corporations ⊂=435—Agreement to purchase land not needed in business, though with purpose of winding up affairs, held void.**
   Under Rev. St. Tex. 1911, arts. 1164, 1175–1177, an agreement by a Texas corporation to exchange property owned by it for lands in Texas, which were not needed in any business it was authorized to transact, and were not taken in due course of business to secure the payment of a debt, would have been not merely ultra vires, but wholly void, though the exchange was for the purpose of winding up its affairs, paying debts, and distributing its assets.

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

Action by C. H. Jackson against the Western Union Telegraph Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. F. Carl, of San Antonio, Tex. (Carl, Swearingen & Clifton, of San Antonio, Tex., on the brief), for plaintiff in error.

C. A. Goeth, of San Antonio, Tex. (W. E. Spell, of Waco, Tex., Goeth, Webb & Goeth, of San Antonio, Tex., and Francis Raymond Stark, of New York City, on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was an action by the plaintiff in error, C. H. Jackson (herein referred to as the plaintiff), to recover damages for the alleged negligent failure of the defendant in error, Western Union Telegraph Company (herein referred to as the defendant), to deliver a telegram sent to the former on March 17, 1917, by an official of the Texas Cooking Oil Company, a Texas corporation, stating that corporation's acceptance of a proposition previously made to it by Jackson to trade its oil mill refinery, located at Burlington, Tex., for a tract of land in Gaines county, Tex., containing 13,284 acres, subject to an incumbrance thereon. The plaintiff had an option on the Gaines county land, which expired on the date mentioned. Under the proposition made by the plaintiff to the Texas Cooking Oil Company, the latter had to accept not later than that date. The plaintiff had a contract with one McGregor to sell to him the oil mill refinery property on such terms that the plaintiff would have made a net profit of $4,000, if he had got the Gaines county land under his option and had traded that land for the oil mill refinery property. It was claimed that the defendant's failure to deliver the telegram prevented the exercise by the plaintiff of his option on the Gaines

county land, and caused him to lose the profit he would have made by trading that land for the oil mill refinery property. The charter of the Texas Cooking Oil Company shows that the purpose for which that corporation was formed was:

"The erection and operation of a plant for the manufacture of all classes and grades of products to be made from cotton seed, more especially the manufacture and sale of cooking oil from cotton seed."

It was disclosed that the Gaines county land was suitable for grazing purposes only, that the acquisition and ownership of it was not necessary to enable the Texas Cooking Oil Company to do business in Texas, that said lands were not suited for the conduct of the business for which that company was incorporated, or a business which that corporation was lawfully authorized to transact, and that said lands were not being purchased by that company in due course of business to secure the payment of a debt. It was disclosed that the oil mill refinery property of that company was unprofitable, that that company had ceased to do business and owed debts, and that its acceptance, evidenced by the above-mentioned telegram, of plaintiff's proposition, was made, with the consent of all its shareholders, for the purpose of winding up its affairs, paying its debts, and distributing its assets among its shareholders in such a way as would be to their profit and advantage. The court ruled that the contract resulting from the Texas Cooking Oil Company's acceptance of the plaintiff's above-mentioned proposition to it was prohibited by the laws of Texas, was wholly unperformed, and was ultra vires, unlawful, and void, and the suit was dismissed.

[1,2] It cannot well be said that the plaintiff would have been benefited by the prompt delivery of the telegram in question, if the contract resulting from the acceptance by the Cooking Oil Company of the proposition made to it by the plaintiff was an executory one, conferring on the plaintiff no legally enforceable right. The prompt delivery of the telegram would have served only to inform plaintiff that the Cooking Oil Company agreed to trade its oil mill refinery property for the Gaines county lands. That that agreement, made under the circumstances stated, created no legal obligation, we think is plainly shown by the following provisions of the statute law of Texas:

"No private corporation shall be permitted to purchase any land under the provisions of this chapter, unless the lands so purchased are necessary to enable such corporation to do business in this state, or except where such land is purchased in due course of business, to secure the payment of debt."

"All private corporations authorized by the laws of Texas, * * * as mentioned in the preceding articles, which have, heretofore, * * * acquired by lease, purchase or otherwise more land than is necessary to enable them to carry on their business, shall, within fifteen years from the time this law takes effect, * * * sell and convey in fee simple all lands so acquired, and which are not necessary for the transaction of their business."

"No private corporation heretofore or hereafter chartered or created whose main purpose of business is the acquisition or ownership of land by purchase, lease or otherwise shall hereafter be permitted to acquire any land within this state by purchase, lease or otherwise."

"No corporation, domestic or foreign, doing business in this state, shall

employ or use its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation or those permitted by law."

Revised Civil Statutes of Texas 1911, §§ 1175, 1176, 1177, and 1164.

The agreement was an executory one of a private corporation to purchase lands not necessary to enable it to do business in Texas, and it was not one for the purchase of land in due course of business, to secure the payment of debt. It was one to do a thing prohibited by the above set out statute law. The stated exceptions to the explicit prohibition do not include a purchase of land by a corporation for the purpose of winding up its affairs, paying debts, and distributing its assets among its shareholders. The timely receipt of the telegram by the plaintiff could not have had the effect of making the oil mill refinery property subject to the plaintiff's control, so as to enable him to realize a profit on a resale of it. The contract was not merely ultra vires in the proper sense; that is to say, outside the object of the corporation's creation as defined in the law of its organization, but was explicitly prohibited by statute. Such a contract is not voidable only, but is wholly void, and of no legal effect. Central Transportation Co. v. Pullman Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; Jacksonville v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515; McCormick v. Market Nat. Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; California National Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198. The purpose of the telegram was to obligate the sender to do a thing prohibited by the law of Texas. The sending of it was a step towards bringing about a forbidden result. The plaintiff could not have been damaged by a failure to get notice of the making of a promise which created no obligation and was without any legal effect. His position was not changed for the worse by the defendant's negligent failure to deliver. The timely delivery of the telegram would not have improved the plaintiff's position with respect to contemplated trades based upon the oil mill refinery property being subject to his disposition. He was equally without any enforceable right in or to that property, whether the proposition he had submitted was accepted or rejected. The conclusion is that the plaintiff acquired no right as a result of the nondelivery of the telegram evidencing the Texas Cooking Oil Company's undertaking to do a thing prohibited by the law under which it existed. It follows that the court did not err in ruling as above stated.

The judgment is affirmed.

LYBRAND v. UNITED STATES.

DRAFTS v. SAME.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

Nos. 1817, 1818.

1. **Bankruptcy ⇐496—Instruction as to advice of counsel held inapplicable, when affidavit on which perjury was assigned was not so made.**
Where defendant filed a sworn claim in bankruptcy on receipts for cotton, and subsequently filed an affidavit in support of a third person's claim for the same cotton, and was indicted for false swearing in making such affidavit, an instruction that, if he fairly stated the facts with reference to the claim to an attorney and honestly followed the attorney's advice in swearing to the affidavit in question, he was not guilty, was inapplicable, the second affidavit not having been made on advice of counsel, especially as, on the government's theory, the first affidavit, which was so made, was true.

2. **Bankruptcy ⇐495—On trial for making false proof of claim in bankruptcy, advice of counsel to third person held incompetent.**
Where L. was indicted for false swearing in connection with a claim in bankruptcy on a receipt for cotton, and D., who had previously filed a claim for the same cotton, testified that in so doing he acted on the advice of counsel, the conversation with counsel was properly excluded as incompetent; the truth or falsity of D.'s proof of claim not being in issue.

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

Henry D. Lybrand and George S. Drafts, Jr., were convicted of false swearing, and they bring error. Affirmed.

C. M. Efird, of Lexington, S. C. (Efird & Carroll, of Lexington, S. C., on the brief), for plaintiffs 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 KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

KNAPP, Circuit Judge. These cases were separately tried, but the facts in the main are common to both, and they may be disposed of in one opinion.

March 30, 1912, one W. P. Roof, of Lexington, S. C., was adjudicated bankrupt. In the mercantile business carried on by him at that place he was accustomed to buy cotton and issue therefor cotton bills, or receipts, showing the price on the day of delivery, which bills could be held by the sellers and presented for payment as they desired, and these bills were sometimes transferred from one person to another. In April, 1912, the defendant George S. Drafts, Jr., filed a claim against the bankrupt's estate, sworn to in the usual form, for eight bales of cotton, evidenced by two bills, each for four bales, one issued in February and the other in March of that year. Subsequently a divi-

dend was paid to him on the amount thus claimed to be due for the eight bales of cotton, less some credits on the bills and a merchandise account. He retained the whole of this dividend.

On the 15th of August, 1918, the defendant H. D. Lybrand, filed proof of claim with the trustees, in which he swore that one of the cotton bills issued to Drafts, which one does not appear, had been transferred to him prior to the bankruptcy of Roof, and asked allowance of the amount. On the 14th of August, 1918, Drafts made an affidavit that he had transferred this bill to Lybrand prior to the bankruptcy of Roof. For making these affidavits both of them were indicted and convicted, under subdivision 6 of section 29 of the Bankruptcy Act.

[1] *The Drafts Case.* On his trial Drafts admitted making the proof of claim for eight bales of cotton in April, 1912, and the inconsistent affidavit of August, 1918. His explanation of the former was that he went to one Dreher, a Lexington attorney of good standing, who had since died, to have his proof of claim made out; that he told Dreher he had transferred one of the bills to Lybrand prior to the failure of Roof; that Dreher advised him that he must make out the claim for the whole of the eight bales; and that he accepted this advice and made out the claim accordingly. His statements in this regard were substantiated by other witnesses present at the time. In view of this testimony, defendant's counsel asked the court to instruct the jury as follows:

"If you conclude from the evidence in this case that the defendant went to his attorney and stated fairly the facts with reference to his claim against the bankrupt estate of Roof, and, having so stated the facts fairly and fully, that he honestly followed the advice of his attorney in swearing to the affidavit in question here, then he is not guilty of perjury."

The court refused this request and instructed the jury that "the advice of counsel is no excuse for intentional crime."

The only errors assigned are based on exceptions to this ruling. It is enough to say in answer to the contention here made, as the learned judge said in refusing the request, that defendant was on trial not for swearing falsely in the original proof of claim, but for swearing falsely in the affidavit of August, 1918, and there is no pretense that the latter was made on the advice of counsel. If the affidavit on which Drafts was indicted was true, the affidavit of April, 1912, was false, and the advice of counsel would be a defense only as against a charge of false swearing in that affidavit. On the other hand, if the August affidavit was false, as the government asserts, the April affidavit was true, and, if true, the fact that it was made on the advice of counsel is of no importance. In either case, therefore, the instruction asked for was inapplicable to the issue submitted to the jury, and the record shows that it was refused for that reason. Moreover, taking the charge as a whole, it is evident that the matter in dispute was fully and clearly explained to the jury, and they could not have been misled by refusal to add the requested proposition. This is not to say that the ruling in question is deemed erroneous from any point of view,

for we are not of that opinion, but merely that in the circumstances here considered it needs no defense.

[2] *The Lybrand Case.* On the trial of Lybrand, following that of Drafts, the latter was a witness for defendant. As in his own behalf, he testified again without objection that his proof of claim in 1912 for eight bales of cotton was made on the advice of his attorney, Dreher; that he had in fact transferred to Lybrand, before the failure of Roof, one of the bills issued to him; that he so informed Dreher, to whom he fully and fairly stated all the facts of the case; and that Dreher advised him that under the circumstances "the proper way to make out the claim was for the entire eight bales covered by both receipts." He was then asked to give the conversation with Dreher, including what was said by Dreher with reference to proving his claim, but this was excluded. Another witness for defendant, who overheard the conversation between Drafts and his attorney, was asked the same question, but was not allowed to answer. The exclusion of this testimony is the only error assigned.

The contention can hardly be regarded as serious. Lybrand was on trial for false swearing in his affidavit of August, 1918. He was not a party to or in any wise connected with the proof of claim made by Drafts in 1912, and the advice upon which the latter acted at that time could not be a defense to the charge which Lybrand was called upon to meet. Besides, as above pointed out, the truth or falsity of Drafts' proof of claim was not in issue. It was proper for him to explain the contradiction between that proof and his later affidavit by showing that the former was made on advice of counsel, but as respects Lybrand that advice was a collateral matter and the offered testimony was clearly incompetent.

In both cases the judgment will be affirmed.

ST. PAUL FIRE & MARINE INS. CO. v. SNARE & TRIEST CO.

(Circuit Court of Appeals, Second Circuit. November 17, 1920.)

No. 21.

Insurance ⊜312—Substantial compliance with representation, in marine policy, of dry-docking required.

The overhauling of a scow, in which her bottom was not seen or examined, *held* not a substantial compliance with a promissory representation in a marine insurance contract that she should be dry-docked, before the policy attached.

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

Action at law by the Snare & Triest Company against the St. Paul Fire & Marine Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 258 Fed. 425, 169 C. C. A. 441.

This case is here after the retrial ordered in 258 Fed. 425, 169 C. C. A. 441. The evidence outlined in that report was given again; but it further ap-

peared that the witnesses who had testified to the scow's overhaul before starting on her last voyage had never seen her bottom, and that no effort of any kind had been made to examine the bottom from its underside. The vessel had not been dry-docked, nor hauled on a marine railway, nor put ashore and blocked up, nor (as had happened once before in the life of the boat) turned over.

The trial judge, overruling defendant's motion for a direction, sent the case to the jury, saying: "You will find for the defendant only in the event that you find that the vessel was not so overhauled or so reconditioned as to put her in substantially as good a condition as the dry-docking would have brought about. * * * If the defendant has not been deprived of any substantial thing by the failure of the plaintiff to literally comply with that promissory representation, * * * then the law holds that the representation will not deprive the plaintiff from recovery. If, on the other hand, you find that the plaintiff did not give the defendant substantially the vessel which its representations, if complied with literally, would have given to the defendant, then the plaintiff cannot recover."

The jury found a verdict for plaintiff, and defendant brought this writ.

Harrington, Bigham & Englar, of New York City (George S. Brengle, of New York City, of counsel), for plaintiff in error.

Hector N. Hitchings, of New York City, for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The record before us contains more particulars and details than were offered when the case was here before, but the essential facts are not changed. The insured is still compelled to assert in effect that, because the scow was overhauled, dry-docking or any equivalent therefor may be excused. A new trial was awarded because, in our opinion, issues had been presented to the jury which were wholly immaterial, and there appeared no appreciation on the part of all concerned that the one issuable fact was whether the representation as to dry-docking had been "substantially performed."

From arguments now made we conclude with regret that our efforts to indicate the point in the case were not wholly successful. The present plaintiff in error asserts that on the second trial the court below felt bound by our previous decision to submit to the jury the question whether "seaworthiness took the place of dry-docking." No such understanding appears in the charge, but it is true that we did not point out just what acts might constitute substantial performance of the representation proven. Not knowing whether plaintiff could or could not make a better case along the lines indicated than it had done when seeking recovery on a false legal theory, we refrained from weighing merely possible evidence.

On this very full record the only question presented by the writ is whether there was any evidence of substantial performance. That the scow should be seaworthy is a matter covered by the implied warranty of seaworthiness contained in every contract of marine insurance such as this. Hazard v. New England, etc., Co., 8 Pet. 557, 8 L. Ed. 1048; Long Dock, etc., Co. v. Mannheim, etc., Co. (D. C.) 116 Fed. 886, affirmed in this court 123 Fed. 861, 59 C. C. A. 668. The representation is superadded to the warranty, is some-

thing wholly separate, and therefore cannot itself be fulfilled by fulfilling the warranty. Hazard v. New England, etc., Co., ut supra.

When a contract has not been literally, but has been substantially, performed, it has been "in good faith complied with in all *essentials* to the full accomplishment of that which was contracted for." Manning v. School District, 124 Wis. 100, 102 N. W. 361. Cf. Dorrance v. Barber (C. C. A.) 262 Fed. 492. The thing that was promised and in a sense contracted for here was dry-docking, to the "full accomplishment of which" the essential is that the bottom of the vessel should be examined by the eye from the outside.

It plainly appears by this record, as well as from common knowledge, that there are ways of effecting this result other than by putting such a humble craft as a scow in what is called a dry dock. A marine railway may be used, the vessel may be hauled ashore and blocked up, or, as had happened with this particular scow, she might be turned over. None of these things was done, yet the jury was left to find that there had been a substantial performance, although it was plain, by evidence uncontradicted, that the very end and object of dry-docking had not been in any way or to any degree accomplished.

We think this was error, and that on the whole case the defendant's motion for a directed verdict should have been granted.

Judgment reversed, with costs.

WARD, Circuit Judge (concurring). I feel bound to add on, so important a question of marine insurance, that in my opinion our former decision (258 Fed. 425, 169 C. C. A. 441) was wrong, and that Judge Grubb was right in telling the jury as matter of law that the representation as to dry-docking was material and was not complied with. The evidence at that trial showed that the scow had not been dry-docked, and that the repairs made were made while she was afloat, so that it was impossible to see or examine her bottom. Yet we held that the court should have submitted to the jury the question whether the repairs actually made were a substantial compliance with the representation that the scow had been dry-docked; i. e., whether they made the scow as seaworthy as if her bottom had been visible and had been examined. Now we hold as matter of law, and I think rightly, that such an examination was necessary to a substantial compliance with the representation, and that because it was not complied with the court should have directed a verdict for the defendant.

ROBERTSON, State Revenue Agent, v. JORDAN RIVER LUMBER CO. (two cases).

SAME v. WOLF RIVER LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1921.)

Nos. 3604–3606.

1. **Appeal and error ⇐185(1)—Jurisdiction of federal District Court raised by Circuit Court of Appeals.**
   Since the consent of parties cannot confer jurisdiction on the federal District Court, the Circuit Court of Appeals will determine the question of the District Court's jurisdiction, though it was not raised by either party.
2. **Removal of causes ⇐41—Suit by agent on behalf of state not removable for diverse citizenship.**
   A suit by a state revenue agent to recover land, the title to which was alleged to be in the state, is a controversy to which the state is a party, and which cannot be removed to the United States court as a controversy between citizens of different states.
3. **Removal of causes ⇐41—State, as trustee for class, is not nominal party.**
   The state, as the holder of the legal title to lands sought to be recovered in trust for a class as beneficiaries, is not a merely nominal party to the suit, and the suit, therefore, cannot be removed to the United States court for diversity of citizenship.

Appeals from the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Three suits by Stokes V. Robertson, as State Revenue Agent, two against the Jordan River Lumber Company and one against the Wolf River Lumber Company. Decree for defendant in each suit, and complainant appeals. Reversed, with instructions to remand the causes to the state court.

See, also, Robertson v. Hines, 267 Fed. 605.

F. C. Hathorn and A. A. Hearst, both of Hattiesburg, Miss., for appellant.

V. A. Griffith and W. L. Wallace, both of Gulfport, Miss., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Stokes V. Robertson, "revenue agent for the state of Mississippi, herein suing for the state of Mississippi, as trustee for the use and benefit of the inhabitants of" certain designated townships, filed the above suits against Jordan River Lumber Company in the chancery court of Hancock county, Miss., and a suit against Wolf River Lumber Company in the chancery court of Pearl county, Miss. Each suit alleged the title to the land to be in the state of Mississippi; it did not claim any interest in the subject-matter of the suit in the complainant, who sued alone as the agent of the state; it prayed a decree in favor of the state, as trustee and holder of the legal title. Each case was removed to the United States District Court for the Southern District of Mississippi on the sole ground that the controversy therein was between citizens of different states.

[1] No point appears to have been raised on the jurisdiction of the United States District Court. This court has, however, raised the question that each suit is in fact one by the state of Mississippi, as the trustee and holder of the legal title, and that the District Court acquired no jurisdiction of the case, as presenting a controversy between citizens of different states, by such removal. The Supreme Court of the United States has declared:

"On every writ of error or appeal the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." M., C. & L. N. Ry. Co. v. Swan, 111 U. S. 379, 382, 4 Sup. Ct. 510, 511 (28 L. Ed. 462).

The consent of parties could not confer jurisdiction. Chicago, Burlington & Quincy Ry. Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521.

[2] A suit by an agent of the state as a nominal party in behalf of the state presents a controversy to which the state is a party, and cannot be removed to the United States court as a controversy between citizens. Ferguson v. Ross (C. C.) 38 Fed. 161, 3 L. R. A. 322; Missouri Ry. Co. v. Missouri Rd. Com'rs, 183 U. S. 53, 59, 22 Sup. Ct. 18, 46 L. Ed. 78; In re Ayers, 123 U. S. 443, 489, 8 Sup. Ct. 164, 31 L. Ed. 216. A state is not a citizen, and a suit in which she is a party to the controversy is not removable on the ground of diverse citizenship. Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962.

[3] The state, as the holder of the legal title of these lands in trust for a class as beneficiaries, is not a merely nominal party. Foster's Fed. Pr. (6th Ed.) § 44; Wilson v. Oswego Township, 151 U. S. 56, 65, 14 Sup. Ct. 259, 38 L. Ed. 70. The United States District Court, therefore, had no jurisdiction of these cases. Chicago, R. I. & P. Ry. Co. v. State of Nebraska, 251 Fed. 279, 163 C. C. A. 435.

The decrees in these causes are therefore reversed, with instructions to the District Court to remand them to the state court.

HUMPHRIES v. NALLEY.

(Circuit Court of Appeals, Fifth Circuit. October 12, 1920.)

No. 3578.

Bankruptcy ⇐408(2)—False oath to schedule, to bar discharge, must be made knowingly and fraudulently; "knowingly and fraudulently making false oath."

The making by a voluntary bankrupt of oath to his schedules, in which it was stated that he had no property, when in fact he had a small amount of money, with which he paid the costs, and a small amount of household furniture, which he could have claimed as exempt, *held* not sufficient to constitute the offense of "knowingly and fraudulently mak-

ing a false oath," within Bankruptcy Act, § 29b (Comp. St. § 9613, subd. [b]) which would bar his right to a discharge.

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

Appeal from the District Court of the United States for the Northern District of Georgia; Samuel H. Sibley, Judge.

In the matter of George Washington Humphries, bankrupt. Said bankrupt appeals from an order denying his discharge, upon the objection of Lawton Nalley. Reversed.

Frank L. Neufville, of Atlanta, Ga., for appellant.

Albert Kemper, of Atlanta, Ga., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This is an appeal by a bankrupt from an order sustaining objections made by a creditor to the bankrupt's discharge and denying a discharge. The grounds of the objections were to the effect that the bankrupt committed an offense punishable by imprisonment under the Bankruptcy Act (Comp. St. § 9585 et seq.), in that he willfully, knowingly, and fraudulently made oath that he had no property when his voluntary petition was filed, when in fact $30 in money was due to him from his employer on account of wages earned, and he had in his possession and owned $25 in lawful money and household goods and furniture of the value of about $150. The evidence adduced on the hearing of the objections consisted of the schedules filed and sworn to by the bankrupt with his voluntary petition, which stated that he had no property and that there was no debt owing to him, and testimony to the effect that on his examination at the first meeting of his creditors he testified that when his petition and schedules were sworn to and filed he had about $30 in cash, a watch, some household furniture worth not less than $100 or $125, and that his employer owed him something like $25 or $30. It was also testified, and not contradicted, that the $30 the bankrupt had when the petition was filed was used to pay the costs of the proceeding.

It was not enough to prove that the bankrupt swore falsely in a particular charged when he made oath to his petition and the schedules filed therewith. What was charged in the objections was that the bankrupt willfully, knowingly, and fraudulently made a false oath in a respect stated. The making of the false oath was not a ground for denying a discharge, unless it was knowingly and fraudulently made, and that it was so made must be shown by clear and convincing evidence. Bankruptcy Act, §§ 146, 29b (Comp. St. §§ 9598, 9613); Collier on Bankruptcy (11th Ed.) 376, 363. No evidence adduced was inconsistent with the conclusion that the bankrupt was innocent of any fraudulent purpose or intent to deprive the trustee or any creditor of any right. So far as appears, the bankrupt, who was a laborer working for wages, voluntarily made a full and true disclosure of his condition when he testified at the meeting of his creditors. The use of

the only money he had in paying costs of the proceeding indicates the absence of any intention to improperly withhold that part of his property for his own use or benefit. The only other property he is shown to have been entitled to was such that it could have been retained under a claim of exemption. It was not disclosed that he did anything to conceal or hide any of his property.

The circumstances attending the act of the bankrupt in swearing to his petition and schedules were not proved. It was not shown that those instruments were prepared by the bankrupt himself, or that he was informed of their contents, otherwise than by their being presented for his signature and oath. Not infrequently it happens that persons unaccustomed to legal proceedings carelessly and falsely make oath to papers prepared for their signature, who, if they had been called on to testify orally as to matters so sworn to, would have stated them differently and truly. It was not fairly made to appear that the bankrupt at any time understandingly and with fraudulent intent made any false statement in regard to his property or affairs. We are not of opinion that the evidence adduced was such that it properly may be regarded as clearly and convincingly showing that the false oath of the bankrupt to some of his schedules was knowingly and fraudulently made.

The order appealed from is reversed.

FORD et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 21, 1921.)

No. 3517.

1. **Intoxicating liquors ⇐132—War Time Prohibition Act continued in force for trials thereunder.**
   Under National Prohibition Act, § 35, providing that it shall not relieve any person from liability incurred under existing laws, the War Time Prohibition Act (Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f–3115¹¹/₁₂h) remained in force for the trial, after enactment of the National Prohibition Act, of a charge for selling intoxicating liquor prior to such enactment, contrary to the War-Time Prohibition Act.

2. **Indictment and information ⇐166—Prosecution need not prove fact was unknown to grand jury.**
   A prosecution for selling intoxicating liquor, where the indictment alleged the liquor was alcohol mixed with some substance to the grand jury unknown, and there was no evidence that the grand jurors knew or were informed what that substance was, there was a presumption that it was unknown to the grand jury, which dispensed with the necessity of proving that allegation of the indictment.

In Error to the District Court of the United States for the Western District of Texas; W. R. Smith, Judge.

John Ford and others were convicted of selling intoxicating liquor, in violation of the War-Time Prohibition Act, and they bring error. Affirmed.

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

Joseph M. Nealon, of El Paso, Tex., for plaintiffs in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex. (E. B. Elfers, Asst. U. S. Atty., of El Paso, Tex., on the brief), for the United States.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The plaintiffs in error were convicted on counts of an indictment, filed on October 13, 1919, charging sales of intoxicating liquor in violation of the War-Time Prohibition Act of November 21, 1918 (Comp. St. Ann. Supp. 1919, §§ 3115$^{11}/_{12}$f–3115$^{11}/_{12}$h).

[1] There is no merit in the suggestion that the law mentioned was not in force when the trial and conviction occurred, as section 35 of the National Prohibition Act of October 28, 1919 (41 Stat. 305), contains the provision:

"Nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

[2] Each of the counts upon which there was a conviction charged a sale of a glass of alcohol mixed with some substance to the grand jury unknown. Error is assigned on the court's refusal to give the following instruction requested in behalf of the defendants:

"You are instructed that if the evidence shows that the grand jurors could by reasonable diligence have ascertained what was the substance mixed with the alcohol, alleged to have been sold in the various counts of the indictment, you will acquit each of the defendants on all of the counts of the indictment."

The refusal to give that charge was not reversible error. There was no evidence tending to prove that the grand jurors knew or were informed what was the substance which was mixed with the alcohol charged to have been sold. In that condition of the evidence there was a presumption that such substance was unknown to the grand jury, and such presumption dispensed with the necessity of adducing evidence to prove the averment of the indictment in that regard. United States v. Riley (C. C.) 74 Fed. 210.

Of the other rulings complained no more need be said than that no one of them was erroneous.

The judgment is affirmed.

UNITED STATES DIRECTOR GENERAL OF RAILROADS v. BISHOP.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

No. 1808.

1. **Trial ⇐143—Instruction equivalent to peremptory instruction properly refused, when evidence conflicting.**
   Where the evidence was conflicting, an instruction which would have been equivalent to an instruction to decide the issue of fact made by the evidence in favor of defendant was properly refused.
2. **Continuance ⇐22—Denial of continuance for illness of witness held not abuse of discretion.**
   There was no abuse of discretion in refusing a continuance because of the illness of a witness, where defendant had the benefit of a statement of what her testimony would be, and the facts within her knowledge were in the main testified to by other witnesses.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action by Annie V. Bishop, administratrix of T. M. Bishop, deceased, against the United States Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

James G. Martin, of Norfolk, Va., for plaintiff in error.
John N. Sebrell, Jr., of Norfolk, Va., for defendant in error.

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

WOODS, Circuit Judge. By derailment of his engine on December 12, 1918, T. M. Bishop, engineer on Norfolk Southern Railroad, was seriously burnt on his legs and buttock, and his collar bone was broken. He was taken to the hospital and apparently received proper attention at the hands of the defendant from doctors and nurses. The wounds seemed to be healing, and he appeared to be on the way to early recovery, until pneumonia supervened on January 4, 1919. Bishop died of pneumonia on January 8, 1919. His widow, as administratrix, recovered a verdict for $30,000 on a declaration charging that the injuries and death were due to the negligence of the defendant. The District Judge ordered a new trial, unless the plaintiff should remit $10,000 from the verdict. The plaintiff complied with the order, and judgment was entered for $20,000.

There was evidence that the injuries were due to negligence of the defendant and no error is assigned as to that issue. The main question on the trial was whether there was any ground for a reasonable conclusion that the injuries were the sole or a contributing cause of the fatal attack of pneumonia. On this issue the evidence was conflicting.

[1] The several requests to charge of plaintiff and defendant given by the trial judge were indisputably correct statements of the law. No analysis seems necessary to show that the objections of defendant's counsel relate to verbiage rather than meaning and are hypercritical. The instruction asked by defendant and refused would have been

equivalent to an instruction to decide the issue of fact made by the evidence in favor of the defendant.

[2] There was no abuse of discretion in refusing a continuance because of the illness of the witness, Mrs. Covington. Defendant had the benefit of a statement of what her testimony would be, and the facts within her knowledge were in the main testified to by other witnesses.

Affirmed.

THE A. E. ACKERMAN.

Appeal of ACKERMAN TOWING CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 52.

Collision ⊜125—Insufficiency of evidence.

A decree against a tug for collision with a lighter lying in a slip *held* not sustained by the evidence.

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

Suit in admiralty for collision by the Hudson River Lighterage Company against the tug A. E. Ackerman; the Ackerman Towing Company, claimant. Decree for libelant, and claimant appeals. Reversed.

F. W. Park, of New York City, for appellant.

Harrington, Bigham & Englar, of New York City (G. C. Manning, Jr., of Brooklyn, N. Y., of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This libel was filed against the tug Ackerman to recover damages for injuries to the derrick lighter Essex sustained June 12, 1916. The libel verified April 17, 1917, set forth with great particularity that the lighter was lying on the south side of Pier 4, Bush's Docks, half way up the dock, bow in; that the tug Ackerman came into the dock between Piers 3 and 4, made fast to the barge Charles Rockwell, lying at the bulkhead, and in taking her out of the slip the barge came into collision with the lighter, doing slight damage; that the master of the lighter called out to the captain of the tug to look at the damage, but he paying no attention continued on out of the slip. At the time in question there were seven piers each about 1,000 feet long at the Bush Docks.

At the trial April 4, 1918, the master of the lighter who was the only witness of the libelant told the same story. The claimant, however, showed conclusively, and the District Judge found, that the tug picked up the Rockwell on the north side of Pier 5, close to the outer end, and took her to Pier 27, Brooklyn. The deckhand of the tug as well as the captain of the Rockwell, who were claimant's only witnesses testified, that the Rockwell was in no collision on that day. Notwithstanding this, the District Judge thought that the master of the lighter

was too honest, and, if not too honest, too stupid, a man to fabricate his story, and therefore found, in spite of his entire misstatement as to the place of the collision, that the lighter was in collision with the Rockwell.

We do not think the account given in the libel and adhered to at the trial can be dismissed by mere conjecture. If the derrick was where the libelant stated, she could not have been in collision with the Rockwell. A party is bound by his pleading, unless the clearest explanation is given of mistake. Not only was there none such in this case, but the master of the lighter was contradicted by two witnesses.

The decree is reversed.

PERRETT v. CLARA KIMBALL YOUNG FILM CORPORATION.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 14.

Courts ⇐405(5)—Circuit Court of Appeals without jurisdiction, where jurisdiction of District Court as a federal court is involved.

Where the question is as to the jurisdiction of a District Court as a federal court, the judgment is reviewable by the Supreme Court, under Judicial Code, § 238 (Comp. St. § 1215), and the Circuit Court of Appeals is without jurisdiction, under section 128 (Comp. St. § 1120).

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

Action at law by Leonce Perrett against the Clara Kimball Young Film Corporation. Judgment for defendant, and plaintiff brings error. Writ of error dismissed.

Jacobson & Pollock, of New York City (H. L. Jacobson and Henry W. Pollock, both of New York City, of counsel), for plaintiff in error.

Konta, Kirchwey, France & Michael, of New York City (K. W. Kirchwey, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. The question in this case was as to the jurisdiction of the District Court as a federal court, and should have gone by writ of error to the Supreme Court. Section 128, Judicial Code (Comp. St. § 1120). Because we have no jurisdiction under that section (W. S. Tyler Co. v. Ludlow-Saylor Co., 212 Fed. 156, 129 C. C. A. 12), the writ of error is dismissed.

EXCELSIOR STEEL FURNACE CO. v. WILLIAMSON HEATER CO.

(Circuit Court of Appeals, Sixth Circuit. November 3, 1920. On Petition for Rehearing, January 14, 1921.)

No. 3250.

1. **Injunction ⊜56—Master and servant ⊜60—Defendant's employment of former servant of plaintiff held not illegal.**
   Where the evidence did not show that a former servant of plaintiff had been employed in a confidential capacity, or had agreed not to divulge plaintiff's secret, or that plaintiff was taking any special precautions to protect the secrets of its machines and processes, the subsequent employment of that servant by defendant to construct similar machines for defendant is not illegal.

2. **Patents ⊜61—Prior application deemed prior art.**
   An application for a patent, filed prior to the time of filing the application for the patent in suit, is to be considered a part of the prior art, in the absence of any evidence to the contrary, though the patent on the prior application was issued after the patent in suit, and no interference was declared between them.

3. **Patents ⊜328—729,964, claims 1, 3, 8–10, for machine for cutting irregular shapes of sheet metal, held invalid, but claims 2, 4–7, held valid.**
   The Scherer patent, No. 729,964, claims 1, 3, 8–10, for a machine for cutting irregular shapes of sheet metal, *held* invalid, in view of the prior art; but claims 2, 4–7, which included as an element a secondary guiding means not found in the prior art, *held* valid.

4. **Patents ⊜328—729,964, for a machine for cutting irregular shapes of sheet metal, held infringed by one of defendant's machines, but not by the other.**
   The Scherer patent, No. 729,964, for a machine for cutting irregular shapes of sheet metal, *held* infringed by defendant's machine, as constructed by a former employé of plaintiff, but not by the machine constructed by defendant according to the specification in a patent which was part of the prior art.

On Petition for Rehearing.

5. **Patents ⊜156—Costs on appeal not affected by failure to file disclaimer before suit.**
   Failure to file, before suit for infringement is begun, disclaimer as to invalid claims of patent in suit, affects only the costs in the trial court, and has no relation to costs in the Circuit Court of Appeals (Rev. St. § 973 [U. S. Comp. St. § 1614]).

6. **Patents ⊜153—Disclaimer entered after decision on appeal and expiration of patent held timely.**
   Under Rev. St. §§ 4917, 4922 (U. S. Comp. St. §§ 9462, 9468), authorizing suit for infringement by patentee whose patent contains too broad claims, if patentee has not unreasonably neglected or delayed to enter a disclaimer where complainant in suit for infringement of patent contends that claims of patent in suit are valid, but District Court and Circuit Court of Appeals hold otherwise, it is not too late to enter disclaimer after decision on appeal, though patent has then expired.

7. **Patents ⊜317—No injunction on expired patent.**
   An injunction cannot issue in suit for infringement of patent, after expiration of the patent.

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

Suit by the Excelsior Steel Furnace Company against the Williamson Heater Company for infringement of patents, unfair competition, and fraudulent acquisition of trade secrets. From a decree dismissing the bill, plaintiff appeals. Decree reversed, in so far as it held one patent void.

Benjamin T. Roodhouse, of Chicago, Ill. (Benjamin, Roodhouse & Lundy, Benj. T. Roodhouse, and John A. Brown, all of Chicago, Ill., and Wm. F. Madden, of Cincinnati, Ohio, on the brief), for appellant.

Wm. R. Wood, of Cincinnati, Ohio (Wm. R. Wood, of Cincinnati, Ohio, and Wood & Wood, of Athens, Ohio, on the brief), for appellee.

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

KILLITS, District Judge. The appellant, the Excelsior Steel Furnace Company, whom we will hereafter designate as the plaintiff, sued the appellee, the Williamson Heater Company, a corporation, whom we will hereafter designate as the defendant, in the District Court on a bill charging infringement of two patents, unfair competition, conspiracy to infringe patents, fraudulent acquisition of secrets having to do with the mechanism, dimensions, and method of operating the patented machines and all other such machines not patented, and conspiracy to obtain such information. From the decree of the District Court, dismissing the bill, plaintiff appeals.

[1] Although the question occupies a great deal of the record and argument in this case, we do not find it difficult to dispose of that part of the bill which is predicated upon the alleged piracy, in several forms, by the defendant of plaintiff's business methods. In a very large measure the charge centers upon the employment by the defendant of one Holub, a workman from plaintiff's factory, through whom the defendant is alleged to have introduced into its factory practices and to have constructed machines closely following those used in plaintiff's factory. Unless Holub's engagement by defendant was actionably reprehensible under settled principles of equity, plaintiff has no case on any of the grounds involving piracy. Without venturing an opinion upon the ethics of the situation, we are satisfied, with respect to this phase of the case, to leave it upon the judgment and opinion of the learned District Judge.

The case on its facts does not rise to a dignity which would invoke the rule of such cases as Herold v. Herold China & Pottery Company (decided by this court) 257 Fed. 911, 169 C. C. A. 61. The practices and machines, knowledge of which defendant may have gained through its employing of Holub, were not in the nature of trade confidences. Some of the important practices which it is charged the defendant introduced into its factory operations through unfair use of Holub were disclosures made by plaintiff through the patent office. All of those alleged to have been fraudulently appropriated by defendant were usages more or less open in plaintiff's factory. At least they were not restricted to the activities of confidential employés. They were secret only to the extent that many manufacturers are accustomed to exclude the general public from an inspection of their methods. There is no

proof here at all of any contractual relation in Holub which involved an agreement by him not to disclose these matters, as in Nulomoline Co. v. Stromeyer, 249 Fed. 597, 161 C. C. A. 523. The court below also rightfully found that the general charge of unfair competition was not sustained.

[2] Of the patents sued upon, plaintiff seems to have abandoned its case as to that known as Scherer, No. 728,020, but presses its demand for reversal of the decree below and for relief against the alleged infringement of its rights under Scherer, No. 729,964, filed December 18, 1902, and granted June 2, 1903, machine for cutting sheet metal. The court below held that this patent, which is owned by the plaintiff as assignee, is void. The alleged invention is claimed to be an improvement in machines for cutting sheet metal, with the main object to be provided that sheet metal may be readily cut in any pattern through a novel construction, which in the language of the specification is "particularly adapted to the cutting of sheet metal in long, irregular curves"; the inventor saying that it is used "principally for cutting sheet metal in proper shape for sheet metal elbows of large dimensions."

Of the anticipations in the prior art cited, the one principally depended upon as specially important is that to Chambers and Bullard, No. 730,874, allowed June 16, 1903, two weeks after the Scherer allowance. The application for this grant was filed June 6, 1902, or six months prior to the filing of Scherer's application. The two applications were in the same classification and were for the same general class of improvements. They pended in the Patent Office at the same time, but seemed not to have been brought into contact with each other. Of course, as far as they are seen to interfere as to valid invention, the Chambers and Bullard patent, having the earlier application, has priority; the record before us indicating nothing to the contrary. As the case is presented to us, and as we also view it, so far as Scherer has avoided the anticipation of Chambers and Bullard, he is not in conflict with the other references, and, on the record, we are to read the Scherer grant as in a field still further restricted by Chambers and Bullard.

The grant under consideration has 10 claims. The problem with which it deals is to provide cutting rollers to follow a curved track, which determines the pattern, to the end that the cut product, when properly edged and rounded, may make suitable sections of an elbow to such sheet metal pipes as are used in hot-air furnaces. The machine cuts these sections so successfully that, when they are edged and connected up, elbows and turns in the completed pipe are readily produced in varying angles and directions.

The details of the Chambers and Bullard machine are a suitably supported table, in front of which is a shelf for a second table supported by brackets; a movable pattern plate, clamped through slots in the table, for guides or tracks which form the pattern, these tracks being arranged in relation to each other to outline the cut to be made; clamps controlled by threaded rods, supported on the under side of the table by bearings; a cutting device, provided with cutting rolls and

suitable means for revolving the same; a wheel or roller to support the cutting machine, which travels on the supplementary table or shelf; rollers to further support the cutting machine, and which travel on the guides or tracks; other guide rollers suitably provided, which guide and hold the cutting machine in a position while it is being operated that it does not tend to bind on the tracks, or to displace the cutting shears or rolls, or to draw the metal operated on.

[3] In most particulars the alleged invention in issue here is similarly or equivalently equipped, and, only as it may be inventably distintinguished in any essential detail from the reference in question, may the Scherer grant be sustained. We are of the opinion that such a distinction should be made and the grant upheld in some measure as a patentable improvement over Chambers and Bullard.

The special distinction between the two machines is in the manner of adjusting the cutter head to effect a cut which definitely follows the pattern. In Chambers and Bullard the cutter head is rigid on the carriage, but Scherer mounts it on a frame which is adjusted slidingly on the carriage. The effect is to permit a simultaneous movement of the cutting mechanism longitudinally as the carriage follows the track and radially of the curve of the track. This keeps the cutter always directly over the curving track, a result secured from disadjustment by vertical rollers, which are attached to the sliding cutter frame and which span the track.

This is, we think, a patentable improvement. The Chambers and Bullard device was designed for the cutting of thin metal plates or streaks to form the skin of a boat. For that purpose only an approximate identity in curves between the pieces cut and the pattern is necessary, because in using the section or streaks in building up the boat's skin overlapping was employed, and even fairly substantial departures from the pattern of the curves are innoxious. In building up an elbow of a large pipe, however, slight deviations from the curve which is theoretically necessary may be fatal to success.

Much is argued as to the lack of clear disclosure in the specification and drawings, and it is even insisted that there was a purposeful withholding of description effective to advise one skilled in the art of the alleged invention. This criticism does not impress this court. There is nothing intricate or obscure in the idea, and while the drawings might be clearer, and possibly the description also, there certainly is no valid ground for predicating purposeful obscurity in the defects of either, and little to create perplexing indefiniteness.

Of the ten claims, 1, 3, and 10 appeal to the court to be but variant expressions of the same combination, and to read, each, upon Chambers and Bullard. Claim 1, which is typical of the three, reads:

"In combination with a supporting table, carrying an adjustable and removable pattern and means for holding the metal in place, of a carriage supporting a cutting mechanism guided in its movement by the pattern."

For claims 8 and 9, a departure from the claims hereafter noted is specially argued, in that a clamping mechanism is more specifically defined. It does not seem to the court that there is distinction involving invention in this feature from Chambers and Bullard, or that other-

wise either of these claims is properly allowable as an acceptable variant of any claim which is in fact sustainable. Our judgment, therefore, is that claims 1, 3, 8, 9, and 10 are invalid.

To the court the gist of the invention appears to be fairly covered by claims 5 and 7. They read as follows:

"5. In combination with a table, a pattern mounted thereon, consisting of a track of the proper shape secured on a base of convenient shape and dimensions and means for holding the sheet metal while being cut, of a carriage mounted upon the table, a frame adjustably mounted upon the carriage and means for cutting the sheet metal carried by the said frame, and guided in its movements by means of the track of the pattern."

"7. In combination with a table having means for holding the piece of sheet metal and a pattern, consisting of a track of the proper shape secured on a base of convenient shape and dimensions, of a carriage, a substantially U-shaped frame slidingly mounted upon said carriage, a cutting mechanism carried by the frame above and below the piece of sheet metal."

What, in our opinion, gives these claims validity, is the inclusion in the combination of the secondary guiding means, which, as we have noted above, distinguishes Scherer from Chambers and Bullard, in that they effect an identity in curves between the pattern track and the resulting cut. In claim 5 this distinction appears in the words "a frame adjustably mounted upon the carriage and means for cutting the sheet metal carried by the said frame, and guided in its movements by means of the track of the pattern," and in claim 7 by the words "frame slidingly mounted upon said carriage, a cutting mechanism carried by the frame above and below the piece of sheet metal."

Claims 2, 4, and 6 appear to be refinements upon 5 and 7, depending for validity upon the theory that they vary 5 and 7 only in developing, in more detail, the one element which, in combination, serves, in the court's judgment, to uphold the grant. We are not disposed to reject any one of these three claims as superfluous, nor to uphold either one as adding anything very substantial to the patent. They are allowed because, being consistent with the two claims (5 and 7) which we deem important, they may serve to more particularly cover the one feature which, as we have said, suggests invention.

[4] We are of the opinion that defendant's machine shown to have been constructed by Holub and Deering infringes the claims which we have approved. The cutters of the infringing machine are, in fact, not positioned as those of Scherer; but, as defendant's counsel describe them, they—

"extend about eight inches beyond the track toward the clamp holding the sheet to be cut, overhanging cutters. It has a track not corresponding to the pattern to be cut, but constituting a templet to develop one curve from another. The cutters are mounted on a gibway, not to keep them over the track, but to produce the variations from the track line which develop the desired irregular curve."

This, in our judgment, is an arrangement which is not sufficient to avoid equivalency. In order to get away from Scherer, defendant provides that one distortion of the Scherer mechanism shall compensate the effect of another, so that the result shall be precisely what Scherer accomplishes.

Defendant's second machine, shown to have been constructed after the specification of Chambers and Bullard is found not to infringe.

Counterclaims on the Chambers and Bullard grant (assigned to defendant) were pleaded in the answer and denied in the decree below. No appeal was prosecuted by the defendant, and no question in that connection was presented in argument to us. We notice the matter briefly, that it may be settled so far as this record is concerned. The cross-claims are so far distinct from the issues raised in the bill that a reversal affecting plaintiff's claim does not warrant the court to disregard the decree below against the defendant, in the absence of an appeal therefrom.

Thus considering and limiting the claims found valid, it follows that the court below should be reversed to the extent that it holds Scherer's patent, No. 729,964, void. Conformably to our practice (Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 C. C. A. 185; Higgin Manufacturing Co. v. Watson [C. C. A.] 263 Fed. 378), plaintiff is privileged to disclose to the court below, within 30 days from the filing of the mandate herein or such further time as the District Court may allow, that claims 1, 3, 8, 9 and 10, of Scherer, No. 729,964, which we find invalid, have been abandoned, whereupon a decree of injunction may be entered in behalf of plaintiff conformable to this opinion, and such further proceedings may be had, at plaintiff's instance, as the pleadings justify.

Plaintiff will recover costs in this court.

On Petition for Rehearing.

PER CURIAM. [5] In support of its petition, defendant appellee contends that plaintiff can obtain no relief under the decision of this court, for the reasons that certain of the patent claims sued upon have been, by this court, pronounced invalid; that up to the time of this court's decision, plaintiff had not filed disclaimer as to the invalid claims; and that, the patent having now expired, it is too late to so disclaim. We think this contention not maintainable. Failure to file disclaimer before suit is begun affects, necessarily, only the costs in the court below. It has no relation to the costs in this court. R. S. § 973 (U. S. Comp. St. § 1614); Johnson v. Foos Mfg. Co. (C. C. A. 6) 141 Fed. 73, 89, 72 C. C. A. 105. The District Court denied costs to plaintiff. So far as substantial relief is concerned, disclaimer before suit brought is not essential. The only requirement is that there be no unreasonable neglect or delay in entering disclaimer. R. S. §§ 4917, 4922 (U. S. Comp. St. §§ 9462, 9468). It is well established that a disclaimer as to part of a patent, in good faith relied upon as valid, is effective, if made after the final decision and as a condition to granting relief. In such case, "unreasonable delay to file a disclaimer will not begin until that question is finally settled by the courts." Walker on Patents (5th Ed.) p. 272. This court recognizes that rule. Herman v. Youngstown, 191 Fed. 579, 587, 588, 112 C. C. A. 185.

[6] Had our decision been made and disclaimer entered previous to the expiration of the patent, no question could arise as to the pro-

priety of giving relief upon such disclaimer. In our opinion, the case is not altered by the fact that at the time our decision was actually made the patent had expired. The case was submitted to this court several months before the expiration of the patent. Until our decision was rendered, complainant was not bound to disclaim as to features of the patent which he was contending were valid and as to which he was awaiting the decision of this court; delay pending our decision was not unreasonable. The statute does not imperatively forbid relief unless disclaimer is made while the patent is still alive. Yale Lock Co. v. Sargent, 117 U. S. 536, 554, 6 Sup. Ct. 934, 29 L. Ed. 954. The fact that the District Court held the patent in suit invalid does not, in our opinion, distinguish it from Yale v. Sargent. Had plaintiff disclaimed immediately upon the decision below, it would have lost its right to the relief which this court gave it. Page v. Dow (C. C. A. 2), 168 Fed. 703, 94 C. C. A. 209; Mershon v. Bay City Co. (C. C.) 189 Fed. 741, 753. (It appears that disclaimer has actually been entered, apparently since our decision.)

[7] Of course, injunction cannot issue upon an expired patent, and our order and mandate will be modified to that extent only.

The other grounds advanced in support of the petition for rehearing require no specific mention.

The petition is denied.

ENAMELED METALS CO. v. WESTERN CONDUIT CO. et al. (two cases).

(Circuit Court of Appeals, Sixth Circuit. December 10, 1920.)

Nos. 3395, 3396.

1. **Patents ⇐328—950,341, for method of treating conduit pipes, void for lack of invention.**

The Patterson patent, No. 950,341, for a method of treating metal pipes for use as conduits for electric wires, claim 1, *held* void for lack of invention in view of the prior art and also for prior public use.

2. **Patents ⇐328—1,120,731, for process of treating conduit pipes, void for lack of invention.**

The McIlroy patent, No. 1,120,731, for a process of treating conduit pipes by providing a sleeve of paper or other fragile material for the threaded portion of the pipe and couplings to protect the threads during the enameling process and prevent their being filled with enamel, and the resulting product of such process, *held* void for lack of invention and for prior use.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Two suits by the Enameled Metals Company against the Western Conduit Company and the Youngstown Sheet & Tube Company. Decrees for defendants, and complainant appeals. Affirmed.

W. Clyde Jones, of Chicago, Ill. (James Negley Cooke, of Pittsburgh, Pa., on the brief), for appellant.

George E. Stebbins and Clarence P. Byrnes, both of Pittsburgh,

Pa. (Geo. H. Parmelee, of Pittsburgh, Pa., on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. On the 25th day of May, 1915, the appellants, as assignee of the inventor, John S. Patterson, filed a complaint in the United States District Court, Northern District of Ohio, Eastern Division, asking that defendant the Western Conduit Company be enjoined from further infringement of letters patent No. 950,341, issued to the inventor, Patterson, on February 22, 1910, and for damages for past infringement.

On the 5th of November, 1915, appellants filed a separate complaint in the same court to enjoin the Western Conduit Company from further infringement of letters patent No. 1,120,731, issued December 15, 1914, to complainant, as assignee of the inventor, McIlroy, and for damages.

Issues were joined by answer to each of these complaints, and, it appearing to the court that these patents related to the same art, it was ordered, pursuant to the stipulation of counsel, that these causes be consolidated. At the trial of the case it was conceded by stipulation that the Youngstown Sheet & Tube Company is the successor of the Western Conduit Company, that it has taken over the business and has continued the acts charged as infringement of these patents, and thereupon that company was added as a party defendant.

The trial court found from the evidence that claim 1 of the Patterson patent and all the claims of the McIlroy patent were invalid for lack of invention and lack of novelty, in view of the prior art and prior uses, and entered a decree dismissing both bills of complaint and for costs.

The complainant perfected a separate appeal to the decree finding the equities with defendant and dismissing both complaints, but a joint transcript of the record has been made up for both appeals, and they were heard and submitted together in this court.

[1] The Patterson patent relates to a method of treating metal pipes, and has special reference to such pipes as are used for electrical conduits. Claim 1 of that patent reads as follows:

"The method of treating metal pipes, which consists in removing the scale therefrom, threading an end of the same, and applying a coating to said pipe, including its threaded end."

Claim 2 of this patent is not involved in this controversy.

It appears from the evidence that, in preparing an ordinary commercial metal pipe for use as electrical conduit, it is necessary to remove all slag or scale, especially from the inner side of the pipe, so as not to tear or injure the insulation of the wires to be drawn through the same, and after this is done a coat of enamel is applied both inside and outside the pipe.

It is claimed that, prior to the invention of the patent in suit, the process in most general and successful use by the manufacturers of conduit was to purchase ordinary commercial pipe manufactured by the tube mills, in lengths of 10 feet and threaded at both ends. The

scale or slag attached to the inner and outer surfaces of this pipe was then detached or loosened by means of a chemical pickling bath, composed of a weak solution of sulphuric acid, in which bath a bundle of pipe was immersed vertically in a vat containing this pickling solution and allowed to remain there from two to five hours. In order to avoid burning they were withdrawn at frequent intervals, and the pipes which had been sufficiently treated were removed, and those requiring further treatment were returned to the vat. This process was continued until the slag or scale had all been detached or loosened, and a blast of air containing sand or other abrading material was then blown through the interior of the pipe to dislodge and drive out the scale and slag loosened or detached therefrom by the pickling process. Other methods than the air sand blast, such as tumbling barrel, drawing the pipe to smaller dimensions, the use of a ramrod, or the like, were also employed to remove the scale, after the pickling process. The pipe was then enameled, by dipping it in a tank containing an enameling fluid and then baking it in an oven.

It further appears from the evidence that there were at least two principal objections to this method of treatment. The first and most serious objection was that the sulphuric acid operated more quickly upon the fresh-threaded ends of the pipe than it did upon the uncut parts of its surface, thereby causing injury to the thread, so that when the pipe was put in place it was frequently necessary for the workmen to remove the threaded end and cut a new thread. The other objection was that the enamel so filled the threads that, before the pipe could be used, the threads had to be rechased with a die to clean the same, so as to secure good bonding when installed.

Claim 1 of the patent in suit relates solely to the first objection above stated, and this objection it sought to overcome by the use of unthreaded pipe, changing the order of treatment to pickling first, then threading, then enameling, instead of threading, pickling, and enameling.

It is admitted by the defendant that it is using the process described in claim 1 of the Patterson patent, but it denies that that claim has any validity whatever, for the reasons:

(1) Prior knowledge and use of the process of claim 1 in suit in this country before the alleged invention thereof by the patentee.

(2) Public use in this country of the process of claim 1 in suit by others more than two years prior to the filing of the application for the patent in suit.

(3) Claim 1 in suit is invalid, in view of the state of the art at the date of the alleged invention, since it claims merely an obvious factory expedient in selecting the sequence of the steps of cleaning, threading, and coating pipe.

Upon the issue so joined the District Court found that the evidence clearly established each of these defenses. There is practically no disputed question of law involved in this litigation.

It is insisted that claim 1 of this patent includes, as a distinguishing and essential element of the invention, a method for the removal of scale and slag, different from the method then in use. The descrip-

tion of the patent itself, as to method of cleaning, reads almost word for word on Garland, No. 611,900, issued October 4, 1898, and the evidence as to the prior use of this same method of cleaning, described by Patterson in his application for a patent, leaves no question of doubt whatever that it was in common use long prior to Patterson's purported invention.

The evidence discloses that the Youngstown Sheet & Tube Company is the successor of the Western Conduit Company, which company was the successor of the H. A. Peterson Manufacturing Company; that prior to 1906 Peterson was a contractor engaged in installing electrical equipment, and as such contractor experienced difficulties with acid-eaten threads in electrical conduit used by him in his business; that after due investigation of the cause responsible for these defective threads, and for the purpose of remedying the same, he undertook the manufacture of electrical conduit with "perfect and uniform threads," by securing from the tube mills unthreaded pipe, then cleaning the same with sulphuric acid and other well-known means, then enameling the pipe, and thereafter threading the ends and fitting the couplings. In January, 1906, he exhibited this electrical conduit, manufactured after this method, at an electrical exhibit in Chicago. A description of this exhibit appears in the next month's issue of the Electrocraft. Peterson at once started upon the construction of a factory for the purpose of manufacturing this conduit and his factory was open in September, 1906. Electrical conduit manufactured according to this process was placed upon the market not later than the 1st of December, 1906. The Peterson method differed from claim 1 of the Patterson patent, in that the enameling coat was applied before the pipe was threaded.

While Patterson's application for a patent was filed August 8, 1908, there is some conflict in the evidence in reference to the actual date of the claimed invention. He testifies that he first began to experiment with the unthreaded pipe in 1908, and that he made the invention of the Patterson process in that year. Later he testified that the proper date of his invention was in October or November, 1906. It does appear, however, that in April, 1908, the first commercial pipe was made by complainant in accordance with the Patterson process, while Peterson had made pipe according to his process, for the exhibit in Chicago, in January, 1906, and that his factory commenced actual operation in September of that year. Even if Patterson discovered his invention as early as October or November of 1906, Peterson was then engaged in making commercial conduit by a process that differed from claim 1 of the Patterson patent only in the fact that enameling preceded the threading, so that Peterson's process was clearly an anticipation of claim 1 of the Patterson patent, in so far as that claim required the pickling and cleaning of the pipe to precede the threading.

But Peterson was not the first to change the order of the well-known steps in the treatment of metal pipe for electrical conduit. As early as 1898 the Boston Electroduct Company manufactured electrical conduit exactly in the manner described in claim 1 of the Patterson process. This method was also followed by the Safety-Armorite Con-

duit Company in 1901, the American Circular Loom Company in 1902, and the Mark Manufacturing Company in April, 1906. It is insisted, however, that these manufacturers used methods of removing scale and slag other than the sand and air blast after, and in addition to, the pickling process. That is true, perhaps, as to some of them; nevertheless they all threaded the pipe after pickling.

It further appears from the evidence that some of these manufacturers used, after the pickling process, no other or further means of removing the scale and slag than the sand blast described in Patterson's patent. Yet, even if they did use other means, it is apparent that claim 1 of the Patterson patent does not relate to a method of removing scale from pipe, but, on the contrary, only to a change in the order of the use of well-known means of producing the finished product.

The claim that this use in the prior art was only in the nature of experiments that were finally abandoned is not sustained by the evidence. It is true, perhaps, that this method was not continuously employed by the various companies using the same; but that is fully explained by the fact that it was sometimes more advantageous, from an economic standpoint, to purchase the threaded pipe, even though there should be some loss occasioned in the pickling process, than to buy unthreaded pipe and thread after pickling.

It further appears from the evidence to have been the common practice of the manufacturers above named to reverse factory methods from time to time, whenever, in the exercise of good business judgment, the purchase of standard threaded pipe, or unthreaded pipe, or random length pipe, appeared to be advantageous from a factory standpoint.

The finding of the trial court that claim 1 of the Patterson patent is invalid because of prior knowledge and use, and public use for more than two years prior to the filing of the application for the patent in suit, is fully sustained by clear and convincing evidence.

To avoid the effect of this evidence as to anticipation and prior use, the appellant now proposes to file disclaimer limiting claim 1 to a process by which the scale and slag are completely loosened and removed by chemical treatment by submersion in a solution of acid, preferably sulphuric acid, so that the scale and slag can be dislodged and driven out by the air blast. Under the facts and circumstances of this particular case, it is at least doubtful whether the result sought can be accomplished by disclaimer, rather than by reissue, for the reason that it was Patterson's plain intent to make this claim cover the three-step process, with the steps in the order he specified, and without regard to whether the cleaning was by pickling, or by sand blast, or both, so there is no ground to claim that the patentee has made this claim too broad "through inadvertence, accident, or mistake." R. S. § 4917 (Comp. St. § 9462).

The method of loosening the slag and scale by dipping in a weak solution of sulphuric acid was old in the art when Patterson's application for patent was filed. Beyond question it was obvious to all persons using this method, as it is now obvious to appellant, that, if the pipe were permitted to remain in this sulphuric acid bath a sufficient length of time, it would loosen all the scale and slag adhering

to the interior of the pipe, so that it could readily be removed by the air blast alone. This, however, would injure the thread to such an extent that it was not practicable to permit the pipe to remain in the acid a sufficient length of time to loosen and remove the slag so thoroughly that no abrading material would be required in connection with the air blast; but when unthreaded pipe is used this difficulty wholly disappears. If there is anything of novelty in the Patterson patent, it is the use of unthreaded pipe and threading after the cleaning process, and the proposed disclaimer can in no way effect the validity or invalidity of claim 1 of the patent in suit. That claim covers only a change in the order of use of old and established methods; this clearly appears from the Patterson file wrapper and contents.

After all of the claims first contained in Patterson's application for a patent were rejected, "as devoid of invention, covering an obvious choice of well-known steps to produce the desired result," Patterson amended his claims, and in support of the amended claims made this statement:

"The essential feature of this method is to thread the pipe after cleaning by pickling or sand blasting."

We are of the opinion that this statement, made by Patterson to induce the Patent Office to allow his application for a patent, fully covers all that he claimed for his invention, and all that could possibly be considered as new or novel in the art. It is certainly obvious to a person of ordinary intelligence, regardless of whether or not he be engaged in the manufacture of electrical conduit, that if the acid bath necessary to loosen and remove the scale and slag from the inner surface of the pipe injures or destroys the thread, the remedy is by threading after, and not before, the cleaning process. Whether this latter method is one of economic advantage depends upon sound business judgment, based upon factory experience, and is not invention. It would therefore appear that the evidence also fully sustains, by the requisite degree of proof, the further finding of the District Court that claim 1 of the Patterson patent is, in view of the prior art, invalid for lack of invention.

[2] The McIlroy patent relates "to coated pipes and to the treatment of enameled coated pipes for use as electrical conduits for containing electric wires and other purposes," and the object of the purported invention is "to provide a protector for the exposed threads of the conduit coupling which will securely inclose the same, and which can be very quickly applied before coating, and can be very quickly removed when the conduit is finished, or at the point where the conduit is to be used," and also for the protecting sleeve over the threaded end of the pipe, so that the interior threads on the projecting end of the coupler and the exterior thread on the end of the pipe may be prevented from being filled up or choked with the enamel or coating fluid.

The description in the application calls for a sleeve formed of any suitable material, such as paper, linen, pulp, metal, wood, or cardboard; but in claims 1, 3, and 5 of the patent no reference is made to the material of which this sleeve is to be manufactured. In claims 2, 4, and 6 this sleeve is referred to as "a fragile protecting sleeve." The

original idea of McIlroy was to protect by this sleeve the interior threads of the couplings extending beyond the end of the pipe to which it was attached. Later, however, and while the application was pending, he extended his description and claims to include a protecting sleeve of similar material and manufacture for the protection of exterior thread on the end of the pipe to which no coupler is attached. The defendant is not using, and never has used, any sleeve for the protection of the interior thread of the couplings extending beyond the end of the pipe to which it is attached, but is using a protecting cardboard sleeve upon the exterior thread of the opposite end of the pipe to which the coupler is attached. It is therefore wholly immaterial, in the determination of the issues here presented, whether or not this internal sleeve is new to the art. The several claims of this patent are:

(1) The process of treating a conduit unit having a threaded portion, consisting in the steps of applying a protecting sleeve to cover said threaded portion, and then applying a coating over said unit and said sleeve.

(2) The process of treating a conduit unit having a threaded portion, consisting in the steps of applying a fragile protecting sleeve to cover said threaded portion, and then applying a coating over said unit and said sleeve.

(3) The process of treating a conduit unit having an exteriorly threaded end, consisting in the steps of applying a protecting sleeve to cover said threaded end, and then applying a coating over said unit and said sleeve.

(4) The process of treating a conduit unit having an exteriorly threaded end, consisting in the steps of applying a fragile protecting sleeve to cover said threaded end, and then applying a coating over said unit and said sleeve.

(5) As a new article of manufacture, a conduit unit having a threaded portion, a protecting sleeve covering said threaded portion, and a protecting coating over said unit and sleeve.

(6) As a new article of manufacture, a conduit unit having a threaded portion, a fragile protecting sleeve covering said threaded portion, and a protecting coating over said unit and sleeve.

The defendant contends that all the claims of this patent are invalid, so far, at least, as they relate to the exterior sleeve, for the following reasons:

(1) Prior knowledge and use of the patent.

(2) Public use and sale in this country by others more than two years prior to the filing of the application for the patent in suit.

(3) Public use by the patentee, McIlroy, and his assignee, the plaintiff, more than two years prior to the filing of the McIlroy application.

(4) The patent is invalid, in view of the state of the art at the date of the alleged invention, since it claims merely an obvious factory method.

(5) Defendant, in its process complained of, has used only a process and sequence of steps which were old and well known at the date of the alleged invention of the patent in suit.

The truth or falsity of these defenses depends solely upon the facts

proven by the evidence in this case and involves no disputed question of law. In the patent art the defendants rely upon Loper, 222,920 and 628,408; Harlander, 418,644; Erickson, 712,514; Greenthaler, 811,288; Patterson, 950,341.

Without discussing these patents in detail, it is sufficient to say that the trial court properly found that these patents, especially Loper, 222,920 and 628,408, anticipated McIlroy in all respects, except the use of protecting sleeves to prevent the threads from being filled up or choked with a coating fluid when the threaded pipe is subjected to the enamel bath. Patterson, 950,341, in describing the enameling process, specifically refers to the use of a protector "on one or both ends of the pipe."

The evidence is clear that the predecessor of the defendant used protectors identical with the protector in use under the McIlroy patent as early as 1909, long before McIlroy claims to have discovered this invention; that for purely business reasons it discontinued the use of these particular protectors, and used couplings in their stead for like purpose, on both ends of the pipe, during the enameling process. This involved considerable labor, and when the European war started, and wages advanced, it became necessary for this defendant to return to the use of paper ferrules or protectors, in order to cheapen the cost of production. It therefore does not appear that the Western Conduit Company, or its successor, abandoned the use of these ferrules as a discontinued invention, but rather because of the fact that conduit without these protectors was selling for as much money as the conduit upon which they were placed. However, just as soon as the market conditions changed, so that the use of these protectors would not be a total loss to the manufacturer, this defendant resumed the same method that its predecessor had used prior to the McIlroy patent.

The New York Transit Company also used a cap and plug upon its pipe and coupling for the purpose of protecting the threads from the parolite coating operation as early as 1910.

The American Circular Loom Company used a similar method of keeping its thread clean as early as 1902. There is some evidence, however, that the iron coupling used by the American Circular Loom Company does not keep the threads as clean of enamel as paper protectors. However, that company has been using this process for a great number of years without experiencing any factory or commercial difficulties, and the testimony of Patterson and of McIlroy would indicate that, from their experience in doing their work in this way, the iron coupling is a successful method of keeping the threads of the conduit substantially free from enamel.

The Safety-Armorite Conduit Company also protected the threads of its conduit bends in like manner as early as 1901. It is still using this method. It further appears from the testimony of Schweinsberg that the process employed by the Safety-Armorite Conduit Company during all these years consisted of first pickling the pipe and then threading it, in a manner identical to the process to which appellant's disclaimer attempts to limit the claims in the McIlroy patent. This company also used paper protectors in its West Pittsburgh factory to

keep the threads free from enamel, as early as 1905. These protectors were used openly on pipe going through the regular factory process. Pettengill testified that during the time he was superintendent of this factory he personally used these paper protectors and observed the result. The witness Schweinsberg, who was employed at the West Pittsburgh plant of the Safety-Armorite Company from 1905 to 1908, and during the time paper protectors were used in that factory, entered the employ of the Western Conduit Company as superintendent January 1, 1909. He was familiar with the use of paper protectors in the Armorite factory, as testified by Pettengill, and it was while he was superintendent of the Western Conduit Company's factory that 5,000 of these paper protectors, substantially identical with the McIlroy protector, were purchased and used by that company.

The Clifton Manufacturing Company as early as July, 1911, used half couplings over the threaded ends of pipe, and then pickled and enameled and shipped the pipe with these thread protectors attached. This company also used brass unthreaded sleeves and wire thread protectors, which came on shipments of pipe, for the same purpose as the half coupling.

The Sprague Electric Company, about 1900, manufactured about 10,000 feet of conduit, using paper sleeves to protect the thread from the enamel bath. These sleeves were used openly in the factory in the presence of all the workmen. The appellant used at least 3,000 half couplings, or short couplings, and wire protectors, for the purpose of protecting the threaded end of the pipe from the enameling bath, as early as in June, 1908. McIlroy testifies that there was no secret in the use of the half couplings or wire protectors in the appellant's factory, and that the conduit upon which they were used was sold along with the usual commercial run of conduit. He further testified that these metal thread protectors were not satisfactory, although they were a great improvement "over using nothing at all," but that they were not as good as the Patterson process of enameling, threading and enameling after the pickling and cleaning operation. However, the public use of half couplings and wire thread protectors by the plaintiff as early as 1908 covers the process step by step to which the disclaimer would limit the claims of the McIlroy patent, and this was more than two years prior to the time McIlroy claims to have invented the process and the use of the paper protectors in connection with that process.

It is therefore apparent, not only that metal caps, couplings, and wire protectors were in public use for the purpose of protecting the thread of conduit and other kinds of pipe from the enameling or other coating process more than two years prior to the time of the filing of McIlroy's application for a patent, but also that paper protectors had been known and used commercially, at least on the exterior thread on the end of the pipe, not only for two years, but for many years, prior thereto.

The appellant proffers a disclaimer, the effect of which is:

"To limit claims 1, 2, 3, and 4 to a process, and claims 5 and 6 to a product, in which the conduit unit having a threaded portion is made by removing the

scale and slag by chemical treatment prior to the threading of the pipe, and in which the protecting sleeve has a substantially smooth and unthreaded surface, which will fit closely or snugly over the threaded end, but loose enough to allow sufficient or a small amount of enamel to reach the threads to form a thin, rust-preventing coating not sufficiently thick to require rechasing of the threads."

It is apparent, however, that this proposed disclaimer would amount to a virtual restatement of the claims of the patent. While McIlroy does state the usual practice with reference to the removal of the slag or scale and the threading of the pipe afterwards, substantially as in Patterson, nevertheless McIlroy's patent relates solely to a protecting sleeve to cover the threaded portions of the pipe and couplings before the enamel coating is applied. The process by which the pipe is prepared to receive this enamel coating is wholly unimportant in so far as the McIlroy invention, or claimed invention, is concerned. It will operate for the purposes described in the application, regardless of whether the pipe is threaded before or after the pickling process. In other words, the declared object and purpose of this invention is to protect the threaded ends of the pipe and the interior threads of the couplings from being filled up or choked from the enameling fluid. The validity of the claims in this patent cannot and does not depend upon the manner in which the pipe is prepared to receive this enamel bath. If this patent were intended to cover a process for the preparation of pipe to receive the enamel coating by first removing the scale and slag by an acid bath, followed by a sand blast, and then threading the pipe, it is sufficient to say that to that extent it would be anticipated by Patterson, and also by the public knowledge and prior use of that method as stated in the foregoing portions of this opinion relating to the Patterson patent. It is also true that, in view of the evidence relating to the prior art, it is wholly immaterial whether the claims in this patent be limited to a process or a product in which the conduit unit having the threaded portion be made by removing the scale and slag by chemical treatment prior to the threading of the pipe.

Nor can this disclaimer be permitted to limit the claims to an unthreaded sleeve which will fit closely or snugly over the threaded end, but loose enough to allow sufficient or a small amount of enamel to reach the threads to form a thin, rust-preventive coating, not sufficiently thick to require rechasing of the threads. In the disclosure in the application for this patent it is stated that, "if desired, the sleeve can be made loose enough to allow sufficient or a small amount of enamel to reach the threads in the projecting portion of the coupling to prevent their rusting"; but there is nothing in the claims or in the disclosure in reference to a threaded or unthreaded sleeve. The claims cover all sleeves, threaded or unthreaded, loose or close-fitting, so that it is evident that this application was made and allowed upon the theory that a protecting sleeve, of the kind described in the application and claims, involved invention, and not upon any theory that the invention consisted in a loose or unthreaded sleeve.

The court is not now at liberty to usurp the functions of the Patent Office, and by forced construction, with the aid of the proposed disclaimer, issue in effect a new patent, limiting the claimed invention to a particular kind of sleeve, notwithstanding the essential element of the

claimed invention consisted wholly in protecting the threads of the conduit by any "fragile" sleeve suitable for that purpose. Kellogg Switch Board & Supply Co. v. Dean Electric Co., 257 Fed. 425–428, 168 C. C. A. 465 (C. C. A. 6).

Even though this disclaimer might affect the question of anticipation and prior use, it is clear that the McIlroy process is not invention. It is no more than an obvious factory expedient to accomplish the desired result. The object desired was to keep the threads clean from the enameling substance. To do this required that they should be covered during the enameling process. If it was desirable that some of the enameling substance should enter into the thread, then the protective covering must be attached more loosely to the pipe than if the object desired was to exclude entirely all enamel or other coating substance from the thread. The history of this business, as detailed by the testimony of witnesses experienced and expert in the manufacture of conduit pipe, shows that it was not the exception, but the rule, to protect the threads during the enameling process. The use of couplings, half couplings, wire thread protectors, brass or paper protectors, was wholly a matter of choice, based upon economic reasons, factory experience, and good business judgment. The use of all of these forms of caps and coverings was known and available to all manufacturers of this or similar products for a period long exceeding two years prior to the filing of the application by McIlroy for this patent.

For the reasons above stated, the decree of the District Court, holding claim 1 of the Patterson patent and all the claims of the McIlroy patent invalid for lack of invention and lack of novelty, in view of prior knowledge and prior usage, is affirmed.

PANOUALIAS v. NATIONAL EQUIPMENT CO. (two cases).

(Circuit Court of Appeals, Second Circuit. November 17, 1920.)

Nos. 48, 49.

1. **Action ⟸53(1)—Cause of action for infringement of patent cannot be split.**

   In a suit in equity for infringement, where an amended bill is broad enough to cover infringement by a new construction adopted by defendant pending the suit, a waiver by complainant of any claim for profits and damages does not entitle him to maintain actions at law against defendant or its customers to recover damages for infringement by the new machine.

2. **Judgment ⟸592—All claims for infringement of patent should be included in one suit.**

   If different claims have been infringed, it is the patentee's duty in his suit for infringement to set forth all such clams for adjudication; and the rule is the same in respect of damages and profits arising from infringements not presented, but which might have been presented.

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

Suit in equity by Panayiotis Panoualias against the National Equipment Company. Complainant appeals from an order granting an injunction, and defendant appeals from an order denying an injunction. Affirmed on complainant's appeal, and reversed on defendant's appeal. See, also, 188 Fed. 211, 110 C. C. A. 430; 198 Fed. 493; 227 Fed. 1008.

The patent in question was granted to Panoualias (No. 685,790), and defendant is and long has been the manufacturer of alleged infringing devices. The patent expired November 12, 1918. Prior to 1910 Panoualias sued Confectioners' Company on the patent at law, claiming infringement of four claims. He obtained a judgment for nominal damages. Confectioners' Company took a writ therefrom to this court, and the judgment was affirmed in 110 C. C. A. 430, 188 Fed. 211, with a holding that claims 37 and 38 had been infringed and were the only ones applicable.

December 22, 1910, this suit was begun, being an ordinary patent proceeding to obtain the usual relief in respect of infringing machines sold after the date of the action at law. Prior to 1912, defendant, which had been making and selling what may be called the "single belt machine," changed its device, and made and sold, and has since continued to sell, what may be called the "divided belt machine." July 1, 1911, and after our affirmance of the judgment at law, plaintiff amended his bill, claiming broadly to recover for any infringement of claims 37 and 38, and on March 26, 1912, filed a supplemental bill reiterating that demand for relief.

In May, 1912, this cause was tried in open court and an opinion rendered to the effect that plaintiff was entitled to an injunction and an accounting in respect of all acts of infringement occurring after the beginning of the aforesaid action at law. 198 Fed. 493. June 15, 1912, interlocutory decree entered, enjoining defendant from any infringement of claims 37 and 38, and appointing a master to take an account. Since that time the accounting has proceeded, and no final decree has ever been entered.

Immediately on the expiration of the patent, plaintiff began an action at law to recover damages from the defendant for infringing the patent aforesaid. The prosecution of this action was enjoined on defendant's motion by the first order appealed from; plaintiff appealing.

In July, 1919, plaintiff began three other actions at law, against as many customers of the defendants, likewise to recover damages for infringement of said patent but by use of infringing devices. Defendant thereupon applied for the issuance of an injunction restraining the prosecution of such actions. This application was denied by the second order appealed from; defendant appealing.

Frank C. Briggs and S. Michael Cohen, both of New York City, for plaintiff.

Wm. Quinby, of Boston, Mass., and Livingston Gifford, of New York City, for defendant.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The propriety of the orders under review depends upon whether infringement by the "divided belt" machine is or is not involved in this suit in equity. When plaintiff, having acquiesced in the decision of this court (110 C. C. A. 430, 188 Fed. 211), filed his supplemental bill so as to claim broadly for any infringements of claims 37 and 38, it is plain that, not only was defendant making and selling the "divided belt" machine, but plaintiff knew it.

When the cause came to trial, plaintiff took the position that he would not "demand for profits or damages" in respect of the "divided belt" device, but would "simply ask the ordinary injunction against the infringement of claims 37 and 38." Apparently his reason for this proceeding was that, if he had "an injunction [he could] proceed to punish for contempt if it is violated"; and his counsel stated that proceedings under the injunction were "the proper place to determine whether the change is substantial or colorable, and whether the new

machine is contrary to the injunction restraining them from infringing these two claims of our patent."

The court permitted the trial to proceed on these terms, and by its interlocutory decree of June 15th ordered a recovery of the profits, etc., derived by defendant through "the manufacture or sale of candy-coating machines substantially like the defendant's machine in said action at law in infringement of claims 37 and 38." The situation was not changed by this language, for if the "divided belt" machine was substantially the device of claims 37 and 38, it was also the equivalent of the "single belt" machine, which was the infringement proved in the action at law.

This decree also directed the issuance of a perpetual injunction, which was to be directed generally against machines embracing "the invention described in claims 37 and 38." We have no evidence before us that such injunction was ever issued, but the preliminary injunction issued after our affirmance of the action at law, and still in force, is equally broad, and plainly covers *any* machine which in any way infringes claims 37 and 38.

We are thus satisfied as matter of fact that plaintiff, during the pendency of this plenary suit against one alleged to infringe by manufacturing and selling, has instituted against the same defendant an action at law to recover a portion of what he is entitled to in this suit, and three actions at law against customers of the defendant knowing them to be such customers, while knowing that defendant had assumed to defend its customers' use. It is avowed in argument that the reason for this multiplication of suits is a preference for proceeding before a jury.

[1] Plaintiff's legal proposition is in effect that, by not demanding (i. e., waiving) profits and damages in respect of the divided-belt device, while insisting on an injunction which restrained its manufacture, sale, and use, he reserved the right to sue elsewhere. No authority exists for such splitting of action, and it is opposed to fundamental rules; for a cause, once properly in a court of equity for any purpose, will ordinarily be retained for all purposes. Camp v. Boyd, 229 U. S. 552, 33 Sup. Ct. 785, 57 L. Ed. 1317. A "waiver" of pecuniary recovery made at trial, while insisting on injunction, cannot be construed as a lawful segregation for future litigation of the recovery waived. Indeed, waiver implies abandonment, not reservation for future use.

The methods of testing a changed infringement have been recently considered in this court, and where the change is more than merely colorable we adhere to our preference for a supplemental bill. Gordon, etc., v. Turco, etc., Co., 247 Fed. 490, and cases cited, 159 C. C. A. 541. In this case there was no necessity for such proceeding, because the original bill was so amended, after the change in defendant's device was well known, as to cover any and all infringements, whether by a single or a divided belt, and both alleged infringements were before the court at the time of the trial.

[2] Even if it were suggested (as it is not) that there are claims other than Nos. 37 and 38 which may be infringed by the divided belt

machine, since that device was before the trial court, it was the duty of plaintiff then and there to put forth all the claims that were infringed. Bryant Electric Co. v. Marshall (C. C.) 169 Fed. 426, affirmed 185 Fed. 499, 107 C. C. A. 599. And the rule is the same in respect of damages and profits arising from infringements, not presented to the trial court, but which might have been so presented. Horton v. New York Central, etc., Co. (C. C.) 63 Fed. 897.

It follows that the order entered April 29, 1919, was right, and is affirmed, with costs.

Since in this case the reference to the master has not yet been considered, it cannot now be said how full a recovery plaintiff will obtain; and it is certainly true that it must be decided in this case whether the divided belt machine does or does not infringe claims 37 and 38; and the users defendant, in the actions complained of, employ that style. Until such decision is reached, the actions against users must be stayed, as in Stebler v. Riverside, etc., Ass'n, 214 Fed. 550, 131 C. C. A. 96, L. R. A. 1915F, 1101.

The order of January 9, 1920, is reversed, with costs, and the court below directed to enjoin the prosecution of plaintiff's actions against defendant's customers until the termination of this present suit in equity.

NISBET et al. v. PERKINS TONNEAU WIND SHIELD CO., Inc., et al.

(District Court, S. D. New York. November 8, 1920.)

1. Patents ⟸168(2)—Patent held limited by amendment to meet objection of examiner, though based on erroneous supposition.

Where an applicant for a patent yielded to the objection of the examiner, though based on an erroneous supposition, and limited his claim accordingly, the patent was limited to the structure which the examiner had thought would secure the function which he supposed the applicant intended.

2. Patents ⟸168(1)—Claim not limited as examiner intended to, but failed to limit it.

Where by mistake the examiner did not impose a close enough limitation to narrow a patent as he meant to do, the patent could not be made over, as against the patentee, because of the mistake of the examiner in failing to phrase it properly.

In Equity. Suit by Theodore B. Nisbet and others against the Perkins Tonneau Wind Shield Company, Incorporated, and another. Decree for plaintiff for part of the relief asked.

Thomas Ewing and Frank C. Cole, both of New York City, for plaintiffs.

W. P. Preble, of New York City, for defendants.

LEARNED HAND, District Judge. [1] There seems to be no question that the amendments on which the examiner granted the patent were made in compliance with his understanding of the concluding language of the specification (page 2, lines 38–42):

"One of these [i. e., the supports] is then folded inwardly against the front seat, and the other is subsequently folded inwardly, as shown in Figure 3. This positions the main shield adjacent to the back of the front seat."

The examiner, reading this language, had assumed that—

"When the shield is moved from the position shown in Figure 1 to that shown in Figure 3," it "would cause the 'movable supports' to fold."

This does not follow from the language of the specification, but perhaps it was a natural understanding of its meaning. Mechanically speaking, as distinct from geometrically, the examiner's supposition was erroneous, because of the friction of the sleeves along the supports Nevertheless, the applicant yielded to the objection, and modified his claims by adding the limitation in question. He added to the second claim the words:

"The distance between said fixed pivot supports exceeding the normal distance between said sleeves."

This certainly was meant to limit the patent to that structure which the examiner had thought would secure the function which he supposed the applicant intended. He had said that it was necessary "that the pivots for the supports be farther apart than the pivots for the sleeves or slides." "Normal" is nowhere defined, but I cannot understand it as other than extended position of the shield. If so, the defendant has, of course, avoided infringement of claim 2. If by "normal" is meant the folded position, the question becomes more doubtful. The sleeve pivots are the same distance apart as the support pivots, but some parts of the sleeves proper are nearer together. In saying this, I disregard the division of the sleeves into two parts. On the whole, I should regard the pivots as controlling even then, rather than the sleeves, considering the function to be incorporated. In either event I think claim 2 is not infringed, both verbally and functionally considered.

[2] The situation is different as to claim 1. The examiner probably thought that the words, "the distance between said supports exceeding the length of said windshield," insured a greater difference between support, than between sleeve, pivots. But the defendant has avoided the function, while infringing the claim, by extending the sleeves beyond the edges of the shield. He argues that the language should be construed functionally, and that he has not, therefore, used the real feature on which the patent was granted.

I agree this far: He has not taken that functional element which the examiner thought the language secured; but it seems to me that this only means that the examiner was in error in supposing that a narrow shield necessarily required closer sleeve, than support, pivots. It did not; you might keep the windshield narrow, and yet avoid using the function, as the defendant shows. Hence, through his mistake the examiner did not impose a close enough limitation to narrow the patent as he meant to do. However that may be, he did what he did; and there cannot be the slightest question to my mind that, viewed as a grant, it covered all cases in which the shield was narrow. I cannot make over the patent against the patentee, because of the mistake of the examiner in failing to phrase it properly. The language is clear. If the defendant objects, let him widen his shield.

Of course, if the art would not allow such an interpretation, it would be another matter, but nothing in the art in the least approaches the in-

vention. Auster is the only reference which is at all relevant, and, aside from the fact that it was before the examiner, it is clearly distinguishable. The invention was a decided advance, and ought, I think, to have received wider claims than it did; but that, of course, is not open now. It is enough that the actual shield as made does infringe claim 1 and that claim 1 is valid. What the future may have in store, which of us shall say?

Decree for the plaintiff on claim 1; bill dismissed on claim 2 for noninfringement. No costs.

THE EMPIRE STATE.

THE E. M. DORAN.

(District Court, E. D. New York. November 12, 1920.)

1. **Collision ⇐70—Dredge need move out of channel only after reasonable notice.**
   While a dredge working in a channel under a government contract cannot obstinately or unreasonably block the channel, it is obliged to move out of the channel to give room to passing vessels only after reasonable notice to do so.
2. **Collision ⇐71(2)—Tug held at fault for collision between tow and dredge.**
   A tug *held* at fault for a collision between a barge in its tow and a dredge at work in the Kills, where the dredge moved only so as to increase the width of water for the tug, and the tug gave no notice for the dredge to move farther.
3. **Collision ⇐136—Dredge cannot recover for time lost in getting back into position.**
   A dredge only slightly injured, while engaged in government work on a channel, by a collision due to the fault of the tug in charge of the other vessel, cannot recover for the trouble and time necessary to get back into working position after moving out of the channel, but is restricted to the actual time lost in repairing the injuries which were received.

In Admiralty. Separate libels by E. Brown Baker, as owner of the dredge Empire State, against John Barton Payne, as Agent, and by Edward O'Neill and another, as owners of the canal boat E. M. Doran, against John Barton Payne, as agent, with E. Brown Baker, as claimant of the Empire State, impleaded. Decree rendered for libelants.

Foley & Martin, of New York City (J. A. Martin, of New York City, of counsel), for libelants O'Neill.

John C. Wait, of New York City, for libelant Baker.

Charles M. Sheafe, Jr., of New York City (E. R. Brumley, of New York City, of counsel), for John Barton Payne, Agent.

CHATFIELD, District Judge. The tug Mahanoy was towing certain barges and canal boats up through the Kills on the early evening of August 25, 1919. The dredge Empire State was excavating a channel under government contract from a line between Tufts Point, N. J., and Rossville, Staten Island, to a point some miles to the northward. There is no apparent doubt from the evidence that the next to

the last tier, having the barge Bully on the starboard side, came in contact with the dredge; that the Doran, the starboard boat in the last tier, also came in contact with the dredge; and the testimony shows plainly that some injury was received by the Doran.

It appears from the testimony that the dredge was excavating on the east side of the channel to be dredged under the contract. This would place her some 400 feet from the New Jersey bank, and some 600 feet from the Staten Island bank. She was lying generally north and south, the tide was running flood, and the dredge was kept from swinging by two cables, one to New Jersey and one to Staten Island, but both of which were allowed to rest upon the bottom, except when some strain was necessary to be exerted by the winch on one line or the other, so as to hold the dredge against the tide.

On the night of August 25th the weight of these cables appears to have been sufficient to keep the bow of the dredge from swinging. The stern of the dredge was held in place by a single spud.

Two actions have been brought: One by the owners of the Doran against the tug Mahanoy, which was towing the boats at the time, and which has in turn brought the dredge in by petition under the rule; the second action is brought by the dredge for the small amount of injury resulting to its pipe line, through which the mud excavated was being carried to the Staten Island shore for dumping, and for the amount of time lost because of the collision. While the amount of damage to the dredge is small, the question of responsibility is not to be measured thereby, and the matter of damage will be left for a reference, if necessary.

In the first action the Doran is shown to have been a canal boat of ordinary size. It appears that she had been placed with 3 other canal boats and a small barge in the last tier of this tow as the safest place for these small boats, and because the 5 boats were no wider than the boats in the tier ahead. It is alleged by the witnesses from the dredge that the tow contained six tiers of boats, of 4 each; but the testimony showing that there were but 14 boats in the tow, with 3 large barges in each of the first three tiers, is too definite to be overlooked.

Assuming, therefore, that the Doran was in the position described, the responsibility primarily for towing her safely through the Kills rested upon the tug. There is no fault shown against the canal boat in any way. The libelant O'Neill, therefore, is entitled to a decree for the damages sustained by his boat primarily against the Mahanoy, unless consideration of the issue raised in the other case should make it necessary to hold the dredge either entirely or in part for the results of the collision.

Considering, therefore, the question as between the Mahanoy and the dredge, there seems to be little issue of fact. The captain of the Mahanoy testifies that he did not blow a passing signal, but when he was within such distance that he could appreciate the situation, which, according to his testimony, was apparently some 1,000 or 1,200 feet away, he directed his tow toward the Jersey shore, so as to pass the dredge, which had been in sight for over half a mile. When several hundred feet from the dredge, he states that he blew an alarm, be-

cause at that time the dredge appeared to move towards New Jersey, and thus to further block the channel through which he expected to pass.

The testimony on behalf of the dredge shows that the captain of the dredge observed the Mahanoy when she was at least the same distance down the Kills as that from which the captain of the Mahanoy observed the dredge. Neither of them seems to have considered that whistle signals were necessary, unless there might be something in the size of the tow or its makeup which might cause danger, and which was not observable to the captain of the dredge. On the facts of the case there appears to have been no need of a whistle signal, as both parties were observing each other and acting accordingly.

The Empire State, however, knowing that it was occupying the channel, so that none too much room was given on the Jersey side through which the signals displayed indicated that the tow would have to pass, did endeavor, through taking in its port cable, to work toward Staten Island. The limit of this swing would be measured by the arc of the dredge rotating on the spud as a pivot, and the dredge, after moving toward Staten Island as far as it could, raised the spud and the tide swung the stern toward Staten Island. This maneuver apparently was what the captain of the Mahanoy saw when the bow of the dredge appeared to move toward New Jersey.

It is apparent, looking at the chart, that the captain of the Mahanoy, rounding the turn and seeing the dredge apparently rotating, with the bow of the dredge moving toward his port side, undoubtedly thought that the bow of the dredge was swinging towards New Jersey, and explains his testimony in that regard.

The fact remains that the amount of water available for the Mahanoy was increased rather than diminished, and there is nothing in the case to show that the dredge did move, so as to interfere with the Mahanoy's progress. I must therefore consider the case directly from the standpoint of responsibility for undertaking the passage or for creation of the situation as the Mahanoy undertook the passage.

[1] It appears from the rules, which are adopted according to statute, that the dredge is not allowed to obstinately or unreasonably block a channel of this nature. It has been held in numerous cases against the Berne and other Jersey Central and Lehigh Valley boats that the tugs cannot, without stopping and giving proper notice, expect the dredge to navigate out of the way of a large tow in time to let the tug pass through without delay. The regulations are in exact accordance with the situation that develops, and provide that upon proper notice, or reasonable notice, the dredge cannot obstinately refuse to move; but, aside from this provision, the statutes of the United States make it possible for the War Department to completely close the channel, if necessary, to do the excavating, and there is no legal obligation on the dredge to get out of the way on the giving of a whistle signal, in the sense in which a boat navigating up or down the channel would immediately obey that signal. The obligation, on the contrary, is on the captain of the tugboat to so manage or navigate his tow as to make the passage safely if he attempts it, and taking into account only the rights

which he and other persons using the channel can rely upon, namely, that the dredge shall not change its position, so as to interfere with the movements of the tug and its tow. Custom apparently has modified the rule to a certain extent; that is, that the dredges, in order to avoid injury to themselves, and out of a reasonable interpretation of the regulations, have been and are in the habit of giving the tows as much room as is possible; but I see from that no legal right on the part of the tow to expect that the dredge will always give way sufficiently to let the tow by.

In the case of the Mahanoy the responsibility is increased by the fact that the tow was a small one and that the boats were in but four tiers.

[2] The testimony shows that in coming around this point the swing of the tide would carry the tail of the tow toward Staten Island, and the tows do not move rapidly enough, even with the tide, to prevent the swing. In fact, the captain of the Mahanoy testified that, in order to swing his tow in this tide, he had to drop the starboard towing hawser at the time when he saw that the boats were going to come in contact with the dredge and when he attempted to swing them under a strong starboard helm.

On these facts I see no reason why the Mahanoy should not be held responsible for the unsuccessful attempt to pass the dredge in the position in which the dredge was lying at the time, and I see nothing in the action of the dredge which made the situation of the Mahanoy any worse, or which would indicate negligence on the part of the dredge at the time.

The decree, therefore, for O'Neill, should be against the Mahanoy, and the petition of the Mahanoy against the dredge dismissed, without costs.

[3] The libelant Baker should have judgment against the Mahanoy for the actual damage that he suffered, even though that is slight in value, and the question as to whether demurrage can be made to include the ordinary or usual delay in restoring the dredge to its position must be carefully considered. The libelant will not be given a decree in this case, as in a test case, for the trouble to which the dredges may be put and the time which may elapse in getting back into working order after moving out of the channel; but the damages will be restricted to the actual time lost in repairing the injuries which were received.

THE SAXON.

(District Court, E. D. South Carolina. January 5, 1921.)

1. **Intoxicating liquors ⊂=246—Large iron steamship not necessarily subject to forfeiture; "boat;" "craft;" "water craft;" "steamer;" "steamship;" "vessel."**

Under National Prohibition Act, § 26, providing that, when intoxicating liquors shall be seized, the officer shall take possession of any vehicle, boat, water craft, etc., in which it is transported, a large iron steamship of 10,000 tons, engaged in general commerce, is not necessarily subject to seizure because liquor was transported thereon through the unlawful act of members of the crew, especially as "boat," "craft," and "water craft" are usually applied to small vessels, while larger vessels, especially in the case of large iron steamships, are usually referred to by the terms "steamer," or "steamship," or "vessel."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Boat; Craft; Steamer; First Series, Steamship; First and Second Series, Vessel; Water Craft.]

2. **Intoxicating liquors ⊂=247—Steamship not subject to sale for illegal transportation without knowledge of owner.**

Under National Prohibition Act, § 26, providing that, when intoxicating liquors transported or possessed illegally shall be seized, the officer shall take possession of the conveyance, and that on conviction, unless good cause to the contrary is shown, the court shall order a sale of the property seized, good cause to the contrary is shown by showing that the owner of the conveyance was wholly ignorant and innocent of the illegal use thereof, and a large iron steamship, with a large crew, is not subject to sale and forfeiture because members of the crew, without the knowledge of the owners and in dereliction of their duties, have illegally transported intoxicating liquors for their individual purposes.

3. **Intoxicating liquors ⊂=251—Seizure of steamship and requiring bond as condition of release held improper.**

On the arrest of officers and members of the crew of a steamship for illegal possession and transportation of intoxicating liquors, where there was no charge or evidence that the owners knew the liquor was on board, it was improper to seize the steamship and require a bond for its production as a condition of its release.

Proceeding by the United States against the steamship Saxon. On application by the owner of the steamship for its release, and the cancellation of a bond given for its production. Steamship released, and bond annulled.

F. H. Weston, U. S. Dist. Atty., of Columbia, S. C., and J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C.

Miller, Huger, Wilbur & Miller, of Charleston, S. C., for defendant.

SMITH, District Judge. In this case an application is made for the cancellation of the bond given to procure the release of the steamer Saxon under the following circumstances:

The steamship Saxon is an American steamship about 20 years old, 330 feet in length over all, 40 feet 4 inches beam, double decked, and of 2,663 gross tonnage. Her home port is in the city of New York, state of New York. The Saxon is navigated by her owners, the Clinchfield Navigation Company, which is a domestic corporation, under the

laws of the state of New York, with its principal offices in the city of New York, and has until recently been engaged in carrying coal from the port of Charleston to the port of Havana, Cuba. The Saxon arrived in the port of Charleston, S. C., on December 20, 1920, from Havana, Cuba, in ballast; that on the arrival of said steamship in the port of Charleston, the federal prohibition agents, under the National Prohibition Act, boarded the vessel, found a quantity of liquor thereon, in the possession of the officers and crew of said steamship, who were thereupon arrested, and have been bound over for trial in this court for unlawfully manufacturing, selling, bartering, transporting, importing, exporting, furnishing, dealing in, and possessing intoxicating liquors, in violation of the National Prohibition Act, and have also been charged with conspiring to commit an offense against the United States.

The federal prohibition agents at the same time seized the steamship, and refused to release the vessel or permit her clearance, until a bond was given in the sum of $15,000, conditioned for the return of the steamship to the custody of the federal authorities on the day of the trial of the criminal prosecution against the said arrested parties.

In this state of affairs, the Clinchfield Navigation Company, the owner of the vessel, has applied to this court for relief, and to have the vessel released and the bond cancelled, alleging that, if intoxicating liquor was found by the federal prohibition agents upon the vessel, the officers and crew of the vessel who possessed the liquor are responsible for that; that the vessel was not engaged in transporting intoxicating liquors, but was engaged in commerce, in transporting coal; that the liquor was not a part of the cargo of the ship; that no consideration was received for its carriage; that the owners knew nothing whatsoever of the existence of the liquor on board of the ship; that it was without the knowledge or consent of the owners, who had in the most direct and positive way prohibited the master, officers, and crew from bringing liquor or alcoholic beverages of any character upon the boat.

The application of the owners is further to the effect that a steamship of this size is not a "boat" or "water craft," within the contemplation of the National Prohibition Act (41 Stat. 305), nor liable to seizure and detention in this way. Due notice of this application was given to the United States attorney for this district, who has appeared and been heard on the application. There is no dispute as to the facts as hereinbefore stated.

Section 26 of the National Prohibition Act provides that whenever an 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 thereon, being transported contrary to law. The section proceeds:

"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 by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise," etc.

[1] Upon the consideration of this act it will be seen that the language used is that a person must be discovered in the act of transporting, in violation of the law, intoxicating liquor in any wagon, buggy, automobile, water or air craft, and following that the statute prescribes that whenever the intoxicating liquors being 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.

The words used as applicable to the means of transportation by water are "water craft" and "boat." Ordinarily the term "boat" and the term "craft" are applied to water transporting conveyances of small character. As a rule, the word "boat" is used somewhat in contradiction to the word "vessel"—"vessel" being a boat of larger size, generally one fitted to navigate the high seas; while "boat" as a rule was applied to an undecked, small, open vessel.

Anterior to the application of propulsion to small boats by means of gasoline, so as to bring them within the class of self-propelled vessels, the word "boat" was usually applied to small, open vessels only, propelled by oars in the hands of oarsmen; although poetically, and otherwise, the term "boat" may be sometimes applied to a vessel of any size. The word "water craft," or the term "craft," as usually used, was applied to small vessels generally engaged in coastwise or domestic navigation. For larger vessels, as used in the present day, especially in the case of large iron steamships, the terms "steamer," "steamship," or "vessel" are generally used. Unless, therefore, the generality of the language of the statute be sufficient to embrace vessels used in water transportation, of any size, and of any kind, the words of the statute in this case would not cover a large iron steamship.

But, more than this, the intention of the statute is to be regarded. The intention of the statute is that the officer shall seize water craft or boat or land means of transportation which are actually engaged in the transportation of intoxicating liquors as its purpose so to say. Where that purpose is merely incidental, and carried on illegally by some one upon the vehicle or water craft, it would not necessarily come within the purport and intention of the law to seize the conveyance. An automobile carrying liquor, and evidently engaged in it for that purpose, for the occasion, at least, would clearly be within the terms of the law. But a railway train, upon which liquor may be found, which is being illegally transported by some employee or passenger, would not be liable to summary seizure, as would be an automobile. So, a small or comparatively small boat, or sailing boat, or gasoline- or steam-pro-

pelled small vessel, which at the time it is used for that purpose, at the time, as the main purpose of its then employment, would be subject to seizure under the statute. But if a large vessel of 10,000 tons, engaged in general commerce, such as the transportation of general merchandise, as its purpose and object, had liquor aboard only incidentally, through the unlawful act of some member of the crew, it would not necessarily be subject to seizure. The ancient and immemorial maxim of the law is that ships were made to plow the seas, and should be released, as far as possible, from all detention that would prevent them from accomplishing that main and primary purpose.

[2] It is further to be remarked that the statute does not forfeit in express terms a vehicle or means of conveyance upon which liquor is found, but only declares that, upon conviction of the person arrested, the property seized shall be sold by the court unless good cause to the contrary is shown by the owner. Good cause to the contrary would certainly be that the owner of the method of transportation, whether it be by vehicle or watercraft, was wholly ignorant and innocent of the illegal use of his property. For instance, if a man left his automobile in the street, and it was unwarrantably taken possession of by an evil-doer, who transported liquor in it, it would not be sold. So if a vessel was at anchor, and was seized and taken possession of by an evil-doer, who then proceeded to subject it to the unlawful uses of transporting liquor, good cause to the contrary would be shown in the innocence of the owner, and the property would not be sold. It would likewise follow that a large iron steamship, in the employment and use of which likewise a large crew of officers and men is required, would not be subject to sale and forfeiture, because one or more of the crew, without the knowledge or assent of the owners and in dereliction of their duties, were to seek to use the vessel to carry out for their own individual purposes the illegal transportation of intoxicating liquors.

[3] The officers and members of the crew, in whose possession was found this liquor, have been arrested and bound over for trial. There is no charge or evidence that the owners of the vessel were aware the liquor was on board. To allow the vessel to remain tied up and not performing the purpose for which she is created until these parties are tried, when they are mere employees, and not the owners, of the vessel, and when their conviction would in no wise necessarily lead to the forfeiture or sale of the vessel, would seem to be wholly useless. If the vessel, under the circumstances of this case, would not be held, then no bond should have been required for its production, and any bond given to procure its release was improperly required, and should be canceled. If the circumstances should show that through the improper use of the vessel it should be forfeited to the United States, then it can be libeled wherever found in the United States, and by proper proceedings, in which the owners can appear and defend their rights, an adjudication can be had.

It is accordingly ordered that the steamship Saxon be released from custody, and the bond given for its production be annulled.

In re GERONIMO PARA.

In re ZASUECHI NARASAKI.

(District Court, S. D. New York. May 3, 1919.)

No. 452.

Aliens ⇐65—Service in army or navy does not authorize naturalization of aliens not white persons or Africans; "any alien."

Act June 29, 1906, § 4, subd. 7, as amended by Act May 9, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4352), relative to the naturalization of "any alien," Porto Rican, or Filipino, serving in the army, navy, etc., merely provides more expeditious and favorable terms of admission for such persons than before existed and does not extend the right of naturalization to aliens other than free white persons, aliens of African nativity, and persons of African descent, specified in Rev. St. § 2169 (Comp. St. § 4358), in view of section 2 of the act of 1918 (section 4352aa), providing that nothing therein shall repeal or enlarge section 2169, except as specified in subdivision 7 and under the limitations therein defined.

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

Applications for admission to citizenship by Geronimo Para and by Zasuechi Narasaki. Petitions denied.

AUGUSTUS N. HAND, District Judge. The petitioner in the first proceeding is a South American Indian, and in the second proceeding a Japanese. Each petition is filed under the seventh subdivision of section 4 of the Act of June 29, 1906, as amended by the Act of Congress approved May 9, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4352). The petitioners claim that, by reason of service in the naval forces of the United States during the present war, they are eligible for citizenship, notwithstanding that the first is of the American Indian race and the second of the Mongolian race. The government contends that naturalization is under any circumstances restricted to free white persons, persons of African descent, and native-born Filipinos and Porto Ricans. Heretofore persons eligible for naturalization have not included Indians, Malays, or Mongolians. In re Camille (C. C.) 6 Fed. 256; Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; In re Alverto (D. C.) 198 Fed. 688; Bessho v. United States, 178 Fed. 245, 101 C. C. A. 605; In re Buntaro Kumagai (D. C.) 163 Fed. 922; In re Knight (D. C.) 171 Fed. 299.

Section 2169, United States Revised Statutes (U. S. Compiled Statutes, § 4358), provides that:

"The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

Section 14 of the Act of May 6, 1882 (U. S. Compiled Statutes, § 4359), provides that:

"Hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."

Section 4 of the Act of June 29, 1906 (being section 4352 of the U. S. Compiled Statutes), provides:

"An alien may be admitted to become a citizen of the United States in the following manner and not otherwise."

United States Revised Statutes, § 2166 (U. S. Compiled Statutes, § 4355), provides:

"Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or the volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such. * * *"

The last section was construed by the Circuit Court of Appeals for the Fourth Circuit, in Bessho v. United States, 178 Fed. 245, 101 C. C. A. 605, as limited by the provisions of section 2169 of the United States Revised Statutes, which admits to the privilege of naturalization only free white persons and persons of African nativity or descent; that is to say, the words "any alien," in section 2166 of the Revised Statutes, supra, were held to mean any alien of the restricted class, and not to include a subject of the Mikado of Japan, who in that case was applying to be naturalized. See, to the same effect, In re Buntaro Kumagai, supra; In re Knight, supra.

Subdivision 7, section 4, of the act of June 29, 1906, as amended by Act of May 9, 1918, provides that:

"Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the regular or the volunteer forces, or the National Army, the National Guard or Naval Militia of any state, territory, or the District of Columbia, or the state militia in federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a re-enlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of this subdivision it is shown that such residence cannot be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; any alien declarant who has served in the United States Army or Navy, or the Philippine Constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon

proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization; and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in section three of the act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the government from the bureau of Naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed prima facie evidence to satisfy all of the requirements of residence within the United States and within the state, territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate of honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed; and any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court. Any alien, who, at the time of the passage of this act, is in the military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. The time of military service may be established by the affidavits of at least two other citizens of the United States, which, together with the oath of allegiance, may be taken in accordance with the terms of section seventeen hundred and fifty of the Revised Statutes of the United States after notice from and under regulations of the Bureau of Naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or of the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the Government from the Bureau of Naturalization at the hearing as provided by section eleven of the act of June twenty-ninth, nineteen hundred and six. Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relating to the administration of the naturalization law; and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the Commissioner or Deputy Commissioner of Naturalization: Provided, that it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of

the court: Provided further, that service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry.

"During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military service of the United States for filing his petition or issuing the certificate of naturalization upon admission to citizenship, and no clerk of any state court shall charge or collect any fee for this service unless the laws of the state require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the state shall be charged or collected. A full accounting for all of these transactions shall be made to the Bureau of Naturalization in the manner provided by section thirteen of the act of June twenty-ninth, nineteen hundred and six."

Section 2 of the act of May 9, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4352aa), provides that:

"All acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh sub-division of this act and under the limitation therein defined. * * * That as to all aliens who, prior to January first, nineteen hundred, served in the Armies of the United States and were honorably discharged therefrom, section twenty-one hundred and sixty-six of the Revised Statutes of the United States shall be and remain in full force and effect, anything in this act to the contrary notwithstanding."

The question is whether the words "any alien," appearing in the amended act of May 9, 1918, are broader than the words "any alien" used in section 2166 of the Revised Statutes which I have above quoted. This last statute was passed upon by the Circuit Court of Appeals of the Fourth Circuit and by Judge Chatfield and Judge Hanford in the decisions I have cited, and the words "any alien" were held to be limited, by section 2169 of the Revised Statutes, to white persons and aliens of African nativity and to persons of African descent. It might well be held under the reasoning of these cases that section 2169 still limited the provisions of the Act of May 9, 1918, except so far as that act by expressly covering native-born Filipinos and Porto Ricans enlarged the former provisions pro tanto, even if section 2169 had not been referred to; but it seems clear that the words of section 2 of the Act of May 9, 1918, expressly providing that "nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined," were intended to preserve the definition of the classes of persons who could become citizens of the United States except certain Porto Ricans and Filipinos.

The Naturalization Act of June 29, 1906, repealed sections 2165, 2167, 2168, and 2173 of the Revised Statutes, while it retained section 2169, defining the classes of aliens which may be naturalized. This section is expressly preserved and practically re-enacted by section 2 of the act of 1918. If the words "any alien" are to be taken literally, not only would a meaning be given wholly contrary to existing judicial interpretation, but all the definitions of section 2169 would be ren-

dered meaningless, and even Chinese who had served in the army could be naturalized, in spite of the express language to the contrary. However worthy may have been the military services of the petitioners, I can find no warrant in the statutes for their naturalization. The words "any alien," appearing in the Act of May 9, 1918, are subject to prior judicial interpretation, and in my opinion embrace only such aliens as could theretofore have been admitted to citizenship, and merely provide more expeditious and favorable terms of admission than before existed.

For the foregoing reasons, the petitions are denied.

CARTIER et al. v. DOYLE, U. S. Internal Revenue Collector.

(District Court, W. D. Michigan, S. D. August 7, 1920.)

1. **Internal revenue ⇐7—Income from sale of timber land attributed to partnership's business of dealing in lumber.**
   Under Act Oct. 3, 1917, § 201 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336¾b), providing, relative to the excess profits tax, that all trades and businesses in which a partnership or corporation is engaged shall be treated as a single trade or business, etc., income of a partnership dealing in lumber derived from an isolated sale of timber land must be attributed to the business of dealing in lumber.

2. **Internal revenue ⇐7—Partnership having invested capital less than that fixed not entitled to complain of method of determining.**
   Under Act Oct. 3, 1917, §§ 201, 209, 210 (Comp. St. 1918, Comp. St. Ann. Supp. 1918, §§ 6336¾b, 6336¾j, 6336¾k), imposing an excess profits tax at different rates on partnerships having and those not having an invested capital, and providing a method of determination when the invested capital cannot be satisfactorily determined, a partnership which had invested capital, not nominal in amount, but less than the arbitrary or supposititious invested capital fixed under the statute, could not complain of the method employed in fixing it; the tax being correspondingly diminished.

3. **Internal revenue ⇐7—Persons buying and selling lumber held not "brokers."**
   Partners buying lumber from manufacturers, reselling it to their own customers, and employing a large amount of capital, were not "brokers," as respected liability for the excess profits tax, though they conducted the business personally with the existence of a small clerical office force.

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

4. **Statutes ⇐219—Departmental regulations are aids to interpretation, but cannot change statute.**
   While in doubtful cases departmental regulations may be aids in the construction and interpretation of taxing statutes, they can neither add to nor subtract from plain congressional enactments.

5. **Internal revenue ⇐7—Property of partners pledged as security for borrowed money is part of "invested capital."**
   Under Act Oct. 3, 1917, §§ 201, 209 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 6336¾b, 6336¾j), imposing excess profits taxes at different rates on partnerships having and those not having an invested capital, where a firm's working capital was borrowed on notes of the firm, to

secure which property of the individual partners was pledged, the property so pledged was a part of the "invested capital," though by express provision of the statute invested capital does not include borrowed money.

In Equity. Suit by Charles E. Cartier and another, copartners doing business as the Cartier-Holland Lumber Company, against Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan. Judgment for defendant.

Butterfield, Keeney & Amberg, of Grand Rapids, Mich., for plaintiffs.

Myron H. Walker, U. S. Dist. Atty., of Grand Rapids, Mich., and Aubin L. Boulware, of Washington, D. C., for defendant.

SESSIONS, District Judge. Cartier-Holland Lumber Company is a partnership composed of Charles E. Cartier and Edward M. Holland, and engaged in the business of buying, selling, and dealing in timber, lumber, and other forest products. The net income or profits of the firm during the taxable year 1917 amounted to $47,018. Of this sum, $20,353 resulted from an isolated sale of timbered land, and the balance from the regular or customary lumber business of the partnership. The company has never owned any lands, timber, plant, mill, or yard, and has never done any manufacturing or carried any stock of manufactured lumber. Its principal business consisted of buying lumber from manufacturers and reselling the same to its own customers. The business was conducted by the partners personally, with the assistance of a small clerical office force, one bookkeeper and two stenographers. Since its organization, in 1912, the firm has at all times been a heavy borrower of money. According to its books, on January 1, 1917, the company's indebtedness to banks, for borrowed money was the sum of $36,300, and its other indebtedness, presumably for lumber purchased, amounted to $12,309.22, making a total indebtedness of $48,609.22; its accounts and bills receivable probably representing lumber sold, aggregated $39,281.72; and its other assets, including petty cash, office furniture, insurance paid, and cash in bank, amounted to the sum of $2,108.65, making a total of assets of $41,390.37. In other words, at the beginning of the taxable year, the liabilities of the firm exceeded its assets by the sum of $7,218.85. The account of each member of the firm was then several thousand dollars overdrawn. At the end of the year 1917, the firm assets exceeded its liabilities by nearly $14,000, which consisted entirely of profits made during the taxable year.

Plaintiffs' articles of agreement of copartnership contained the following provision:

"The paid-in capital of the partnership is to be thirty thousand ($30,000.00) dollars, any or all portion of which amount is to be furnished to the partnership by above-named Charles E. Cartier as the requirements of the partnership appear, and upon the note or notes of such partnership; such note or notes not to be made transferable, nor made items of record. Such notes are to be paid at the earliest practicable opportunity out of the net earnings of the partnership business, and to bear legal rate of interest."

For a time, in carrying out this provision of the partnership agreement, plaintiff Cartier borrowed money from the banks upon his own note, secured by collateral, and furnished the same to the company. Later, and probably before January 1, 1917, the agreement was modified, and working capital was obtained by borrowing money from banks upon firm notes, indorsed by both members of the firm and secured by collateral furnished by Cartier; the property so pledged as collateral security in all cases and at all times being of greater value than the face of the notes. This method was pursued during the entire year 1917.

Plaintiffs, as copartners, made due return of net income of $47,018 for the year 1917, and voluntarily paid an excess profits tax, computed at 8 per cent., in accordance with the provisions of section 209 of title II of the Act of October 3, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336⅜j), and amounting to $3,761.44. Apparently their right to a deduction of $6,000 from the income before computing the tax was inadvertently overlooked. Thereafter the Commissioner of Internal Revenue, claiming that plaintiffs were not entitled to the benefit of the provisions of section 209 of the Act of October 3, 1917, but were taxable under the provisions of sections 201 and 210 of that act (sections 6336⅜b, 6336⅜k), assessed against them an additional excess profits tax for 1917 amounting to $9,027.46. Plaintiffs paid the additional tax under protest and have brought this suit for its recovery.

The conclusions reached upon questions of law involved in this case may be thus summarized:

[1] 1. Plaintiffs' contention that, in the assessment of excess profits taxes, the income derived from the single timberland deal, amounting to the sum of $20,353, must be considered and treated by itself, and separate and apart from other partnership income or profits, is negatived, in express terms, by the statute here under consideration:

"For the purpose of this title every corporation or partnership not exempt under the provisions of this section shall be deemed to be engaged in business, and all the trades and businesses in which it is engaged shall be treated as a single trade or business, and all its income from whatever source derived shall be deemed to be received from such trade or business."

Confessedly the company's principal business was dealing in lumber, and, under this statute, its entire income must be attributed to that business.

[2] 2. If, during the year 1917, Cartier-Holland Lumber Company had invested capital, within the purview and meaning of that term as employed in the statute, more than nominal in amount, excess profits taxes upon its income could not be assessed under the provisions of section 209 of the statute, and, if the amount of such invested capital could not be satisfactorily determined, excess profits taxes must have been assessed under sections 201 and 210 in accordance with proper regulations prescribed by the Commisioner of Internal Revenue. If the lumber company had invested capital more than nominal in amount, plaintiffs are not in a position to complain of the regulations promulgated or of the method employed in determining

the amount of the firm's invested capital, which forms the basis of the computation of the taxes, because, under the undisputed evidence, the arbitrary or supposititious invested capital fixed upon was larger in amount than the invested capital actually possessed and employed, and the taxes imposed were correspondingly diminished. These taxes are assessed upon percentages of income to invested capital. The larger the capital, the smaller the percentage and resulting tax.

[3] 3. Plaintiffs are not brokers, within any accepted definition of that term. They are paid neither a salary nor commissions for their services. They buy and sell lumber, and undertake and assume all the risks and enjoy all the benefits of a merchandising business. They employ a large amount of capital; their income is dependent upon their personal services and efforts only in the same way and to the same extent that the farmer who works his own farm or the merchant who conducts his own store derives his income from his individual endeavors.

[4] 4. The rights of these parties cannot be made to depend upon nonstatutory classifications, regulations, or definitions. The statute applies to all trades and businesses, without regard to their class or character. While, in doubtful cases, Departmental regulations may be an aid in construction and interpretation, they can neither add to nor subtract from plain congressional enactments. In this instance, differences in the meaning of the terms "invested capital" and "capital" are wholly immaterial. If Cartier-Holland Lumber Company had any invested capital, it was substantial, and not merely nominal, and plaintiffs must fail. On the other hand, if the company had no invested capital, plaintiffs are entitled to recover, regardless of the amount of its borrowed or other noninvested capital.

[5] That the partnership was doing business upon borrowed money is beyond dispute, and that invested capital does not include borrowed money is settled by the express terms of the statute; but it by no means follows that plaintiffs are right in their contentions. The term "invested capital," as here used, includes all working capital consisting of money or property employed in the business or for its benefit, and furnished or "paid in" by one or more of the partners. Applying this test, it is clear that this partnership had invested capital within the purview and meaning of the statute. In the determination of this question, money borrowed from banks or individuals other than members of the firm, and solely upon the credit of the firm, must be excluded and may not be considered; and, for the purpose of this decision, it is unnecessary to determine whether, as claimed by counsel for defendant, money borrowed upon the notes of the firm, indorsed by the individual partners, and largely, if not wholly, upon the credit of the latter, is to be deemed invested capital of the partnership. If the original partnership agreement had been carried out and performed, it would not be claimed that the moneys paid in and furnished by plaintiff Cartier in accordance with its terms would not constitute invested capital of the firm, without regard to the manner in which or the source from which such moneys were ob-

tained by him. The method or plan adopted and used in 1917 was a change in form rather than in substance. The evidence shows conclusively that, for every dollar of money borrowed from the bank, property of one of the members of this firm, exceeding in value the amount of the loans, was deposited with the bank and pledged as collateral security for the repayment of such borrowed money. The property so furnished and pledged became a part of the working capital, and was used and employed in the business of the company to the same extent as if it had been paid directly into the firm treasury.

Judgment will be entered for defendant, with costs of suit to be taxed.

THE PRINCESS SOPHIA.

Petition of CANADIAN PAC. RY. CO.

(District Court, W. D. Washington, N. D. October 23, 1920.)

No. 4553.

1. **Admiralty ⇐75—Equity rules as to discovery not applicable.**
   The admiralty rules promulgated by the Supreme Court under the Act Aug. 23, 1842, comprehend a complete procedure in admiralty, and are independent of any other rules promulgated by that court relating to equity procedure, and in rules 27 and 32 (29 Sup. Ct. xlii) provide a procedure for the discovery of facts, and the equity rules on that subject do not govern.

2. **Admiralty ⇐75—Interrogatories should not fish into evidence of adverse party.**
   Interrogations in a suit in admiralty should not be used merely to fish into the evidence which the party interrogated may produce in support of his own allegations.

3. **Admiralty ⇐75—Documents may be subject of interrogatories by defendants.**
   Under admiralty rule 32 (29 Sup. Ct. xlii), the defendants in a suit by a shipowner to limit liability may interrogate the petitioner regarding documents forming the subject-matter of the litigation, but letters telegrams, etc., between the petitioner and its officers, agents, etc., are not an issue within such rule.

4. **Admiralty ⇐75—Oath in answer to interrogatories sufficient, without production of documents.**
   Under admiralty rule 32 (29 Sup. Ct. xlii) authorizing the defendant to require the libelant to answer interrogatories requires only an oath in answer thereto, and does not provide an inspection of documents.

5. **Admiralty ⇐75—Exhibition of documents should have regard to substantial rights appearing from pleadings.**
   Exhibitions of documents in admiralty should have regard to the substantial rights, and, as a basis for the right to the discovery of such documents, the special right must appear upon the face of the pleadings.

6. **Admiralty ⇐75—Production of privileged communications for inspection may not be required.**
   Letters, reports, statements, telegrams, etc., between a shipowner and its officers, agents, etc., and the members of the crew concerning the stranding of the steamer, *held* apparently privileged, so that their production for inspection might not be required under any law or rule in a proceeding by the shipowner to limit its liability.

7. Admiralty ⟸79—Powers as to forms and modes of procedure not arbitrarily applied.

While courts of admiralty and maritime jurisdiction are given ample powers as to forms and modes of procedure, such power must not be arbitrarily applied, but must have relation to rules of evidence, or promulgated rules of courts, or statutes duly enacted.

8. Admiralty ⟸75—Production of unspecified documents for inspection denied.

Where, in a suit by a shipowner to limit its liability for the sinking thereof, the claimants had copies or access to some of the documents, the production of which was sought to be compelled for inspection, but did not specify the particular documents, as would be required in an action at law, under Rev. St. § 724 (Comp. St. § 1469), the motion for production of the documents will be denied.

In Admiralty. Petition by the Canadian Pacific Railway Company, owner of the steamship Princess Sophia, for limitation of liability. On motion to require the production of certain documents, etc. Motion denied in part.

Bogle, Merritt & Bogle, of Seattle, Wash., for petitioner.
William Martin, of Seattle, Wash., for claimants.

NETERER, District Judge. The petitioner seeks to limit liability of claim for damages on account of the vessel Princess Sophia foundering on Vanderbilt Reef. The claimants take issue, and seek to impress claims for damages. Interrogatories have heretofore been filed by the claimants, and exceptions sustained to some and answers made to others. The claimants now seek by motion to require the petitioner to produce:

First. "All letters, reports, statements, telegrams, cablegrams, wireless and radio messages, memoranda, containing substance of all telephone and radio messages, paper writings, and communications of every nature and kind, had or passing between any of the officers, agents, attorneys, and employees" of the petitioner, pertaining to the loss of the steamship Princess Sophia, to "its officers, its crew, its stranding upon Vanderbilt Reef, while upon Vanderbilt Reef its foundering, the passengers thereon, the keeping or removing of the passengers and crew from said wreck, the disposition of the bodies of the passengers or their effects, and of the salving of said steamship."

Second. "Also all telegrams, cablegrams, radiograms, and messages of any kind, letters and memoranda, and substance of any conversation or communication by telephone, wireless, or otherwise, sent by any of the officers or agents of the petitioner to any of the officers or crew of the steamship Princess Sophia, or received from any of the officers or crew of the Princess Sophia, by any of the agents or officers of the petitioner on the 23d, 24th, 25th, and 26th days of October, 1918."

Third. "Also all letters, telegrams, cablegrams, wireless messages, and agreements between the agents of the petitioner and their attorneys, and between the attorneys of the petitioner, and also between Capt. Leadbetter and E. M. Miller of the Cedar and Capt. J. J. Miller of the King & Winge, pertaining in any manner to their appearing before and giving testimony before the Canada commission appointed to investigate said wreck, showing the amount of money paid to each of them for going to and appearing before said commission and giving their testimony, or for any other purpose whatsoever, or at all, together with a statement of the costs and expenses and of all moneys paid out or expended, and to whom paid, by the petitioner, in connection with the stranding and foundering of said steamship and the

loss of the lives of the passengers thereon, and of all vessels sent to stand by said wreck, or subsequent services rendered in connection with the salving of said wreck, gathering and disposing of the bodies of the passengers, with a copy of the contracts, if any, made with all of said vessels as to their going to said wreck, and the parties thereof standing by or rendering such services."

Fourth. Request is made for the passenger list, names, destination, class, also names, ages, and residences and position of every officer and member of the crew upon the instant voyage, and also upon the three prior voyages of said steamship.

Fifth. To produce and leave with the special commissioner, for claimants' proctors' inspection, "use and evidence," all the ship's logs, and all the pilot house logs and scrap logs of the steamship Princess Sophia, covering a period of three years immediately prior to the foundering, and all reports made by any of the officers of the crew for three years, and all its records and routes and courses navigated through the three years immediately prior to the foundering, and all reports, records, and accounts kept and made by the officers in charge of said ship, showing the number of times said steamship had been wrecked and gone ashore, and under what circumstances and conditions, or whether said steamship ran ashore and on reefs during the six years immediately prior to foundering of said steamship.

Sixth. To produce and leave with the special commissioner, "for inspection of claimants' proctors and use and evidence, all of the telegrams, reports, papers, logs, maps, charts, and exhibits withdrawn by the petitioner, its officers, agents, or attorneys from the office of the deputy Minister of Marine of the Dominion of Canada, at Ottawa, Canada," being exhibits introduced before commission appointed by the Minister of Marine of the Dominion of Canada for the purpose of investigating the Princess Sophia wreck.

Seventh. To produce and leave with the special commissioner, "for inspection of claimants' proctor and use as evidence," all diaries, letters, telegrams, notes, and memoranda of every kind and description, made by any of the passengers of or concerning said wreck, or found upon the bodies of any of the passengers, or floated from said wreck, or about said wreck, in the possession of the petitioner or any of its officers, agents, or employees.

In support of the motion claimants cite sections 724 and 862, Rev. Stat. (Comp. St. §§ 1469, 1470), and equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv). Section 724 reads:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertaining to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. * * * *"

Section 862 reads:

"The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."

Equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) reads:

"The plaintiff at any time after filing the bill, and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter, by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer, but no party shall file more than one set of interrogatories to the same party without leave of the court or judge."

Section 917, R. S. (Comp. St. § 1543), reads:

"The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with laws of the United States, the * * * modes of * * * taking and obtaining evidence, of obtaining discovery, * * * to be used, in suits in equity or admiralty, by the * * * district courts."

Section 918, R. S. (Comp. St. § 1544), provides that:

"The several * * * District Courts may, from time to time, * * * make rules * * * as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

As to admiralty and maritime cases on the instance side of the court, in pursuance of Act Aug. 23, 1842, c. 188, 5 Stat. 516, rule 27 (29 Sup. Ct. xlii) provides:

"In all libels in causes of civil and maritime jurisdiction, whether in rem or in personam, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation, and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel."

Rule 32 (29 Sup. Ct. xlii) provides:

"The defendant shall have a right to require the personal answer of the libelant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libelant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libelant to any prosecution or punishment or forfeiture as is provided in the thirty-first rule. In default of due answer by the libelant to such interrogatories, the court may adjudge the libelant to be in default, and dismiss the libel, or may compel his answer in the premises by attachment, or take the subject-matter of the interrogatory pro confesso in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice."

[1] The rules promulgate under the act of 1842, supra, comprehend a complete procedure in admiralty and are independent of any other rules promulgated by the Supreme Court relating to equity procedure, and provide a procedure for discovery of facts as appears in rules 27 and 32, supra. While, as stated by the claimant, admiralty courts proceed upon equitable principles, and the provisions of the equity rules should obtain, since admiralty courts are not restricted by the technical rules of the common law, the admiralty court has laid down its rules of procedure and, as is stated in The Fred E. Richards (D. C.) 248 Fed. 956, it would result in confusion to borrow equity rules in an admiralty procedure.

[2] Judge Hand, in Coronet Phosphate Co. (D. C.) 260 Fed. 846, said:

"Interrogatories * * * serve two purposes, to amplify the pleadings of the party interrogated, and to procure evidence in support of the libel or defense of the party interrogated. * * * They should not, however, be used merely to fish into the evidence which the party interrogated may produce in support of his own allegations."

If this is true of the procedure under express admiralty rule, much more emphatic is the thought when it is attempted under a borrowed rule.

[3, 4] Under rule 32 claimants have a right to interrogate petitioner upon any matter charged in the libel, all documents forming the subject-matter of the litigation may be the subject of interrogatories. The letters or telegrams, etc., communicated to the petitioner are not an issue in the pleadings, but are only sought as evidentiary matter. While claimants may interrogate a petitioner upon any material fact in issue, the rule requires only the oath in answer thereto, and this has been given in the interrogatories propounded. There appears no rule applicable to the inspection of documents. Judge Brown, in Havermeyers, etc., v. Compania, etc. (D. C.) 43 Fed. 90, said:

"The English practice, which provides for the production of documents * * * in admiralty, is founded upon express statutory provisions and definite rules of court. * * * We have no such statute applicable to proceedings in admiralty."

[5] Section 724, supra, relates to actions at law only. Judge Brown, in Havermeyers, supra, reviewing the modes of discovery, predicates the present right upon the principle of actio ad exhibendum, and while in our admiralty proceedings the distinctions of form are disregarded, exhibitions of documents should have regard to the substantial rights, and as the basis for right to the discovery special right must appear upon the face of the pleadings. 2 Story, Eq. Jurisprudence, §§ 1490, 1491. The practice requiring an exhibition of all correspondence, accounts, books of entry, etc., says Judge Brown—

"is repugnant to the spirit of our jurisprudence, which has always jealously guarded the private affairs of litigants from the unnecessary prying of their adversaries. No precedent can be found for it, either in equity or admiralty."

[6] The motion of the claimants could scarcely be more far-reaching. The communications sought, as now presented, appear privileged, and a production for inspection may not be required under any law or rule. Cully v. N. P. Ry. Co., 35 Wash. 241, 77 Pac. 202. It appears that some of the matter sought by the claimants is a matter of public record before a special court of inquiry in British Columbia, and claimants have access thereto, and it was stated at bar that they have copies of such hearing, except maps, and some of the messages sought are given in answers to interrogatories propounded in this proceeding. The Supreme Court in Carpenter v. Winn, 221 U. S. 533, 31 Sup. Ct. 683, 55 L. Ed. 842, said:

"* * * A bill of discovery cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise, or vague guesses is called a 'fishing bill,' and will be dismissed. Story, Eq. Pl. §§ 320 to 325. Such a bill must seek only evidence which is material to the support of the complainant's own case, and prying into the nature of his adversary's case will not be tolerated."

[7, 8] While ample powers are given to courts of admiralty and maritime jurisdiction as to forms and modes of procedure, it is a power "held in trust for the benefit of litigants," and to be applied to the practical needs of justice. The Alert, 40 Fed. 838; The Hudson (D. C.) 15 Fed. 175; Deslions v. La Compagnie, etc., 210 U. S. 95,

28 Sup. Ct. 664, 52 L. Ed. 973. This power, however, must not be arbitrarily applied, but must have relation to rules of evidence, or promulgated rules of court, or statutes duly enacted. As now advised, claimants, it appears, have a copy or have access to the public record of the evidence before the Canadian commission appointed by the Dominion government to inquire into the sinking of the steamship Sophia, where the information here sought is disclosed. If that record discloses documents, etc., material to the tendered issue, claimants would in an action at law be required to specify the particular letter or message, etc., desired, giving the contents and relevancy to his contention under section 724, R. S.

The motion is denied, except that the log for the steamship Sophia for the three years immediately preceding the sinking shall be produced before or at the trial.

LINDSEY v. ALLEN, Atty. Gen. of Massachusetts, et al.

(District Court, D. Massachusetts. September 21, 1920.)

No. 1019.

1. **Physicians and surgeons ⇐5(1)—Malice of registration board immaterial, if applicant was not entitled to register.**
   In a suit to compel the state registration board to register plaintiff as a physician and surgeon, the alleged malice of the board in denying registration is immaterial, if under the state law plaintiff was not entitled to registration.

2. **Physicians and surgeons ⇐5(1)—Under Massachusetts statute, registration without examination three years after enactment is prohibited.**
   The provision of St. Mass. 1894, c. 458, § 3, authorizing registration of practitioners of medicine on payment of a fee of $1, was limited by section 8 of the same act, requiring examination of all applicants on and after January 1, 1895, so that a previous practitioner, who did not apply for registration until 1898, was not entitled to registration without examination.

3. **Injunction ⇐109—Malice of board in prosecuting physician for practicing without license immaterial.**
   In a suit to restrain the prosecution of plaintiff for practicing medicine without a license, the alleged malice of the registration board in instituting numerous prosecutions against plaintiff in the state courts, while permitting others to practice who had never passed examination, was immaterial, if plaintiff was guilty as charged in the prosecutions, and there was no showing that the act was being administered in an unconstitutional way.

4. **Physicians and surgeons ⇐1—State has power to except certain classes from operation of Medical Registration Act.**
   The exception from the operation of the Massachusetts statute for the registration of physicians and surgeons of some classes of practitioners that many would regard as swindlers does not exceed the power of the state to embody its own convictions and policies in its laws.

5. **Courts ⇐508(7)—State prosecutions under unconstitutional statute cannot be enjoined, if question can be raised therein.**
   The federal court will not interfere with prosecutions in the state courts, where there is no impediment interposed to the raising in those

prosecutions of any defense which accused may have, or may think he has, under the Constitution of the United States.

6. Courts ⇐508(7)—**In prosecution, stipulation not to practice medicine held not ground for enjoining subsequent prosecutions.**

A stipulation by accused not to engage in the illegal practice of medicine, entered in a prior prosecution for that offense, would not preclude accused from attacking the state statute as contrary to the United States Constitution in a subsequent prosecution, and so such stipulation is not ground for injunction by the United States courts against prosecutions.

In Equity. Bill for injunction by Willard M. Lindsey against J. Weston Allen, Attorney General of Massachusetts, and others. Motion for injunction denied, and bill dismissed.

Hector M. Hitchings, of New York City, and Henry N. Rice, for plaintiff.

Arthur E. Seagrave, Asst. Atty. Gen., of Massachusetts, for defendants.

Before HOLMES, Circuit Justice, ANDERSON, Circuit Judge, and MORTON, District Judge.

HOLMES, Circuit Justice. This is a bill in equity brought against the Attorney General of Massachusetts, two District Attorneys of the same State and the members of its Board of Registration. The prayers are that the Board be ordered to convene and to issue to the plaintiff a license to practise medicine upon payment by the latter of the statutory fee of one dollar; that all the defendants be restrained from maintaining any criminal or other proceedings against the plaintiff because of his practicing medicine and prefixing Dr. or affixing M. D. to his name without a license or on the ground of his character; that it may be declared that the plaintiff has a vested right to practise medicine and to call himself Dr. and M. D. of which he cannot be deprived by a Massachusetts statute; and that it also may be declared that the patenting and sale of his medicines under the laws of the United States cannot be prevented by any act of the defendants or law of the State.

By Chapter 458 of the Acts of 1894 the State Board of Registration was established with the duty to examine applicants and to issue certificates to those who passed the examination and complied with the provisions of the Act. By section 3 every person who had been a practitioner of medicine continuously for a period of three years next prior to the passage of the Act, upon payment of a fee of one dollar was entitled to registration and a certificate, but by section 8, on and after January 1, 1895, all applicants were to be examined, thus allowing a little less than seven months for the operation of section 3, as the act was approved on June 7, 1894. The Statute was amended by Chapter 230 of the Acts of 1896, and the two with some further modifications were taken up into Chapter 76 of the Revised Laws of the State.

The bill alleges that the plaintiff had practised medicine for more than eight years before the passage of the Act of 1894, calling himself Dr. and M. D., that he did not know of the Statute until January, 1898,

and then tendered a dollar to the Board and demanded a certificate which was refused. It also alleges that he continued to practise without molestation until 1914, and had discovered remedies of which it is enough to say that they are alleged to cure tuberculosis, blood clots, fistulas, cancers, gallstones, and syphilis. Since 1914, he has been convicted several times of practising medicine without a license, etc., and fined under the penal provisions of the Statutes and in one case pleaded nolo contendere and "was discharged upon entering into a stipulation 'to never again engage in the illegal practice of medicine.'" He had applied several times to the Board for a license, demanding it as of right, not offering to submit to the statutory examination, but the Board has rejected the applications and, it is alleged, has then maliciously caused the above mentioned criminal proceedings to be instituted against him. There are extensive allegations of the merits of the plaintiff and the demerits of the Board which it is unnecessary to state more at length. There is no allegation that the sale of the plaintiff's compounds has been or will be interfered with apart from his attempt to style himself Dr. or M. D. Affidavits are filed in support of the above allegations. The case came on before us on a motion by the plaintiff for a preliminary injunction and a counter motion by the defendants that the bill be dismissed. An answer has been filed containing a demurrer, and the plaintiff admitted at the hearing that the bill should be dismissed if in our opinion it could not be maintained upon the pleadings and affidavits introduced.

[1-4] We say that the charges of malice and improper motives against the Board are immaterial, even if otherwise sufficient, because, whatever may have been the animus of its members, it was its plain duty under the statute to refuse a demand for a certificate without examination, when the demand was not made until 1898. Section 8 limited the operation of section 3, and even if the time allowed was short, the plaintiff was not entitled to wait three years. As to the prosecutions, it seems that the plaintiff was guilty under the act and here again the motives for instituting them were immaterial. It is alleged that the Board permitted others to practise who had never passed an examination, but nothing sufficient appears to show that the act is administered in an unconstitutional way. We perceive no valid ground open on the bill for contesting the constitutionality of the Act. As to the plaintiff's right to call himself M. D. and to practise medicine it is enough to say that the law gave him a fair chance to preserve the supposed rights and that he let it go by. Whether M. D. does not convey the implication that the person affixing those letters to his name has received a degree from an authorized source and therefore was in this case a fraud in contemplation of law, we need not consider. The exception from the operation of the statute of some classes of practitioners that many people would regard as swindlers does not go beyond the right of the State to have its own convictions and its own policy and to embody them in law.

[5, 6] In view of what we have said it is enough to add that at least there is no such clear infraction of the plaintiff's rights or impediment to his asserting any defence that he may think he has under

the Constitution of the United States if he is indicted again as to warrant this court's interfering with the regular processes of justice in the State. There is no deterrent. The stipulation above mentioned, even if it was more than an understanding outside the record, which does not appear, would present no obstacle to any defence upon a new indictment, probably would be disregarded for all purposes if the statute should be held unconstitutional, and whatever its effects, was the act of the plaintiff not of the Statute. If this bill should be entertained any criminal might seek an injunction in the courts of the United States to prevent the regular administration of the State laws whenever a question as to their constitutionality could be raised. Here however we see no ground for even a reasonable doubt that on the questions before us the Act was within the power of the State.

Motion for injunction denied.

Bill dismissed with costs.

THE GOWANUS.

(District Court, E. D. New York. November 16, 1920.)

Collision ⊂=95(7)—Both tug and ferry held at fault for collision between tow and ferry.

On libel to recover damages from a collision between a barge in tow and a ferryboat, where the tow and ferry were meeting on substantially parallel courses, the tug *held* at fault for attempting to cross the bows of the ferryboat when it was too late for such maneuver, and the ferryboat *held* at fault for approaching too close to the tug without agreement for passing arranged by whistles.

In Admiralty. Libel by the Undercliff Terminal & Warehouse Company against the ferryboat Gowanus, in which the City of New York was impleaded. Decree rendered for libelant, against both respondents.

Henry A. Rubino and Finis E. Montgomery, both of New York City, for libelant.

John P. O'Brien and Mr. Carroll, both of New York City, for respondent.

CHATFIELD, District Judge. The pleadings in this case set forth situations which are exactly like those now stated by the captains of the two boats, and which make out two different stories, both of which contain impossible elements.

The accident happened on February 18, 1916, so that the witnesses are going back over four years in their recollection. Both captains have reconstructed the positions and the situation of the boats, so as to explain the matter as laid out in the pleadings, and, as usual, the facts appear to make out a probable situation rather than either one of the impossible situations which they claim.

In the first place, this accident happened in broad daylight. The boats were at no time at which they had anything to do with the movements of each other more than 1,000 feet apart. There was no pressing circumstance affecting the handling of either boat. The Taylor,

which had two barges on her port side and one on her starboard side, having come down the Hudson river, had gone across below Governors Island on a course which would bring her into the Red Hook Channel on her way to Pier 4 of the Bush Terminal. This necessitated a passage down Red Hook Channel for a distance of 2,000 or 3,000 feet. The ferryboat, which had come out from the Thirty-Ninth street ferry slip, Brooklyn, had approached the Red Hook Channel from the southeast on a course which would necessitate her passing through the Red Hook Channel in a position which is not only the customary route of the ferryboats, but is a compass course, as I know from the many matters which have been disposed of in other cases. The course of the ferryboats is thus a matter of habit, and is followed with very slight deviation. This would take the ferryboat on a course parallel to that of the Taylor, but in an opposite direction, for the 2,000 or 3,000 feet up and down the Red Hook Channel. The courses of both boats would thus be parallel to the bulkhead wall of the Erie Basin, and the captains of both boats agree that they were proceeding parallel to that wall.

The captain of the ferryboat saw the Taylor coming across and turning into the Red Hook Channel, and assumed that she was bound for the Erie Basin. No confusion was caused by the fact that she was at least as far over as the center of this channel, or on the port side of mid-channel, and the ferryboat intended to go up the channel and pass the Taylor starboard to starboard.

The captain of the Taylor, on the other hand, saw that the ferryboat was turning into the Red Hook Channel, and that she was apparently passing by, so as to pass the Taylor, either starboard to starboard, or port to port, as she might proceed to the point of meeting.

Neither of them indicated by any whistle signal the course that they intended to follow until they were comparatively close together. There is no dispute that two vessels, one of which was the Dolphin, or a destroyer, passed down the Buttermilk Channel, one on each side of the Taylor and went by the ferryboat port to port. Apparently the ferryboat had not yet reached a position where it was necessary for her to signal the naval vessels, nor for the naval vessels to signal her. In fact, the ferryboat either gave way to the naval vessels, or so directed her course that the naval vessels went across her bow without difficulty, and actually passed her on port to port courses.

There appears to have been a tow coming around the lower point of the Erie Basin and close enough to the Brooklyn shore to make it difficult for the Taylor to go down on the inside of the ferryboat.

The captain of the Taylor testifies that, when he saw that the ferryboat was proceeding, as he thought under a port helm, to pass astern of the naval tug, and when he realized that the situation was close enough to make some signal necessary, he decided to blow a one-whistle signal and attempt to pass outside of the ferryboat; that is, port to port, according to the rules. Both captains agree that this one-whistle signal was given, and it appeared that the boats at the time were but a few hundred feet apart; the ferryboat fixing the distance

at 600 or 700 feet, and the Taylor fixing it less. The result would indicate that the boats were closer together than 600 or 700 feet.

The Taylor did, under this one-whistle signal, port her helm and attempt to move out. The ferryboat apparently made no change of helm, but blew three whistles, reversed, and attempted to stop.

There is nothing to indicate that this of itself was any wrong maneuver on the part of the ferryboat, as the vessels were apparently too close for any change of course at that time. The boats came together with the port forward corner of the outside port barge in the tow of the Taylor striking on the starboard side of the front of the ferryboat. The momentum of the ferryboat caused the vessels to crash further together, with the deck or overhang of the ferryboat riding over and across the barge, which thus was carried far enough aft on the ferryboat to damage the superstructure on the starboard side of the ferryboat, while the injury inflicted by the ferryboat to the barge was just aft of the port forward corner, as testified to by Mr. Bushey.

That explains the location of the injuries, and makes it apparent that the accident could not have happened as the captain of the Taylor describes it; for his story is that the ferryboat executed a letter S maneuver and struck the barge a blow which could have been inflicted only by a boat that was overtaking the barge, instead of her meeting head on.

The captain of the ferryboat has described the way the boats came together, and there seems to be no reason now to doubt that the blow occurred as he said, with the exception that apparently the boats were not on as much crossing courses as he would indicate.

Both witnesses have attempted to place their boats at the extreme position according to their own stories. It would appear that the Taylor was not as far inshore as the captain of the Gowanus places her, because it would have been a physical impossibility for the Taylor to have made the turn and covered the distance in the time which elapsed, if she had been that much closer to the Brooklyn shore. Besides, if she had been in that position, the ferryboat could have run around her, and I am satisfied that no captain woud have blown a reverse whistle and attempted to stop, if he had had clear water ahead of him and on his port hand, when given a signal by a heavily laden tow working against the tide, which was 200 feet or more to the starboard of his course.

I shall find, therefore, that the vessels were on courses substantially not far apart; that the Taylor was misled by the movements of the naval tug and of the ferryboat, when viewed in conjunction with the presence of the tow coming around the Erie Basin, and that she then attempted to cross the bow of the ferryboat and to indicate her desires by one-whistle signal. Her captain should have realized that it was too late to do so, and was negligent.

On the other hand, I think that the captain of the Gowanus was misled by the idea that the Taylor was going into the Erie Basin, or was intending to round the corner of the Erie Basin, to go into the Gowanus Creek, and that he held his course and indicated no whistle

signal until he was too close to the tow of the Taylor to maneuver safely at the speed at which he was going with the tide.

Therefore, both captains were at fault for the situation in which they found themselves, and responsibility should be divided.

I will divide the damage between the ferryboat and the Taylor. The libelant may recover for the barge.

M. & J. TRACY, Inc., v. MARKS LISSBERGER & SON, Inc.

(District Court, E. D. New York. November 15, 1920.)

1. **Wharves ⇐20(6)—Consignee held liable for injury at public dock.**
   A consignee, who directed the barge to be sent for unloading to a public dock, where it was known it would ground at low water, is liable to the barge owner for injuries caused by a rock in the bottom at that berth; the consignee's remedy, if any, being against the municipality in control of the dock.

2. **Wharves ⇐20(3)—Consignee must give warning of necessity to breast out vessel at dock.**
   Where the consignee directed a barge to be sent to a public dock for unloading, and it appeared that, under some circumstances, but not always, it was necessary to breast out vessels from the dock, the consignee is liable for injuries from a defective condition of the berth, where he did not give warning of the necessity for breasting out under the conditions, though he would not have been liable if that was necessary under all conditions and the master of the barge was familiar with the dock.

In Admiralty. Libel by M. & J. Tracy, Incorporated, against Marks Lissberger & Son, Incorporated. Decree rendered for libelant.

Foley & Martin and W. J. Martin, all of New York City, for libelant.

White & Case and Allen McCarty, all of New York City, for respondent.

CHATFIELD, District Judge. The testimony shows that the barge Albany sank opposite to the northerly end of West street, in Long Island City. West street runs out to the south side of the slip or body of water known as the Standard Oil creek. The bulkhead at this street is used as a public slip and is maintained by the city, although practically every one who uses the berth has to encroach on the oil properties on either side of the street. It must be held from the testimony that the boat was in good condition and not leaking when she arrived there with a cargo of coal, which would give her a draft of some 6 or 7 feet. She arrived Thursday night, was reported some time that night or Friday, and on Friday afternoon was observed to be sinking. She stayed on the bottom until Monday, when her cargo of coal was taken off, and during that time was observed to lie at an angle, with her stern some 1½ or 2 feet higher than the bow, and in a position some 10 or 12 feet from the face of the bulkhead.

It is not necessary to go into the differences in the testimony, because

the only witness for the respondent who had anything to do with the boat or her condition is manifestly confused in his recollection.

On Monday the boat was pumped out and her cargo removed, when she floated and stayed afloat until taken to a dry dock in Jersey City, where a boulder was found imbedded in her bottom, some 6 or 7 feet forward of the stern, and held in a break in three or four of the bottom planks. The boat was consigned to this public wharf by the respondent. If the wharf were a private wharf, maintained by the respondent, upon a similar showing of facts the libelant would be entitled to a decree, as there seems to have been no fault on the part of the captain of the vessel or of the libelant, and no sounding or test of the slip would have disclosed the particular boulder which caused the damage.

[1] According to the testimony the captain loosened the line, so she could rise and fall with the tide, and no instructions were given to breast the boat off any distance from the wharf, although the stevedores who unload customarily in that place testify that they ordinarily breast off vessels to avoid their being injured at low tide. Under such circumstances the consignee would be responsible, if the condition of the berth is within his control. When the consignee depends upon an independent contractor to furnish a berth for him, or when he uses a public dock, the duty rests upon the consignee to see that proper warning is given as to the way in which the berth should be used, if the consignee has been in the habit of using that particular berth, so as to be familiar with its general condition. That would seem to be the situation in this case. But in addition, if the consignee was not bound to give warning, or to take any particular care of the boat at the dock, then his reliance upon the maintenance of the public berth by the city is the reason why he goes to no trouble himself and assumes that the berth is safe. Under these circumstances he is responsible for the care of the vessel which is placed by him in the berth, and he in turn must look to the parties maintaining the public berth for which he pays hire, if they do not furnish him with a safe berth.

The libelant cannot be compelled to look to any one except his consignee, where an accident occurs through an obstruction the presence of which could have been discovered by ordinary care, or what would be reasonable care in maintaining a safe berth. This is not the case of a temporary or floating obstacle, for which no one could be held responsible or shown to have failed to take reasonable notice of its existence. The consignee is primarily liable, and whether or not he can relieve his responsibility by bringing in any other party does not affect the right of the libelant to recover. On the testimony the libelant should have a decree, and the amount of damage should be determined on a reference.

Mr. McCarty: May I call your attention to just one thing, for such consideration as you desire to give it, in view of the turn your opinion has taken; that is, the uncontradicted testimony of Mr. Sievern, a stevedore of long experience in those waters, to the effect that he on numerous occasions had unloaded boats that belonged to the

libelant at this very dock, indicated a certain amount of knowledge and familiarity with the conditions there on the part of the libelant?

[2] The Court: I referred to that because I conceived of a situation where the responsibility for not breasting a boat in a place where every one knows they have to take bottom might rest upon the captain. Where both the consignee and the captain, or the employers of the captain, know that the boat has to be breasted out, or has to lie on the bottom, and they take the risk of letting her lie on the bottom, the necessity of giving warning to breast the boat out may be removed. We frequently have cases where the question turns upon whether the captain did properly breast out his boat, everybody assuming that that is what he should do. But I do not think the evidence in this case shows just that kind of a situation. Here was a berth that according to the testimony was used both ways, and it would depend upon the draft of the vessel, the character of its cargo, the conditions under which the boat went there, whether it was the duty of the captain to breast out, or whether it was the duty of the consignee—that is, the person maintaining the slip—to obtain sufficient information as to whether breasting out was necessary.

I do not think the testimony in this case goes so far as to show that either the libelant or the libelant's captain was informed of the nature of this berth as to any danger, from which the responsibility rested upon them to breast the boat out in any event. That question of law depends on the facts of the case, as I see it. I do not think in this case that the captain was called upon to do it. If the case was different, and such testimony had been put in, I anticipate that that might be the issue in the case; but I think it has been removed by the testimony here, so that I do not view the case in that light.

DEMPSEY v. MARYLAND TRANSP. CO.

MILLER FERTILIZER CO. v. SAME.

(District Court, D. Maryland. December 22, 1920.)

1. **Towage ⇐11(10)—Tug liable for loss of tow.**
Owner of a tug *held* liable for loss of a barge in tow, where the master left port with three barges when storm signals were displayed, and on encountering weather no worse than should have been anticipated abandoned the barges and failed to take any action to save them after the storm had abated.

2. **Shipping ⇐208—Tug owner not entitled to limitation of liability for lost tow.**
The owner of a tug, which failed to send assistance to barges for two days after being notified that the tug had cast them loose in Chesapeake Bay during a storm, *held* not entitled to limitation of liability for one which had sunk in the meantime.

In Admiralty. Suit by John J. Dempsey, trading as Dempsey & Sons, and by the Miller Fertilizer Company, against the Maryland Transportation Company. Decree for libelants.

Lord & Whip, of Baltimore, Md., for libelants.
Whitelock, Deming & Kemp, of Baltimore, Md., for respondent.

ROSE, District Judge. The libelants in these consolidated cases seek compensation for the barge Curtin, and for its cargo of fertilizer lost when, on the 7th of last March, it foundered in the Chesapeake, in consequence, as is alleged, of the default of the respondent's tug Seminole. The respondent denies liability, and in the alternative seeks to limit it to the value of the tug.

[1] On the first issue, the libelants must prevail. It is probable that the Seminole would have had difficulty in taking care of a tow of three laden barges in anything like stormy weather. Nevertheless, its master started from Baltimore, in early March, when storm signals were flying, and the barometer falling. In the bay, between the Patapsco and the Severn, he was caught in a heavy blow, which, however, does not appear to have been any worse than might at that season of the year have been anticipated from the weather indications accessible to him when he left port. His story of his difficulties, and of the way he dealt with them, as told by himself and other witnesses, does not inspire confidence in either his skill or his courage. When the gale became heavy, he cut off the barges he had in tow. He says, before doing so, he whistled them to anchor, although it does not appear that they heard his signal. He at once sought refuge for himself and his tug in Annapolis Harbor. It is quite possible that, by the time he cast off his charges, there was little else left for him to do; but there is much reason to suspect that it was poor seamanship which had gotten his tug in such a position that it was shipping a dangerous amount of water. Although the bad weather appears to have been of very short duration, he remained in the Annapolis harbor for nearly 24 hours, or until 4 o'clock the next afternoon, when he at last returned to look

after the helpless barges. He found one of them securely anchored and in good condition. Its master, however, told him that he had better look after the other two. He went towards the Curtin, the nearer of them; but he says he went aground before he got to it, and concluded that it was impossible to reach it. The charts do not show any shoal water in his way. When the Curtin was subsequently raised, there was no difficulty whatever in getting to her, and two days later a tug of at least equal draft with that of the Seminole went to the third barge, which lay from a quarter to a half mile nearer the shore than the Curtin, without trouble or apprehension of it.

The master of the barge to whom he first spoke testifies that, as the Seminole passed upon its return from the direction of the Curtin, its captain told him that both the other barges had sunk, and that nobody was aboard either of them. Neither of these statements was the fact. The truth was, in all probability, that he never went near enough either of the barges to form any accurate opinion as to what their condition was. He went back to Annapolis, and from there telephoned to the tug's owner in Baltimore that the barges were out in the bay, and that he had not coal enough left to complete the voyage to Norfolk. He was ordered to come back to Baltimore, and was told that another tug would be sent for his charges. On the next Sunday, apparently in every respect a pleasant day, he took his boat to Baltimore. At 4 o'clock in the afternoon, the Curtin, whose weight had been greatly increased by the ice which formed upon it, and whose pumps were frozen, went down, and its cargo became a total loss. On the next day, Monday, the respondent sent another tug to look after the barges, and the two which were still afloat were taken in charge without difficulty.

[2] What has been said renders unnecessary any further discussion of liability. May the respondent limit it?

The owner of the barge claims that he contracted for the services of the tug Baltimore, a larger and more powerful boat than the Seminole, and that, when the latter was sent, the master of the sunken barge did not accept its service until he was assured that it was strong enough for the work. If there was any breach of duty in this respect, it was that of the respondent. In fair weather, the Seminole was doubtless equal to the task of towing three such barges to Norfolk. It was a mistake for it to try to do so under the weather conditions to be expected when the trip began; but that appears to have been the blunder of the master rather than of the owner. Under stress, the former proved incompetent; but there is no reason to believe that before the event the owner had any reason to suspect that he was. The owner seems to have exercised reasonable care in selecting him.

But, if, on this point, the owner is entitled to a verdict of not guilty, or at least, not proven, how is it with its failure to see that the barges were looked after on Sunday?

The owner, that is to say, its president and its executive officer, whose privity and knowledge is for the purpose at hand that of the owner, was told by the captain of the Seminole on Saturday, by telephone from Annapolis, that he was not sure that one of the barges was all right. Nevertheless, as that captain reported that he was short

of coal to make the trip to Norfolk, the owner ordered him back to Baltimore, adding that another tug would be sent for the tow, as soon as the weather was fit. All the evidence is clear that the weather on Sunday, at least, was all that could be desired, and yet no tug was sent until Monday. No explanation is given for the delay. Under such circumstances, and in March, no one had the right to trifle with time. Had a tug gone down Sunday morning, the Curtin and it valuable cargo would doubtless have been saved. The failure to send one was, of course, with the privity and knowledge of the owner, for it was the owner who failed.

The petition for limitation of liability must be denied.

PRATT & YOUNG, Inc., et al. v. SUSQUEHANNA COAL CO.

(District Court, D. Massachusetts. January 6, 1921.)

No. 1002.

1. **Sales ⟸219(3)—Party electing to treat coal obtained by fraud as sold cannot sue third party for conversion.**
   Where coal was obtained from defendant by the D. Co. by fraud, and thereafter, with full knowledge, defendant brought suit against the D. Co., alleging an agreement of settlement and nonperformance thereof, and that the D. Co. was indebted to it in a sum including the value of such coal, and obtained a decree establishing the indebtedness of the D. Co., and giving it an equitable lien on proceeds of sales of such coal, it definitely and finally elected to treat the coal as sold to the D. Co., and could not sue a third party for conversion of the coal as its property.
2. **Injunction ⟸26(6)—Plaintiff held entitled to enjoin action at law, instead of presenting defense in such action.**
   Where defendant, from whom the D. Co. obtained coal by fraud, had elected to treat the coal as sold to the D. Co., plaintiff could maintain a suit to enjoin defendant from suing plaintiff for conversion of the coal, instead of presenting such defense in the action at law; there being no real issue of fact, and the questions involved being purely legal.

In Equity. Suit by Pratt & Young, Incorporated, and others, against the Susquehanna Coal Company. On motion for an injunction. Motion allowed.

Henry F. Hurlburt and Damon E. Hall, both of Boston, Mass., for plaintiffs.

Hale & Dorr, of Boston, Mass., for defendant.

MORTON, District Judge. The facts are clear, and there is no serious controversy concerning them. The A. H. Dollard Coal Sales Company (which I shall call the Dollard Company) obtained by fraud from the Susquehanna Coal Company 93,756 tons 13 cwt. of anthracite coal, valued at $444,488.09. Thereafter, and with full knowledge of what had been done, the Susquehanna Coal Company brought a suit in equity against the Dollard Company in the United States District Court in the Southern District of New York. In the twenty-fourth paragraph of that bill the transactions as to said 93,756 tons were

specifically set out. It further alleged that an agreement in the nature of an agreement of settlement between the Dollard Company and the Susquehanna Coal Company was made after said fraud had been discovered, and that said agreement was not kept by the Dollard Company, which, notwithstanding repeated requests, had refused "to transfer and assign to this plaintiff [the Susquehanna Company] the accounts receivable due to it for coal sold to its customers which said defendant Sales Company [the Dollard Company] obtained and secured from the plaintiff [the Susquehanna Company] under the circumstances set forth in paragraph 24." The bill further charged that the Dollard Company was *"indebted"* to the Susquehanna Company in the sum of $905,019.36, which included said sum of $444,488.09, interest on which was therein claimed. The prayers of the bill were, inter alia, that the amount of the indebtedness due to the plaintiff from the Dollard Company be ascertained and determined.

The defendant answered. Decrees were made establishing the indebtedness of the Dollard Company to the Susquehanna Company at $905,019.36, awarding interest on said sum of $444,488.09, which constituted part of said amount, from July 31, 1915, and giving to the Susquehanna Company "an equitable lien on the proceeds of the sales by the defendants or either of them of the 93,756 tons 13 cwt. of coal mentioned in the bill of complaint," with the right "to follow the proceeds of the sale thereof into the hands of the defendants, or either of them, or to collect from the persons to whom said coal was sold by the defendants, or either of them, any sums of money which remain unpaid by the purchasers thereof." This decree was assented to by the Susquehanna Company. A receiver of the property of the Dollard Company was appointed in the same suit, and was authorized to collect all sums due to the company; and a special master was also appointed for the carrying out of the decree.

[1] It is as plain as the English language can make it that the Susquehanna Company claimed that the value of the 93,756 tons 13 cwt. constituted an indebtedness to it from the Dollard Company, and has had that indebtedness included in the statement of accounts between them, and has procured from the New York court a decree establishing an equitable lien in its favor on the bills receivable of the Dollard Company arising out of the sales of this coal. The 45,600 tons of coal, for the conversion of which this suit is brought, were part of the 93,756 tons.

Under these circumstances, it seems to me clear that the present defendant definitely and finally elected to treat the coal fraudulently obtained from it as sold to and by the Dollard Company, and to work out its rights to the coal through the Dollard Company. It cannot both proceed against Pratt & Young through the Dollard Company to collect the bill for the coal as sold by the Dollard Company and also sue Pratt & Young for conversion of the same coal as its property.

The principles of law involved have been recently and fully stated by the Circuit Court of Appeals for this Circuit in Arzuaga v. Gonzalez, 239 Fed. 60, 152 C. C. A. 110. See, too, Briggs Iron Co. v. North & Co., 12 Cush. (Mass.) 114.

[2] The remaining question is whether, under Plews v. Burrage (C. C. A., 1st Cir., July 2, 1920) 266 Fed. 347, Pratt & Young must be left to make their defense in the action at law. I understand that decision to be based upon the view that, as a real issue of fact was raised by the plea of res judicata, the plaintiff in the action at law ought not to be deprived of the right to try that question to a jury. Here there is no real issue of fact. The questions involved are purely legal. They lie at the root of the controversy. To say that the parties can approach them only by way of long and expensive hearings before an auditor, and a long and expensive jury trial, while there is this simple and direct way to a decision of them, would be a discredit to the law. I do not think that Plews v. Burrage compels me to adopt that course.

Motion for injunction allowed.

In re CHINESE FUR IMPORTERS, Inc.

(District Court, S. D. New York. January 19, 1921.)

Bankruptcy ⇐377—Only claims allowed before creditors' meeting closes counted in determining acceptance of composition before adjudication.

Bankruptcy Act, § 12a (Comp. St. § 9596), providing that in compositions before adjudication the court shall call a meeting of the creditors for the allowance of claims, examination of the bankrupt, etc., contemplates proof at the meeting of claims of such creditors as are to be counted when the confirmation of the composition is to be considered, so that claims filed after the creditors' meeting closes, though regular in form and filed before the petition for confirmation is filed, cannot be counted in determining whether a majority of the creditors agreed to a composition before adjudication.

In Bankruptcy. In the matter of the Chinese Fur Importers, Incorporated, alleged bankrupt. On application for confirmation of a composition with creditors. Application denied, and an order for an entry of adjudication granted.

Joffe & Joffe, of New York City, for objecting creditors.
H. & J. J. Lesser, of New York City, for alleged bankrupt.

AUGUSTUS N. HAND, District Judge. It is evident in this case that a majority of creditors in number and amount did not accept the composition, and that it cannot therefore be confirmed. Upon the argument of the motion for confirmation of the composition, an important question of procedure in "compositions before adjudication" was raised by counsel for objecting creditors. In such cases it has apparently been the practice of the referees in bankruptcy in this district to allow, for the purposes of the composition, claims filed after the meeting called under section 12a of the Bankruptcy Act (Comp. St. § 9596) has been closed. If such claims, though filed after the meeting is over, are regular in form, the referees count them when certifying to the court that a majority of the creditors in number and amount have accepted a composition. The referees only cease

to allow claims for the purposes of a composition before adjudication when they are presented after the petition for confirmation is filed in the office of the referee. This practice, though quite general, is, I think, erroneous.

Section 12a of the Bankruptcy Act provides:

"* * * In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt. * * *"

The foregoing provisions contemplate proof at the meeting of the claims of such creditors as are to be counted when the confirmation of the composition is considered. No trustee has been elected at the time of the meeting for allowance of claims, and there is no one to contest their validity except the creditors. They should know what claims may be allowed and counted in connection with the composition, and should be able to contest their validity before the referee allows them or certifies to the court that the composition has been accepted. If it be said that this interpretation of the statute will impose too heavy a burden upon bankrupts offering a composition, the answer is that, in cases where the facts call for an adjournment of the meeting, so that other claims which any party desires to have considered upon the composition may be proved, application may be made to the referee for such adjournment. In my opinion, the claims of all creditors that are to be counted in consideration of the composition should be proved before the meeting called for that purpose is finally closed.

It is, of course, obvious that nothing I have said above is intended to limit the right of a creditor to prove his claim for purposes other than consideration of the same upon a composition. Furthermore, the above observations apply only to compositions before adjudication; for those after, another procedure obtains.

The application for the confirmation of the composition in this particular case is denied, and an order granted for the entry of an adjudication.

FOLTZ v. PAYNE, Secretary of the Interior, et al.

(Court of Appeals of District of Columbia. Submitted October 8, 1920. Decided December 6, 1920.)

No. 3355.

Public lands ⇐109—Mortgagee of relinquished claim indispensable to suit against Secretary of the Interior by subsequent claimant.

A mortgagee of a desert land entrywoman, who had relinquished her claim, is an indispensable party to a suit by a subsequent homestead entryman to restrain the enforcement of the order of the Department of the Interior, sustaining proof essential to establish the desert claim offered by the mortgagee, since the object of the suit is to deprive the mortgagee of his interest in the property, which will not be done in equity without giving him an opportunity to be heard.

Appeal from the Supreme Court of the District of Columbia.

Bill in equity by Leo L. Foltz against John Barton Payne, Secretary of the Interior, and another. From a decree dismissing the bill, complainant appeals. Affirmed.

Patrick H. Loughran, of Washington, D. C., for appellant.

C. E. Wright and Chas. D. Mahaffie, both of Washington, D. C., for appellees.

ROBB, Associate Justice, This is an appeal from a decree dismissing appellant's bill to restrain appellees from enforcing certain decisions of the Department of the Interior. The material averments of the bill are substantially as follows:

In 1910 Emil Grasswick made desert land entry of the land in controversy, and he and Rosie Grasswick, his wife, executed a mortgage thereon to Ebenezer G. Ranney. Later in that year, and before the entry became perfected, Emil Grasswick filed a relinquishment. In 1911 Rosie Grasswick made desert land entry of the same land, in her individual right. On January 6, 1913, Mrs. Grasswick made final proof, and on January 22d, following, final certificate was issued to her. On October 5, 1914, the Department required Mrs. Grasswick to furnish evidence that a court of competent jurisdiction had recognized her ownership of the share of stock evidencing her right to water for the irrigation of the land entered by her. On October 5, 1914, Mrs. Grasswick filed a relinquishment of her entry, and thereafter Clementine A. Shaw filed a homestead application for the land. On April 29, 1916, the appellant, Leo L. Foltz, filed an affidavit of contest against this entry, and on May 27th, following, a relinquishment was filed by the entrywoman. Thereupon appellant, who then was in "actual occupancy" of the land, filed a homestead application therefor.

Upon the relinquishment of Mrs. Grasswick's entry, Ranney, the mortgagee, claiming the right to be subrogated to her interest, was permitted by the Department to furnish proof of the validity of the water certificate held by her. On November 27, 1917, the Department, being satisfied with Ranney's proof, ruled that as mortgagee he was entitled to have issued a patent for the entry in the name of the entry-

woman. The sufficiency of this proof is challenged in the bill, but, under our view of the case, it is unnecessary to consider the question.

Ranney is not made a party to the bill, although it plainly appears that he is a party in interest. The court is asked to strike down the departmental rulings that he has met the requirements as to the validity of the water stock and that the Grasswick entry is confirmed for patent. With these rulings out of the way, appellant would be entitled to perfect his entry. This being a proceeding in equity, all "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," are indispensable parties. Shields v. Barrow, 17 How. (58 U. S.) 130, 139, 15 L. Ed. 158. It is clear that the object of the bill is to deprive Ranney of any equitable right in the land involved. Surely this ought not to be done without giving him a day in court. We therefore affirm the decree on the ground that Ranney is an indispensable party.

Affirmed.

AULT & WIBORG CO. v. JAENECKE AULT CO.

(Court of Appeals of District of Columbia. Submitted November 11, 1920. Decided December 6, 1920.)

No. 1347.

1. **Commerce ⇐42—Shipment to distributor is not use in "interstate commerce."**

   Shipments of trade-marked articles from the factory to a distributing branch in another state do not establish the use of the trade-mark in interstate commerce, within the Trade-Mark Act.

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

2. **Trade-marks and trade-names ⇐45½, New, vol. 7A Key-No. Series—Evidence held to show use of trade-mark before registrant's use.**

   On petition to cancel a registered trade-mark, evidence of the adoption of the mark by petitioner five years before the registration, and book entries of orders for the trade-marked goods and shipments made thereon more than one year before the date of registration, *held* to show use of the trade-mark by petitioner in interstate commerce before the date of registration by registrant, though none of the persons to whom the goods were shipped were produced.

Appeal from the Commissioner of Patents.

Petition by the Jaenecke Ault Company to cancel the registered trade-mark of the Ault & Wiborg Company. From an order directing the cancellation of the trade-mark, the registrant appeals. Affirmed.

Percy H. Moore, of Washington, D. C., for appellant.

Mortimer C. Lyddane, of New York City, for appellee.

VAN ORSDEL, Associate Justice. Appellee, Jaenecke Ault Company, petitioned the Commissioner of Patents to cancel the trade-mark of appellant, the Ault & Wiborg Company, consisting of the word "Surprise" as a trade-mark for printing ink. From an order sustaining the petition and directing the cancellation of the mark, this appeal was taken.

[1] Registrant relied upon its registration date, August 1, 1911, contending that appellee had failed to establish any use of its mark in interstate commerce prior to that date. It is urged that the most the testimony establishes as to trade-mark use by appellee company is that ink bearing the mark "Surprise" was shipped by it from its factory at Newark, N. J., to its branch office at Chicago, Ill. Of course, the mere shipment of goods bearing the mark from the factory to a distributing branch in another state would not constitute use of the mark in interstate commerce within the Trade-Mark Act (21 Stat. 502).

[2] While none of the persons to whom goods were alleged to have been shipped by appellee company have been produced, which is ordinarily regarded as the most convincing proof of the use of a mark in commerce, the evidence, we think, establishes the adoption of the mark by appellee company, or its predecessor in business, about 1906 or 1907. The books of the company show orders for Surprise ink and shipments made to various parties as early as January, 1910. Labels were introduced which were shown to have been used in 1909.

We agree with the Commissioner that appellee has established the use of the mark in question prior to appellant's date of registration or the date of use alleged in its application.

The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as by law required.

Affirmed.

SMURR v. JAMES.

(Court of Appeals of District of Columbia. Submitted November 9, 1920. Decided December 6, 1920.)

No. 1325.

Patents ⇐90(5)—Priority in interference awarded to senior applicant over objection of nonreduction to practice.

A junior applicant cannot prevail in interference proceedings on the ground that the senior applicant had not reduced the invention to practice, where the junior applicant admittedly began work on the machine where the senior applicant left off, and the counts of the issue plainly read on the senior's machine as set forth in his application, which was a constructive reduction to practice, and which was filed before the date the junior applicant claimed reduction to practice.

Appeal from the Commissioner of Patents.

Interference proceeding between Samuel P. Smurr, junior applicant, and Edward James, senior applicant. From the decision of the Com-

missioner of Patents, awarding priority of invention to the senior applicant, the junior applicant appeals. Affirmed.

Geo. E. Waldo, of Chicago, Ill., for appellant.

H. B. Fay, of Cleveland, Ohio (Fay, Oberlin & Fay, of Cleveland, Ohio, on the brief), for appellee.

VAN ORSDEL, Associate Justice. This appeal is from the decision of the Commissioner of Patents in an interference proceeding, in which priority of invention was awarded to appellee, James.

The invention relates to a die or head for use in a machine for spirally coiling wires around an insulated electric conduit. It appears that—

"James was employed by the Western Conduit & Manufacturing Company in 1910 under a contract, the terms of which provided that for certain specified amounts James was to make 'a machine capable of producing flexible metal tubing or conduit and armored cable three-eighths inch internal diameter, at a rate of not less than three feet per minute, * * * which will comply with the National Electric Code Construction Rules."

In May, 1911, James turned over the machine to the company in the form shown in the application here in interference.

Appellant, Smurr, contends that the machine James turned over was impracticable and inoperative, and that he and others were called upon to further develop it. It would thus appear that, at most, Smurr began where James left off. Hence he is compelled to pitch his own case upon the inoperativeness of James' device. We concur with all the tribunals of the Patent Office in holding that the counts of the issue clearly read upon the James machine as set forth in his application, and, since Smurr claims nothing until after James completed his device and turned it over to his employer, he is in poor position to prevail. With the completion of his machne in May, 1911, James must, at least, be accorded conception. This was followed by his application August 5, 1911, which constituted a constructive reduction to practice, since the claims of the issue were disclosed by the drawings of the application. Smurr does not claim a reduction to practice until February 1, 1912.

In this situation there is no theory upon which Smurr can prevail. Whatever he may have added to the James machine by way of combination or improvement, in the light of James' constructive reduction to practice, cannot be considered in this proceeding.

The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as by law required.

Affirmed.

In re LOWER.

(Court of Appeals of District of Columbia. Submitted November 10, 1920. Decided December 6, 1920.)

No. 1331.

Patents ⇐66—Combination of overfeed and underfeed mechanism for locomotive fire box discloses invention.

Though both overfeed and underfeed stoking machines were known, and in one patent for overfeed machine there was provision for overfeed stoking in emergency, the combination of mechanism for simultaneous overfeeding and underfeeding discloses invention, especially when applied to locomotive fire box, where the space available for the mechanism is small, and in view of the utility of the applicant's device.

Appeal from the Commissioner of Patents.

Application by Nathan M. Lower for a patent for a locomotive stoker. From a decision of the Patent Office, rejecting two claims of the application, applicant appeals. Reversed.

See, also, 263 Fed. 478.

F. W. Winter, of Pittsburgh, Pa., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

ROBB, Associate Justice. Appeal from a decision of the Patent Office, rejecting claims 25 and 27, relating to a locomotive stoker capable of simultaneously supplying fuel to a fire box through the underside of the grate and on the top of the fire. The claims read as follows:

"25. Stoker mechanism comprising in combination, a fire box, power mechanism for underfeeding fuel to said fire box, and separate power mechanism co-operating with said first-named mechanism for simultaneously feeding fuel into said fire box above the level of the fire therein."

"27. Stoker mechanism, comprising in combination, a fire box, mechanism for underfeeding fuel to said fire box, separate mechanism for simultaneously overfeeding fuel to the fire in said box, and power mechanism for actuating both of said feeding devices in timed relation with each other."

The two methods of fuel feeding were old, but the Patent Office concedes that "no patent is shown which discloses underfeed and overfeed mechanism." The nearest approach to such a device is the disclosure in the Smead patent (No. 707,364, dated August 19, 1902). That patent related particularly to furnaces for hot-water heaters or steam generators, and the drawing discloses a conduit capable of being used "in case of emergency" (specification) to conduct fuel to the top of the fire. In other words, if the underfeed system should fail for any purpose, the patentee provides an overhead emergency feed.

We agree with the Patent Office that there was no conception of simultaneous feeding, nor is the device disclosed capable of being so used, within the meaning of the claims in issue. But we are not prepared to accept the ruling of that office that appellant's conception was devoid of invention. It seems to us that, had the idea been so obvious

as it now may appear, some one would have adopted it long before this, for the Smead patent was issued many years before appellant's application was filed. It seems reasonably clear that, by combining old elements in this novel way, a new and useful result has been achieved. Moreover, it must be kept in mind that a locomotive fire box is in a very restricted space, and that it would be by no means obvious that the combination of the issue could be successfully applied thereto. Having in mind the character of appellant's device, its apparent utility, and the fact that the underlying idea is entirely new, we follow our rule that any doubt will be resolved in favor of the applicant, and we therefore must reverse the decision. In re Eastwood, 33 App. D. C. 291; In re Harbeck, 39 App. D. C. 555.

Reversed.

McNEIL v. MOLYNEUX.

(Court of Appeals of District of Columbia. Submitted November 16, 1920. Decided December 6, 1920.)

No. 1359.

Patents ⇐106(1)—Priority in invention of process for joining fabric sections awarded to senior applicant notwithstandng prior decision.

In an interference proceeding relating to claims for a process for joining sections of fabric, senior applicant held entitled to priority, notwithstanding a decision denying priority to him in an interference case relating to machines for carrying out the process as to claims containing an element first adopted by another.

Appeal from the Commissioner of Patents.

Interference proceeding between Chester McNeil and George E. Molyneux, relating to a process for joining sections of fabric. From a decision of the Commissioner of Patents awarding priority to Molyneux, McNeil appeals. Affirmed.

Chas. L. Sturtevant and E. G. Mason, both of Washington, D. C., for appellant.

John F. Heine, of Elizabeth, N. J., and Geo. F. Scull, of New York City (Henry J. Miller, of Elizabeth, N. J., and Gifford & Bull, of New York City, on the brief), for appellee.

ROBB, Associate Justice. This in an interference proceeding relating to a process for joining sections of fabric, and in which priority was awarded the senior party, Molyneux, by each of the three tribunals of the Patent Office. Two claims are involved, but claim 1 sufficiently illustrates the invention and is here reproduced:

"1. The process of joining fabric sections consisting in uniting the superposed edges of the fabric sections for stitching, opening the sections of fabric until the major portions lie in substantially the same plane, exerting a strain on the respective fabric sections in opposite directions away from and transversely of the line of stitching, and uniting said fabric sections while under said strain by connected parallel lines of stitches disposed respectively on opposite sides of the first line of stitching."

Appellant contends that our decision in Seymour v. Molyneux, 49 App. D. C. 219, 263 Fed. 471, is controlling here. The issue in that case related to machines for carrying out the process set forth in the present interference, and, inasmuch as all save two of the claims contained the limitation that the auxiliary feed dogs should engage the fabric "in advance of the stitch-forming mechanism," we awarded priority to Seymour as to those limited claims. However, we affirmed the decision of the Patent Office awarding priority to Molyneux as to the broader claims. The counts of the present interference are silent as to the extent of the strain that shall be exerted on the fabric sections at the moment they are united. The one limitation is that the union shall be made while the sections are under a transverse strain. We agree with the Patent Office that the Molyneux application involved in the prior interference (of which the present application is a division) discloses the issue set forth in the counts of the present interference, and since each tribunal of the Patent Office has fully discussed and satisfactorily answered every question involved here, we affirm the decision without more.

Affirmed.

BURNSTINE v. DREW.

(Court of Appeals of District of Columbia. Submitted October 7, 1920. Decided December 6, 1920.)

No. 3354.

Appeal and error ⟸1048(7)—Admission of statement of conclusion for impeachment held harmless.

Where no objection had been made to the question laying foundation for impeachment, and the witness had, in effect, admitted making the statement, error, if any, in admitting the testimony of the impeaching witness over the objection that the statement testified to was a conclusion, was harmless.

Appeal from the Supreme Court of the District of Columbia.

Action by Abraham Burnstine, administrator of the estate of David Burnstine, deceased, against Fred Drew. Judgment for defendant and plaintiff appeals. Affirmed.

Dan Thew Wright, of Washington, D. C. (Philip Ershler, of Washington, D. C., on the brief), for appellant.

W. C. Clephane, J. Wilmer Latimer, and Gilbert L. Hall, all of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. Plaintiff below appeals from a judgment for defendant in a suit for damages for the alleged wrongful death of his son, who was killed by an automobile operated by defendant.

The single assignment of error relates to the admission of the following evidence, laying the foundation for the impeachment of one of plaintiff's witnesses:

"Q. Didn't you say to him [Mr. Hall], in substance, these words: 'I thought that thing had been dropped. There is not anything in it, and I called up Mr. Drew and told him so.' A. No, sir; I do not recall that.
"Q. You do not recall telling him that in substance? A. No, sir; I do not.
"Q. You do not remember anything like that? A. I do not think I called it 'the thing.'"

It will be observed that, when the question laying the foundation for the impeachment was propounded to plaintiff's witness on cross-examination, no objection was interposed. When, however, counsel for defendant attempted to prove the statement by their impeaching witness, Mr. Hall, objection was made on the ground that it called for an expression of opinion by the witness to the effect that plaintiff had not a good case.

The objection came too late. Plaintiff's witness had, in effect, admitted making the statement, and the exclusion of Hall's testimony would not have operated to exclude the admission; hence, if error was committed in the admission of Hall's confirmation, it was without prejudice.

The judgment is affirmed, with costs.

Affirmed.

PAYNE et al. v. HEARST.

(Court of Appeals of District of Columbia. Submitted November 22, 1920. Decided December 6, 1920.)

No. 3415.

Appeal and error ⊜1107—Act authorizing sale of ships requires reversal of prior injunction restraining sale.

A decree enjoining the United States Shipping Board from selling certain German vessels taken over by the United States during the war, on the ground that the board had no power to make such sales, must be reversed, where, pending the appeal, Congress passed Merchant Marine Act June 5, 1920, which expressly authorized the board in its discretion to sell all vessels acquired during the war, and defined the manner in which the sales may be made.

Appeal from the Supreme Court of the District of Columbia.

Action by William Randolph Hearst against John Barton Payne and others, composing the United States Shipping Board. From a decree enjoining the defendants from selling certain vessels, defendants appeal. Reversed and remanded.

J. E. Laskey, U. S. Atty., of Washington, D. C., for appellants.

E. S. Bailey, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from a decree of the Supreme Court of the District of Columbia, enjoining the individual appellants, composing the United States Shipping Board, and the United States Shipping Board Emergency Fleet Corporation, from selling certain former German vessels taken over by the United States during the war.

The present consideration is on motion of appellants that the decree be reversed, for the reason that, since the entry of the final decree and the taking of this appeal, Congress, by an act approved June 5, 1920 (U. S. Stats. 1919 and 1920 [41 Stat.] p. 988), known as the Merchant Marine Act, has expressly authorized the United States Shipping Board, in its discretion and under certain limitations therein expressed, to sell all vessels acquired by the United States during the war, including the vessels here in question. The act not only vests the power in the board to do the thing enjoined, but defines how it shall be done.

Whether, therefore, the board exceeded its power, or was threatening to do so, when the decree appealed from was made, is now a moot question. The motion to reverse the decree must be sustained. Public Utility Commissioners v. Compania General, 249 U. S. 425, 39 Sup. Ct. 332, 63 L. Ed. 687.

The decree is reversed, without costs, and the cause is remanded, with directions to dismiss the bill, without costs to either party.

Reversed and remanded.

In re LEES.

(Court of Appeals of District of Columbia. Submitted November 11, 1920. Decided December 6, 1920.)

No. 1340.

Patents ⇐136—Reliance on solicitor does not authorize reissue with broadened claims.

An affidavit that applicant was unskilled in patent matters and relied on his solicitor, and only recently discovered that the claims were not as broad as the invention, does not show special circumstances excusing the delay, which alone authorized a reissue of the patent with broadened claims more than two years after the original issue.

Appeal from the Commissioner of Patents.

In the matter of the application of Ernest J. Lees for reissue of a patent with broadened claims. Application denied, and applicant appeals. Affirmed.

C. B. Mueller, of Cleveland, Ohio, for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

ROBB, Associate Justice. Appeal from a decision of the Patent Office refusing to reissue appellant's patent with broadened claims; the application having been filed about two years and five months after the granting of the patent.

In the affidavit accompanying the application for reissue, appellant states that he was unskilled in patent matters, relied upon his solicitor, and only recently discovered that his claims were not as broad as his invention. Since it is settled law that a patent will not be reissued after the lapse of two years, for the purpose of enlarging

its claims, unless special circumstances are shown to excuse the delay (Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; In re Starkey, 21 App. D. C. 519; In re Schneider, 49 App. D. C. 204, 262 Fed. 718), it cannot be said that there was any abuse of discretion on the part of the Patent Office in ruling that such special circumstances have not been shown here.

It follows that the decision must be affirmed.

Affirmed.

In re WILLIAM SCHLUDERBERG & SON.

(Court of Appeals of District of Columbia. Submitted November 17, 1920. Decided December 6, 1920.)

No. 1361.

Trade-marks and trade-names ⇐43—Registration of trade-mark refused because of existing similar mark for similar goods.

An application to register the word "Highland" as a trade-mark for ham, corned beef, and cooked shoulders was properly refused, where another had registered as a trade-mark in connection with the sale of canned meats the representation of a Highlander and the words "Highland Brand," since it is obvious that confusion would be likely to result.

Appeal from a Decision of the Commissioner of Patents.

In the matter of the application of William Schluderberg & Son for registration of a trade-mark. From a decision of the Patent Office, refusing registration, applicant appeals. Affirmed.

John A. Saul, of Washington, D. C., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

ROBB, Associate Justice. Appeal from a decision of the Patent Office refusing to register the word "Highland" as a trade-mark for ham, corned beef, and cooked shoulders.

It appearing that Matthews & Co. have registered and long used, as a trade-mark in connection with the sale of canned meats, the representation of a Highlander and the words "Highland Brand," the decision must be affirmed, for it is obvious that confusion would be likely to result, should registration be accorded appellant's mark.

Affirmed.

NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS et al. v. FEDERAL BASEBALL CLUB OF BALTIMORE, Inc.

(Court of Appeals of District of Columbia. Submitted October 12, 1920. Decided December 6, 1920. On Motion for Rehearing, January 3, 1921.)

No. 3368.

1. **Monopolies ⟸12(2)—"Trade" and "commerce" involve transfer of goods, persons, or intelligence.**
Within the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), making unlawful restraint of trade or commerce among the several states, "trade," which is defined as the exchange of commodities or the buying and selling of commodities, and "commerce," which means exchange of goods both trade and commerce involve the transfer of something, whether it be persons, commodities, or intelligence, from one place or person to another.

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

2. **Monopolies ⟸12(2)—Baseball club is not engaged in "trade" or "commerce."**
The business of giving exhibitions of baseball games for profit is not trade or commerce, within the meaning of the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), and a corporation formed for the purpose of giving such exhibitions is not engaged in such trade or commerce, though as an incident thereto it transports the players and their paraphernalia from one state to another.

3. **Monopolies ⟸12(1)—Persons not engaged in commerce may be guilty of interfering with commerce.**
A baseball club, even though not engaged in interstate commerce, may be guilty of violating the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), if it illegally interferes with the interstate features of the business of another club.

4. **Monopolies ⟸12(2)—Sherman Act prohibits only direct restraints of interstate commerce.**
The Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830) does not apply, unless the effect of the act complained of on interstate commerce is direct, not merely indirect or incidental.

5. **Monopolies ⟸12(1)—Reserve clause in baseball players' contracts is not direct restraint of commerce.**
The reserve clause in baseball players' contracts under the National Agreement was intended to protect the rights of clubs operating under that agreement to retain the services of sufficient players for their purposes, and its effect on the interstate commerce of a club outside the National Agreement was only indirect and incidental, so that it does not amount to a violation of the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830).

On Motion for Rehearing.

6. **Appeal and error ⟸1176(1)—Defendants in error on request given final judgment against it, instead of new trial, to permit further appeal without delay.**
After a case has been reversed and remanded for new trial, a petition by defendant in error, plaintiff in the suit, stating it does not desire to present new testimony, but is willing to stand on the record made, and prefers a decision directing judgment against it, so that it may appeal to the Supreme Court without further delay, should be granted.

Appeal from the Supreme Court of the District of Columbia.

Action by the Federal Baseball Club of Baltimore, Incorporated, against the National League of Professional Baseball Clubs and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded on rehearing, with directions to enter judgment for defendants.

B. S. Minor, of Washington, D. C., and George Wharton Pepper, of Philadelphia, Pa. (Samuel M. Clement, Jr., of Philadelphia, Pa., on the brief), for appellants.

Chas. A. Douglas and J. V. Morgan, both of Washington, D. C., and Wm. L. Marbury, Wm. L. Rawls, and L. Edwin Goldman, all of Baltimore, Md. (Charles S. Douglas and Hugh H. Obear, both of Washington, D. C., on the brief), for appellee.

SMYTH, Chief Justice. This is an action for damages under the Sherman Anti-Trust Act (26 Stat. 209 [Comp. St. §§ 8820–8823, 8827–8830]). The plaintiff, who is appellee here, was awarded a verdict for $80,000, which was trebled under section 7 of the act, and a judgment for $240,000, with costs and attorney's fees, entered against the defendants, who bring the case before us for review.

Appellee is a corporation organized in October, 1913, in Baltimore, for the purpose of giving exhibitions of baseball. Its organization was brought about by the Federal League of Professional Baseball Clubs, which was incorporated in March, 1913, and consisted of eight clubs, of which the appellee was one. One club was located in each of the following cities: Brooklyn, Pittsburgh, Buffalo, Baltimore, St. Louis, Kansas City, Indianapolis, and Chicago. The league issued to each club a franchise, that authorized it to conduct competitive baseball games in the league. The league continued in existence, with more or less success, until December, 1915, when an agreement, called the "Peace Agreement," was entered into between it, the National League, and the American League of Professional Baseball Clubs. This agreement resulted in the dissolution of the Federal League and all its constituent clubs, save the appellee. The latter refused to become a party to the agreement; but, as there was none of its league clubs left after the dissolution with which to compete, it ceased to operate. Appellee, asserting that the disbandment of the league and the consequent injury to it were due to acts of the appellants done in violation of sections 1 and 2 of the Sherman Act, instituted this action.

The appellants, defendants below, are: The National League of Professional Baseball Clubs, referred to herein as the National League, an unincorporated association, and its eight incorporated constituent clubs, one of which was established in each of the following cities: New York City, Brooklyn, Philadelphia, Boston, Chicago, St. Louis, Pittsburgh, and Cincinnati. Also the American League of Professional Baseball Clubs, spoken of hereafter as the American League, an unincorporated association, and, like the National League, having eight constituent clubs, one located in each of these cities: New York City, Boston, Philadelphia, Washington, D. C., Chicago, St. Louis, Detroit,

and Cleveland. Also John K. Tener, president of the National League; Bancroft A. Johnson, president of the American League; and August Herrmann, chairman of the National Commission, hereafter described. The cities having National League clubs form the baseball circuit for that league, and those having American League clubs the baseball circuit for that league.

The National League and the American League are generally denominated major leagues. With them are united, by what is called the "National Agreement," the National Association of Professional Baseball Leagues, which consists of a large number of minor leagues of professional baseball, similar in structure to the major leagues, but the players have not, in general, attained as high a degree of skill as that which characterizes major league players. The leagues of the association constitute training fields from which the major leagues draw new players. While the association covers the greater part of the field of professional baseball below the major league grades, yet there are outside of it some professional, many semiprofessional, and all college and amateur organizations.

Each club of the major leagues obtained a ball ground and equipped it with stands and seats for the accommodation of the public in its home city. The clubs were organized for profit, but not the leagues. The function of each league was to regulate contests between teams representing the several clubs in the league, which compete annually for championship. Baseballs were purchased by each league and sold to its clubs at cost, and each league had a contract with a telegraph company for service, and had an income sufficient only to meet necessary expenses. Such unspent funds as it might have were not held for distribution, but as a reserve to meet liabilities.

The National Commission, already referred to, is an unincorporated body composed of the presidents of the two leagues and a third person, selected by them. It is an administrative body, and is not a profit-making concern. The club which wins the championship pennant in any year in one major league competes for the world's championship in that year with the winner of the pennant in the other. It is one of the functions of the National Commission to regulate these contests. A schedule for each league is arranged by its president prior to the beginning of the playing season. During the playing season teams travel by train from place to place, taking with them their uniforms and other paraphernalia of the game.

The National Commission exists by virtue of the National Agreement, heretofore referred to. It is claimed that this agreement has produced the system which constitutes the violation of the Sherman Act complained of. By this agreement players, before they could secure employment in any club operating under it, were required to enter into contracts which, it is alleged, gave the appellants control over practically all available players of sufficient skill to serve in a major league club, and thus the Federal League was unable to secure players capable of producing such exhibitions of baseball as the public demanded; and, in consequence of this inability, disaster came upon the Federal League and its constituent clubs, including the appellee.

The court instructed the jury: (a) That appellants were engaged in interstate commerce; (b) that they attempted to monopolize, and did monopolize, a part of that commerce, principally through what is called the "reserve clause" and ineligible list features of certain agreements; but (c) left it to the jury to say whether the appellants had conspired together to destroy, and did destroy, the Federal League, to the end that they might perfect their monopoly of professional baseball, and whether, if they did so conspire with the effect stated, their act resulted in injury to the appellee.

Did the giving of exhibitions of baseball, under the circumstances disclosed in the record, constitute trade or commerce within the meaning of the Sherman Act? If it did not, then the act does not apply, and the appellee has no right to invoke its provisions.

[1] The Sherman Act, in section 1, declares every contract, combination, or conspiracy "in restraint of trade or commerce among the several states * * * to be illegal," and, in section 2, condemns every person who shall monopolize, or attempt to monopolize, or combine with others to monopolize, that trade or any part thereof. "The word 'trade,' in its broadest signification, includes, not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally." May v. Sloan, 101 U. S. 231, 237 (25 L. Ed. 797). It means "the buying as well as the selling of property." United States v. United States Steel Corporation et al. (D. C.) 223 Fed. 55, 177. Webster's Dictionary defines trade as "the act or business of exchanging commodities by barter; the business of buying and selling for money; commerce; traffic; barter"—and says that "Commerce, in its simplest signification, means exchange of goods. * * * It may be said to be trade, traffic, or exchange between different places and communities." And according to the Century Dictionary, commerce is defined as "interchange of goods, merchandise or property of any kind; trade; traffic." "Commerce, briefly stated, is the sale or exchange of commodities." United States v. Swift & Co. (C. C.) 122 Fed. 529. Substantially the same definitions are given in the cases of United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Gibbons v. Ogden, 9 Wheat, 1, 189, 190, 6 L. Ed. 23; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; In re Charge to Grand Jury (D. C.) 151 Fed. 834.

Through these definitions runs the idea that trade and commerce require the transfer of something, whether it be persons, commodities, or intelligence, from one place or person to another. The concomitant of this concept is the principle, approved by the Supreme Court of the United States, that "importation into one state from another is the indispensable element, the test, of interstate commerce." International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

[2] The business in which the appellants were engaged, as we have seen, was the giving of exhibitions of baseball. A game of baseball is not susceptible of being transferred. The players, it is true, travel from place to place in interstate commerce, but they are not the game.

Not until they come into contact with their opponents on the baseball field and the contest opens does the game come into existence. It is local in its beginning and in its end. Nothing is transferred in the process to those who patronize it. The exertions of skill and agility which they witness may excite in them pleasurable emotions, just as might a view of a beautiful picture or a masterly performance of some drama; but the game effects no exchange of things according to the meaning of "trade and commerce" as defined above.

The transportation in interstate commerce of the players and the paraphernalia used by them was but an incident to the main purpose of the appellants, namely, the production of the game. It was for it they were in business—not for the purpose of transferring players, balls, and uniforms. The production of the game was the dominant thing in their activities. In Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, the Supreme Court of the United States was asked to hold that, because an insurance corporation, in effecting a marine insurance policy, used some of the instrumentalities of commerce, it was engaged in that commerce; but the court refused to yield to the argument, and said:

"It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce, or an instrumentality thereof, on the one side, and the mere incidents which may attend the carrying on of such commerce on the other."

And the court held that the business of marine insurance was not commerce, irrespective of the fact that some of its incidents were. Consult, also, Paul v. Virginia, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357; New York Life Insurance Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116. So, here, baseball is not commerce, though some of its incidents may be.

Suppose a law firm in the city of Washington sends its members to points in different states to try lawsuits; they would travel, and probably carry briefs and records, in interstate commerce. Could it be correctly said that the firm, in the trial of the lawsuits, was engaged in trade and commerce? Or, take the case of a lecture bureau, which employs persons to deliver lectures before Chautauqua gatherings at points in different states. It would be necessary for the lecturers to travel in interstate commerce, in order that they might fulfill their engagements; but would it not be an unreasonable stretch of the ordinary meaning of the words to say that the bureau was engaged in trade or commerce? If a game of baseball, before a concourse of people who pay for the privilege of witnessing it, is trade or commerce, then the college teams, who play football where an admission fee is charged, engage in an act of trade or commerce. But the act is not trade or commerce; it is sport. The fact that the appellants produce baseball games as a source of profit, large or small, cannot change the character of the games. They are still sport, not trade.

It has been ruled that the production of grand opera at points in different states according to a prearranged schedule involves "none of the elements of trade or commerce as commonly understood." Metropolitan Opera Co. v. Hammerstein, 162 App. Div. 695, 147 N.

Y. Supp. 535. "Such a transaction," said the court, "is as far removed as possible from the commonly accepted meaning of trade and commerce." In another case it was held that the skill of theatrical players which attracts the public "is not sold; it is merely exhibited for hire;" and the fact that the producing corporation "must buy scenery and stage appliances and furniture, which it may afterwards sell again, is of no importance" in determining whether or not the corporation was engaged in trade or commerce. In re Oriental Society, Bankrupt (D. C.) 104 Fed. 975. As supporting the same principle, see People v. Klaw (Gen. Sess.) 106 N. Y. Supp. 341, American Baseball Club of Chicago v. Chase, 86 Misc. Rep. 441, 149 N. Y. Supp. 6, Minnesota v. Duluth Board of Trade, 107 Minn. 506, 121 N. W. 395, 23 L. R. A. (N. S.) 1260, Rohlf v. Kasemeier, 140 Iowa, 182, 118 N. W. 276, 23 L. R. A. (N. S.) 1284, and State v. Frank, 114 Ark. 47, 169 S. W. 333, 52 L. R. A. (N. S.) 1149, Ann. Cas. 1916D, 983. In the American Baseball Club Case the precise question we are considering was passed upon in a carefully prepared opinion, and it was held that the production of exhibitions of baseball did not constitute trade or commerce. The National Agreement, the rules and regulations adopted pursuant to it, and the players' contracts, complained of in this suit, were all considered by the court in reaching its conclusion.

Much stress is laid by the appellee upon Marienelli v. United Booking Offices (D. C.) 227 Fed. 165, and International Text-Book Co. v. Pigg, supra; but we think they are not in point. In the first case the combination was between a series of theaters and persons engaged in theatrical brokerage, according to which the brokers had the exclusive right of acting for the theaters in booking performances on an interstate schedule. The entire business consisted in the negotiation of a contract to travel and perform. The brokers were not interested in the service rendered or the skill exhibited by the performers. The court stressed this feature, and distinguished the case before him from the Hammerstein Case, supra, by saying that the trade and commerce element in the case he was considering was essential, while that element in the Hammerstein Case was but incidental. For the same reason the Marienelli Case is distinguishable from the case before us. In the Pigg Case the chief element was the communication of intelligence through instrumentalities of commerce.

[3] This brings us to consider whether or not the restrictions, which appellee says resulted in the monopolization denounced by the statute, affected illegally the interstate features of appellee's business, that is, the movement of its players and those of the other clubs of the Federal League and their paraphernalia from place to place in the league's circuit; for it is well settled that persons not engaged in interstate commerce may be guilty of violating the statute by illegally interfering with those who are so engaged. Loewe v. Lawlor, 208 U. S. 274, 297, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.

[4] The statute does not apply "where the trade or commerce af-

fected is interstate, unless the effect thereon is direct, not merely indirect." United States v. Patten, 226 U. S. 525, 542, 33 Sup. Ct. 141, 145 (57 L. Ed. 333, 44 L. R. A. [N. S.] 325). If the necessary effect is but incidentally or indirectly to restrict the commerce, "while its chief result is to foster the trade and increase the business of those who make and operate it, it is not violative of this law." United States v. Standard Oil Co. (C. C.) 173 Fed. 177, 188; Hopkins v. United States, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. United States, 171 U. S. 604, 618, 19 Sup. Ct. 50, 43 L. Ed. 300; United States v. Joint Traffic Association, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 244, 20 Sup. Ct. 96, 44 L. Ed. 136.

[5] Generally speaking, every player was required to contract with his club that he would serve it for one year, and would enter into a new contract "for the succeeding season at a salary to be determined by the parties to such contract." The quoted part is spoken of as the "reserve clause," and it is found, in effect, in the contracts of the minor league players, as well as in those of the major league players. For his services each player was given a certain consideration, and for consenting to the reserve clause another consideration, both of which were set forth in his contract. It is provided in the rules adopted by the leagues and in the National Agreement that, if a player violates the reserve clause, is guilty of "contract-jumping," he shall be punished by being treated as ineligible to serve in any club of the leagues until he has been formally reinstated, and a list of such ineligible players is kept by the leagues.

The number of players which each club was permitted to employ was limited to 22. It is admitted that this was a reasonable number, and that none of the clubs retained more players than it needed. The number of skilled players available did not equal the demand, and clubs within the appellant leagues were competing among themselves for first-class players. One of the directors of the appellee admitted that, if his club had to compete for public favor with the appellants, it undoubtedly would have been driven to the ranks of the latter for many of its players. If the reserve clause did not exist, the highly skillful players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them. By means of the reserve clause and provisions in the rules and regulations, said one witness, the clubs in the National and American Leagues are more evenly balanced, the contests between them are made attractive to the patrons of the game, and the success of the clubs more certain. The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts, and hence the Federal League and its constituent clubs, of which the appellee was one, were unable to obtain players who had contracts with the appellants; in other words, these things had the intended effect, viz. of preventing players from disregarding their obligations. On these provisions, all having for

their purpose the preservation by each club of its necessary quota, and no more, of players, rests the gravamen of appellee's case. It must be obvious that the restrictions thus imposed relate directly to the conservation of the personnel of the clubs, and did not directly affect the movement of the appellee in interstate commerce. Whatever effect, if any, they had, was incidental, and therefore did not offend against the statute.

There are many other questions raised by the record, but it is not necessary for us to consider them.

The judgment must be, and it is, reversed, at the cost of the appellee, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

On Motion for Rehearing.

A petition for rehearing and for modification of the judgment of the court has been filed by the appellee. It appears therefrom that the appellee does not desire to present additional testimony, nor does it wish a new trial, but is willing to stand on the record as made, and that it prefers, instead of a ruling granting a new trial, a decision reversing the judgment of the lower court and directing that court to enter judgment for the appellants, in order that it may carry the case to the Supreme Court of the United States without further delay. We think the petition should be granted. Union Castle Mail S. S. Co. v. Thomsen, 190 Fed. 536, 111 C. C. A. 368; Id., 243 U. S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322.

The judgment, therefore, of this court, entered on December 6, 1920, is hereby vacated, and the judgment of the Supreme Court of the District of Columbia is reversed, at the cost of the appellee, and this cause is remanded to the Supreme Court of the District, with instructions to enter a judgment for the appellants.

Reversed and remanded.

DUTCHER v. JACKSON.

(Court of Appeals of District of Columbia. Submitted November 9, 1920. Decided January 3, 1921.)

No. 1329.

Patents ⇐113(7)—Decision by both tribunals of Patent Office affirmed, unless clearly wrong.

Where each of the tribunals of the Patent Office decided a question of fact in an interference proceedings in favor of the same party, the decision of the Commissioner must be affirmed, unless the court, after examining the record, can say the patent tribunals were clearly wrong.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding between Frank Dutcher and George B. Jackson. From a decision of the Commissioner of Patents, awarding priority to Jackson, Dutcher appeals. Affirmed.

A. S. Pattison, of Washington, D. C., for appellant.
Charles H. Howson, of Philadelphia, Pa., for appellee.

SMYTH, Chief Justice. This in an interference proceeding in which priority was awarded by the Commissioner of Patents to the senior party. The invention relates to railway signal torpedoes and the controversy turns on a question of fact. Each of the tribunals of the Patent Office decided in favor of Jackson. We have examined the record and are unable to say that they were clearly wrong. In view of this, the decision of the Commissioner must be, and it is, affirmed. In re Barratt, 11 App. D. C. 177; Creveling v. Jepson, 47 App. D. C. 597; Reid et al. v. Kitselman (D. C.) 266 Fed. 255; Lindmark v. Hodgkinson, 31 App. D. C. 612.

Affirmed.

WHELAN et al. v. WELCH et al.

LYNCH v. SAME.

(Court of Appeals of District of Columbia. Submitted December 8, 1920. Decided January 3, 1921.)

Nos. 3402, 3403.

1. **Appeal and error ⟸1005(1)—Denial of new trial, claimed for insufficiency of evidence, not reviewable.**
An order overruling a motion for a new trial, based on the claim that the verdict was not sustained by sufficient evidence, is not reviewable on appeal under federal practice; but that question should be raised by a request for a peremptory instruction.

2. **Appeal and error ⟸882(14)—Request for submission to jury precludes claim evidence was insufficient.**
Where plaintiffs requested the court to submit the case to the jury, they impliedly represented that there was a question for the jury's consideration, and cannot, on appeal, claim that the evidence was insufficient to sustain the verdict against them.

3. **Stipulations ⟸18(3)—Stipulation allowing plea in bar precludes right to judgment on overruling pleas in abatement.**
Where the parties stipulated that the demurrers to the pleas in abatement should be sustained, and defendants granted leave to plead in bar, and thereafter plaintiffs joined issue on the pleas, they cannot, after an adverse verdict, claim that the court erred in not entering judgment for them immediately on the overruling of the pleas in abatement.

4. **Pleading ⟸225(1)—Defendant can amend after demurrer to plea in abatement is sustained.**
Common-law pleading is in force in the district only in so far as it has not been modified by statute or rule, and under Supreme Court law rule 31, providing that, on sustaining a demurrer the opposite party shall have 10 days to amend, a defendant to whose pleas in abatement a demurrer was sustained can thereafter amend by pleading in bar.

5. **Appeal and error ⟸1033(2)—Rulings favorable to appellants will not be reviewed.**
On appeal by the plaintiffs the court's action in sustaining the demurrers to the pleas in abatement will not be reviewed, where the defendants against whom the decision was rendered are not complaining thereof.

6. **Abatement and revival ⟸74(6)—Time to serve summons runs from death, not from notice thereof.**
Under Code, § 236, abating the action if the representative of a deceased defendant is not made a party within one year from the death of defendant, the year within which the summons must be served on the heirs and personal representatives of a deceased defendant runs from date of defendant's death, not from date on which plaintiffs learned of the death.

7. **Statutes ⟸190—Construction resorted to only in case of ambiguity or absurdity.**
Construction of a statute to ascertain the legislative intent will be resorted to only where the language is ambiguous, or where its plain meaning would lead to an absurd consequence.

8. **Appeal and error ⟸237(2)—Evidence admitted subject to objection reviewed only after motion to strike.**
Evidence which opposing counsel agreed should go in subject to his objection was admitted subject only to his right to move to have it stricken, and the admission of such evidence cannot be reviewed on appeal, where he did not thereafter exercise that right.

9. **Appeal and error ⟸1050(1)—In ejectment, evidence as to profits received by defendant held not prejudicial to plaintiff.**
In ejectment, where it was agreed plaintiff was entitled to recover all profits from the premises from the defendants in the action, whether they were received by defendants or others, and the amount of such profits was stipulated, evidence as to the amount of the profits which the defendants themselves received, which was less than the stipulated amount, was not prejudicial to plaintiff, as inducing the jury to find against their right to the premises to avoid imposing on the defendants liability for profits not received by them.

Appeals from the Supreme Court of the District of Columbia.

Separate actions in ejectment by Thomas C. Whelan and others and by William T. Lynch against Mary J. Welch and others, which were submitted together. Judgment for defendants in each case, and plaintiffs appeal. Affirmed.

C. A. Douglas, C. A. Keigwin, H. H. Obear, and J. V. Morgan, all of Washington, D. C., for appellants.

Clarence R. Wilson, Paul E. Lesh, and Nathaniel Wilson, all of Washington, D. C., for appellees.

SMYTH, Chief Justice. These appeals involve the same questions, were submitted together, and will be disposed of as one case. Appellants instituted actions in ejectment for the recovery of a lot in the City of Washington. They were consolidated for trial. In one two-thirds of the title was claimed, and in the other the remaining one-third. Judgments were entered against them, and they bring the cases here for review.

[1] 1. It is asserted that the court erred in overruling a motion for a new trial based on the assumption that the verdict was not sustained by sufficient evidence. According to federal practice this is not assignable as error. Mr. Justice Story, as long ago as Barr v. Gratz, 4 Wheat. 213, 220 (4 L. Ed. 553), said that it "is too plain for argument that such a refusal affords no ground for a writ of error." See, also, Crumpton v. United States, 138 U. S. 361, 363, 11 Sup. Ct.

355, 34 L. Ed. 958; Wheeler v. United States, 159 U. S. 523, 524, 16 Sup. Ct. 93, 40 L. Ed. 244; Moore v. United States, 150 U. S. 57, 61, 14 Sup. Ct. 26, 37 L. Ed. 996; Brown v. Clarke, 4 How. 4, 15, 11 L. Ed. 850; United States v. Daniel, 6 Wheat. 542, 545, 5 L. Ed. 326.

[2] If appellants desired to raise the question of the sufficiency of the evidence, they should have done so by a request for a peremptory instruction to return a verdict in their favor (German Insurance Co. v. Frederick, 58 Fed. 144, 148, 7 C. C. A. 122; Western Coal & Mining Co. v. Ingraham, 70 Fed. 219, 222, 17 C. C. A. 71; Joplin & P. Ry. Co. v. Payne, 194 Fed. 387, 389, 114 C. C. A. 305); but they did not do so. On the contrary, they requested the court to submit the case to the jury, thus impliedly stating that there was a question for the jury's consideration. Williams v. Vreeland, 250 U. S. 295, 298, 39 Sup. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. They will not now be heard to say that the representation was not correct. United States v. Memphis, 97 U. S. 284, 292, 24 L. Ed. 937; Hartford Life Ins. Co. v. Unsell, 144 U. S. 439, 451, 12 Sup. Ct. 671, 36 L. Ed. 496; Walton v. Chicago, St. Paul, etc., Railway Co., 56 Fed. 1006, 6 C. C. A. 223; Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co., 85 Fed. 417, 421, 29 C. C. A. 239.

Appellants refer us to a number of decisions wherein it was ruled that if the testimony is of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition thereto, the case should not be submitted to the jury. Of course that is true. But how must the question be raised, so that it may be examined by a reviewing court? Not for the first time by a motion for a new trial, but always by a request for a directed verdict. And that is the manner in which it was presented in the cases cited. None of them countenances the procedure followed here.

We have, however, considered the testimony, and find it much in conflict. It was because of this a proper subject for the consideration of the jury.

[3] 2. Appellees, defendants below, filed pleas in abatement puis darrein continuance, which were demurred to by plaintiffs. After the demurrers had been argued, but before the court had ruled, the parties stipulated that the demurrers might be sustained, that the defendants be granted leave to plead in bar, and that amendments which plaintiffs had offered to the declarations might be filed. The court approved the stipulation, the amendments were filed and so were the pleas in bar. Plaintiffs joined issue on the pleas, a trial was had, and a verdict returned. Now they insist that the court erred in not entering judgment for them immediately upon the overruling of the pleas in abatement; in other words, that error prejudicial to their case was committed by doing that which they stipulated might be done. Counsel present no authorities for so startling a proposition, and we do not believe any can be found. The Supreme Court of the United States said in Wallace v. McConnell, 13 Pet. 136, 152 (10 L. Ed. 95) that if the defendant, after a plea in bar, "pleads a plea puis darrein continuance, this is a waiver of his bar, and no advantage shall be

taken of anything in the bar." But there is nothing in this which prohibits the plaintiff, for whose benefit the law raises the waiver, from refusing to take advantage of it, and this he would do by consenting that the defendant might rehabilitate his plea in bar.

[4] Besides, common-law pleading is in force in this district only in so far as it has not been modified by statute or rules of court. Law rule 31 of the Supreme Court provides that "upon the sustaining of a demurrer the opposite party shall have ten days to amend." The rule, it will be perceived, is general and applies to all demurrers—those leveled against a plea in abatement as well as those directed against a declaration or an answer. So that, when we consider the stipulation and the rule, or either, it must be apparent that no error of which appellants can complain was committed by the failure of the court to give judgment for the appellees at the time it overruled the pleas puis darrein continuance.

[5] 3. Much space is given in the brief of appellants to the contention that the pleas in abatement puis darrein continuance were bad, both in substance and in form, and this is on the theory that we will, on this appeal, review the court's action in sustaining the demurrers to the pleas, for the purpose of determining whether it was correct. But why should we do so, since the appellees, against whom the decision was rendered, are not complaining?

[6] 4. During the pendency of the suit certain of the defendants died. Summonses were issued, at the request of the plaintiffs, against their heirs, and also against the administrator of the estate of one of them, for the purpose of making them parties to the action. The administrator filed a plea in abatement, and the others moved to quash the summonses. The demurrer to the plea and the motion to quash were sustained. It appears, without dispute, that none of the summonses was issued until more than a year after the death of the original defendants. Code, § 236, says:

"If the proper representative of a deceased defendant be not made a party to the action within one year from the death of said defendant, the action shall abate as to such defendant."

[7] It is admitted that if this is taken literally, the court below was right, but it is insisted that the provision should be construed so that the year would be measured not "from the death" of the defendants, but from the date on which the plaintiffs learned of their death. There is no authority for this. Judicial construction is never resorted to "until uncertainty is encountered." Mayo v. Whedon, 47 App. D. C. 138, 140, and cases there cited. See, also, Lake County v. Rollins, 130 U. S. 662, 671, 9 Sup. Ct. 651, 32 L. Ed. 1060, and Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 38, 15 Sup. Ct. 508, 39 L. Ed. 601. There is no ambiguity in the Code provision. Its meaning is plain and unmistakable. When the language of a statute is not ambiguous, it must be construed in its natural and obvious sense. United States v. Union Pacific Railroad Co., 91 U. S. 72, 23 L. Ed. 224; Mayo v. Whedon, 47 App. D. C. 138, 140. "* * * Where the language of an act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been

designed by the Legislature." Denn v. Reid, 10 Pet. 524, 527, 9 L. Ed. 519. See, also, Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 37, 15 Sup. Ct. 508, 39 L. Ed. 601.

It is true, as urged by appellants, that in construing a statute the intention of the lawmakers should be sought; but that is to be done by studying the language used, and it must be taken according to its plain significance, unless that would lead to an absurd consequence. Mayo v. Whedon, supra. Nothing of that nature would result here by taking the Code according to its obvious meaning. There is nothing in the decisions cited by appellants which conflicts with these rulings.

5. The action sought not only the lot, but also the amount of profits received by the defendants, so far as their recovery was not barred by the statute of limitations. It appears, from what we said when discussing the pleas in abatement puis darrein continuance, that all those claiming an interest in the lot adverse to the plaintiffs were not before the court at the time of the trial. The amount of profits received by the defendants was shown. It was about half the total amount received by all the defendants, including those not served. In the court's charge the jury were told that if they found for plaintiffs with respect to the title they should also award them the entire amount of recoverable profits received by those in possession, on the theory that the served defendants were jointly liable with those not served. It is asserted that, in view of this charge, the soundness of which is not questioned, the testimony disclosing that defendants had received only half of the profits for which they might be held liable had a tendency to deter the jury from finding against them touching the title, and therefore that plaintiffs were prejudiced by it. No objection, however, was made to the testimony of the first witness on the subject until after her answer had been given, nor was any motion made to withdraw it from the jury's consideration.

[8, 9] As to this testimony, and that of the others upon the same subject, counsel for plaintiffs stated that he was willing it should "go in" subject to his objection; that is, subject to his right, if he so elected, to move to have it stricken out and the jury instructed to disregard it. But he did not exercise that right. It is manifest from the record that he attached but very little importance to it at the time, and correctly so, for we cannot perceive how it could have prejudiced plaintiffs in the minds of the jury. A statement of the amount of profits was agreed upon between the parties and handed to the jury to be included in the verdict in case they found for the plaintiffs. Thus both parties agreed that, if the land belonged to the plaintiffs, the defendants were liable to them in the stipulated amount.

Washington Gaslight Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543, is cited by appellants as authority for their position. That was a libel action against individuals and a wealthy corporation. A verdict, including punitive damages based on the wealth and ability of the corporation to pay, was returned. The Supreme Court held that the corporation was not liable, but that the individuals were, and reversed the case, however, as to all, saying that there was

"no justice in allowing the recovery of punitive damages in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only." 172 U. S. 553, 19 Sup. Ct. 303, 43 L. Ed. 543. We do not think there is any analogy between that case and this.

Other errors are assigned with respect to the admission of the testimony of one witness and the rejection of the testimony of another. The testimony in both instances was so inconsequential that no injury could have resulted.

A careful consideration of all the errors assigned forces us to the conclusion that there are no infirmities in the judgments, and therefore they are affirmed, with costs.

Affirmed.

HOLLEY v. SMALLEY.

(Court of Appeals of District of Columbia. Submitted October 13, 1920. Decided January 3, 1921.)

No. 3369.

1. **Bills and notes ⟸493(2)—Presumption of consideration cannot prevail against testimony.**
   The presumption of consideration for a negotiable instrument, created by the Negotiable Instruments Law (Code of Law, 1910, § 1328), disappears when confronted by facts setting up either absence or failure of consideration, in which case, as between the original parties, the burden is on the plaintiff to prove that he is a holder for value by preponderance of the evidence without resorting to the presumption, and where all the evidence showed the failure of consideration it was error to refuse to direct a verdict for defendant.
2. **Bills and notes ⟸97(1)—Failure to surrender existing notes defeats recovery on renewal note.**
   In an action on a note, where it was undisputed that the note in suit was given to the payee on consideration of his promise to surrender prior notes given by the maker to the payee, the failure of the payee to surrender the prior notes establishes failure of consideration for the note in suit, regardless of whether there was any consideration for the prior notes.
3. **Bills and notes ⟸448—Assumpsit, declaring on common counts or special contract, proper for recovery on note.**
   A suit on a promissory note may be sustained on a declaration in assumpsit, either on the common counts or on a declaration on the contract.
4. **Executors and administrators ⟸450—Evidence that payee's estate was financially involved is immaterial.**
   In a suit by an executor on a note given his testator, evidence that the estate was financially involved and had practically no assets, except the note in suit, was immaterial and inadmissible.
5. **Evidence ⟸314(1)—Testimony deceased payee attempted to borrow money to lend to maker is hearsay.**
   In an action by the executor on a promissory note given his testator, where the defense was want or failure of consideration, testimony that deceased was repeatedly attempting to borrow money from witness to lend to the maker, despite the witness' warnings, was hearsay and inadmissible.

Appeal from the Supreme Court of the District of Columbia.

Assumpsit by William A. Smalley, as executor of T. S. Leach, deceased, against Francis Holley. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

L. J. Mather, of Washington, D. C., for appellant.

A. Coulter Wells, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This suit in assumpsit was brought by appellee to recover from defendant, Holley, upon a promissory note the sum of $3,923.27. From a judgment for the amount sued upon, defendant appeals.

The defense is, in substance, that the note in question was given in satisfaction of a series of notes given from time to time by Holley for printing done by Ferris & Leach for the Bureau of Commercial Economics, a charitable organization, of Washington, D. C., of which defendant was president. The notes were given upon the assurance of Leach that he had personally assumed the indebtedness of the bureau to his firm, which, upon the testimony of his partner, Ferris, was shown to have been false. From the abstract of the testimony of the principal witness for defendant, as set forth in the record, the facts relating to the execution of the present note and the consideration therefor were stated as follows:

"On the 1st day of July, 1917, decedent, when on one of his weekly visits to Washington, told the defendant, in the presence of witness, that certain property of his in Philadelphia was jeopardized, as foreclosure proceedings were being had against it, and he wanted defendant to give him a note, embracing all the other notes he had already given him, which he could use in the attempt to save his property from this foreclosure; but Mr. Holley insisted that he would not sign the note asked for unless all his other notes—delivered to decedent prior to that time—were returned to him, and said decedent promised that he would look them up immediately upon his return to Philadelphia and send them over to Mr. Holley, and, upon this assurance being given the defendant, said decedent made out the note for $3,923.47 (the note in question) and left it in the office of the bureau in the Southern Building for defendant's signature, he having gone out in the meantime, and when he returned to his office said defendant signed the note and mailed it to decedent in Philadelphia; that decedent did not send the old notes back to defendant as he promised, and never has returned them to him, and they are still outstanding and unpaid. On cross-examination witness testified that she was very intimately acquainted with decedent; that the note in suit was given to decedent by the defendant for his accommodation to enable him to prevent foreclosure of his Philadelphia property; that defendant had from time to time given plaintiff's intestate certain notes which were given without any consideration whatever; that it was not a fact that all the notes given by Mr. Holley were given entirely for printing bill; that she remembered that Mr. Holley had given Mr. Leach a note back as early as 1915; that she was not certain as to the number or the amounts of these notes, but that she knew they were given without consideration and were only given as accommodation notes."

[1] At the conclusion of the evidence, counsel for defendant moved the court for a directed verdict, which was denied, and to which counsel duly excepted. We think this was error. The case should not have been submitted to the jury on the case made by the plaintiff. When the plaintiff introduced the note and rested, he had made a

prima facie case, which, if unchallenged, would have been sufficient to sustain a verdict and judgment in his favor. The Negotiable Instruments Law (Code D. C. § 1328) provides:

"Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value."

This amounts, however, to a mere legal presumption, which disappears when confronted by facts setting up either absence or failure of consideration. Here the failure of consideration was established, not only by the witnesses for the defense, but by a letter which plaintiff introduced and thereby adopted as part of his proof. This letter was written by defendant to one Francis S. McIlhenny, of Philadelphia, in which, among other things, he stated:

"The notes which I gave Mr. Leach were not accommodation notes, but covered the amount advanced to me from time to time, and the new one of July 1st was given to take the place of the others, which he promised to return to me, and which I have not received."

The court is not justified in submitting to a jury a case, where they are only called upon to weigh a mere legal presumption against all the facts adduced at the trial.

In Smith v. Sac County, 11 Wall. 139, 20 L. Ed. 102, suit was brought upon certain bond coupons by the holder by transfer of the bonds and coupons. Evidence was introduced in defense that the bonds had originally been procured through fraud. Plaintiff failed to prove that he was a purchaser for value. In upholding a judgment denying recovery, the court said:

"Treating the bonds and coupons sued on in this case, which are payable to bearer, as negotiable paper, and conceding to its fullest extent the protection which commercial usage throws around such paper in the hands of a bona fide purchaser for value before maturity, it is nevertheless undoubtedly true that circumstances may be shown in connection with the origin of such paper, which will devolve upon the holder the burden of showing that he *did* give value for it before maturity. * * * But to hold that, after all this was shown in defence, such holder should have a judgment on those bonds, without any proof that he purchased them for value or that he gave any consideration for them at all, is in our judgment pushing the doctrine which gives sanctity to negotiable paper beyond any just principle or any decided case."

In Stewart v. Lansing, 104 U. S. 505, 26 L. Ed. 866, where the questions involved were substantially the same as in the preceding case, the lower court, holding that the plaintiff had failed to adduce evidence of his bona fide ownership sufficient to send the case to the jury, instructed a verdict for defendant. The Supreme Court, in sustaining this action, said:

"It is an elementary rule that, if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover, must prove that he is a holder for value. The mere possession of the paper, under such circumstances, is not enough. Smith v. Sac County, 11 Wall. 139. * * * This makes it necessary to inquire whether upon the testimony the burden of establishing a bona fide ownership was so far overcome at the trial as to make it improper for the court to take that question from the jury. * * *

While it would not, perhaps, have been improper for the court, in the exercise of its rightful discretion, to leave the case to the jury on the evidence, we cannot say it was error not to do so."

If, upon proof of fraud or illegality in the inception of the negotiable paper, the indorsee or transferee thereof cannot avail himself of the presumption of bona fide ownership, certainly as between the original parties thereto, upon proof of want or failure of consideration, the burden is upon the plaintiff to prove by a preponderance of the evidence, without the aid of the presumption of consideration, that he is a holder for value.

[2] As we view the case, it matters not whether the earlier notes were accommodation notes, as testified to by defendant's principal witness; since it is not denied that Leach held certain of defendant's notes, he promised surrender of which was the consideration for the note here in issue. The notes were not presented in court or accounted for, as should have been done. Until the prior notes were surrendered to defendant, there was a total failure of consideration for the present note.

There are other assignments of error, which, in view of a possible retrial, will be briefly considered.

The declaration is in two counts. The first declares on a promissory note for the full amount claimed, and the second is on the common counts. Defendant pleaded non assumpsit and nil debet, and by affidavit of defense set up failure of consideration for the note.

[3] The alleged lack of any evidence whatever in support of the cause of action on the common counts led to a motion for a directed verdict on the second count, which was denied. This is assigned as error. In assumpsit, a declaration on the common counts may be supported by evidence of an existing contract not under seal. A suit upon a promissory note may be sustained upon a declaration in assumpsit, either upon the common counts or upon a declaration upon the contract. That being true, and the verdict being a general one for the amount sued upon and judgment accordingly, we think there was no error in denying the motion for an instructed verdict upon the second count.

[4, 5] Error was committed in permitting plaintiff to testify, over the objection of defendant, as to the financial condition of the deceased, to the effect that the estate was heavily involved, "so that there is now only $700 left in the estate beside the note in suit," and to the further effect that the deceased "was repeatedly attempting to borrow money from witness in his lifetime to lend to Mr. Holley despite the fact that witness warned him against so doing." The testimony as to the financial condition of the deceased was not material in any respect to the issues involved, and therefore not admissible upon any theory known to the law, and the testimony as to his attempting to borrow money to lend to defendant was hearsay, and for that reason inadmissible.

The judgment is reversed, with costs, and the case is remanded for a new trial.

Reversed and remanded.

OLSON v. POSPESHIL.

(Court of Appeals of District of Columbia. Submitted November 10, 1920. Decided January 3, 1921.)

No. 1333.

1. **Patents ⇐90(3)—Period of three months for attorneys to prepare application does not show lack of diligence.**
   The lapse of the period of three months between the time a case was turned over to patent attorneys to prepare the application and the filing of the application is not in itself evidence of lack of diligence on the part of the client, which would defeat his priority as to an application filed by a junior inventor during that period.
2. **Patents ⇐91(4)—Evidence held to show applicant submitted earliest drawing to attorneys before interfering application.**
   In a patent interference proceeding, evidence, aside from the evidence of another proceeding which was not properly presented for consideration, *held* to show that the junior applicant, in giving the case to his attorneys to prepare the application before the senior application was filed, delivered to the attorneys the earliest drawing he made embodying the invention, so that he was not wanting in diligence in that respect.
3. **Patents ⇐106(3)—Testimony in prior interference proceeding cannot be considered on notice.**
   Under Rules of Practice of the Patent Office, rule 157, providing that, on motion duly made and granted in accordance with rule 153, testimony in an interference proceeding may be used in any other interference proceeding, subject to the right of any contesting party to recall witnesses and to take other testimony, the testimony introduced in a prior interference proceeding cannot be examined by the Commissioner of Patents, where no motion to bring it into the subsequent proceeding was made, but only a notice was given that at the hearing any of the tribunals would be asked to take official cognizance of such testimony.

Appeal from the Commissioner of Patents.

Interference proceeding between Nels L. Olson and Joseph B. Pospeshil. From a decision of the Commissioner of Patents, granting priority to Pospeshil, Olson appeals. Reversed.

Otto F. Barthel, of Detroit, Mich., and Theodore K. Bryant, of Washington, D. C., for appellant.

Milans & Milans, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This is an appeal from the decision of the Commissioner of Patents, granting priority of invention to the senior party, Pospeshil, and reversing the decisions of the Board of Examiners in Chief and the Examiner of Interferences. Pospeshil filed the application in interference September 5, 1916, which is a division of an application filed March 31, 1916. Olson filed his application April 14, 1916. The invention in interference relates to means by which an automobile may be converted into a truck, and is limited to the following issue:

"The combination with a semi-floating axle structure including a casing, an axle journaled therein having a projecting end, and a wheel fixed to said projecting end, of means for converting it into a three-quarter floating axle structure comprising a flange secured to the inner side of the wheel and sur-

rounding the end of the casing and bearings interposed between said flange and said end of the casing."

It conclusively appears, and was held by all the tribunals below, that Pospeshil established no date of invention, either by conception, disclosure, or reduction to practice, prior to the filing of his original application, March 31, 1916. We agree with the Examiner of Interferences and the Board of Examiners in holding that Olson is entitled to September 30, 1914, for conception and disclosure of the invention in issue. This is established by a drawing (Exhibit 33) bearing that date. This, however, is not important; since Olson turned his case over to his attorneys on January 24, 1916, with directions to prepare an application for a patent. This was two months before Pospeshil entered the field.

[1] It is urged that Olson was lacking in diligence between January 24 and April 14, 1916. Indeed, Pospeshil's case is limited to this contention, and upon this the Commissioner based his decision. We agree with the Examiner and the Board that the period of less than three months for the attorneys to prepare an application is not, in itself, evidence of lack of diligence on the part of the client. There is nothing to show that Olson did anything to delay the progress of the work in the attorneys' office, or that the attorneys delayed the preparation of the application beyond the time reasonably necessary in the due course of business.

But the Commissioner resolves the question of diligence against Olson by finding that the drawing (Exhibit 33) was not submitted to his attorneys on January 24th, when he first consulted them with reference to preparing his application. After reviewing the testimony of the witnesses on this point, and comparing it with the evidence in a prior interference, the Commissioner reached the following conclusion:

"It appears, therefore, from the testimony in the prior interference, which was given some six months before the testimony in the present interference, and when the present invention was not involved, that this drawing, Exhibit No. 33, was shown to the attorneys some time later than the original sketches and description. This testimony is more in accord with the manner in which the application was prepared than is the testimony in the present interferences, since, as above noted, there was no description of, and no claim made to, the present invention at the time the application was filed. It is significant that Mr. Stickney, who is said to have actually prepared the application, was not called as a witness. As noted above, the witness Stauffiger, who made the drawings, is unable to testify when he made them, and no records of the attorneys were produced to establish this date. In order to prevail, Olson, who has established a conception some time prior to January 24, 1916, must show that he was diligent at the time Pospeshil entered the field, and as he was doing nothing with the invention, except to submit it to his attorneys for the purpose of filing his application, it is necessary that he establish that the invention was submitted to them prior to Pospeshil's filing date."

[2] Barring the reference to the testimony in the earlier interference, which we will presently consider, we think the evidence conclusively establishes that the drawing (Exhibit 33) was taken to the attorneys on January 24th. But, assuming that it was taken later, there is nothing upon which a presumption can be predicated that it was not

in the attorneys' hands prior to March 31, 1916, Pospeshil's earliest date. When it is remembered that Olson filed 14 days after this date, the margin is too narrow to justify the presumption of delay.

[3] But we come to the more important feature of the case—the Commissioner's reference to the testimony in the former interference. When Olson had concluded his evidence in chief, counsel for Pospeshil gave the following notice:

"Notice is given on the record by counsel for the party, Pospeshil, to counsel for Olson, that at the hearing the Examiner of Interferences and other tribunals considering this case, on appeal or otherwise, will be asked to take official cognizance of statements made by the various witnesses who have testified in this case, in connection with the testimony which they have given in that case."

"That case," indefinitely mentioned in the notice, it will be assumed refers to the earlier Olson interference. It will be observed that the notice does not contemplate the introduction of the earlier record or any parts of it. It fails to designate the portions the tribunals may be called upon to consider, and it does not even give notice of an intention to introduce the record or parts of it later on in the course of the trial. Rule 157 of the Rules of Practice of the Patent Office provides as follows:

"Upon motion duly made and granted (see rule 153), testimony taken in an interference proceeding may be used in any other or subsequent interference proceeding, so rar as relevant and material, subject, however, to the right of any contesting party to recall witnesses whose depositions have been taken, and to take other testimony of rebuttal of the depositions."

Rule 153 relates to notice of motions and affidavits filed in the course of contested cases, with proof of service, and for hearing of such motions by the tribunals in which the motion is made. Rule 157 provides the only manner in which a record in another case may be used, namely, by filing a motion in the proper tribunal, with proof of service, as required by rule 153. It then provides that, when the motion has been allowed and a former record, or portions thereof, are introduced, the contesting party may call witnesses to rebut it.

It warrants no such practice as was indulged in this case. The present notice is not in the form of a motion duly served and allowed, as by rule required; but it merely says to Olson that at any stage of this proceeding, through the Patent Office, or, indeed, in this court, without further notice or opportunity to be heard, the former record may be sprung to insure your defeat. And that is what occurred. The Commissioner, without giving Olson a hearing or an opportunity to be heard, on his own motion, after the appeal had been submitted, reached into the earlier record and extracted therefrom an answer to a question here and an answer there, and used them to raise a presumption which has no support whatever in the present record.

The elementary rules of practice should be observed as strictly in the trial of causes in the Patent Office as in the courts, and no principle of law is better established than that a litigant cannot be deprived of his rights without notice or an opportunity to be heard.

The protection of neither was accorded Olson in respect of the testimony gleaned by the Commissioner from the earlier record and used to accomplish his defeat.

The decision of the Commissioner of Patents is reversed, and the clerk is directed to certify these proceedings as by law required.

Reversed.

LIEBMANN et al. v. NEWCOMB.

(Court of Appeals of District of Columbia. Submitted November 12, 1920. Decided January 3, 1921.)

No. 1351.

1. **Patents ⟸90(5)—Prior invention, not meeting standard of issue, is not reduction to practice.**
   If both inventions meet the standard set up by the issue, the poorer one, if prior in point of time, would prevail; but, if the prior invention fails to meet that standard, it is not a reduction to practice.
2. **Patents ⟸90(5)—Earlier application held not to disclose invention of issue.**
   The senior application in an interference proceeding on an issue for a make-and-break contact, consisting only of a face plate of tungsten and a support of iron or steel welded thereto, which shows a construction whereby the tungsten was so alloyed with the iron that the face plate was no longer of tungsten only, does not disclose a reduction of the issue to practice, and the junior applicant is entitled to priority, since the invention falls in that class where the machine is intended for particular use, and reduction to practice in such case requires satisfactory operation in the actual execution of the object.

Smyth, Chief Justice, dissenting.

Appeal from the Commissioner of Patents.

Interference proceeding between Alfred J. Liebmann and another and Harold A. Newcomb. From a decision of the Commissioner of Patents, awarding priority of invention to Newcomb, Liebmann and another appeal. Reversed.

Cornelius C. Billings, of New York City, for appellants.

Wesley G. Carr, of East Pittsburgh, Pa., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from the decision of the Commissioner of Patents in an interference proceeding awarding priority of invention to appellee. The invention is an electric make-and-break contact having a tungsten face plate welded to a supporting base of iron or steel. The issue is in the following counts:

"1. An electric make-and-break contact consisting only of a face plate of tungsten and a supporting base of another metal of comparatively high melting point secured directly to each other by an electrical resistance weld.

"2. An electric make-and-break contact consisting only of a face plate of tungsten and a support of iron or steel welded thereto."

Appellants were granted a patent for the invention October 5, 1915, on an application filed May 22, 1915. Appellee filed January 4, 1916, a division of an application filed May 11, 1914, into which

he copied the claims in issue from appellants' patent. Appellee's original filing date of May 11, 1914, is prior to any date claimed by appellants. Hence, if he sufficiently disclosed the invention in his earlier application to constitute constructive reduction to practice, he must prevail.

The whole case turns upon appellee's earlier application, which claims only a process of welding tungsten to steel. After describing the process in the application, appellee states:

"Various applications of welded metals produced according to my process will readily suggest themselves to persons skilled in the art. For example, when it is desired to form electrical contact elements having an effective surface of tungsten attached to an iron or steel support, rods of steel and tungsten may be welded together according to the process described above and then broken at the joint, half of the tungsten rod being attached to each of the steel rods. The welded end of each half may then be ground into any suitable form."

At this time tungsten contacts belonged to the prior art; hence, the suggestion involved no inventive conception. Appellee, at most, disclosed a process for producing "electrical contact elements" by a combination of tungsten and steel. There is nothing in his application describing a process for welding a face plate of tungsten directly to a support of iron or steel under conditions which will keep the tungsten free from alloy with the steel, nor is any claim made for such a product. Indeed, there is nothing in the application to indicate that appellee had in mind the invention of the present issue.

The present contention may be best disposed of by an analysis of the object and purpose of the invention. Electrical make-and-break contacts may be made of any of the common metals; but experience has demonstrated that contacts made, for example, of iron or steel would possess little or no utility, since they would disintegrate under the severe test to which these contacts are subjected. Tungsten, however, is the one metal which possesses the qualities of endurance best suited for this purpose. It follows that the tungsten, to meet the requirement, must be kept free from impurities which would affect its durability. The standard set by the issue is a face plate of tungsten metal, not a combination of tungsten and other metals. The invention consists in successfully welding a face plate of tungsten directly to a support of iron or steel. It was old in the art to accomplish this by using "solder of copper, silver or gold," as disclosed in an earlier patent to one Coolidge. To produce a product—and this is a product, not a process, invention—which would amount to invention or an improvement over the prior art, the product made by substituting a direct weld for the "solder of copper, silver or gold" must contain a tungsten face plate which will maintain the high standard recognized for the contacts having face plates of this metal. It is not sufficient that a piece of tungsten has been welded or fused into a piece of steel, unless the tungsten retains its full power to withstand the test of which it is capable as shown by the prior art.

[1, 2] This is not a case where one of two inventions is poorer than the other. Of course, if both meet the standard set up by the

issue, the poorer one, if prior in point of time, would prevail. But if either one fails to meet the required standard of the issue, it is not a reduction to practice. What is the standard here set up?

"An electric make-and-break contact consisting only of a face plate of tungsten and a support of iron or steel welded thereto."

It logically follows that, if in the process of welding, the tungsten becomes impregnated with a foreign substance or alloyed with the iron or steel, which leaves it with less resistance than pure tungsten, it is no longer only "a face plate of tungsten."

It must be remembered that the issue not only calls for a face plate of tungsten, but it appears that tungsten, by reason of its extremely high melting and low vaporization qualities, is a very superior metal for the purpose required. It also conclusively appears that in appellee's product the tungsten was so alloyed with the iron in the process of welding that it was incapable of making a contact which would withstand any reasonable test. It failed to meet the test of the prior Coolidge invention or the tests to which the product of appellants was subjected. The Coolidge statement showed a contact which would stand 32,000,000 makes-and-breaks without showing material depreciation, and appellants' contact, after being tested to the equivalent of a 50,000-mile run on an automobile, showed such slight evidence of depreciation that it required the aid of a magnifying glass to detect it; while the contact made by the process described in appellee's 1914 application deteriorated almost beyond the point of usefulness in the equivalent of a 1,000-mile run.

In the case of Sydeman v. Thoma, 32 App. D. C. 362, the court, considering what in law amounts to actual reduction to practice, said:

"Decisions involving this often-litigated question of actual reduction to practice may be divided into three general classes. The first class includes devices so simple and of such obvious efficacy that the complete construction of one of a size and form intended for and capable of practical use is held sufficient without test in actual use. [Cases cited.] The second class consists of those where a machine embodying every essential element of the invention, having been tested and its practical utility for the intended purpose demonstrated to reasonable satisfaction, has been held to have been reduced to practice notwithstanding it may not be a mechanically perfect machine. In other words, it is sufficient reduction to practice, although a more desirable commercial result may be attained by some simple and obvious mechanical improvement, or by substituting another well-known material for the one used in the original construction, as, for example, metal for wood, cast metal for sheet metal, and the like. [Cases cited.] The third class includes those where the machine is of such a character that the particular use for which it is intended must be given special consideration, and requires satisfactory operation in the actual execution of the object. [Cases cited.]"

We think the invention here comes within the third class. The tests made in attempting to meet the counts of the issue from the description set forth in appellee's earlier application resulted substantially in the product described and claimed in that application—not in the welding of a face plate of tungsten directly to a steel support, but in a welding process which consisted rather in fusing than in welding, and in the alloy of the metals. This fails entirely to meet the counts

of the issue, and results in the failure of appellee's earlier application to constitute a constructive reduction of the invention to practice.

The decision of the Commissioner of Patents is reversed, and the clerk is directed to certify these proceedings as by law required.

Reversed.

Mr. Chief Justice SMYTH dissents.

SHERBY et al. v. BROWNLOW et al., Commissioners of District of Columbia.

(Court of Appeals of District of Columbia. Submitted October 15, 1920. Decided January 3, 1921.)

No. 3459.

1. **District of Columbia ⇐22—Commissioners can park Louisiana avenue and reduce sidewalk width.**

Act April 6, 1870 (Rev. St. D. C. § 225), authorizing the authorities to set apart, as parks, strips of any avenue in the city except Louisiana and three other named avenues, leaving a roadway not less than 35 feet in width, when construed with Act Cong. March 3, 1881, repealing so much of the former act as prohibited the narrowing of the carriageways of those four avenues, restricted only the width of the roadway, but did not prohibit establishing a parkway in the center of Louisiana avenue, and as incidental thereto lessening the width of the sidewalks, so as not to diminish the width of the roadways.

2. **District of Columbia ⇐22—Commissioners with supervisory powers over streets are subject to control by Congress.**

The Commissioners of the District of Columbia are vested with full power to repair and improve the streets and alleys of the District, subject to the reserved authority of Congress to direct the manner in which street improvements shall be carried out.

Appeal from the Supreme Court of the District of Columbia.

Suit by Harry Sherby and others against Louis Brownlow and another, Commissioners of the District of Columbia, to restrain defendants from proceeding with a street improvement. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

C. A. Douglas, Conrad H. Syme, H. H. Obear, and J. V. Morgan, all of Washington, D. C., for appellants.

F. H. Stephens, of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. Appellants filed a bill for injunction in the Supreme Court of the District of Columbia to restrain defendants, Commissioners of the District, from proceeding with the improvement of Louisiana avenue, in the city of Washington. The case was heard below on bill and answer, and from a decree dismissing the bill this appeal was taken.

The improvement in question was inaugurated under authority of a provision contained in the District Appropriation Act of June 5, 1920 (41 Stat. p. 845), making an appropriation "for repaving the roadway on Louisiana avenue, Pennsylvania avenue to Tenth street,

in accordance with plan approved by the commissioners of the District of Columbia, $60,000."

Louisiana avenue, at the block in question, is 160 feet wide from building line to building line. The paved street or roadway is 80 feet wide, with a sidewalk 40 feet wide on either side. The street on either side is lined with wholesale and retail places of business. The sidewalks, under permits from the District, are occupied by adjacent property owners for the display of their goods. It is averred that in the block in question, business is transacted in excess of $15,000,000 per annum, $6,000,000 of which is retail business.

The improvement contemplates reducing the width of the sidewalk on each side of the street 12½ feet, creating an ornamental parking in the center of the street 25 feet wide, extending the length of the block, and paving roadways 40 feet wide on each side of the parking. It will be observed that the 80 feet of roadway is retained in the two 40-foot ways, and the 12½ feet taken from each of the sidewalks is equivalent to the width of the parking. At present, the property owners occupy 20 feet of the walk adjacent to the building line for the exhibition of their goods, 15 feet of the walk is kept open for the use of the public, and 5 feet adjacent to the curb is used as a platform for loading and unloading goods. The plan of improvement contemplates the reduction of the space for exhibiting goods from 20 feet to 10½ feet, the reduction of the space for pedestrians from 15 feet to 12 feet, and the retaining of the 5 feet for platform as at present.

[1] In this proceeding a number of the property owners challenged the authority of the Commissioners to make this change. Appellants pitch their case upon the act of Congress of April 6, 1870, 16 Stat. 82 (section 225, R. S. D. C.), which provides:

"The proper authorities of the District are authorized to set apart from time to time, as parks, to be adorned with shade trees, walks, and inclosed with curbstones, not exceeding one-half the width of any and all avenues and streets in the said city of Washington, except Pennsylvania, Louisiana, and Indiana avenues, and Four-and-a-Half street between the City Hall and Pennsylvania avenue, leaving a roadway of not less than thirty-five feet in width in the center of said avenues and streets, or two such roadways on each side of the park in the center of the same, but such inclosures shall not be used for private purposes."

It is urged that Louisiana avenue is excepted from the general power conferred upon the authorities of the District in respect of parking the avenues of the city, that this limitation has not been removed, and that the act of 1920 does not operate to repeal it by implication.

By the act of Congress of March 3, 1881 (21 Stat. 458, 462), an act making appropriations for the District of Columbia, it was provided:

"That so much of the act of Congress, approved April sixth, eighteen hundred and seventy, as prohibits the Commissioners of the District of Columbia from narrowing the carriageways of Louisiana and Indiana avenues and a portion of Fourth-and-a-Half street be, and the same is hereby, repealed."

Construing the acts of 1870 and 1881 together, it is apparent that the restriction in the earlier act extended only to a limitation in the width of the roadway on each side of the parking that the authorities,

acting under the general power conferred by the act, might thereafter construct in Pennsylvania, Louisiana and Indiana avenues and Four-and-a-Half street. No limitation was placed upon the authorities of the District in respect of constructing parking in those streets, the restriction being only to the width of the roadway. Otherwise, the act of 1881 is meaningless. Inasmuch as this construction harmonizes the two acts and gives effect to the interpretation which Congress itself by the later act placed upon the earlier act, we are forced to the conclusion that the authority to construct parking in Louisiana avenue was conferred by the act of 1870, which authority still exists.

Coming to the present act, the question whether it, by implication, authorizes the construction of parking in Louisiana avenue is eliminated by our interpretation of the act of 1870. Being in harmony with the prior acts, Congress undoubtedly deemed it unnecessary to specifically set out the character of improvement to be made, but delegated to the Commissioners power to repave the street in accordance with plans to be approved by them. We think the reduction of the width of the sidewalks is merely incidental to the proper execution of the duties thus imposed.

[2] The Commissioners are vested with full power to repair and improve the streets and alleys of the District. In Barnes v. District of Columbia, 91 U. S. 540, 549, 23 L. Ed. 440, the court, considering the power vested in the Board of Public Works, said:

"This board is invested with the entire control and regulation of the repair of streets and alleys, and all other works which may be intrusted to their charge by the legislative assembly or Congress. They shall disburse all the money appropriated by the legislative assembly or by Congress, or collected from property holders for the improvement of streets and alleys."

The Commissioners of the District have succeeded to all the authority which formerly belong to the Board of Public Works. In McBride v. Ross, 13 App. D. C. 576, 578, the court said:

"The Commissioners, three in number, are its governing officers, and in that capacity have succeeded to the control over the streets and highways that was once vested in the Board of Public Works under the preceding municipal government. * * * They are, by existing laws, as we have seen, invested with the control and regulation of the public streets of the city of Washington, with certain exceptions in which the street in question is not included. In addition to this, a recent act of Congress, enacted apparently to remedy an omission pointed out in the case of District of Columbia v. Libbey, 9 App. D. C. 321, expressly transfers to and vests in the Commissioners the jurisdiction and control of the street parking in the streets and avenues. 30 Stat. 570."

Notwithstanding this general supervisory power vested in the Commissioners, Congress unquestionably has reserved to itself authority to direct the improvement of a street to be carried out under plans approved by the Commissioners, as in this instance, or according to specific directions and limitations expressed in the act, as has been done frequently in the course of street improvement in the District. In either instance, however, the general authority of the Commissioners is only restricted to the extent of the express provisions of the particular act.

The decree is affirmed, with costs.

Affirmed.

In re HENDERSON.

(Court of Appeals of District of Columbia. Submitted November 8, 1920. Decided January 3, 1921.)

No. 1322.

1. **Patents ⊂=112(4)—Interference decision estops party who copied claims only as to exact decision.**
   A decision determining priority in an interference proceeding is conclusive against the party who copied his opponent's claims, and who, therefore, could not bring into judgment matters outside of those claims, only as to the exact thing in judgment, not as to what might have been adjudicated.
2. **Patents ⊂=112(4)—Interference decision as to claims for motor conclusive against claims for device.**
   An interference decision, awarding priority to another for claims covering a controller for electrically operating a motor in either direction, is conclusive against the defeated party as to claims for a controller for a device, which is shown by the specifications to be identical with the motor of the interference.
3. **Patents ⊂=97—Equity regarded in administering patent law.**
   Equitable principles have a place in the administration of patent law, and shield the innocent from the consequences of unfair practice.
4. **Patents ⊂=109—Delay until senior's time for reissue expired held to estop new claims.**
   A party defeated in an interference proceeding, who took the full time allowed him for presenting new claims, as a result of which the successful party's time for applying for a reissue to cover the new claims, if disclosed by his specifications, had expired, is estopped en pais from making the new claims.
5. **Patents ⊂=109—Commissioner represents adverse litigants and public.**
   The Commissioner of Patents, in passing on an application for a patent represents an adverse litigant in previous interference proceedings and the public, so that he can rely on injury to the adverse litigant and to the public to establish estoppel to make the new claims.
6. **Patents ⊂=112(1)—Junior inventor not entitled to claim dominating senior.**
   An applicant, who had been defeated in an interference proceeding, is not entitled thereafter to an allowance of claims which would dominate the claims awarded to his opponent in the interference.

Appeal from the Commissioner of Patents.

Application by Clark T. Henderson for a patent. From a decision of the Commissioner of Patents, refusing to allow claims 1 to 5 of the application, applicant appeals. Affirmed.

E. B. H. Tower, of Milwaukee, Wis., and R. O. Hinkle, of Chicago, Ill., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

SMYTH, Chief Justice. The Commissioner of Patents refused to allow claims 1 to 5, inclusive, of Henderson's application, on the ground that he was estopped from asserting them. Claim 1 is representative of the others, and is as follows:

A controller having positive and negative line terminals and terminals for the device to be controlled, an electromagnetic switch for connecting one of

the line terminals to one of the terminals for said device, another electromagnetic switch for connecting the same line terminal to the other terminal for said device, a third electromagnetic switch for connecting the first terminal for said device to the other line terminal, and means for energizing said switches so that the first switch may close alone and the other two may be in closed position at the same time.

In April, 1908, one Gilpin filed an application on which a patent issued in August of the same year. A little over a month afterwards Henderson filed his present application, in which claims 1 to 6 of the Gilpin patent were copied. He requested an interference with the latter which was declared. All the tribunals of the Patent Office decided against him, and this court affirmed the Commissioner's decision. Henderson v. Gilpin, 39 App. D. C. 428. In February, 1913, the claims of the interference in Henderson's application were finally rejected in accordance with the practice in the Patent Office.

Henderson waited almost a year and then presented claims similar to those before us. They were rejected on the ground of res judicata. After much delay he again presented the disallowed claims, rewritten, however, so as to improve their terminology but without changing their substance. They were finally rejected and are now before us on appeal. The examiners in chief held that Henderson was estopped by judgment, and the assistant commissioner that he was estopped en pais.

[1, 2] With respect to the estoppel by judgment, if there is such an estoppel in this case it must be touching the exact thing in judgment—not what might have been adjudicated—because the claims having been taken from Gilpin's patent could not be changed, so as to bring into judgment matters outside of them. Henderson, therefore, is bound only by the thing passed upon. It covered means for electrically operating a "motor" in either direction. In the present proceeding the invention relates to a "device" electrically controlled so that it will move backwards and forwards. Now, a motor is a device, but a device may be a motor or something else. When, however, we consider the appealed claims in connection with the specifications, we are convinced that the "device" of the issue is identical with the "motor" of the interference. The subject-matter, then, of the two proceedings is the same; so are the parties, for the commissioner represents Gilpin. In re Dement, 49 App. D. C. 261, 263 Fed. 813, and cases cited. It follows that Henderson is estopped by the judgment. Blackford v. Wilder, 28 App. D. C. 535.

In re Curtiss, 46 App. D. C. 183, relied on in this regard by Henderson, does not conflict with anything we have said. It was asserted in that case that the decision in an interference proceeding between Curtiss and one Janin had disposed of the questions then before the court, but the contention was rejected because the claims in the first case related to a flying machine capable of arising from the surface of the water, while in the case which the court was considering a skimming boat was the subject of the controversy. In other words, the subject-matter of the one case was different from that of the other. Not so here.

If we assume, however, that the subject-matter is not the same, that would not save Henderson, because he is undoubtedly estopped en pais.

[3] We have shown the dilatory course pursued by him in the Office. He took every moment of time allowed by law. While ordinarily this would not have harmed him, it must be held otherwise here because of the interposition of certain equitable principles. Equity has a place in the administration of the patent law (Hisey v. Peters, 6 App. D. C. 68; In re Mower, 15 App. D. C. 144; Scott v. Scott, 18 App. D. C. 420; Computing Scale Co. of America v. Automatic Scale Co., 26 App. D. C. 238), and shields the innocent from the consequences of practices that are unfair.

[4] Henderson had access to the Gilpin papers in the interference. He knew whether Gilpin's disclosure would support a claim such as he, Henderson, is now asserting. If it would, Gilpin would have a right to apply for a reissue to cover it, provided his application was made within the time provided by law. Equity required Henderson to make known to Gilpin before the lapse of that time that he had a claim which, if allowed, would dominate Gilpin's. If he had done so, the latter would have had an opportunity to defend himself; but Henderson did not do this. Instead he waited until Gilpin was helpless, and then sought to take from him what this court had awarded him in Henderson v. Gilpin, 39 App. D. C. 428.

[5, 6] Not only is Gilpin interested in this phase of the case, but the public is also, and it is the duty of the Commissioner to protect the public as well as the litigants. In re Marconi, 38 App. D. C. 286, 290; Moore v. Chott, 40 App. D. C. 591, 596; In re Drawbaugh, 9 App. D. C. 219, 240. Gilpin under his patent has enjoyed a monopoly of the invention for about 12 years. A reissue would not extend his monopoly beyond 17 years. If, however, we yield to Henderson's contentions, he would receive a patent which would run 17 years from its date, thus stretching the time of the monopoly to which the public would be subjected at least 12 years more than the law contemplates. Considering, as we must, the rights of Gilpin and the rights of the public, we are clear that Henderson is estopped en pais. Moreover, it is the law that a losing party in an interference is not entitled to claims that would dominate the claims given to his successful rival. In re Marconi, supra. This principle would be violated in the present case if Henderson was permitted to prevail, for his claims would dominate Gilpin's.

The decision of the Commissioner of Patents is right, and it is affirmed.

Affirmed.

MANNING v. AMERICAN SECURITY & TRUST CO. et al.

(Court of Appeals of District of Columbia. Submitted December 6, 1920. Decided January 3, 1921.)

No. 3396.

1. **Appeal and error ⟸1009(1)—Findings by chancellor are highly persuasive.**
   The findings of fact by a chancellor, who heard the witnesses, are highly persuasive to the reviewing court, and will not be disturbed, except for manifest error.
2. **Specific performance ⟸41—Possession and small payment under oral contract to sell land insufficient.**
   The statute of frauds is as binding in equity as in law, except that equity will protect one who has gone into possession on the strength of an oral agreement, and has made improvements, performed services, or advanced money in accordance with the terms of the contract, so that an oral contract for the sale of lands will not be specifically enforced, where the purchaser had gone into possession, but had made only small payments in a desultory way, and not the monthly payments which he agreed to make, and not sufficient to equal the rental value of the premises.
3. **Specific performance ⟸49(2)—Gift or contract for good consideration not enforced.**
   Equity will not decree specific performance of a gift, or of an oral agreement based merely upon a good consideration, as distinguished from a valuable consideration.
4. **Specific performance ⟸121(5)—Oral contract to sell land must be conclusively proved, and part performance referable thereto.**
   To entitle a party to specific performance of an oral contract to purchase lands, the proof of the contract must be clear, definite, and conclusive, and show that the consideration has been paid or tendered, or that there has been such part performance that the rescission of the contract would be a fraud on the other party.
5. **Specific performance ⟸42—Part performance must be referable to contract alleged.**
   Part performance of an oral contract to sell land must be such as is referable to the contract as alleged and consistent with it.

Appeal from the Supreme Court of the District of Columbia.

Suit by Powell T. Manning against the American Security & Trust Company and others, to enforce specific performance of an alleged oral contract for the purchase of real estate. From a decree dismissing the bill, plaintiff appeals. Affirmed.

C. A. Keigwin and Hayden Johnson, both of Washington, D. C., for appellant.

George E. Hamilton and John J. Hamilton, both of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. This is an appeal from a decree dismissing a bill in equity filed by appellant in the Supreme Court of the District of Columbia to enforce specific performance of an alleged oral contract for the purchase of real estate. The terms of the contract, as set out in the bill, are as follows:

"During the month of September, 1908, Charlotte T. Dailey, since deceased, a sister of the plaintiff, and a woman of considerable means, entered into a verbal agreement with the plaintiff whereby it was agreed between them that the said Charlotte T. Dailey should purchase for the sum of $13,000, upon the terms hereinafter stated, lot 41, in William R. Kellogg's subdivision of part of block 6, Washington Heights, in the county of Washington, District of Columbia, with the improvements thereon, also known as premises No. 1800 Belmont Road, Northwest, in said city, and take the title thereto in her own name; that on account of the purchase price she should make the required initial payment of $500, and should receive a conveyance of the equity in the property subject to an existing first deed of trust of $8,000, and that she should execute to the grantor her note for $4,500, being the deferred purchase price, and secure it by a second deed of trust upon said property; that she should pay the interest upon the $8,000 note secured by said first deed of trust, as such interest should mature, and pay taxes upon said property until such time as by the further terms of said agreement, presently set out, the plaintiff should become entitled to a conveyance of the title to said property; and by the further terms of said contract it was agreed that the plaintiff should occupy said premises without liability for rent therefor, and that he should discharge said $4,500 second trust to be placed on said property by the said Charlotte T. Dailey, by monthly payments of $50 each, and should pay all interest accruing upon said second trust, and that he should also keep the said premises in repair; and that when the said second trust should be entirely discharged by the plaintiff in the manner herein set out, the said Charlotte T. Dailey should convey to the plaintiff the equity in said premises, without the payment of any price or charge to be paid by him, but subject only, to the said first trust, and which first trust should then be assumed by the plaintiff."

[1] There is considerable conflict in the evidence in respect of the conditions under which plaintiff occupied the property, as well as the amount of money advanced by him during the years of his occupancy. But it is undisputed that the amount paid was not equivalent to a reasonable rental for the property. The trial justice heard the witnesses and ruled that the evidence did not present a case which, in view of the restrictions of the statute of frauds, would justify a decree. The findings of fact by a chancellor are highly persuasive to the reviewing court, and will not be disturbed except for manifest error.

[2] Without stopping, therefore, to review the case at length, we are convinced that there is no theory upon which plaintiff can escape the bar of the statute of frauds. The record does not disclose such a state of fact as would justify the conclusion that the failure to enforce this alleged oral agreement against the vendor would result in a fraud upon the vendee. The statute is as binding in equity as at law, except that it will protect a vendee who has gone into possession upon the strength of an oral agreement to purchase and has made valuable improvements, performed services, or advanced money in accordance with the terms of the contract. In this instance, all that plaintiff did was to advance, from time to time, small sums of money in a desultory way, not the monthly payments which he alleges he agreed to make when he entered into possession of the premises. Hence he has established no such equitable status as will suspend the operation of the statute of frauds.

[3] Nor is his case improved by the intimation that the alleged agreement was in the nature of a gift based upon the consideration of love and affection, since equity will not decree specific performance

of a gift or an oral agreement based merely upon a good consideration, as distinguished from a valuable consideration.

[4] The proof of the terms of an oral contract, to admit of enforcement by specific performance, must be clear, definite, and conclusive, and show that the consideration has been paid or tendered, or that there has been such part performance that the rescission of the contract would be a fraud upon the other party which could not be compensated in damages. Purcell v. Miner, 4 Wall. 513, 18 L. Ed. 435. The record here fails to disclose such part performance as would justify a decree for specific performance.

"In some jurisdictions it is held that the acts relied on as part performance are sufficient to take the case out of the statute of frauds, if they are unequivocally and in their own nature referable to some such agreement as that alleged. Many courts declare a stricter rule, however, holding that the party seeking aid must show by clear and satisfactory proof the existence of the contract as laid in his pleading, and that the acts of part performance must be of this identical contract. It is not enough, say these courts, that the acts of part performance evidence some indefinite agreement. They must be unequivocal and satisfactory evidence of the particular agreement pleaded and proved." Hammon on Contracts, 615.

[5] This rule is supported in Williams v. Morris, 95 U. S. 444, 24 L. Ed. 360, which was a case appealed from this District. In an exhaustive discussion of the subject, the court, in part, said:

"Specific performance in such a case will not be decreed, unless the terms of the contract are clearly proved or admitted, and a sufficient part performance is made out to show that fraud and injustice would be done if the contract was held to be inoperative; and all the authorities agree that the acts of part performance must be such as are referable to the contract as alleged, and consistent with it."

A careful review of the evidence fails to disclose satisfactory proof of the agreement set out in the bill, or conduct by plaintiff referable to such an agreement; hence there is nothing upon which to base a decree for specific performance.

The decree is affirmed, with costs.

Affirmed.

SNELLING v. WHITEHEAD, Commissioner of Patents.

(Court of Appeals of District of Columbia. Submitted December 7, 1920. Decided January 3, 1921.)

No. 3380.

1. **Patents ⇐106(2)—Claim of abandonment can be adjudicated in interference proceeding.**
   While the question of patentability will not be considered by the Court of Appeals in an interference appeal, the question of abandonment by one applicant is always available as affecting his right to priority.

2. **Injunction ⇐75—Conduct of interference proceeding by Commissioner of Patents cannot be controlled.**
   Under Rev. St. § 4904 (Comp. St. § 9449), providing for the declaration of an interference by the Commissioner of Patents, and the other statutes and rules having the force of statute, prescribing the procedure on

interference, an injunction to restrain the Commissioner of Patents from further proceeding with an interference and to require the striking of certain orders made therein would control actions of executive officer in matters committed by law to his discretion, and injunction will not issue for that purpose.

3. **Injunction ⇐75—Will not issue where there is adequate remedy by appeal in interference proceeding.**

An injunction to control the Commissioner of Patents in interference proceedings will not issue, where plaintiff's claim is based on alleged abandonment by another party to the interference, so that there is an adequate remedy at law by appeal in the interference proceeding

Appeal from the Supreme Court of the District of Columbia.

Suit by Walter O. Snelling against Robert F. Whitehead, Commissioner of Patents, for a mandatory injunction. Decree for defendant, and plaintiff appeals. Affirmed.

F. D. McKenny, J. S. Flannery, and G. B. Craighill, all of Washington, D. C., for appellant.

R. F. Whitehead and L. B. Mann, both of Washington, D. C., for Commissioner of Patents.

VAN ORSDEL, Associate Justice. Appellant, plaintiff below, filed a bill in equity in the Supreme Court of the District of Columbia against the defendant, as Commissioner of Patents, praying a mandatory injunction to restrain defendant from proceeding further with an interference proceeding pending in the Patent Office, and to require defendant to strike from the files pertaining to said interference certain orders made therein, to discontinue further proceedings in connection with said interference, to reject without further hearing the application for a patent filed May 18, 1915, by one Walter F. Rittman, and for general relief.

Defendant made return to the rule and filed a motion to dismiss the bill for (a) want of equity; (b) want of jurisdiction to control the action of defendant Commissioner in matters involving the exercise of official judgment and discretion; and (c) because plaintiff has an adequate and complete remedy provided by law.

It appears that Rittman filed an application for a patent on May 1, 1915, and requested that the patent be granted thereon without requiring the payment of the fee as provided by the act of Congress of March 3, 1883 (22 Stat. 625 [Comp. St. § 9441]), authorizing the issuance of a patent to any officer of the government, other than officers and employees of the Patent Office, without the payment of any fee, provided that the applicant state in his application:

"That the invention described therein, if patented, may be used by the government or any of its officers or employees in the prosecution of work for the government, or by any other person in the United States, without payment to him of any royalty thereon, which stipulation shall be included in the patent."

Thereafter, pursuant to certain correspondence set out in the bill, the fee was paid on March 15, 1915, and the application was filed as

of that date. On May 18, 1915, Rittman filed a second application, paid the fees thereon, and made no reference therein to the act of 1883. The interference here sought to be restrained is a tri-party proceeding, in which Brooks, Bacon and Clark, who filed March 26, 1915, were made senior parties; Rittman, the intermediate party, and appellant, who filed November 20, 1916, the junior party. In this situation, Rittman, in view of his application of March 15, 1915, moved to shift the burden of proof with respect to Brooks, Bacon and Clark. The motion was sustained by the Examiner of Interferences, and, on appeal, affirmed by the Commissioner. It may be suggested that it is not apparent just how appellant could be affected by this shift in the burden of proof; since, in any event, he retains his position as the junior party, due to his later filing date.

[1] It is insisted, however, that Rittman, by his attempted dedication of his patent to the government thereby abandoned it and forfeited any right to continue in the interference. The refusal of the Commissioner of Patents to treat Rittman's application as abandoned does not, as appellant assumes, go to the patentability of the invention in issue. While the question of patentability will not be considered by this court in an interference appeal, the question of abandonment is always available as affecting the right of priority. Hence, there is nothing of which appellant complains that cannot be adjudicated by this court on an appeal in the interference proceeding.

[2, 3] When two or more parties apply for the same invention, provision is made for the declaration of an interference by the Commissioner of Patents. Rev. Stat. § 4904 (Comp. St. § 9449). The procedure for taking testimony, trial and appeal through the tribunals of the Patent Office to this court is provided by statute or rules which have the force of statute. It therefore follows that to grant the injunctive relief here sought would amount to controlling the actions of an executive officer in matters committed by law to his discretion. It is settled by an unbroken line of decision that neither injunction nor mandamus will lie for this purpose. Nor can these extraordinary remedies be invoked when, as here, the aggrieved party has an adequate and complete legal remedy.

The decree is affirmed, with costs.

Affirmed.

UNITED STATES ex rel. ANDERSON v. SIMON et al.

(Court of Appeals of District of Columbia. Submitted December 6, 1920. Decided January 3, 1921.)

No. 3442.

1. **Schools and school districts ⇐141(5)—Teacher waives objection to irregularity in charges by going to trial.**
   A public school teacher, who appeared with counsel and went to trial on written charges against him, thereby waived the objection that the charges were not countersigned by the superintendent of schools, as required by rule of the board.

2. **Mandamus ⇐79—Will not issue to correct errors in school board's proceeding within jurisdiction.**
   A school board, in conducting a trial of a public school teacher on written charges for dismissal, is acting within the jurisdiction conferred on it by statute, and mandamus will not be granted to correct errors of the board, committed while acting within such jurisdiction.

Appeal from the Supreme Court of the District of Columbia.

Mandamus proceeding by the United States, on the relation of Horace G. Anderson, against Abram Simon and others. From an order sustaining defendant's motion to dismiss the petition and discharging the rule to show cause, relator appeals. Affirmed.

Tracy L. Jeffords and John H. Wilson, both of Washington, D. C., for appellant.

F. H. Stephens, of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. Relator, Horace G. Anderson, filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus to restore him to his position as a teacher in the public schools, from which he had been dismissed. On the petition, rule to show cause was issued, to which defendants answered. Defendants then moved to dismiss relator's petition; and from the order sustaining the motion and discharging the rule relator appealed.

It is contended that relator was dismissed from the service without a trial by the board of education, as required by statute. The law provides that no teacher shall be dismissed, except after trial on written charges, with the right, on trial or investigation, to be attended by counsel or friend. By rule of the board it is provided that the complaint shall be countersigned by the superintendent of schools.

[1] It appears that a trial was had at which testimony was taken and at which relator was present with counsel; and the board, by unanimous vote, found relator guilty of the offense charged. But it is urged that the complaint was not countersigned by the superintendent. This defect was waived by relator going to trial without objection. This is but one of the alleged errors which it is sought here to have corrected.

[2] The present proceeding is an attempt to convert mandamus into a proceeding in error to review the action of the board. What-

ever errors the board may have committed, it is clear it was acting within the jurisdiction conferred by statute.

"The extraordinary writ of mandamus will not be granted to correct mere errors of judgment committed by the board, so long as it acts within the authority conferred by statute." Nalle v. Hoover, 31 App. D. C. 311.

The judgment is affirmed, with costs.
Affirmed.

SHEFFIELD-KING MILLING CO. v. THEOPOLD-REID CO.

(Court of Appeals of District of Columbia. Submitted November 17, 1920. Decided January 3, 1921.)

No. 1336.

1. **Trade-marks and trade-names ⟸44—Prior decision as to application for different mark held not res judicata.**
   A judgment in a prior opposition to registration of a trade-mark involving the same parties, denying registration to a mark consisting simply of the portrait of a man and the word "Faribault" thereunder, is not res judicata of the applicant's right to register a trade-mark consisting of the portrait of a man with the words "Jean Baptiste Faribault" beneath the picture; the picture and words being located in a circular field, with a representation of stalks of grain on either side of the portrait.
2. **Trade-marks and trade-names ⟸43—Owner cannot oppose another mark having only geographical name in common.**
   Where the only feature common to the trade-marks of applicant and opposer which might lead to confusion is a geographical name, which either party has a right to use, the opposition to the registration cannot be sustained.

Appeal from the Commissioner of Patents.

Application by the Theopold-Reid Company for registration of a trade-mark, opposed by the Sheffield-King Milling Company. From a decision of the Commissioner of Patents, granting the application for registration, the opposer appeals. Affirmed.

A. C. Paul, of Minneapolis, Minn., and W. G. Henderson, of Washington, D. C., for appellant.

James F. Williamson, of Minneapolis, Minn., and Charles J. O'Neill, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. The Sheffield-King Milling Company appeals from the decision of the Commissioner of Patents holding the Theopold-Reid Company entitled to register a trade-mark for wheat flour consisting of the portrait of a man with the words "Jean Baptiste Faribault" written beneath the picture, the picture and words being located in a circular field with a representation of stalks of grain on either side of the portrait.

The opposition is based upon the previous use by the opposer of the mark "Faribault Fancy" on wheat flour. Both parties are located at Faribault, Minn.

[1] Appellant contends that applicant's right to registration is res

judicata because of a judgment rendered in a prior opposition involving the same parties. The mark of the earlier opposition consisted simply of the portrait of a man and the word "Faribault" written in large type thereunder. Comparing the marks, we agree with the Commissioner that the mark in the second opposition is so different from the mark of the first opposition that judgment against applicant in the first could not, under any circumstances, work estoppel in the second.

[2] Coming to the merits of the case, the only feature common to the two marks which might lead to confusion is the word "Faribault"; but this is geographical, and either party, or any other person, has a right to use it. Nor will the registration of applicant's mark containing the word prevent any other manufacturer in Faribault from using it. Opposer, therefore, is not in position to establish injury from the registration of applicant's mark.

The decision is affirmed.

Affirmed.

JOHN v. SPLAIN, U. S. Marshal.

(Court of Appeals of District of Columbia. Submitted December 6, 1920. Decided January 3, 1921.)

No. 3431.

1. **Extradition ⇐35—State's agent without authority to change sheriff's application for requisition.**
   Where the sheriff's application to the Governor for a requisition on the authorities of the District of Columbia for an alleged fugitive from justice referred to the prisoner as "he," instead of "she," the state's agent had no right to change the paper.

2. **Extradition ⇐35—That sheriff's application inadvertently used wrong gender in referring to prisoner held immaterial.**
   Under the maxim, "Lex non curat de minimis," the fact that a sheriff's application to the Governor for a requisition on the authorities of the District of Columbia for "Anna Grow, alias Anna Grove," stated that "he is now a fugitive from the justice" of such state, was immaterial; the context showing that the use of the word "he" was inadvertent.

Appeal from the Supreme Court of the District of Columbia.

Habeas corpus by Mary John against Maurice Splain, United States Marshal, in and for the District of Columbia. From an adverse judgment, petitioner appeals. Affirmed.

Robert I. Miller and James A. O'Shea, both of Washington, D. C., for appellant.

J. E. Laskey, of Washington, D. C., for appellee.

SMYTH, Chief Justice. Mary John sued out a writ of habeas corpus, alleging she was illegally restrained of her liberty by the United States marshal. In his return to the writ the marshal set forth that she was detained on a warrant issued by the Chief Justice of the Supreme Court of the District upon the requisition of

the Governor of Florida. True copies of all the requisition papers were included in the return. It appears that in the application of the Florida sheriff to the Governor for the requisition Mary John was refered to as "he." The agent of the state admitted that after he had reached Washington he changed the word "he" to "she," and because he did this it is argued that Mary John should be discharged.

[1, 2] Of course the agent had no right to change the paper, but the change was utterly immaterial. The application stated that "Anna Grow, alias Anna Grove," the name by which Mary John was known in Florida, was "charged with the crime of obtaining money by false pretense," etc., and that "he [she] is now a fugitive from the justice" of the state. The context shows that the use of "he" for "she" was an inadvertence. This is obvious. No one could be misled or prejudiced by it. Hogue v. United States, 192 Fed. 918, 114 C. C. A. 11; Funderburk v. State (Tex. Cr. App.) 61 S. W. 393; State v. Willis, 16 Mo. App. 553. There is no other criticism of the proceeding below.

We think this appeal is a proper one for the application of the maxim, "Lex non curat de minimis." The judgment is affirmed, with costs.

Affirmed.

DE FOREST v. MILLER.

(Court of Appeals of District of Columbia. Submitted November 11, 1920. Decided January 3, 1921.)

Patents ⇐106(2)—Objection that applicant was not real inventor cannot be raised in interference proceeding.

In an interference proceeding, the junior applicant cannot object that the record shows the senior applicant was not in fact the real inventor, which question is solely for the determination of the Commissioner of Patents in allowing the patent to the senior applicant, on which the junior has no right to be heard.

Appeal from the Commissioner of Patents.

Interference proceeding between Lee De Forest and Frank E. Miller to determine priority of invention. From a decision of the Commissioner of Patents, awarding priority to Miller, De Forest appeals. Affirmed.

Samuel E. Darby, of New York City, for appellant.

Leonard Day, of New York City, for appellee.

VAN ORSDEL, Associate Justice. This appeal is from the decision of the Commissioner of Patents in an interference proceeding, awarding to appellee priority of invention for a device described by the Commissioner as "a system for producing musical tones, making use of an audion and a loud-speaking telephone."

It is unnecessary to set out the counts of the issue, since we concur with the tribunals of the Patent Office on the questions of fact and the

conclusions thereon. Appellant, however, seeks to prevail upon the ground that it is shown by the record, as he contends, that appellee is not, in fact, the real inventor; but the invention which he here claims was made by a third person not a party to this proceeding. Without stopping to consider whether this contention is supported by the record, it is sufficient that it cannot here be raised. This proceeding can only settle the issue of priority as between the parties before the court, and appellant cannot defeat his opponent by showing that a party other than appellee was the real inventor. Foster v. Antisdel, 14 App. D. C. 552; Luellen v. Claussen, 43 App. D. C. 444.

Appellee, in the light of this record, may have difficulty in securing a patent; but that is a question to arise later between appellee as an applicant and the Commissioner of Patents. In that proceeding, however, appellant would have no standing to be heard. Foster v. Antisdel, supra.

The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as by law rquired.

Affirmed.

STEUBING v. HENNESSY.

(Court of Appeals of District of Columbia. Submitted November 16, 1920. Decided January 3, 1921.)

No. 1354.

Patents ⟸113(7)—Concurrent decision of tribunals reversed, only if manifestly wrong.

Where the three tribunals of the Patent Office concurred in a decision in an interference proceeding, the Commissioner's decision will be affirmed by the District of Columbia Court of Appeals, unless the court can say the decisions are manifestly wrong.

Appeal from the Commissioner of Patents.

Interference proceeding between William Steubing, Jr., and Daniel E. Hennessy. From the decision of the Commissioner of Patents, awarding priority to Hennessy, Steubing appeals. Affirmed.

John W. Strehli, of Cincinnati, Ohio, for appellant.

H. Dorsey Spencer, of New York City, for appellee.

SMYTH, Chief Justice. Steubing appeals from a decision of the Commissioner of Patents finding that Hennessy is entitled to priority with respect to an invention relating to lifting trucks of a certain type. There are 16 claims involved. The decision of the three tribunals of the Patent Office are concurrent. We cannot say that they are manifestly wrong, and hence, following a well-established rule of decision in this court (In re Barratt, 11 App. D. C. 177; Creveling v. Jepson, 47 App. D. C. 597; Reid et al. v. Kitselman [D. C.] 266 Fed. 255; and Lindmark v. Hodgkinson, 31 App. D. C. 612), we affirm the Commissioner's decision.

Affirmed.

STEINOLA CO. v. STEINWAY & SONS.

(Court of Appeals of District of Columbia. Submitted November 11, 1920. Decided January 3, 1921.)

No. 1335.

Trade-marks and trade-names ⇐43—Piano manufacturer can oppose registration of similar name for phonographs.

Steinway & Sons, manufacturers of pianos, can successfully oppose the registration of the word "Steinola" as a trade-mark for phonographs.

Appeal from the Commissioner of Patents.

Application by the Steinola Company for registration of a trade-mark, opposed by Steinway & Sons. From a decision of the Commissioner of Patents, sustaining the opposition, the applicant appeals. Affirmed.

T. K. Bryant and Joseph W. Milburn, both of Washington, D. C., for appellant.

C. P. Goepel, of New York City, and W. G. Henderson, of Washington, D. C., for appellee.

PER CURIAM. This is a trade-mark opposition, in which Steinway & Sons, manufacturers of pianos, object to the registration by appellant company of the word "Steinola" as a trade-mark for phonographs. We concur in the opinion of the Commissioner of Patents sustaining the opposition.

The decision is affirmed.

Affirmed.

FARLEY v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3483.

1. **Internal revenue ⊜2—National Prohibition Act repeals act punishing engaging in business without paying special tax.**
   Act Feb. 8, 1875, § 16 (Comp. St. § 5966), prescribing the punishment for unlawfully carrying on the business of a retail liquor dealer without paying a special tax, is repealed by implication by the National Prohibition Act, which, in title 2, § 3, covers the whole field, notwithstanding section 35, providing that the regulations therein shall be construed as in addition to existing laws, that such act shall not relieve any one from paying any taxes or charges on the manufacture or traffic in liquor, and that the payment of the tax or penalty therein prescribed shall give no right to engage in the manufacture or sale, nor shall the act relieve any person from any civil or criminal liability.
2. **Internal revenue ⊜39—National Prohibition Act, imposing tax and penalty for unlawful manufacture or sale, held not criminal statute.**
   National Prohibition Act, § 35, providing for the collection of a tax and penalty for the illegal manufacture or sale of intoxicating liquor, is not to be regarded as a criminal statute.
3. **Indictment and information ⊜119—Indictment under repealed act sustained under National Prohibition Act, and unnecessary allegations treated as surplusage.**
   Where an indictment for unlawfully carrying on the business of a retail liquor dealer without paying the special tax in violation of Act Feb. 8, 1875, § 16 (Comp. St. § 5966), was sufficient to charge a sale of intoxicating liquor in violation of National Prohibition Act, tit. 2, §§ 3 and 29, it will be sustained as an indictment under that act; the omission to pay the special tax being treated as surplusage.
4. **Intoxicating liquors ⊜223(1)—Under National Prohibition Act, allegation as to engagement in business need not be proved.**
   Under the National Prohibition Act, an allegation of an indictment for selling intoxicating liquor that defendant was engaged in the business of a retail liquor dealer need not be proved.
5. **Witnesses ⊜270(2)—Exclusion of cross-examination as to conduct of witness and others on other occasions held not error.**
   Where a witness in rebuttal testified in chief only as to whether he brought with him to defendant's tavern the bottle out of which he and his party were served with liquor, cross-examination to show that on previous occasions he had brought liquor and been served by the waiters, and that on one occasion one of the ladies in the party took possession of his pistol and another of his black-jack and billy and flourished them around, to the annoyance of guests, was properly excluded.
6. **Criminal law ⊜37—That officers called for liquor held not entrapment relieving defendant.**
   Where, for the purpose of ascertaining whether a tavern keeper was dispensing drinks to his customers, officers called for "cough syrup," which was understood to mean whisky, and were served with drinks, their conduct was not an entrapment relieving defendant from guilt.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Robert C. Farley was convicted of an offense, and he brings error. Reversed, and remanded for resentence.

Winter S. Martin, of Seattle, Wash., for plaintiff in error.

Robert C. Saunders, U. S. Atty., of Seattle, Wash., and F. R. Conway, Asst. U. S. Atty., of Tacoma, Wash.

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

WOLVERTON, District Judge. The plaintiff in error, being defendant below, was indicted under what is termed in this proceeding section 3242-a, R. S., which is section 16 of the Act of February 8, 1875, 18 Stat. 310 (Comp. St. § 5966), for unlawfully carrying on the business of a retail liquor dealer without having paid the special tax therefor as required by law.

The penalty prescribed for a violation of the statute is a fine of not less than $100 nor more than $5,000 and imprisonment for not less than 30 days nor more than 2 years.

The defendant was convicted, and adjudged to serve a term of 60 days in jail and to pay a fine of $500.

[1] It is insisted here that this statute, among others, has been superseded by the National Prohibition Act, and that the offense charged against the defendant no longer exists.

The National Prohibition Act (41 Stat. L. 305) is most comprehensive in its provisions relating to the subject of intoxicating liquors. It defines the term "liquor" and the phrase "intoxicating liquor," and what is included thereby, namely, all spirituous, vinous, malt, or fermented liquor containing one-half of 1 per cent. or more of alcohol by volume, and thereafter covers the whole field respecting the manufacture of and the manner of dispensing intoxicants of whatsoever nature, including also the fixing of whatever revenues pertaining thereto are to accrue to the government. Otherwise the manufacture, disposition, and possession of any intoxicating liquor as defined by the act is absolutely prohibited. Section 3, tit. 2.

There can scarcely be a doubt that it was intended by this act to cover the entire subject of the manufacture, sale, and possession of intoxicating liquors.

The rule respecting repeals by implication is tersely stated by the Supreme Court in United States v. Tynen, 11 Wall. 88, 92, (20 L. Ed. 153), as follows:

"It is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject, the rule is to give effect to both if possible. But, if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

So in a recent case in the Supreme Court of Michigan (People v. Marxhausen, 204 Mich. 559, 576, 171 N. W. 557, 562 [3 A. L. R. 1505]) it is said:

"But where the later act covers the whole subject, contains new provisions evidencing an intent that it shall supersede the former law, or is repugnant to the earlier act, it operates as a repeal."

Such is the undoubted rule, sustained by uniform authority. See Porter v. Edwards, 114 Mich. 640, 72 N. W. 614; Graham v. Muskegon County Clerk, 116 Mich. 571, 74 N. W. 729; Attorney General v. Commissioner of Railroads, 117 Mich. 477, 76 N. W. 69.

Attention is directed to section 35 of title 2 of the act as indicative of an intendment not to repeal the revenue laws heretofore existing relating to intoxicants. It is provided by that section that—

"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."

While the language thus employed is by no means clear as defining the purpose of Congress, we think the first clause is merely declaratory of the existing law touching the interpretation of statutes in respect to repeals by implication. As to the last clause, it is obvious, when construed with the entire provisions of the act, that it was not intended that the statutes should be incumbered with two sets of criminal provisions respecting the manufacture and sale of intoxicants. Whatever provisions touching the subject-matter are contained in the later act not inconsistent with or repugnant to previous statutes would, of course, under the general rule for interpretation, operate as additional legislation. So that so far the provisions of section 35 do not call for a different interpretation from that which would be applied under the general rule of law obtaining.

A further provision of section 35 is:

"This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor."

[2] It also provides that, in case of any such illegal manufacture or sale, there shall be assessed against and collected from the person responsible therefor double the amount of tax now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. We construe this simply as providing for an additional tax and penalty for the unlawful trafficking in and manufacture of intoxicating liquors; but it is not to be regarded as a criminal statute. If it were, it is to be assumed that Congress would have manifested such purpose. The language of the quoted clause is indicative of this view.

As we have seen, the Prohibition Act, by the third section of title 2, inhibits in the most comprehensive terms possible the manufacture of or traffic in intoxicating liquors except as authorized by the act, and an infraction of its mandate in this respect is rendered criminal by section 29. So that here we find the entire subject-matter of criminal liability for such manufacture or traffic in intoxicants covered by the later statute, and with different penalties subjoined from those obtaining under the old statutes.

Section 35 further proceeds:

"The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve any one from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

This amounts to a saving clause for the prosecution under previous statutes of offenses committed prior to the time the present act became effective. Subsequently thereto the "existing laws" applicable are obviously those established by the Prohibition Act, especially where inconsistent with or repugnant to prior statutes relating to the subject.

We are of the opinion that the statute under which the indictment in the present case is preferred was repealed by implication by the Prohibition Act. As applicable to the present act, this view is sustained by two cases in the District Courts, United States v. Yuginni et al., 266 Fed. 746, and United States v. Windham, 264 Fed. 376.

[3] It does not necessarily result, however, that the indictment is bad, for it is a rule of law now well settled that, if there be any act in force under which the indictment can be upheld, the court will refer it to such act and sustain it. In a recent case in this circuit the court, speaking through Gilbert, Circuit Judge, says:

"The statute on which an indictment is found is determinable, as a matter of law, from the facts charged, and they may bring the offense charged within an existing statute, although the same is not mentioned, and the indictment is brought under another statute." Vedin v. United States, 257 Fed. 550, 551, 168 C. C. A. 534, 535.

The principle was much earlier announced by the Supreme Court of the United States (Williams v. United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509), and has been consistently followed ever since. See the further additional cases cited in the Vedin Case.

A cursory reading of the indictment, in view of the Prohibition Act, leads to the conclusion that it is sufficient to charge a sale of intoxicating liquor within the purview of section 3 of title 2, which is rendered criminal by section 29, and should be sustained.

The allegation contained in the indictment respecting the omission to pay the special tax may, with propriety, be treated as surplusage.

[4] Nor was it necessary for the government to prove that the defendant was engaged in the business of a retail liquor dealer. It was enough to show that he sold liquor in any quantity. As to this suffice it to say the evidence is quite sufficient.

This also disposes of the criticism of the court's refusal to give requested instruction No. 3.

[5] On cross-examination in rebuttal of W. O. R. Wood, who was in the employ of the government, in the Internal Revenue Department, it was sought to show that on previous occasions the witness had brought with him to the tavern a bottle of liquor, and had it served by the waiters; that on one occasion one of the ladies in his party took possession of his pistol and flourished it around, and another of his black-jack and billy and flourished them around, to the annoyance of the guests; that two weeks before the raid he was out with the witness Eva Shannon, and brought with him liquor, and had the waiter Hunter serve it; all of which the court denied, and error is assigned.

In view of the fact, as the record shows, that the witness was only asked on the examination in chief whether he had brought with him the pint bottle out of which he and his party were served, and that the testimony offered was in rebuttal, we find no error in the exercise of

the trial court's discretion in refusing to admit the testimony excluded.

[6] The further question insisted upon that there was an entrapment of the defendant by the government officers to do what he is accused of doing is without merit. All the officers did was to go to the tavern, and while at their meals order the waiter to serve them with some cough syrup, which was understood to be whisky. They were served accordingly with drinks in small glasses. The officers had nothing to do with furnishing the whisky; their only purpose being to ascertain whether or not the defendant was dealing in or dispensing drinks of the kind to his customers. That such deportment on the part of the officers does not constitute an intrapment that relieves the defendant from guilt has been recently decided by this court. Fiunkin v. United States, 265 Fed. 1.

It is apparent from these considerations that the other assignments of error suggested by the record are not well taken.

It appearing that the trial court has imposed a penalty in excess of that provided by the Prohibition Act—the penalty there prescribed being a fine not exceeding $1,000 or imprisonment not exceeding six months, but not both—the cause will be reversed, and remanded for resentence in pursuance of such act.

THE OLD RELIABLE.

RELIABLE TOWING CO. v. RODGERS SAND CO.

(Circuit Court of Appeals, Third Circuit. January 26, 1921. Rehearing Denied March 3, 1921.)

No. 2591.

1. **Collision ⇐74—Libelant, for damages to barge, held not negligent.**
   In a suit to recover for damages to a barge, due to a collision, while tied up to the guide wall of a dam in the Ohio river, circumstances *held* insufficient to establish negligence on the part of the libelant in overloading.

2. **Collision ⇐74—Evidence held not to show negligence in manner of mooring tug and tow.**
   In a suit to recover for damages to barge by reason of a collision while moored to the guide wall of a dam in the Ohio river, evidence *held* insufficient to satisfy court, on appeal by defendant, that libelant was negligent in the place or manner of mooring its tug and barge, or in fastening the same together.

3. **Collision ⇐70—Failure to prevent swamping of barge not sufficient to establish negligence in providing splashboards.**
   Where a barge was sunk by collision while moored, that splashboards did not prevent it sinking did not establish negligence on the part of libelant in providing splashboards.

4. **Collision ⇐16—Navigator liable for error of judgment.**
   No man is infallible, and there are certain errors of judgment for which the law does not hold a navigator liable; but he is liable for an error of judgment which a careful and prudent navigator would not have made.

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5. Collision ⊂⊃22—"Inevitable accident" defined.

The term "inevitable accident," applied to collision cases, means an accident which both parties have endeavored to prevent by every means in their power, with due care and caution, and a proper display of nautical skill, and it is not an "inevitable accident" where a master proceeds carelessly, and afterwards circumstances arise when it is too late and impossible for him to do what is fit and proper to be done.

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

6. Collision ⊂⊃74—Trial judge justified in conclusion that defendant was solely chargeable with accident.

In a suit to recover for damages to a barge by reason of a collision while moored near a dam in the Ohio river, trial judge *held* justified in his conclusion that defendant was solely chargeable with the accident and that it was not an inevitable accident.

7. Collision ⊂⊃140—Damages cannot exceed value of vessel and cargo in collision.

In a suit for the recovery of damages to and detention of a barge, swamped in a collision, plaintiff cannot recover more than the value of the barge and cargo, although the cost of raising, docking, and repairing exceeded such amount.

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

Suit by the Rodgers Sand Company against the steamship Old Reliable, owned by the Reliable Towing Company. Decree for plaintiff, and defendant appeals. Affirmed.

Lowrie C. Barton, of Pittsburgh, Pa., for appellant.

Charles S. Crawford, of Pittsburgh, Pa., for appellee.

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

DAVIS, Circuit Judge. This was a suit by the Rodgers Sand Company, libelant below, against the steam towboat Old Reliable, to recover for damages done to, and for the detention of, Flat No. 5 and its cargo by the steamboat Old Reliable at Davis Island dam on the Ohio river. On October 31, 1918, the steamboat Margaret left Ambridge, on the Ohio river 10 miles below, with two barges in tow, all belonging to libelant, and proceeded to said dam, to the pins in the guide wall of which she tied up at about 9 o'clock in the evening. It was the intention to pass through the locks, but she could not do so because of the strong current which flowed through the gates, both of which were open, or to go over the wickets on the north side of the dam, 300 feet of which were down, thus creating a pass through which boats often went. The flats were fastened end to end, and the head one was No. 5. They were tied together by means of chains and lashings. Each was 90 feet long, and No. 5 extended somewhere between 20 and 60 feet below the lower end of the guide wall, and the other flat and the steamboat Margaret, which was tied to the stern of the second flat, extended still lower down the river. A strong current from the shore, coming against the boats,

seemed to neutralize the current from the other side, so that the boats lay there quietly and in apparent safety.

Some time after the Margaret with her tow had tied up to the guide wall, and while they were lying there, the steamboat, Old Reliable, with a gasoline barge "hitched on her head," came up the river and attempted to navigate the pass in the wickets, but could not do so on account of the swift current. She then "flanked" over toward the guide wall, with her stern out in the river, and the head of the gasoline barge over toward Flat No. 5. In this position, with her wheel still running ahead, the barge in front was pushed over against Flat No. 5, and as the head of the barge, in dropping back along the side of the flat, approached its lower end, the weight of the barge increased by the force of the current in one direction and the Old Reliable, with her wheel running, in another, shoved the lower end of the flat around and under the guide wall, whereupon the head end swung out, the fastening with the other part of the tow was broken, and in this position the flat was swamped and sank.

The libelant charged that the attempt to tie up and moor the Old Reliable and her tow near the Margaret and her tow was done so negligently as to cause the Flat No. 5 to sink, which resulted in the injury complained of. This was denied by claimant, who alleged that the accident was due to the negligence of the libelant, in that the flat was negligently "hitched" or tied up, was overloaded, had no splashboards to prevent the water from flowing over the gunwales, causing it to sink, and that the repairs were made necessary by the negligence of the libelants in raising the flat.

Upon the pleadings and proofs, the District Court found the libelant was not negligent as charged by claimant, but that the accident was due solely to the negligent navigation of the Old Reliable, and awarded damages against her of $1,200, with interest and costs. The case is here on appeal from the decree of the District Court.

[1] The evidence, in our opinion, does not show that the flat, loaded with 155 tons of gravel, was overloaded or improperly loaded. The Margaret, with the two flats fastened end to end, had stemmed the tide from Ambridge, 10 miles down the river, against a swift current, and was moored at the dam in apparent safety. Up to the time the Old Reliable with the gasoline barge flanked over against the flat, nothing whatever had happened to indicate that it was overloaded. Its sinking under the circumstances is not sufficient, in our opinion, to establish the negligence charged of overloading.

[2] The head flat No. 5, was tied to the pins in the guide wall. The libelant alleges that the flat extended only 20 feet below the lower end of the wall, having 70 feet beside it, while claimant says that only 30 feet of the flat was against the wall and 60 feet below the end, and the other flat, 90 feet long, and the Margaret, 125 feet long, were still below No. 5. This was a place where boats usually tied up, and there is nothing to indicate that it was an improper place. Negligence cannot, therefore, be based upon the place where the flat was moored. Claimant contends that negligence consisted in not having the flat tied with lashings in addition to chains. Libelant denies the

fact upon which negligence is based. Capt. Cavett's testimony, which seems to us reliable, shows that the flats—

"were lashed together with an inch and a quarter line on each side, and had also ratchets and chain on, a three-quarter inch chain. * * * We generally use a long lashing and put it over—it goes back three times—that is, thribble; the lashings I am positive that we had on the inside was thribble. I seen it; I seen it [the lashing] hanging there after it was broke."

Regardless of this testimony, the fact is that the Margaret and the two flats moored and had remained in safety until struck by the gasoline barge. There is nothing in the evidence indicating that they would not have continued to remain in safety, but for the Old Reliable. The evidence does not satisfy us that the libelant was negligent in the place or manner of mooring the Margaret and her tow, or of fastening the same together.

[3] The libelant's witnesses testified that the flat had splashboards on its head, which was apparently all that was required in navigating the Ohio river. At least, they were sufficient for the trip against the strong tide from Ambridge. We think the evidence shows the presence of splashboards ordinarily adequate for the trip. That they did not prevent the flat from sinking under the circumstances is not sufficient to establish negligence on the part of libelant, and this is the proposition to which the question is reduced under the evidence.

Reviewing the whole testimony, we are of the opinion that the District Court was right in its conclusion that the libelant was not guilty of any negligence. Was this, then, an inevitable accident, a theory advanced first before us? Or was it an accident due to the negligence of the respondent?

[4] No man is infallible, and there are certain errors of judgment for which the law does not hold a person liable; but he is liable for an error of judgment which a careful and prudent navigator would not have made. The W. E. Gladwish, 17 Blatchf. 77, 83, Fed. Cas. No. 17,355. The evidence shows that the Old Reliable could have backed out without flanking over to the flat at all. If she had done so, the accident would have been avoided. The error in judgment, if there was such in this case, may consist in flanking over to the flat under the circumstances. If it does, the inability of the captain to avoid the accident after the Old Reliable with her tow was over there does not relieve claimant of the consequences of the error in the first place. On the other hand, the error may be due to the manner in which the boats flanked over to the flat. If the Old Reliable had been so navigated that the gasoline barge had come alongside of the flat with their sides parallel, no excessive strain or pressure would have come against any particular part of the flat. But in flanking over the stern of the Old Reliable was left or thrown out into the river and her wheel continued to run ahead. In this position she pushed the head of the gasoline barge against the flat and in dropping back, when the head of the barge, scraping the side of the flat, reached the lower end, which was not supported by the guide wall, the pressure of the barge, pushed by the Old Reliable, her wheel going ahead, with the current running swiftly against their sides, was so great as to

shove the lower end of the flat under the guide wall and broke it loose from the tow. The head end swung out into the river and the flat was swamped and sank.

[5, 6] The term "inevitable accident," applied to cases of this kind, means an accident which both parties have endeavored to prevent, by every means in their power, with due care and caution, and a proper display of nautical skill. It is not an "inevitable accident" where a master proceeds carelessly, and afterwards circumstances arise when it is too late and impossible for him to do what is fit and proper to be done. Union Steamship Co. v. New York & Virginia Steamship Co., 65 U. S. 307, 313, 16 L. Ed. 699. The instant case is clearly not one of "inevitable accident." The accident was due to negligence, and the learned trial judge was justified in his conclusion that the claimant was "solely chargeable with the accident."

Claimant contends in its answer that, if it is liable at all, it is liable only for the unloading and raising of the flat and for the gravel necessarily lost in so doing, all of which, together with $5 for one day's detention, would not amount to more than $111.40. In its argument here, claimant admits, if liable, damages might amount to $377.05.

[7] The flat was 90 feet long, 16 feet wide, and 6 feet deep. It was built in 1900. It was repaired in 1915 at a cost of $882.27, and again a year later at a cost of $79.52. It appeared to be in good condition at the time of the accident, two years later. The trial judge valued the boat and cargo at $1,200, and that valuation appears to us fair. Damages claimed by libelant are $1,355.18 for raising, docking, and repairing; $445 for detention 89 days, and $93 for 155 tons of gravel, all of which was lost, making a total of $1,893.18. This, being more than the value of the flat and cargo, may not be allowed. Are these various items of damages, notwithstanding, excessive? We have carefully examined them, and, if any of them be excessive, we cannot say that, after deducting the excess, the fair, just, and reasonable amounts left do not aggregate $1,200, for which the District Court entered judgment.

The appeal will therefore be dismissed, and the decree of the District Court affirmed.

PHOTOPLAY PUB. CO. v. LA VERNE PUB. CO., Inc., et al.
SAME v. EASTLACK et al.

(Circuit Court of Appeals, Third Circuit. January 26, 1921.)

Nos. 2533, 2534.

1. **Trade-marks and trade-names ⟸3(2)—"Photoplay" is descriptive term.**
The word "Photoplay," which was adopted by the judges in a contest as the most descriptive single word to designate moving picture performances, is a descriptive term, which cannot be exclusively claimed as a trade-mark by a magazine devoted to moving picture productions.

2. **Trade-marks and trade-names ⟸71—Use of descriptive term having secondary meaning is unfair competition.**
Where a descriptive term, which cannot be claimed as a trade-mark, has acquired a secondary meaning as referring to the product of complainant, the use of that word by defendants with reference to a similar product is unfair competition, which may be enjoined.

3. **Appeal and error ⟸1009(6)—Trial judge's findings, based on written testimony, not entitled to special weight.**
The rule that appellate courts will generally accept the facts found by the trial court, which is based on the better opportunity of the trial judge to pass upon the credibility of witnesses, whom he sees and hears, does not apply in a suit where the testimony was taken by deposition and was uncontradicted.

4. **Trade-marks and trade-names ⟸69—Intention unnecessary to establish unfair competition.**
In a suit to restrain unfair competition, complainant need not prove that defendant intended to pass off his goods as those of complainant; the test being the commercial effect of the acts of defendant.

5. **Trade-marks and trade-names ⟸68—Test of unfair competition is deception of inexperienced public.**
Practices which would deceive the inexperienced public into confusing defendant's goods with those of plaintiff are unfair competition, though experienced wholesalers and retailers were not deceived thereby.

6. **Trade-marks and trade-names ⟸70(3)—Use by defendant of title "Photo-Play Journal" held unfair competition.**
Where complainant had an established magazine, known as "Photoplay Magazine," devoted to moving picture productions, the adoption by defendants of the name "Photo-Play Journal" for a similar magazine, which several witnesses testified had deceived them in mistaking defendant's magazine for plaintiff's, was unfair competition, and the further use of that name can be restrained.

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

Separate suits by the Photoplay Publishing Company against the La Verne Publishing Company, Incorporated, and others, and against Frank T. Eastlack and another, to restrain infringement of a trade-mark and unfair competition. Decree for defendants in each case (261 Fed. 428), and complainant appeals. Reversed, with directions.

MacDonald De Witt, of New York City, and Francis Shunk Brown, of Philadelphia, Pa., for appellant.

Morton Z. Paul and Joseph A. Boyer, both of Philadelphia, Pa., for appellees.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. The complainant, a Delaware corporation, having its principal office in Chicago, publishes a monthly periodical called "Photoplay Magazine." The defendants publish a periodical called the "Photo-Play Journal." Both periodicals are devoted to moving pictures and matters connected therewith, and cover practically the same subject. The complainant filed bills against the defendants, charging them with infringing its registered trade-mark, "Photoplay," and with unfair competition, and prayed that they be restrained from using the word "Photoplay" as the title, or part of the title or name of their periodical, and from publishing and selling any periodical, magazine, or other publication under the name "Photo-Play Journal," or any name containing as a part thereof the word "Photoplay," and for such other and further relief as might seem proper. Identically the same questions are involved in both suits, which were tried and argued together, and both may be disposed of in one opinion, because the conclusions of law and fact are the same in both cases.

Complainant alleges that it and its predecessors have owned, printed, and published continuously since June, 1911, the "Photoplay Magazine," and in June, 1914, complainant had the word "Photoplay" registered as its trade-mark; that since June, 1916, the defendants have been publishing and selling their periodical under the title "Photo-Play Journal," thus using the distinguishing word, "Photoplay," of complainant's title, as a part of their title, so arranged as to copy and colorably imitate the complainant's trade-mark in such manner as to cause confusion and mistake to purchasers, advertisers, and the public generally.

The defendants deny infringement of complainant's rights, and aver that the periodicals are entirely unlike in name, shape, size, general appearance, and color scheme, and that no confusion, deception, or danger to complainant's business or trade can result from the adoption of the word "Photo-Play" as part of the name of their periodical.

[1] Under the pleadings and proofs, the learned trial judge held that the word "Photoplay" is a descriptive term, and not a proper subject-matter of a registered trade-mark. The word was coined in a contest for a "new one-word name for a 'moving picture show.'" The object of the Essanay Film Manufacturing Company in starting the contest was "to select a name which would be descriptive of the entertainment given in motion picture theaters." The company selected three "men of acknowledged authority in moving picture affairs" as judges, to whose decision were submitted more than 2,500 words. They selected the word "Photoplay" as being "more closely descriptive * * * than any other of the long list submitted." In announcing their decision, the judges stated that they were influenced in their selection "by the necessity of adopting a term which would be easily remembered, descriptive in character, simple, and appropriate." The judges recognized in the word "Photoplay" a term "more closely descriptive of the entertainment given in motion picture theaters * * * than in any other of the long list submitted." The fact of its selection called attention to the word, and to-day it is used entirely by some persons in the film and moving picture business,

instead of the words "moving pictures," "moving picture shows," "movies," etc. The word denotes the reproduction of a play by means of photography. It is purely descriptive of that art. The plaintiff appropriated it as part of the title of its publication, which is devoted to the art to which the word relates. Being a trade word, descriptive of the art, it was publici juris, may not be exclusively appropriated, and is not the proper subject of a registered trade-mark. 38 Cyc. 708, 711, 722; Canal v. Clark, 80 U. S. (13 Wall.) 311, 20 L. Ed. 581; McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828; Goodyear Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535; Corbin v. Gould, 133 U. S. 308, 10 Sup. Ct. 312, 33 L. Ed. 611; Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; Howe Scale Co. v. Wyckoff-Seaman & Benedict, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972. We agree with the learned trial judge, in so far as he based his decree upon the right to an exclusive use of the word by the plaintiff on the ground of a registered trade-mark.

[2] The complainant bases its charge of unfair competition upon a secondary meaning, which it alleges the word has acquired. The word, by early and constant use, it contends, became associated with and came in time to mean and designate its periodical only, and that, in consequence of the adoption of this word as part of the title of defendants' publication, confusion and deception have resulted. If this contention is true, relief should be granted. The learned trial judge reached this conclusion, for he found that the complainant has the exclusive right to the use of the title adopted for its publication, so far as that title has come to be associated with and to designate by name its particular publication, and it has the further right to protect the title against any other publication being imposed intentionally or otherwise upon purchasers as complainant's publication.

[3] But he found that there had not been in the use of the word, "Photoplay," any purpose or intention on the part of defendants to deceive or palm off their publication for that of the complainant, and that the defendants' use of the word, "Photo-Play," had not "been such as there would be any reasonable expectation that any one, knowing of and wishing to buy the publication of the plaintiff, would be led into mistaking one publication for the other." Whether or not there has been confusion and deception is a question of fact, upon which the decision of this case depends. Appellate courts, as a rule, accept the facts as found by the trial court. This is a wise rule, for the trial judge sees the witnesses and hears them testify, and so is better qualified to pass upon their credibility and the truth of conflicting testimony from which ultimate facts must be found. When, however, as in the case at bar, the testimony, which was taken by deposition here and there in many parts of the country, is uncontradicted, and the witnesses were never before the trial judge, the rule and reason therefor disappear.

[4] In actions of unfair competition, where the goods of one are passed off as those of another, it is not necessary for the complainant to prove that the defendant intended to pass off his goods as those of

the complainant. The question is: What is the commercial effect of what he is doing? If the effect is to pass off his goods for those of the complainant, his good intentions or honesty of purpose is not a defense. Intention, however, is not immaterial, for it would be difficult, though not impossible, for a defendant to satisfy the court that his fraudulent conduct would not have the effect that it was intended to have. Wholesalers and retailers may not be deceived, while the purchasing public may be. Many tests may be adopted as to what is calculated to deceive, or what the commercial effect of the thing will be; but the all-sufficient test is whether or not, in the light of experience, the thing has actually confused and deceived. Whether or not there is a reasonable basis for confusion and deception, in the absence of actual commercial test, is a matter of conjecture.

[5] What might fully protect experienced wholesalers and retailers might be wholly inadequate to protect the inexperienced public for whose protection courts are so sensitive and careful. Whatever may be theoretically thought of the difference between the two publications, the proofs establish, we think beyond doubt, that there was actual and considerable confusion in the public mind. A number of witnesses testified that the defendants' publication had been passed off on them for that of the complainant's. This number was not large when compared with the entire circulation of the publication, but it was quite large when the difficulty of securing such testimony is considered. The testimony of these witnesses stands uncontradicted and unimpeached. The only effort the defendants made to impeach it was to show that other persons, mostly experienced in the trade, at other times and places, had not been confused or deceived.

[6] "Photoplay" is the catchword in the title of the complainant's publication, under which it became popular and built up a large circulation, and the defendant, knowing this, adopted the catchword of the title and added to it a distinguishing noun, "Journal," in place of "Magazine," which in fact does not distinguish. Confusion and deception may readily happen—indeed, may be expected—if the catchword of the defendants' title is used as descriptive of the next word, which, though different, conveys substantially the same idea, when used in describing a periodical of the same art. Defendants, like complainant, framed the title of their publication of two words. It is the same word, "Photo-Play." The fact that defendants have separated the first part of the word by a hyphen from the latter part, which begins with a capital, does not avoid confusion, for this attempted distinction cannot be detected in pronunciation, and may not be seen by purchasers. They substituted the word "Journal" for "Magazine." This makes little difference, if any, because the two words convey substantially the same idea, when used in describing a periodical of the same particular art. They have similar definitions and are closely synonymous. To illustrate, Scribner's Magazine is popularly called "Scribner's," though it is entitled "Scribner's Magazine." If another Scribner were to come into the field, and issue a periodical of this same character, entitled "Scribner's Journal," it is inconceivable that there would not be confusion and deception in the public mind.

We are of the opinion that there is such similarity in the title of the two publications, which the defendants have created by adopting precisely one word of the complainant's title and the synonym of the other, as to cause confusion and deception in the public mind. Relief should therefore be granted. The decree of the court below will accordingly be reversed, with direction to reinstate complainant's bill and enter decree in conformity with this opinion.

BATES COUNTY, MO., v. WILLS et al.*

(Circuit Court of Appeals, Eighth Circuit. November 24, 1920.)

No. 5162.

1. **Drains ⟸20—Drainage district not "corporation," with capacity to sue and be sued.**
   Drainage districts, created under statutory authority by county boards for special tax purposes only, unless expressly made so by the statute, are not corporations, with capacity to sue and be sued.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corporation.]

2. **Drains ⟸49—Facts held not to change county's liability on express contract in writing.**
   That plaintiffs refused to remove rock material from a drainage ditch constructed by them under a written contract with defendant county, erroneously claiming that it was not within the contract, and that in an action to recover the contract price the county by counterclaim recovered the excess cost of such removal by a subsequent contractor, *held* not to change the nature of the county's liability to plaintiffs, which was on an express contract in writing, within Const. Mo. art. 4, § 48, and Rev. St. Mo. 1909, § 2778.

3. **Counties ⟸225—Judgment against county may specify fund from which payable.**
   Where a county contracted for drainage work on behalf of a drainage district created by the county court as provided by statute, the land within which was to be subjected to special tax to pay for the work, and an action on the contract was brought against the county in a federal court, the judgment properly provided that it was to be paid from the fund raised by special assessment of benefits on the land within the drainage district.

4. **Drains ⟸49—Liability of county on contract for drainage work held not affected by previous collection of tax levied for benefits.**
   It is not an objection to a judgment against a county on a contract for drainage work to be paid from the fund raised by a special tax on the lands of the drainage district that the county has previously collected the tax levied for benefits assessed against the lands and expended the money, where, as by Laws Mo. 1913, p. 271, the state statute expressly provides for an additional assessment when necessary to pay valid obligations of the district.

5. **Drains ⟸49—Refusal of certificate of engineer as to completion of work held not to prevent recovery by contractor.**
   Under a contract with a county for drainage work requiring the contractor to obtain certificates from the engineer as to completion of the work in accordance with the contract and making his decision final, refusal of certificates by the engineer *held* not to prevent recovery by the contractor, where such refusal was not in the exercise of his own judgment, but in obedience to instructions of the county court.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 375, 65 L. Ed. —.

6. Damages ⇐68—Plaintiff may not have interest on amount abated for his nonperformance.

Where, in an action against a county on a contract for drainage work, it was determined that plaintiffs' claim was subject to abatement because of work not done, and which was subsequently done by the county, plaintiffs *held* entitled to interest from the date of suit only on the amount of its claim less the cost to the county of such work, without regard to the time when such cost was expended.

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

Action at law by A. V. Wills and others, partners as A. V. Wills & Sons, against Bates County, Mo. Judgment for plaintiffs, and defendant brings error. Modified and affirmed.

Frank Hagerman, of Kansas City, Mo., for plaintiff in error.

John F. Green, of St. Louis, Mo. (F. N. Judson, of St. Louis, Mo., Frank M. Lowe, of Kansas City, Mo., and William Mumford, of Pittsfield, Ill., on the brief), for defendants in error.

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

HOOK, Circuit Judge. This action was brought by A. V. Wills & Sons to recover from Bates county, Mo., a balance claimed to be due them on contract for digging a drainage ditch. The course of the litigation may be found in Wills v. Bates County (C. C.) 170 Fed. 812; Bates County v. Wills, 111 C. C. A. 354, 190 Fed. 552; Id., 118 C. C. A. 361, 200 Fed. 143; Id., 152 C. C. A. 571, 239 Fed. 785; Id., 158 C. C. A. 22, 245 Fed. 556. At the last trial, and in those previous, the plaintiffs prevailed, and the county prosecuted error. The questions presented may be grouped under three general heads, although in considerable measure they occupy the same ground: (1) The corporate liability of the county; (2) the failure of the plaintiffs to obtain estimates of the engineer in charge; and (3) the matter of interest on the amount found due.

[1] *The Liability of the County.* It is urged that the drainage district established by the county court was itself a suable corporation, and that the liability, if any, was upon it, not the county. This contention was held unsound by the District Court when the case first arose, and by this court on the first and second appeals. It is again presented. Even if the question were at large, we would have no doubt of the correctness of those decisions. The drainage statutes in force when the contract was made and the work entered upon authorized the county courts of counties of Missouri to establish or organize drainage districts, not as corporate bodies, but as territorial districts, comprising lands which should be drained for reasons of public health, convenience, or benefit. The corporate action under the statutes was that of the counties, through their respective county courts. The provision that the cost of the work should be raised by special assessments upon the lands found to be benefited created no different status from that of the ordinary case of a street improvement in a city, where the cost is charged upon abutting property. Each is a species of

taxation for a public purpose. Sometimes the Legislature itself definitely prescribes the area to be charged, as, for example, the property abutting on a street; and in other cases, as here, the power to determine the area and to apportion or distribute the cost among the lands embraced in it according to the particular benefits received is committed to the ordinary municipal subdivisions of the state, that is, to the counties or the cities. In neither case, more than in the other, does the establishment of the taxing district make of it a corporation, with capacity to sue and be sued, without clear language to that effect in the statutes.

The contract under which plaintiffs' cause of action arose was made May 2, 1906. An amendment of the statutes in 1907 provided that drainage districts should be bodies corporate, with capacity to sue and be sued; but it was prospective in operation and did not, if it could, affect preexistent contractual relations. A still later statute, passed in 1913, provided for the reorganization of previously existing drainage districts, with corporate powers, equipment of officers, etc., and the district here in question availed itself of the provisions. But the rights of the parties had become fixed; this action was begun in 1909. The effect of the act of 1913 was fully discussed by this court on the last appeal (152 C. C. A. 571, 239 Fed. 785), and it was held not to have destroyed the rights of the plaintiffs or their pending action, but to have preserved them instead. We see no reason for disturbing that conclusion.

[2] Again, it is contended that under the Constitution and laws of Missouri a county cannot be held liable, except upon an express contract in writing (Const. art. 4, § 48; Rev. Stat. 1909, § 2778), and that the action here is for a quantum meruit, and not upon a written contract, as required. The facts by which this contention is to be determined are as follows: On May 2, 1906, a written contract for a larger and more extensive drainage work in Bates county was executed by the engineer in charge and Timothy Foohey & Sons. As the statute provided, the execution of the contract by the engineer was "on behalf of the county." On the same day Foohey & Sons assigned to plaintiffs that part of the contract covering what was termed section 3 of the main ditch. The original contract specified that it was subject to the approval of the county court of Bates county, and it was duly approved. The assignment to plaintiffs was by its terms also subject to the approval of the county court. A copy of it, executed as an original, was filed with that body, which thereafter dealt with plaintiffs in all substantial respects as though they were original contractors for the section of the work they undertook. Our attention is directed to no statute forbidding the assignment, nor was there any provision to that effect in the original contract itself. The legal status of the plaintiffs as to section 3 of the main ditch was therefore that of original contractors in a written contract.

Section 3 of the main ditch was about 4¼ miles in length. It began at the Marias de Cygne river and ended at the Osage river. When plaintiffs had excavated the ditch to the (bottom) grade line for about two miles they encountered a rock formation, which they claimed they

were not required to remove, because its existence was not disclosed in certain preliminary borings, and also because it could not be removed by steam dredge, which they contended was the implement contemplated by the contract. This contention was denied by the county court. Thereupon on August 6, 1908, they appeared before the county court, and (with the consent of Foohey & Sons) an agreement with that body was entered in its records that plaintiffs should continue with the work as theretofore done by them, without prejudice to the rights of either party or waiver of their respective positions. The plaintiffs then resumed work, and by April, 1909, completed the excavation of the ditch according to their construction of the contract. On April 3, 1909, they brought this action to recover the contract compensation for the work done after the agreement of August 6, 1908, and also the retained percentage for work previously done and accepted. The trial court held they were entitled to recover the full amount, regardless of their failure to remove the nondredgible rock from the ditch. On September 21, 1911, this court reversed the judgment of the trial court. We held that the contract required plaintiffs to remove the rock, and that the agreement of August 6, 1908, with the county court, did not relieve them from that obligation. 111 C. C. A. 354, 190 Fed. 522.

Other questions were also involved and decided, but they are not important on the point now being considered. In the meantime the county contracted in writing with other parties to remove the material left in the ditch by plaintiffs, and the work was done while this case was pending. The cost was set up by the county in defense and by counterclaim, and the excess of such cost over plaintiffs' contract compensation, had they done the work, was ascertained at the trial, and has been charged to them and deducted from their recovery in the judgment now under review. We are of the opinion that the liability of the county was fixed by written contract within the requirement of the state constitution and statute. The county was not held upon an oral agreement, or implied contract, or for the reasonable value of services performed or work done, as distinguished from express contractual stipulations. In a broad sense the last contract under which the rock was removed was for the account of the plaintiffs, and the result, the increased cost, was charged to them. In no view did the county do anything except by written contract, and that is what the statute required. The county was held to no other measure, and it suffered no greater or different liability.

[3] Under the authority of the statutes in force at the time of the contract, the county, as already observed, acted for a subdivision of its territory which it had established, and not for itself at large. Its liability was therefore special, not general. The judgment against the county which is now under review provides in express terms that it is "to be paid and discharged from and out of the fund raised or to be raised by benefit assessments upon and against the land" in the drainage district mentioned. Objection is made to this form of judgment. Passing for the moment the question of future assessments, we think the language employed sufficiently expresses the special character of the liability of the county. A similar objection was made in New Orleans

v. Warner, 175 U. S. 120, 146, 20 Sup. Ct. 44, 44 L. Ed. 96, to a decree against the city on warrants issued for a drainage plant. The court referred to a provision of the decree that it should be paid out of drainage assessments, etc., and declared the objection more apparent than real. In principle the case here does not differ from County of Cass v. Johnston, 95 U. S. 360, 24 L. Ed. 416, which involved coupons from railroad aid bonds issued by a county in Missouri for and on account of a township. The court said:

"It is finally objected that, as the bonds are in fact the bonds of the township, no action can be maintained upon them against the county. Without undertaking to decide what would be the appropriate form of proceeding to enforce the obligation in the state courts, it is sufficient to say that in the courts of the United States we are entirely satisfied with the conclusions reached by the court below, and that a judgment may be rendered against the county, to be enforced, if necessary, by mandamus against the county court, or the judges thereof, to compel the levy and collection of a tax in accordance with the provisions of the law under which the bonds were issued."

It is also said that the bonds that were issued and sold by the county court to raise funds immediately for the improvement purported on their face to be bonds of the drainage district. But that should be taken as descriptive of the special relation of the county, and not as a designation of the corporate contractor. The legal promisor is determined by the statutes back of the bonds. The statutes in their entirety determine the status of the obligations. The cases of Davenport v. County of Dodge, 105 U. S. 237, 26 L. Ed. 1018, United States v. Dodge County, 110 U. S. 156, 3 Sup. Ct. 590, 28 L. Ed. 103, Blair v. Cuming County, 111 U. S. 363, 4 Sup. Ct. 449, 28 L. Ed. 457, and Nemaha County v. Frank, 120 U. S. 41, 7 Sup. Ct. 395, 30 L. Ed. 584, involved statutes of Nebraska which authorized counties and cities to issue bonds in aid of works of internal improvement. Any precinct in an organized county was also authorized to vote such aid, and in such event the county commissioners, having the same relation to the county as the county court has to a county in Missouri, were empowered to issue special bonds for the precinct and levy taxes to pay them on the property in the precinct. It was held that actions on the bonds were properly brought against the county, and in form the judgment would be against it, to be collected by a tax on the taxable property in the precinct; and this though the promisor in the bonds was the precinct. Blair v. Cuming County, supra.

[4] Objection is also made to the alternative provision in the judgment that it should be paid or discharged from funds "to be raised" by benefit assessments against the lands in the drainage district. In support of this objection it is said that benefit assessments against the lands in the district, amounting to $370,000, were duly made; that that sum was the total estimated cost of the proposed work; that drainage bonds of the face value of $355,000 were duly executed and sold at a premium sufficient to realize the estimated cost, the bond purchaser requiring that the premium be used to reduce the amount of the bonds issued, which was done; that all the proceeds of the bonds have been disbursed for drainage work in the district, and there is now no

power or authority under the statutes for other or further assessments. If this be so, it is manifest that a most inequitable and unconscionable result would follow. It appears that, after charging the plaintiffs with the increased cost paid a later contractor for removing the nondredgible rock—that is to say, with the cost in excess of the contract rate with plaintiffs—there is a balance due plaintiffs of $38,057.69, exclusive of interest. No extras for additional work are in this amount. It represents work actually done by plaintiffs on an essential, vital part of the drainage improvement at rates of compensation specified in a contract made at the beginning of the enterprise. The drainage district has received the benefit expressly contracted for, and at a cost which does not exceed the contract amount. This should have been in contemplation, and provision made for it in the disbursement of the moneys. But in effect the county now says the fund has been exhausted for other drainage work in the district, in which plaintiffs did not participate, and that the plaintiffs are therefore without remedy, either for a judgment establishing a liability, or, if one be awarded, then for assessments "to be" levied for its payment. Of course, statutory limitations must be observed; but, if they afford a reasonable way to avoid such a result, it should be taken.

The county relies upon State v. Redman, 270 Mo. 465, 194 S. W. 260, for lack of authority for future assessments after the first assessments have been shown to be insufficient. On the other hand, the plaintiffs cite the Missouri statute of 1913 (Laws 1913, pp. 271, 281), as authority for additional levies. In the case cited the additional levy in controversy was made in 1912 without notice to the landowner. The Supreme Court of Missouri declined to regard the subsequent act of 1913 as a binding legislative construction of the laws in force when the levy was made or to give it retroactive effect. The judgment had been obtained, but there was no authority for the particular remedy at the time it was employed. There was no decision that after authority was conferred by the act of 1913 an additional levy could not then be made. As to this see McWilliams v. Drainage District (Mo. App.) 224 S. W. 35.

The distinction between the Redman Case and the one at bar is plain. Here the words of the judgment to which objection is made contemplate future levies under the act of 1913, or any other law in force at the time they are made. Section 2 of the act of 1913 provides:

"All contracts entered into, all liens established and other obligations created, including warrants and bonds issued, by drainage districts heretofore organized under the provisions of said article 4 of chapter 41, are hereby declared to be valid, and the county courts shall levy sufficient tax to pay all such forms of indebtedness."

The act also declares that the amendments contained in it shall be deemed to be remedial in their character and shall be liberally construed by the court. The above provisions are applicable to the case at bar, and without more dispose of the objection stated. If the exhaustion or depletion of the fund first raised does not destroy the remedy, a fortiori it is no defense against a judgment on the claim itself. Hipple v. Bates County, Mo., 138 C. C. A. 436, 223 Fed. 22, in this court, was an

action against the county on tax bills issued by the city of Butler for grading and paving city streets, upon which property of the county abutted and for which it was liable by statute. It was urged in defense there, as here, that the funds available had been exhausted, but judgment was directed upon the facts stipulated. We said:

"When the proceedings in the city council progressed to the awarding of the contract, the rights of the contractors to payment could not be defeated by the expenditure thereafter of applicable county funds. Otherwise, a contract valid in all respects when made could be nullified by the subsequent acts of the statutory debtor."

[5] *The Failure of the Plaintiffs to Obtain Estimates from the Engineer in Charge.* Some aspects of this subject were considered on the former appeals, and the views then expressed need not be repeated further than necessary to present the points now made. The contract provided for monthly estimates of work done and accepted, and for payments to the contractor accordingly, less 10 per cent. to be retained until final completion. This course was pursued as to the work performed before the dispute over the nondredgible rock, but after August 6, 1908, when plaintiffs and the county court made their agreement with respect to the resumption of the excavation estimates were refused. At the last trial the court construed the provisions of the contract making the engineer an umpire or arbiter as referable only to monthly estimates, and it instructed the jury that the engineer's decision in refusing such estimates was final, except in case of fraud, or such gross mistake as implied bad faith, or a failure to exercise an honest judgment, the burden of proving which was on the plaintiffs. The instructions about the exception were elaborate and were correct. There was substantial evidence that the engineer, in refusing the estimates, did not exercise his own judgment, but deferred wholly to the directions and instructions of members of the county court; and the jury found the issue for the plaintiffs. The evidence and the verdict bring the case within the exception to the rule as to the finality of the action of an engineer upon whom a contract confers the power of a binding decision.

It is now urged that the contract required also a final estimate and a certificate of completion by the engineer, as distinguished from monthly estimates and acceptances of parts of the work as it progressed. If this were so, which is quite doubtful, the cause of the withholding of the former was involved in and determined with the refusal of monthly estimates and acceptances. This applies also to the further contention that the statutes required a final certificate of the engineer of the completion of the work, and an audit based thereon by the county court, before the plaintiffs were entitled to payment. In view of the refusal of monthly estimates and acceptances of the work as it progressed, the reasons of the refusal, and the denial by the county of any liability whatever to the plaintiffs, it would have been an idle ceremony for them to have sought a final certificate and audit. To require those things as conditions precedent would be to give effect to a wrongful denial of liability upon other grounds.

[6] *The Question of Interest.* When the action was brought the compensation for work done by plaintiffs at contract rates, less payments previously made them, and less the 10 per cent. the county was authorized to retain during the progress of the work, amounted to $38,057.69. On the other hand, the excavation of the rock which plaintiffs did not remove cost the county $21,031.82 more than the plaintiffs' contract allowed for that work. The county, however, had in its hands the retained 10 per cent. of plaintiffs' compensation, amounting to $11,026.75, which, applied on the excess cost of the rock excavation, left a balance of $10,005.07 chargeable to plaintiffs' account. The trial court allowed plaintiffs the $38,057.69, with interest from April 3, 1909, the date the action was brought; it allowed the county the $10,005.07, with interest from September 20, 1911, the mean average date of its disbursements; and it awarded the plaintiffs judgment for $44,170.50, that being the difference between those sums plus their interest. We think interest on the $10,005.07 should have been allowed from April 3, 1909, not so much as interest on that sum, as to counterbalance an equal amount of interest on plaintiffs' claim at the date of the action. Plaintiffs' claim was on contract, liability on which was wrongfully repudiated by the county, and the bringing of the action was regarded as a demand for payment, which started interest. But the amount of plaintiffs' claim was found to be excessive by $10,005.07. Interest is an incident of debt; but the $10,005.07 was not so much a debt due the county as it was an ascertained abatement to that extent of the compensation due the plaintiffs on the drainage contract. It did not arise from something foreign to the contract, but grew out of and appertained to it. That the precise amount was not ascertained until the county let a contract for the rock work was not its fault. This difference in interest amounts to $1,479.07 and the judgment should be reduced by that amount. The amounts and dates entering into the calculation appear in a written stipulation of facts. The judgment may therefore be modified, without remand of the case for another trial.

The other contentions on behalf of the county need not be recited. We do not regard them as sufficient. Following the course in the trial court, we have considered only the special liability of the county. We have not considered, and do not determine, whether it also incurred a general one.

The judgment in favor of the plaintiffs is modified, by reducing the amount to $42,691.43, as of December 14, 1917, and, as so modified, it is affirmed.

NOWATA COUNTY GAS CO. v. HENRY OIL CO.

(Circuit Court of Appeals, Eighth Circuit. November 22, 1920.)

No. 5566.

1. **Appeal and error ⇐854(1)—Opinion of court not subject of review.**
Where an action at law is tried to the court without a jury, and no findings of fact are made, assignments of error cannot be based on the opinion of the court.

2. **Public service commissions ⇐7—Prices fixed by contract with customers by public service corporations may be changed by state commission.**
The price fixed in a contract between a public service corporation and its customers may be changed, and a different rate fixed, by a public service commission created under the police power of the state, even though the contract was in existence before the state commission was created and given such authority.

3. **Public service commissions ⇐7—Jurisdiction of public service commission.**
Laws Okl. 1913, c. 93, creating a state corporation commission, to "have general supervision over all public utilities, with power to fix and establish rates," etc., confers power only to fix rates to be charged by such utilities to their customers, and has no relation to prices to be paid by a public utility for a commodity furnished by it to the public, and the commission is without jurisdiction over such prices, where the seller is not charged with any duty to the public.

4. **Gas ⇐1—Natural gas company, selling product to other corporations, not a "public utility," subject to the public service commission.**
A corporation owning and operating gas wells, and selling its product to industries and public service corporations, *held* not a "public utility," within the Constitution and statutes of Oklahoma, and not subject to the authority of the State Corporation Commission.
[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

5. **Gas ⇐14(1)—Contract for gas not abrogated by action of State Corporation Commission.**
Order made by State Corporation Commission in a controversy between plaintiff, a public service gas company, and defendant, from which plaintiff purchased, under contract, the gas which it distributed to customers which merely required defendant to furnish gas to plaintiff for an "adequate" price, without fixing a price, *held* to leave the price stipulated in the contract in effect.

6. **Estoppel ⇐58—Acts must be to prejudice of other party.**
To create an equitable estoppel, it is necessary that the party sought to be estopped by his conduct induced the other party to act on it to his detriment.

7. **Gas ⇐13(3)—Statute held not to excuse breach.**
In an action against a natural gas company for breach of a contract to supply plaintiff with gas, Act Okl. March 26, 1913 (Laws 1913, c. 99), prohibiting operators of gas wells from taking therefrom more than 25 per cent. of their daily natural flow, *held* not to constitute a defense, where defendant continued to furnish gas under the contract for three years after enactment of the statute, and discontinued only because plaintiff refused to pay more than the contract price.

8. **Pleading ⇐372—Defense not raised by pleadings not in issue.**
A defense not pleaded, nor raised by any facts pleaded, is not within the issues, and cannot be considered.

9. Monopolies ⇐13—Statute regulating production from gas wells held not to apply to nearly exhausted field.

The provision of Act Okl. March 30, 1915 (Laws 1915, c. 197), § 5, prohibiting common purchasers from discriminating between producers of natural gas, the purpose of which is to prevent one producer, by obtaining an advantage, from excluding others, and draining their lands, *held* not to apply to a practically exhausted field, where the only producing wells are located in isolated pockets.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Joseph W. Woodrough, Judge.

Action at law by the Nowata County Gas Company against the Henry Oil Company. Judgment for defendant, and plaintiff brings error. Reversed.

Halbert H. McCluer and Charles A. Loomis, both of Kansas City, Mo., for plaintiff in error.

Philip Kates, of Tulsa, Okl., and John J. Jones, of Wichita, Kan., for defendant in error.

Before HOOK and STONE, Circuit Judges, and JOHNSON, District Judge

JOHNSON, District Judge. The plaintiff in error, a public service corporation, was engaged in the business of furnishing natural gas to the citizens of the city of Nowata, Okl., for lighting and heating purposes. It obtained the gas which it supplied to its customers from the defendant in error, the Henry Oil Company, at the wells of the defendant company in the Hogshooter district, situated a few miles southwest of the city of Nowata, under a contract entered into by the parties in 1906, by which the defendant company agreed to furnish to the plaintiff certain specified quantities of gas for a period of 13 years at the rate of 2 cents per 1,000 cubic feet of gas.

The defendant, in February, 1916, ceased to supply the plaintiff with gas, because the plaintiff would not agree to pay for the gas to be thereafter supplied at the rate of 8 cents per 1,000 cubic feet, instead of 2 cents per 1,000 cubic feet, as provided in the contract. From February, 1916, until September, 1917, the plaintiff obtained gas from the Quapaw Gas Company to supply its needs, and paid for the same at the rate of 10 cents per 1,000 cubic feet, the market value thereof, and thereafter brought suit in the court below to recover damages from the defendant for breach of said contract.

The case was tried by the court without a jury, and judgment entered in favor of defendant, dismissing plaintiff's complaint. Unless one or more of the defenses hereinafter mentioned prevent a recovery, the plaintiff, under the undisputed evidence in the case, was entitled to a judgment in its favor.

At the conclusion of the evidence the plaintiff requested the court to give certain declarations of law in its favor, one of which was a general declaration of law that the plaintiff was entitled to recover. This request of the plaintiff for a general declaration of law in its favor, with others, was refused by the court. Plaintiff excepted to the refusal of

the court to give the directed declarations of law requested by it, and has assigned the same as error.

[1] The trial court made no findings of fact, but delivered an opinion, which appears in the record, and plaintiff has made numerous assignments, based upon the views expressed by the court in its opinion, and has also assigned as error the judgment of the court dismissing the complaint. No question for review is raised by these assignments. Mason v. U. S., 219 Fed. 547, 135 C. C. A. 315; U. S. v. Porter Fuel Co., 247 Fed. 769, 159 C. C. A. 627.

It is not necessary to state the assignments of error relied upon by the plaintiff which can be considered, other than the assignment of the refusal of the court to give a general declaration of law in its favor, as this assignment raises for review every question discussed by the parties and necessary to this decision.

The defenses relied upon to sustain the judgment of the trial court dismissing plaintiff's complaint will be considered under the following heads:

(1) That the order made in December, 1915, by the Corporation Commission of the state of Oklahoma, in a proceeding before said commission between the parties to this suit, annulled and set aside the price to be paid in said contract of 2 cents per 1,000 cubic feet of gas, and authorized the defendant to charge, and required the plaintiff to pay, 10 cents per 1,000 cubic feet, and that said order is res adjudicata of the matters in issue in this suit.

(2) That, assuming for any reason the said order to be invalid, the plaintiff, nevertheless, is estopped to assert its invalidity or to maintain this action upon the contract, by reason of having initiated before said Corporation Commission the above-mentioned proceeding.

(3) That, assuming for any reason the said order to be invalid, the plaintiff is, nevertheless, estopped to assert its invalidity or to maintain this action upon the contract, by reason of a former proceeding commenced by it against the defendant before said commission.

(4) That the judgment of the court below, dismissing the action, should be affirmed under the evidence and the provisions of section 9 of the act of the Legislature of the state of Oklahoma approved March 26, 1913 (Laws 1913, c. 99), which act reads as follows:

"Every corporation, joint-stock company, limited copartnership, partnership or other person, now, or hereafter claiming or exercising the right to produce natural gas or to carry or to transport natural gas through pipe line or pipe lines, for hire, compensation, or otherwise within the limits of this state, is allowed by, and upon compliance with the requirements of this act, as owner, lessee, licensee, or by virtue of any other right or claim is hereby prohibited from taking more than twenty-five (25) per cent of the daily natural flow of any gas well or wells unless for good cause shown, under the exigencies of the particular case the Corporation Commission shall establish a different per centum under the prescribed rules and regulations therefor."

(5) That the judgment of the court below dismissing the action should be affirmed under the evidence and the provisions of section 3 of said act which reads as follows:

"Every corporation * * * now or hereafter claiming or exercising the right to carry or transport natural gas by pipe line or pipe lines, for hire,

compensation, or otherwise * * * which is now engaged or hereafter shall engage in the business of purchasing natural gas shall be a common purchaser * * * and such common purchasers are hereby expressly prohibited from discriminating in price or amount for like grades of natural gas or facilities as between producers or persons"

—and of section 5 of the act of the Legislature of said state approved March 30, 1915 (Laws 1915, c. 197), which reads:

"That every person, firm or corporation, now or hereafter engaged in the business of purchasing and selling natural gas in this state, shall be a common purchaser thereof, and shall purchase all of the natural gas which may be offered for sale * * * without discrimination in favor of one producer as against another, or in favor of any one source of supply as against another."

These several defenses will be considered in their order. Assuming for the moment that the order of the Corporation Commission referred to in the first defense is sufficient in form and in substance, its validity depends upon the jurisdiction or authority of the commission to make it.

[2] It is well settled that the price fixed in a contract between a public service corporation and a customer or patron may be changed, and a different rate fixed, by a public service commission created under the police power of the state. This is true, even though such contract (as was the fact in this case) was in existence before the creation by the state of a commission authorized to fix rates to be charged by public service corporations or public utilities. Raymond Lumber Co. v. Raymond Light & Water Co., 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574; Manitowoc v. Manitowoc & N. T. Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056; Kansas City, B. & N. Co. v. K. C. L. & P. Co., 275 Mo. 529, 204 S. W. 1074; Union Dry Goods Co. v. Georgia Pub. Ser. Corp., 142 Ga. 841, 83 S. E. 946, L. R. A. 1916E, 358; Minneapolis, etc., v. Menasha Woodenware Co., 159 Wis. 130, 150 N. W. 411, L. R. A. 1915F, 732; Pinney & Boyle Co. v. Los Angeles G. & E. Corp., 168 Cal. 12, 141 Pac. 620, L. R. A. 1915C, 282, Ann. Cas. 1915D, 471; V. S. Bottle Co. v. Mountain Gas Co., 261 Pa. 523, 104 Atl. 667; Public Utilities Com. of Kansas v. Wichita R. & L. Co. (C. C. A.) 268 Fed. 37 (decided this term by this court); Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; C., B. & Q. R. R. Co. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948; Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274; Portland Ry. L. & P. Co. v. R. R. Com. of Oregon, 229 U. S. 397, 33 Sup. Ct. 820, 57 L. Ed. 1248; Chicago & Alton R. R. Co. v. Tranbarger, 238 U. S. 67, 35 Sup. Ct. 678, 59 L. Ed. 1204; Union Dry Goods Co. v. Georgia Pub. Ser. Corp., 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309; Producers Trans. Co. v. R. R. Com., 251 U. S. 228, 40 Sup. Ct. 131, 64 L. Ed. 239.

The order of the Corporation Commission of Oklahoma, under consideration, does not fix, nor purport to fix, a rate to be charged by the plaintiff as a public service corporation or public utility, and to be paid by the public; but, granting that it fixes a rate at all, it establishes a rate or price to be paid by the plaintiff to the defendant for gas furnished it by the defendant.

[3] Our attention has not been called to any decision by any court which holds that under the police power the state may create an admin-

istrative body or commission with authority to fix or establish prices to be paid by a public utility for things purchased and used by it, or, as in this case, for a commodity furnished by it to the public.

It is unnecessary to consider the question above suggested, as the law of the state of Oklahoma conferring jurisdiction on the Corporation Commission over public utilities does not attempt to confer such authority. The statute (section 2, chapter 93, Session Laws 1913) reads as follows:

"The commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business."

Taken in connection with the other provisions of the statute creating the commission and defining its powers, it seems clear that the Legislature conferred, and only intended to confer, authority to fix the rates to be charged by a public utility and paid by its patrons for the thing furnished or the service rendered by it to the public.

[4] The order of the commission fixing, or attempting to fix, the price to be paid by the plaintiff for gas thereafter to be supplied by the defendant to the plaintiff, and by it furnished to the public, cannot be upheld on the ground that the plaintiff was a public service corporation or public utility. If the order of the commission cannot be sustained upon some other ground, it is null and void, and constitutes no defense to the suit of the plaintiff for damages for breach of the contract.

The commission had authority to fix the rates to be paid by the plaintiff for gas furnished it by the defendant, notwithstanding the contract, if the defendant, the Henry Oil Company, in supplying gas to the plaintiff, was acting in the capacity of, or exercising the functions of, a public utility. The expression "public utility" characterizes the business, rather than the owner of the business, and in order that a business shall be a public utility it must in some way be impressed with a public interest. One of the earliest and the leading case upon the subject is Munn v. Illinois, supra, in which it is said:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

In Pinney & Boyle Company v. Los Angeles G. & E. Corporation, supra, it is said:

"It is the duty which the purveyor or producer has undertaken to perform on behalf of and so owes to the public generally, or to any defined portion of it, as the purveyor of a commodity, or as an agency in the performance of a service, which stamps the purveyor or the agency as being a public service utility."

In State ex rel. M. O. Danciger & Co. v. Pub. Ser. Com. of Mo., 275 Mo. 496, 205 S. W. loc. cit. 40, the Supreme Court of the state of Missouri, in discussing this question, said:

"State regulation of private property can be had only pursuant to the police power, which power is bottomed on and wholly dependent upon the devotion of private property to a public use. If the requirement that the private property shall be devoted to a public use, before it can be regulated, and before inquisitorial authority be exercised over it, is not to be read into the applicatory law, then that law is obviously unconstitutional, because it takes private property for public use without compensation."

From the evidence it appears the defendant is a corporation organized under the laws of South Dakota. It held leasehold interests in numerous parcels of land situated in the gas field above mentioned. In the development of these lands for natural gas it drilled altogether 45 wells. Between 1906 and 1916 it produced and disposed of large quantities of natural gas to seven customers, of which the plaintiff was one. The plaintiff, as already stated, was a public service corporation supplying gas to the people of the city of Nowata. The other customers of the defendant were industrial concerns, some of them perhaps public utilities, located at Bartlesville, a few miles west of the gas field. All of the gas produced by the defendant was disposed of by it to all of its customers, except one, at its wells in the gas field. The gas furnished by the defendant to one of its customers was delivered at Bartlesville through a pipe line owned and operated by another company, known as the Henry Gas Company. The fact that this pipe line was not owned or operated by the defendant company is of no great importance. It does not appear from the record that in the construction of the pipe line the owner exercised, or attempted to exercise, the right of eminent domain, or that it has any franchise in respect to said pipe line from the city of Bartlesville or other public municipality.

During a large part of the time that the defendant was delivering gas to the plaintiff at the rate of 2 cents per 1,000 cubic feet, it was delivering gas to its other customers at rates ranging from 2½ cents to 5 cents per 1,000 cubic feet. Applying the principles of law announced in the foregoing cases to the facts in this case, we do not think the business in which the defendant was engaged constituted it a public utility, or that it is a public utility under the Constitution and acts of the Legislature of the state of Oklahoma creating and defining public service corporations or public utilities.

[5] If the defendant company was not a public utility, the commission was without authority to fix rates to be charged by it and paid the plaintiff company. Assuming that the order is sufficient in form and in substance, it is in any event null and void, and constitutes no defense to the suit of the plaintiff for damages for breach of the contract. If we assume that the commission had authority to fix the price of the gas furnished or to be furnished by the defendant to the plaintiff, the question remains whether or not the order made by the commission did in fact fix a price. The order reads:

"Wherefore, the premises considered, and the commission being fully advised, it is considered, ordered, adjudged, and decreed that the parties hereto proceed to carry out the directions above contained; that the defendant com-

pany furnish gas in sufficient quantity for necessary use at Nowata and sufficient pressure to enable the convenient use and handling thereof, and not less than the pressures heretofore indicated; that the Citizens' Gas Company accept this gas and pay an adequate price therefor, and both companies, under the conditions and directions herein contained, carry out each one its necessary part in supplying gas sufficient for distribution by the plant of the complainant company, in accordance with the needs of and comfort of its patrons."

It is self-evident that an order requiring the payment of an "adequate price" fails to fix or establish a definite price to be charged by the defendant and paid by the plaintiff. It is apparent from the findings made by it that the commission intended only to use its good offices in bringing the parties together for negotiation and voluntary settlement of their differences. The commission in its findings definitely disclaims any intention of fixing a rate. It says:

"Nor does it care, unless such action becomes necessary, to say precisely what the Citizens' Gas Company [the plaintiff] shall pay the defendant company for gas."

Not having fixed a rate or a price to be paid by the plaintiff and charged by the defendant, the price stipulated in the contract continued in effect. Kaul v. American, etc., Co., 95 Kan. 1, 146 Pac. 1130. The alleged order of the commission is therefore no defense to plaintiff's action.

[6] The defense based upon the plea of estoppel cannot be sustained. In the recent case of Bush v. Branson, 248 Fed. 384, 160 C. C. A. 394, this court said:

"In order to create an estoppel, it is necessary that the party sought to be estopped by his conduct induced the other party to act on it to his detriment, or, as said in Bloomfield v. Charter Oak Bank, 121 U. S. 121, 135, 7 Sup. Ct. 865, 872 (30 L. Ed. 923): 'No estoppel in pais can be created, except by conduct, which the person setting up the estoppel has the right to rely upon, and does in fact rely and act upon.'"

It is not alleged in the answer, nor does it appear by the proof submitted in the case, that the defendant was induced by the commencement of the proceedings, or either of them, by the plaintiff before the Corporation Commission, to act at any time relying thereon to its detriment.

[7] The statute quoted in the fourth defense, prohibiting the taking of more than 25 per cent. of the daily natural flow of any gas well, is within the police power of the state and a valid law. Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729. The statute, however, has no application to the facts in this case. When natural gas is permitted to flow freely, it tends to drain the gas from the underlying sands in the neighborhood of the well too rapidly, with the result that the water below the gas sands finds its way up towards the outlet of the gas at the base of the well, cuts off the lateral inflow of the gas, and drowns the well. If the outflow of the gas is under pressure, the lateral flow towards the well will be more extensive and long continued, and in the end the gas will be more completely removed from the gas sands, and the gas field more thoroughly exhausted.

The evidence shows that the gas field known as the Hogshooter dis-

trict, in which the wells of the defendant were located, was about 12 miles in length and from 1 to 2 miles wide. In the years 1910, 1911, and 1912, the period of maximum production, the field was being exploited by six or seven pipe line companies. Beginning with 1912 the gas supply began to decrease, and in 1913 the field was considered by practical gas men as exhausted. Of the 45 wells drilled by the defendant, only 6 remained in operation in 1915; the others having been drowned by the rising of the underground water. Of the pipe line companies theretofore exploiting the field, in 1915 only two remained, the defendant and the Quapaw Company. As early as 1913 the defendant had established a pumping station for the purpose of pumping gas to its several customers. In 1914 the pipe line of the plaintiff was connected with this pump station. A pump station is used either to accelerate the flow of the gas from the sands below or to increase the pressure under which the gas is delivered to customers. The rock or natural pressure of the gas at defendant's wells in operation had greatly decreased, as had the pressure at all the wells in this district, at the time of the installation of the pump station above mentioned.

It is quite clear from the evidence that the field after 1913 was rightfully considered an exhausted field, although after that time a few old wells continued in operation and a few new ones were developed by drilling into gas pockets. It is practically conclusive from the evidence that the various producing wells during this period were in pockets of gas contained in isolated domes of the gas sands below, or in pockets of gas cut off by the rising of the ground waters from below.

The evident purpose of the statute was to conserve the supply of natural gas contained in the gas sands within the state and to promote as nearly as possible a complete exhaustion of the gas contained in the gas sands. Under the evidence it appears that the requirement of the statute limiting the output to 25 per cent. of the free flow of gas from a well is admirably adapted to accomplish the purpose had in view by the Legislature. We are unable to see how the section of the statute limiting the outflow of gas to 25 per cent. of the free flow of a well has any application to an exhausted field, such as this has been since about the year 1913.

The defendant in its answer, pleading this statute as a defense, alleges:

"That the sum of 25 per cent. of the daily flow of all of the gas produced from all of its wells upon the land described in the schedule attached to the contract of 1906, and from all of its wells located in the field from which gas was to be taken for the plaintiff under the original contract of 1906, amounted to less than the sum of ——— cubic feet per day. The defendant could not legally comply with the terms of the contract of 1906 from and after March 26, 1913."

It will be noted that the date after which it is alleged the defendant could not legally comply with the terms of the contract is the date when the statute went into effect, and yet from that date until about the 1st of February, 1916, the defendant did as a matter of fact supply the plaintiff with gas substantially as required by the contract, and until the latter part of the year 1915 it also supplied gas in large

quantities to its other customers. Under date of February 7, 1916, the defendant wrote a letter to the plaintiff, demanding payment for the gas furnished by it during the preceding month at the rate of 8 cents per 1,000 feet. At that time the defendant was willing to continue to supply the plaintiff with gas if it would pay the price demanded, notwithstanding the statute.

Under this state of facts this defense appears to be more theoretical than practical and is scarcely entitled to the serious consideration heretofore given it.

[8] The fourth defense urged by the defendant is based upon what is known as the common purchaser statute of the state of Oklahoma. Neither the statute nor any facts to which the statute might apply are pleaded in the answer of the defendant as a defense to the plaintiff's cause of action. The defense, therefore, is not within any issue in the case under the pleadings. Buchtel v. Evans, 21 Or. 309, 28 Pac. 67; Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117; 13 C. J. § 891, note 79.

[9] The defendant, in the second defense set up in its answer, alleges:

"The subject-matter of the contract of 1906 had become exhausted and destroyed before January 1, 1916, and after that date the defendant, by reason of the destruction of the subject-matter of the contract, was unable to comply with the terms of the contract, because the amount of gas required by that contract could not then be produced from the land. And such destruction of the subject-matter of the contract was in no way the result of any act of the defendant, or any negligence on its part, but arose solely from the natural exhaustion of the gas field which was in the land covered by the contract of 1906."

At the trial the defendant attempted to prove the above defense, and, as already stated, it appears from the evidence that the field was practically exhausted long before February, 1916. After the practical exhaustion of the field there continued to be a few isolated producing wells located in gas pockets or upon domes of the gas sands and separated from each other by the underground water. It would seem to be quite evident that there is no reason for the application of this statute to the owners of such wells. The object of the statute, as correctly stated by the defendant in its brief, is:

"To prevent any one person or corporation from having an undue advantage, the law expressly prohibiting any discrimination in price; * * * that is to say, to prevent one company from selling gas at a less price than others were selling for, and so exclude other companies from the sale, and compel them to shut in their wells, and permit it to exhaust the field through its own wells."

The result which it is the object of the statute to prevent is possible by reason of the mobility of the gas in the sands in which it is found below the surface. A well drilled into the gas sands, often spoken of as a reservoir, would in the course of time in large measure exhaust the gas contained therein. In view of this mobility of the gas below the surface, it was the purpose of the statute to equalize the opportunities of the various well owners in the sale of gas contained in a common reservoir. But, as we have seen, from the conditions already described, the unfair opportunities arising from the mobility of the gas

no longer existed in the Hogshooter field, where the defendant was operating, and the prohibition of the statute against discriminations in favor of one producer as against another has no application.

After the refusal of the defendant to deliver gas under the contract, the plaintiff secured gas from the Quapaw Company, which was operating in the Hogshooter field. How the Quapaw Company secured its gas—whether it was the owner of wells and a producer, or was simply engaged in the business of transporting gas produced by others—does not appear from the record. The plaintiff paid the Quapaw Company at the rate of 10 cents per 1,000 cubic feet of gas, which, it is admitted, was the reasonable market value thereof. The defendant contends that, it being admitted that the market price of gas in the Hogshooter field was 10 cents per 1,000 cubic feet, the common purchaser statute prohibited the payment of any less price by the plaintiff to the defendant, or any other person producing gas in that field, and that the price fixed by the contract of 2 cents per 1,000 cubic feet became illegal and unenforceable.

Assuming the validity of the statute, and that the defendant by a sufficient pleading had made the statute a defense to the action, we do not think the statute has any application to an exhausted field, such as the Hogshooter field has been since about the year 1913.

The judgment will be reversed, and the court below directed to grant a new trial.

DE LA NUX et al. v. HOUGHTAILING.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1921.)

No. 3519.

1. **Reformation of instruments ⟸45(1)—Proof of fraud or mistake must be clear and convincing.**
   To reform a written instrument for fraud or mistake, the evidence must be clear and convincing.

2. **Reformation of instruments ⟸45(5)—Evidence held to show son deceived mother into conveying more property than she intended.**
   In an action to reform a deed to grantor's grandsons, by striking therefrom a clause conveying all the grantor's property, after the description of specific property, evidence *held* to show that the grantees' father deceived his mother into signing the deed, which she thought conveyed only the property particularly described.

3. **Reformation of instruments ⟸32—Remedy held not to have been lost by laches.**
   The right to reformation of an instrument is not lost by laches, notwithstanding a delay of six years in instituting the suit, where the rights of no third parties had intervened, and the grantor had been mentally incompetent for several years because of excessive drinking, so that a guardian for her was finally appointed.

4. **Equity ⟸69—All circumstances considered in determining laches.**
   The defense of laches does not depend on the lapse of a certain definite time, but depends on whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute the proceeding sooner.

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

5. Reformation of instruments ⟸24—Demand on father of minor grantees is sufficient.

If a demand on the grantees for reformation of a deed is necessary before the suit to reform it, a demand for such reformation on the father of infant grantees is sufficient.

6. Appeal and error ⟸719(3)—Failure to make demand for reformation must be specified as error.

The objection that no demand for reformation of a deed had been made before the suit was instituted for that purpose does not present a jurisdictional question, reviewable without specification of error.

In Error to the Supreme Court of the Territory of Hawaii.

Suit by Rebecca Houghtailing, through Frederick E. Steere, her guardian, against Daniel De La Nux and others, for reformation of a deed. A decree for plaintiff was affirmed by the Supreme Court of the Territory of Hawaii, and defendants bring error. Affirmed.

Rebecca Houghtailing, through her guardian, sued George F. De La Nux, Jr., and Daniel De La Nux, minors, her grandsons, for reformation of a deed. While suit was pending, George, Jr., died, and George F. and Lahapa De La Nux, father and mother and heirs of George, Jr., were made parties to the suit. The facts as recited by the trial court are:

That upon April 11, 1916, Rebecca Houghtailing was declared a spendthrift, within the meaning of the laws of Hawaii, because of excessive drink, and Steere was appointed guardian of her estate, and on April 19, 1917, was directed to proceed against defendants for reformation of the deed heretofore mentioned; that the deed purported to have been signed by Rebecca Houghtailing on June 10, 1905, and acknowledged before a notary November 8, 1905, and to have been recorded July 2, 1910. By the deed Rebecca Houghtailing, for and in consideration of love and affection for her grandsons, George De La Nux, Jr., and Daniel De La Nnx, and in further consideration of $1, grants and conveys unto the said grandsons the property described, "now occupied by me as my home, together with the improvements thereon." Immediately following is the clause over which this suit arose: "And also all and singular my real and personal property by me possessed and wherever situate."

The court found that the parcel of land occupied by Rebecca as a home was so occupied by her at the time of the deed, and was occupied by her as a home at the time of the trial in 1919; that when the deed was made the grantor was about 49 years old; that in the year 1905, when the deed was made, and for many years before and after, two sons of plaintiff, Henry and Charles, and their families, lived with her; that when the deed was executed two children of her son Henry lived with her, one Bathsheba, the favorite grandchild of Rebecca, and who had lived with her from the time of her birth up to the beginning of 1919. Other findings were that George De La Nux, the father of the two minors and their guardian, left his mother, Rebecca, when he was about 7 years old, lived apart from her, and did not see her until 1899, except on a few occasions, and that his children rarely visited their grandmother, and that the grandmother made infrequent visits to her son George; that for 30 years Rebecca was addicted to the excessive use of liquor and thereby had impaired her mentality; that she never acquired much knowledge of business affairs, and that the management of her estate was left in the hands of others; that her mind became so impaired by the use of liquor that her son George, "a person of shrewd intellect, was able to influence her without much difficulty to execute the deed in the form above described and set forth"; that Rebecca, when she signed the deed, intended to convey to George, Jr., and Daniel, only the homestead; that in consequence of the trust and confidence reposed in her son George, Rebecca, relying on statements made to her by George, fully believed that the deed, which was prepared under instructions of George, was limited only to the conveyance of

the homestead; that George deceived and defrauded her, by making her believe that the deed conveyed only the home, and that the deception and fraud was made possible by reason of the trust and confidence placed by her in her son George.

The court decreed that the deed be reformed by striking therefrom the words: "And also all and singular my real and personal property by me possessed and wherever situate." This left the deed valid for the home parcel. On appeal the Supreme Court of the Territory of Hawaii affirmed the decree. By writ of error the case is in this court, where it is contended that the Supreme Court erred in holding that the deed should be reformed on the grounds of fraud and deception, and in not dismissing the complaint on the ground of laches, and in not holding that the complaint failed to state the necessary and essential allegations to maintain the suit.

Lorrin Andrews and Wm. B. Pittman, both of Honolulu, T. H., for plaintiffs in error.

A. G. M. Robertson, A. L. Castle, C. H. Olson, W. A. Greenwell, Arthur Withington, and A. D. Larnach, all of Honolulu, T. H., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] To reform a written instrument upon the ground of fraud or mistake, the evidence must be clear and convincing. If the proofs are doubtful and unsatisfactory, and if the fraud alleged is not made very clear, equity will not grant relief. Ivinson v. Hutton, 98 U. S. 79, 25 L. Ed. 66; Northwestern Mutual v. Nelson, 103 U. S. 549, 26 L. Ed. 436. Such is the rule under which we inquire whether the transaction here involved was entered into as intended by the parties interested, or whether, because of the fraudulent conduct of the son, the deed fails to express the precise intention of the parties thereto. Pomeroy's Equity Jurisprudence, § 870.

[2] The proof is convincing that during 20 years before the time of the trial Rebecca Houghtailing was more or less under the influence of liquor. Near neighbors testified that she drank to excess nearly every day, and spent a great deal of money at saloons; that often she was so drunk that she was taken home by neighbors. George, her son, saw but little of his mother until about the year 1900, when he went to work on a plantation not far from his mother's home. It was in 1905 that George, in company with his mother, went to the office of an attorney, and there she signed the deed which has been ordered to be reformed. Rebecca stated on the trial that, after signing the deed, she asked her son not to record it, because she did not wish her two other sons to be displeased because of the gift of the property, which she believed was the homestead, that was conveyed to the children of George. According to her evidence it was about 1914 or 1915 that she learned that she had conveyed all her other property. Thereafter she engaged attorneys to take steps to have the deed corrected, but she first demanded of George that the deed should be reformed, inasmuch as he had committed a fraud upon her. Soon thereafter George drew up a form of letter and gave it to his mother to sign, wherein she discharged the counsel she had employed to proceed to have the deed corrected, and thereafter George persuaded her to give him a power

of attorney. It is also in evidence that, when she wrote the letter dismissing her attorneys, she was sick, and the suggestion that the letter be written came from her son George. After testifying that she remembered signing the deed, Rebecca said:

"I was thinking this homestead was the only thing he [George] wanted. I did not think he had more in the deed, and the reason why I trusted this boy, and I really did, he had been working around this and that, and I trusted him; I trusted the boy; and I told him, 'Well, you take your choice; this is the place you want, and you can have it;' and it was all right. * * * I didn't think the whole thing was going to be put in this deed. Why should I?"

After explaining that she and her son went to the office of an attorney, she continued:

"I went to the place where he told me; of course. I had a little drink in me; not only that, this child that I had, this boy I trusted. he was my eldest boy, and I trusted, and I would trust him again; I would trust him he wouldn't do anything else to me like that, to me; I would give him this homestead; I told him the place was under mortgage, the Kalihi place was under mortgage, and 'you will have to look after this;' and he said, 'Yes;' and I don't think I took the trouble to read the whole thing."

She also said that she had previously told George that he could take the homestead, and that she went down to execute the deed at his request, and that she did not intend to sign a deed giving the two grandchildren all her real property and her personal property, and had she known that the deed contained any such provision she would not have signed it. At the time the deed was executed, the children of George were not living with Rebecca; but the children of another son were, and the evidence is that to one of them, Bathsheba, she was specially devoted.

It is unnecessary to recapitulate more of the evidence, which, we believe, sustains in all respects the findings and conclusions of the trial judge. We have not overlooked the testimony of the attorney who drew the deed that at the time of the execution of the deed Rebecca was not under the influence of liquor, nor that of George, her son, who said that his mother wanted to turn all her property over to him, but that he did not wish her to do so, and finally decided that his children should get her property, and that he had not recorded the deed because his mother asked him not to. Assuming that at the time of the execution of the deed Rebecca was not drunk, still it is plain that she made the instrument at George's solicitation, and did not understand that it conveyed all of her property. The testimony of George was not credited by the trial court, and a reading of it impresses us with the belief that, instead of being true to the natural obligations of a son to an unfortunate mother, he took advantage of her infirmity to violate the affectionate confidence she placed in him, and wantonly deceived her.

[3, 4] The question of laches remains. There is some evidence tending to show that Rebecca had knowledge of the fraud as far back as 1911; but there is also evidence that at that time, and thereafter up to the time of the appointment of her guardian, April 12, 1916, she was in such an enfeebled condition of mind as to excuse her in failing to in-

stitute suit. As the present action is to reform a deed, and as it is proven that Rebecca has been always in possession of the property, no rights of third parties having intervened since the deed under investigation was executed, it is proper to consider all the circumstances in concluding whether there has been a want of due diligence in failing to institute proceedings before they were actually begun.

"The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether under all the circumstances of a particular case plaintiff is chargeable with a want of due diligence in failing to institute proceedings before she did." Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; Ruckman v. Cory, 129 U. S. 387, 9 Sup. Ct. 316, 32 L. Ed. 728; London and S. F. Bank v. Dexter Horton & Co., 126 Fed. 593, 61 C. C. A. 515; Rose v. Parker, 4 Haw. 593; McIntire v. Pryor, 173 U. S. 38, 19 Sup. Ct. 352, 43 L. Ed. 606.

[5, 6] The point that no demand upon the minors for reformation before the filing of suit was alleged or proved is not well taken; for, assuming, without conceding, that such demand was necessary, the evidence shows that there was a demand upon George, who was the natural guardian of his children. Moreover, as pointed out by the Supreme Court of the territory, the point was not contained in the specifications of error and is not a jurisdictional question.

The decree is affirmed.

In re CRAIG LUMBER CO.

COBB et al. v. HILLS-CORBET CO.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1921. Rehearing Denied February 14, 1921.)

No. 3552.

1. **Sales ⟸454—Agreement to install sawmill machinery held conditional sale.**
An agreement whereby claimant was to buy and pay for sawmill machinery and install it in a mill of the bankrupt, which expressly provided that the title to the property therein agreed to be sold should not pass until it was paid for, and that on default of payments the claimant might retake the property agreed to be sold, is clearly a contract for conditional sale of the machinery, though the expense of erecting buildings and installing the machinery was included in the sum to be paid before title passed, and was not an appointment of the claimant as agent for the bankrupt to purchase the property.

2. **Sales ⟸464—Conditional sale contracts are valid.**
A conditional sale contract, whereby the title is not to pass to the buyer until the purchase price is paid is valid, when free from fraudulent intent.

3. **Payment ⟸46(1)—Properly applied first to least secured claims.**
Payments made by a millowner to a contractor, who had retained title to the machinery installed in the mill until fully paid for, which were not applied by the parties, were properly applied by the court to the payment for the buildings and the labor of installation, under the rule followed in the federal courts that it is equitable to extinguish first those debts for which the security is most precarious.

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

4. Fixtures ⟨⟩22—Machinery and sawmill on government property held not a fixture.

Machinery placed in a sawmill erected on piles on the tideland, within a forest reservation, so that the title to the land remained in the government, and which could be removed from the mill without injury to the building, are not fixtures; but the seller can reclaim them under his conditional sale contract from the trustee in bankruptcy of the millowner.

Appeal from the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

In the matter of the Craig Lumber Company, a corporation, bankrupt. From a judgment in favor of the Hills-Corbet Company, a copartnership composed of F. R. Hills and W. W. Corbet, for the balance due on a contract with the bankrupt for conditional sale, E. L. Cobb, as trustee of the bankrupt, and another, appeal. Affirmed.

In the court below, in a bankruptcy proceeding, the appellees filed their petition to reclaim certain machinery and fittings which they had placed in the bankrupt's sawmill in accordance with a contract performed before the bankruptcy. The court below upon the pleadings and the evidence found the facts to be substantially as follows:

That on October 31, 1917, the appellees and the bankrupt entered into a contract whereby the appellees agreed to furnish all machinery, fittings, etc., necessary to equip the bankrupt's sawmill at Craig, Alaska, in accordance with specifications, and agreed to install said machinery and erect necessary buildings therefor. The contract provided that the cost of the sawmill complete should not exceed the estimate of $32,125. It contained a provision that the title to the "apparatus and material herein agreed to be sold" should not pass from the appellees until fully paid for in cash, that upon defaults in payments the appellees might retake the property "agreed to be sold," and in that event it was agreed that the money theretofore paid to the appellees on the contract should be presumed to be the amount of their liquidated damages to be retained by them for breach of the agreement; that the contract further bound the bankrupt to pay the appellees the actual cost of labor and machinery, equipment, and building material, cost of insurance charges, of material and men from Seattle, Wash., to Craig, Alaska, plus 10 per cent., and the bankrupt agreed to pay the appellees in installments, the last of which to be due 30 days from completion of contract; that the appellees fulfilled their contract on or about May 1, 1918; that there remained due them the sum of $12,980.36 on the contract; that before the trial of the cause the trustee in bankruptcy and the Bank of Alaska entered into a stipulation with the appellees whereby the bank took possession of the property described in the contract, and stipulated with the appellees that, if the court should find the contract to be a conditional sale contract, it should make a further finding as to the amount due the appellees under the contract, which sum, if so found, the bank undertook to pay; that the sawmill is constructed on piles on tidelands in a forest reservation, title to which is in the government, and that all the machinery, etc., were so attached to the building as to be easily removable therefrom without damaging the same; that the Bank of Alaska, a party to the suit, holds a mortgage upon the mill and the machinery, but at the time of the execution of said mortgage the bank had notice of the conditional sale contract, and that the appellees had not been fully paid for the machinery; that the material, etc., furnished under the contract by the appellees, together with the work performed thereunder, and the percentages agreed upon in the contract, amount to the sum of $32,539.74, and that in addition thereto the appellees also furnished and delivered to the bankrupt other material, machinery, etc., not included in the contract, amounting to $5,958.79; that after allowing the total credits for payments made there remained a balance due the appellees under the contract of $9,827.39, and the court entered judgment for the appellees for that sum.

J. H. Cobb and J. B. Marshall, both of Juneau, Alaska, for appellants.

Cassius E. Gates and Frank P. Helsell, both of Seattle, Wash., and Newark L. Burton, of Juneau, Alaska, for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellants contend that it was error to hold that the contract was an agreement for a conditional sale, and they argue that at the time when it was made the appellees had nothing to sell, that the lumber company was merely employing them to build and equip their mill according to plans and specifications at a cost not to exceed a specified sum, that in buying the machinery and fulfilling the contract the appellees were merely agents or employés, and that in paying for the same out of their own funds they but advanced the purchase money as agents for their principal. It has been held that conditional contracts of sale are not favored in the law, and where it is doubtful upon the face of the instrument whether the contract is a conditional sale or a mortgage, it should generally be treated as a mortgage. But here the terms of the instrument leave no room to doubt that a conditional sale was provided for. The appellees were to buy and pay for the machinery and to take title thereto in the first instance in their own name. The purchase price therefor was to be paid by them, not with funds advanced by the lumber company, but with their own money. There is nothing in the instrument to give color to the suggestion that they were agents for the lumber company. On the contrary, it appears that they were contractors, who bound themselves to furnish machinery which the contract provided was thereafter to be sold to the lumber company. There is nothing in the instrument to rebut the intention, expressed in clear terms, that the sale is conditional and that—

"Title to the apparatus and material herein agreed to be sold shall not pass from the company until all payments hereinunder shall have been fully paid in cash. Upon default in any such payments, the company may retake the property agreed to be sold."

It is not rebutted by the fact that the contract provided that the title should not pass until the payment of, not only the cost of the machinery and material, but also the expense of erecting buildings and installing the machinery. All of these sums were reckoned together as constituting the cost of that which was agreed to be conditionally sold. But whether or not the appellees could retain title to the machinery until all these sums were paid is immaterial here.

[2] Under the appropriation of payments which the court below made, the unpaid balance is solely for the purchase price of the machinery and apparatus. In Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285, Mr. Justice Bradley said:

"Such contracts are well known in the law and often recognized, and when free from any fraudulent intent are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser."

See, also, Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275.

A similar contract was sustained by this court as a conditional sale in Meyer v. Pacific Machinery Co., 244 Fed. 730, 157 C. C. A. 178. The appellant cites Heryford v. Davis, 102 U. S. 235, 26 L. Ed. 160, Chicago Ry. Co. v. Merchants Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349, Forsman v. Mace, 111 La. 28, 35 South. 372, and Tompkins Co. v. Monticello Cotton Oil Co. (C. C.) 137 Fed. 625; but they are all cases in which the terms of the contract indicated that title was to pass subject to a lien for the purchase price.

[3] It is contended that the court below erred in applying the payments made by the lumber company first to the extinction of that company's debt for extras, whereas they should have been applied to the payment of the purchase price of the machinery and apparatus. The parties to the contract had no agreement as to the application of payments, and at no time did either exercise the power to make application. In Field v. Holland, 6 Cranch, 8, 3 L. Ed. 136, Chief Justice Marshall said:

> But "if neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious."

That rule has been followed in the federal courts and should apply here. Schuelenburg v. Martin (C. C.) 2 Fed. 747; Coons v. Tome (C. C.) 9 Fed. 532; Kortlander v. Elston, 52 Fed. 180, 2 C. C. A. 657; In re American Paper Co. (D. C.) 225 Fed. 121. Such is also the rule in Oregon, the laws of which state form the basis of the Alaskan Code. Trullinger v. Kofoed, 7 Or. 228, 33 Am. Rep. 708; Union Credit Ass'n v. Corson, 77 Or. 361, 149 Pac. 318.

[4] We find no merit in the contention that the trustee is, as to the mill and the machinery, in the position of an attaching creditor with rights superior to those of the appellees. Under the amendment of 1910 (section 47a of the Bankruptcy Act [Comp. St. § 9631]), the trustee may attack the validity of any lien or other claims against the bankrupt's property which a creditor holding a lien by legal or equitable proceedings might have attacked. Pacific State Bank v. Coats, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846; Potter Mfg. Co. v. Arthur, 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268; National Bank of Bakersfield v. Moore, 247 Fed. 913, 160 C. C. A. 103. But it does not appear that creditors holding such liens could have successfully attacked the appellees' title.

The appellants cite Washburn v. Inter-Mountain Min. Co., 56 Or. 578, 109 Pac. 382, Ann. Cas. 1912C, 357, a case in which a stamp mill, title to which was reserved by the seller, was with his consent permanently affixed to the freehold; the conditional agreement not being recorded. The court affirmed the rule that an agreement for the conditional sale of a chattel is valid, as well against third parties as against parties to the transaction, but held that the rule relates to parties dealing for the property as a chattel, and does not apply to third par-

ties without notice of the condition, where the character of the property has been changed to realty by being affixed to the soil. In the present case there is no realty and no freehold estate, and the machinery never became a fixture. 11 R. C. L. 1058; Dudley v. Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368.

"If a person owns a building, and has no property in the land, and may remove the structure when and where he pleases, it is a chattel." 11 R. C. L. 1081; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535, 20 Am. Dec. 547.

The sawmill was constructed on piles on the tideland, within a forest reservation, to which no one had any title, except the government of the United States.

The decree is affirmed.

WEST SIDE IRRIGATING CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1921. Rehearing Denied February 14, 1921.)

No. 3518.

1. **Equity ⊕447(4)—Newly discovered evidence not ground for relief on bill of review, if diligence is not shown.**
   Where an irrigation company had been restrained by the United States from diverting water in violation of a limiting contract, alleged newly discovered evidence that a former irrigation officer had been informed of a mutual mistake in the contract involved before suit, and that he had conveyed such information to the Reclamation Service authorities, *held* not ground for relief on a bill of review, where diligence was not shown in discovering the evidence, and no fraud on the government's part was established.

2. **Equity ⊕447(4)—Relief for newly discovered evidence denied for lack of diligence.**
   Where a bill in the nature of bill of review on ground of newly discovered evidence was not filed until 15 months after discovery of the evidence, and no effort was apparently made to discover it before the original suit, relief will be denied for want of diligence.

3. **Equity ⊕446—Bill of review not authorized for fraud, because plaintiff failed to introduce evidence beneficial to defendant.**
   A judgment in favor of the United States cannot be attacked on the ground of fraud by a bill of review, because a witness for the United States did not volunteer evidence beneficial to the other party.

Appeal from the District Court of the United States for the Southern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Bill in the nature of a bill of review by the West Side Irrigating Company, against the United States. Judgment dismissing the bill (264 Fed. 538), and plaintiff appeals. Affirmed.

Carroll B. Graves and Hartman & Hartman, all of Seattle, Wash., for appellant.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., and E. W. Burr, Asst. U. S. Atty., of Yakima, Wash.

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

HUNT, Circuit Judge. The West Side Irrigating Company, appellant, asks review of an order of the District Court dismissing an amended complaint and entering judgment accordingly. The suit was originally brought by the United States to restrain the Irrigating Company from diverting water from the Yakima river in violation of a certain agreement dated October 21, 1905. Final decree was entered in favor of the United States and upon appeal to this court we affirmed the decree, and subsequently remittitur from this court was filed in the District Court in November, 1917. West Side Irrigating Co. v. United States, 246 Fed. 212, 158 C. C. A. 372; Id. (D. C.) 230 Fed. 284.

The original injunction ran against diversion by means of a canal of more than 80 cubic feet per second of the waters of Yakima river. The suit was brought to enforce the terms of a contract wherein it was agreed that, in order to avoid litigation and "as a compromise," to secure the indirect benefit from irrigation through federal enterprise, each subscriber would limit its respective rights of appropriation to certain specified amounts. The West Side Irrigating Company pleaded that it was not intended that the contract should be a relinquishment of any of the rights of the stockholders, or to place the amount of water claimed by the shareholders in amounts less than the shareholders required for successful irrigation, and that it was not intended that they should be deprived of that right; that the agreement was signed with the understanding that the rule which the appellant had theretofore employed in measuring and delivering water to its stockholders should apply, and that the custom was to measure one inch of water per second of time per acre measured under a five-inch pressure at the point of delivery to the land. On the appeal to this court the contentions of the parties were so fully stated that we need not repeat them herein. Our decision affirmed the decree of the District Court.

Thereafter, in September, 1919, by order of this court, the Irrigating Company was permitted to file the bill of complaint in the present suit. Appellant alleges appropriation and use since 1890 of 4,000 miner's inches of water measured at the user's distribution boxes; that on October 21, 1905, it made the agreement of limitation heretofore referred to at the solicitation of one Noble, agent and representative of the United States, by which the water should be measured in cubic feet per second of flow, instead of miner's inches, which appellant was led to believe by Noble, a hydraulic engineer, was the equivalent of the water it was appropriating (4,000 miner's inches) at the service boxes; that appellant did not discover that mistake had been made until 1908, whereupon appellant notified Noble and protested and repudiated the agreement, but that, although Noble was then employed in irrigation work by the state of Washington, appellant believed he was still employed by the United States Reclamation Service, and did not know to the contrary until the trial, had in 1914; that appellant

discovered when the protest was made that 4,000 miner's inches of water measured at the user's distribution boxes would require a much larger amount than 80 cubic feet per second; that appellant believed its rights would be protected by protest to Noble, and believed that the United States would be duly informed by Noble of its protest. It is further alleged that on the trial Noble testified that he had no recollection of any protest and rights claimed by the appellant in the summer of 1908; that afterwards, when appeal to this court was pending, its officers learned for the first time that after protest had been made Noble communicated the fact of protest to the officer of the United States in charge of irrigation affairs in Yakima valley, and had informed him of the mistake, and of the intention of the Irrigating Company and its stockholders to refuse to abide by the agreement because of the mistake and misunderstanding, discovery of which was made about June 18, 1918; that, although the agent in chief testified on the trial, nevertheless he did not disclose the fact of notice, but kept the same from the court.

Plaintiff pleads surprise at the testimony of Noble, and that it believed such testimony, and says that if a new trial is granted Noble will testify that in 1905 and 1906 he was in the Reclamation Service, and was a party to securing the agreement of limitation heretofore referred to; that he left the United States Reclamation Service in 1907, and went into the employ of the Washington state water commissioner; that in 1908 he discussed with officers of the appellant company the limiting agreement, and was told by them that the company had been misled by misunderstanding and misrepresentation as to the effect of the agreement, and that they had been given to understand that the amount placed in the agreement was equal to 4,000 miner's inches of water according to the method used by the company, and that the company would not be bound by the limiting agreement; that immediately afterwards Noble related the interview he had had with the officers of the appellant company to one Swigart, chief officer of the Reclamation Service in the Yakima projects, and told him of the protest and objection of the company, and that thereupon Swigart advised him (Noble) not to proceed to enforce the agreement; that upon the trial Noble testified, and after leaving the stand was asked by an officer of the appellant company if he (Noble) did not convey the statement and protest made, but that Noble said he did not remember; that afterwards, in 1918, long after the trial, Noble recalled the original interview with an official of appellant, and appellant now says that the reason the agreement of limitation was not enforced was because of the information conveyed to Swigart and his request not to proceed further.

Appellant pleads adverse user, and that it can prove its rights to 4,000 miner's inches if given opportunity to be heard again, and that, because of suppression of the fact by the United States of notice of the protest, a manifest fraud and injustice was visited upon the Irrigating Company; that the reason the Irrigating Company did not immediately file its bill of review was because it believed application for redress was being favorably considered, and that it would be re-

lieved without further litigation; that by reason of the discovery of the new matter the judgment ought to be reviewed and reversed, and decree awarded to the Irrigating Company for all the water originally appropriated by it and used since the time of the appropriation.

It appears that in deciding the original litigation this court considered the resolution of the board of directors of the Irrigating Company that the president and secretary be instructed to sign contracts with the government to accept 80 cubic feet of water per second from April 1st to October 1st, and 34 cubic feet from October 1st to November 1st, of each year, as the appropriation of the company of the waters of the river, provided the government should complete the irrigation project, and disposed of the suggestion made by the company that the agreement of limitation was founded upon mistake by saying:

"There is no evidence whatever that there was a mutual mistake, and there is no convincing evidence of a mistake on the part of appellant or its stockholders. And if, indeed, there was a mistake on their part, they waived the right to assert it by their subsequent silence. There is no plea of mistake in the answer to the complaint. The whole defense of the appellant as pleaded rests upon its construction and conception of the terms of the agreement itself."

We also held that the defense that the agreement of limitation was void for lack of authority on the part of the directors of the company to surrender any part of the physical property of the company was not pleaded in the answer, and that the stockholders had not been shown to have given notice to any officer of the United States that they repudiated the contract, but, on the contrary, had, by their silence, ratified the same. We regarded the case as presenting "only a written instrument and the meaning of its terms," and we held that the instrument was definite and void of ambiguity, and was made in pursuance of the express authority of a resolution of appellant's directors, and, as testified to, was made for the purpose of giving the government a definite and certain figure which it could rely upon as appellant's right to the appropriation of water.

[1, 2] Notwithstanding the decision upon these matters, the basis of the present bill is newly discovered material evidence. Such evidence is not in writing or a matter of record, but consists of the oral statement already outlined, which appellant says would be made by Noble, the engineer, if another trial is had. In Simkins, Federal Equity Cases, p. 631, it is stated that, where newly discovered evidence is relied upon, it must be shown that it was evidence not known, and which could not, with reasonable diligence, have been found, before the term at which trial was had expired. This court, in Jorgenson v. Young, 136 Fed. 378, 69 C. C. A. 222, approved of the rule that the newly discovered evidence which may form the basis of a review must be, not only evidence which was not known, but also such as could not, with reasonable diligence, have been found, before the decree was made. Rubber Co. v. Goodyear, 76 U. S. (9 Wall.) 805, 19 L. Ed. 828; Street on Federal Equity Practice, § 2119.

There is no substantial showing that the officials of the Irrigating Company were diligent in bringing to the attention of Noble the fact

alleged that he had notified some one in the Reclamation Service of his discussions with an official of the Irrigating Company. Trial of the case was had in March, 1915, and on June 18, 1918, discovery of the new evidence made. Application for review was made September 3, 1919. It does not appear that prior to the trial any one in behalf of the Irrigating Company interviewed Mr. Noble concerning the conversation alleged to have taken place between the representatives of the corporation and of the Reclamation Service; nor are there any facts averred from which fraudulent conduct on the part of any representative of the government in having induced Noble to make a false statement or to withhold the truth can be inferred. Furthermore, the conversation alleged to have been had between Noble and Swigart appears to have been quite incidental, and so vague in its character that at the time of the trial the memory of Noble could not recall it. Accepting it, however, that Noble did communicate to an officer of the Reclamation Service notice that an official of the company told him the company would repudiate the agreement, still, the notice having been given after the contract was signed and executed, the court could not safely adjudge that there had been a mutual mistake, and render decree in favor of the company. The execution of the agreement having been deliberately had, we cannot see that the statement by an officer of the company made to Noble was more than a mere claim that defendant contended a mistake had been made.

[3] There is an allegation in the bill that Swigart, agent in chief of the Reclamation Service, was a witness upon the trial, but did not disclose the fact of the notice by Noble, but kept the same from the court and from the appellant herein, and that because of the suppression of the fact of notice of protest and reservation of rights, as set forth, "a manifest fraud and injustice was and has been visited upon and against the company." It is to be noted that in the motion to dismiss the bill as filed in the lower court, and in the brief of appellee, it is positively stated that the record in the former trial conclusively shows that Swigart was not a witness at the trial. Nevertheless, upon this appeal we have assumed that Swigart was a witness and did not disclose that Noble had given him any notice, such as it is now claimed he did give to him, and still in our opinion the failure of Swigart to disclose cannot be construed as a fraud against the Irrigating Company.

Counsel for appellant say that they do not contend that there was intentional bad faith on the part of the government, but that the suppression by Swigart operated to their grave injury and was in effect fraudulent. It goes without saying that the agents of the United States should always deal in the utmost candor and truth with those persons with whom they have official relations; yet this is far from saying that upon the trial of definite issues presented by the pleadings in a litigation between the United States and a citizen, where in good faith the government is asserting a contractual obligation incurred under a writing, it is the duty of such officials to offer testimony in behalf of the one who asserts rights against the United States, and in

direct conflict with the theory that counsel for the United States has adopted in support of the public rights.

After careful examination of the case, our conclusion is that the District Court was correct in its decision, and that the judgment should be affirmed.

Affirmed.

PULLMAN CO. v. SWEENEY (two cases).

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

Nos. 88, 89.

Railroads ⟸5½, New, vol. 6A Key-No. Series—Pullman Company not liable for personal injury occurring during federal control.

Under Act Aug. 29, 1916 (Comp. St. § 1974a), empowering President to take possession of transportation systems, presidential proclamation of December 26, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1974a), exercising such power and providing that carriers might be sued, except as Director General might otherwise determine, and Director General's Order No. 50, directing suits be brought against him, a sleeping car company is not liable for a personal injury occurring during federal control, since Federal Control Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j), authorizing suits against carriers, expressly provides that it should not apply when inconsistent with other acts or presidential orders.

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

Separate actions by Christopher Sweeney and by Anna Sweeney against the Pullman Company to recover damages for personal injuries, loss of services, and medical and other expenses. Judgment for each plaintiff. Defendant brings error. Reversed.

Locke, Babcock, Spratt & Hollister and Herbert W. Huntington, all of Buffalo, N. Y. (Raymond C. Vaughan, of Buffalo, N. Y., of counsel), for plaintiff in error.

John J. Brown, of Buffalo, N. Y. (E. Deane Vincent, of Troy, N. Y., of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. While on a journey from Buffalo to Chicago, Mrs. Anna Sweeney occupied an upper berth on a train leaving the New York Central Station at Buffalo. In the morning, when she wished to rise, she rang the bell for the porter's assistance. When he came to her, she stated to him that she wished to get down, and he brought a ladder to accommodate her. She attempted to get down, and had one foot upon the top of the ladder, when the attention of the porter became diverted by a call from another porter. He turned around quickly and took the ladder with him, and Mrs. Sweeney fell to the floor below, receiving injuries for which she brought this action. Her husband sued for loss of services and medical and other expenses incurred in endeavoring to effect her cure. The action was instituted

against the Pullman Company, and the trial judge submitted the issues of fact as to the happening of the accident to the jury.

At the outset of the trial, a motion was made on behalf of the plaintiff in error to dismiss the complaint, upon the ground that the Pullman lines were taken over by the government pursuant to the President's proclamation of December 26, 1917, and were held and operated by the Director General of Railroads under the Federal Control Act of March 21, 1918, and that the actions could only be maintained against the Director General. The trial judge offered the plaintiff in error's attorney an opportunity to amend, so as to substitute the Director General of Railroads as party defendant in place of the plaintiff in error. This counsel declined to do, declaring that his instructions in these particular cases were to move to dismiss the actions on the opening, on the ground that the proper party was not served. The motion to dismiss was denied, and exception allowed, and the trials proceeded against the plaintiff in error, resulting in a verdict in each action in favor of the defendant in error.

The sole question presented to us is the question of law as to the proper party defendant. By the Act of August 29, 1916 (chapter 418, 39 Stat. 645; Comp. Stat. § 1974a), it is provided:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Pursuant to this authority on December 26, 1917, a proclamation was issued as follows:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail and water systems of transportation, to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon, and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

"It is hereby directed that the possession, control, operation and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. * * * Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; *but suits may*

be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine." Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1974a.

Later, and on March 21, 1918, the Federal Control Act (chapter 25, 40 Stat. 451; Comp. Stat. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p) was enacted. Section 10 of said act provides as follows:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control."

Pursuant to the authority conferred upon the Director General under the proclamation of December 26, 1917, namely, "but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine," General Order No. 50 was issued on October 28, 1918. This directed that actions at law, suits in equity, and other proceedings thereafter brought in any court based on claim for death or injury to person or loss of 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, which action, suit, or proceeding, but for federal control, might have been brought against the carrier direct, shall be brought against the Director General and not otherwise. It will be observed that section 10 of the Act of March 21, 1918, supra, permitted actions at law or suits in equity to be brought by or against the carriers and judgment rendered as provided by law, and that no defense shall be made thereto on the ground that the carrier is the instrumentality or agency of the federal government.

Many of the trial judges have rested corporate liability on this provision. The provision in section 10 that carriers, while under federal control, should be subject to all liabilities as common carriers arising under state, federal or the common law, was expressly subordinated to any inconsistent order of the President. The language above quoted, "except so far as said Director may by general or specific orders otherwise determine," indicates this. The provisions in the same section (section 10) about the bringing and defense of actions are dependent upon the existence of a liability. The action of the Director General, in issuing Order No. 50, was the action of the President, and the

President was exercising his powers through the Director General. We think Congress clearly permitted the President to issue an order which was inconsistent with the liability which it is claimed by the defendant in error is imposed solely against the carrier because of the language in section 10. The defendant in error's injuries occurred on December 26, 1918, after the effective date of Order No. 50. The language of the Chief Justice in Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897, is pertinent. After referring to the proclamation of the President and the appointment of the Director General and the authority, he says:

"The proclamation in concluding declared that 'from and after 12 o'clock on said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said Director without further act or notice.' Carrying out the authority exerted by the proclamation, the railroads passed into the possession, control, and operation of the Director General." 250 U. S. 144, 39 Sup. Ct. 503, 63 L. Ed. 897.

The court held further:

"That no divided, but a complete, possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that, despite the absolute clarity of the provisions concerning the control given the United States and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached, if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came, and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing?"

In Krichman v. United States, 263 Fed. 538, this court, in speaking of the control and operation of the railroads, said:

"Therefore all persons assisting him [Director General] in the operation of the roads, whether officers or mere employés, including the men who handled the baggage, were in so doing persons acting for and on behalf of the United States in an official function."

The Circuit Court of Appeals for the Eighth Circuit has reached the conclusion which is here announced (Hines v. Dahn, 267 Fed. 105; Mardis v. Hines [C. C. A.] 267 Fed. 171), as has the Sixth Circuit (Erie R. R. v. Caldwell, 264 Fed. 947).

We think that authority may be found in the congressional act, authorizing the Director General to issue Order No. 50 and thus requiring that actions arising during federal control must be brought against the Director General and not against the carrier corporation. We conclude that the plaintiff in error could not be held liable for negligence because of the acts referred to, resulting in injury, since it was operated by government agents over which it had no control.

Judgments reversed.

AMERICAN MERCHANT MARINE INS. CO. v. MARGARET M. FORD CORPORATION.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 64.

1. **Insurance ⟸646(6)—Insurer has burden of proving vessel was unseaworthy.**
   As between the owner and insurer, the burden of proving that a vessel was unseaworthy when it left port rests upon the insurer.
2. **Insurance ⟸668(10)—"Seaworthiness" of vessel a jury question.**
   In action to recover insurance on a vessel damaged by storm, testimony by the vessel's captain, its former owner, and the marine surveyor, *held* to make its "seaworthiness" at the time it left port a jury question, since that term is relative, and means capacity to resist the ordinary perils of the sea.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Seaworthy—Seaworthiness.]
3. **Insurance ⟸378(1)—Knowledge of vessel's unseaworthiness renders insurer liable despite warranty.**
   An insurer, issuing a policy with knowledge of vessel's unseaworthiness, cannot avoid liability by relying upon a warranty of seaworthiness contained in policy.
4. **Insurance ⟸542(1)—Substantial compliance with proof of loss provision sufficient.**
   The object of proof of loss is to give the insurer information regarding the facts rendering it liable, and a substantial compliance with the terms of a marine policy is sufficient.
5. **Insurance ⟸542(1)—Proof of loss of vessel sufficient.**
   Where insurer was advised that the vessel had been seriously damaged, a copy of the survey sent, and later formal notice of the vessel's abandonment, *held*, there was a sufficient compliance with the policy's terms as to notification of loss, especially as liability was denied upon the ground of the vessel's unseaworthiness.
6. **Insurance ⟸559(1)—Further proofs of loss waived by defense of vessel's unseaworthiness.**
   Further proofs of loss were waived, when the insurer denied liability on the ground of the vessel's unseaworthiness.

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

Action by the Margaret M. Ford Corporation against the American Merchant Marine Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hunt, Hill & Betts, of New York City (George Whitefield Betts, Jr., and E. Rapallo, both of New York City, of counsel), for plaintiff in error.

Burlingham, Veeder, Masten & Fearey, of New York City (Van Vechten Veeder and William Paul Allen, both of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. After the purchase by Capt. Gilbert, in the fall of 1917, the then barge Henry R. Tilton was rebuilt and re-

fitted as a schooner at a cost of $35,000 to $45,000. Originally she was a schooner. On January 12, 1918, she was placed in dry dock where she was generally overhauled, recaulked, and refastened. While in this dry dock, she was purchased by the defendant in error from Capt. Gilbert. In February, 1918, the plaintiff in error issued its policy of $10,000 in part for the $45,000 of insurance obtained by the defendant in error on this vessel. The insurance policy states that the value of the vessel is $50,000.

In the latter part of February, she left the dry dock and sailed light to Norfolk, there to take a cargo for Brazil. She remained at Norfolk several days, and after being loaded with cargo it was discovered that she was leaking. An examination was made by her master, Capt. Gilbert, examining for the owners, and a marine surveyor, who examined for Lloyd's agent and as a representative of an insurance company. It was found that there was a treenail hole about 50 feet from the bow on the starboard side and about 6 inches under the water line when the ship was loaded and about 4 feet above the water line when the vessel was light. There were also some spike holes. The treenail hole was about seven-eighths of an inch to one inch in diameter, and the spike holes about one-quarter of an inch in diameter. The explanation as to this condition is given as follows: It is said that the treenail hole had not been fully plugged by the pine plug which had been placed in it, and that the spike holes were left when the stage, used in repair work, was removed. But the testimony is that these holes were then carefully plugged and the vessel was declared seaworthy by the three who took part in the examination.

On March 9, 1918, she left Norfolk for Brazil. For the first three days out, she encountered a severe storm reaching a maximum of 60 miles per hour off Hatteras, with heavy seas and gales. The testimony is that the storm came from the south, increased to a gale, with mountainous seas. They could not hold sail on her, and she was making so much water, and laboring so heavily, it was deemed advisable to return to Norfolk, and this was done; the ship arriving on the 18th. Thereafter, and on March 25th, a survey of the vessel was made by the same three examiners. It revealed that she had been badly strained. The testimony is that the conditions found were caused by bad weather. Capt. Gilbert testified that the conditions found were caused by bad weather, and the marine surveyor testified that conditions were due to straining of the vessel. Requests were then made to various shipbuilders for bids for repairs. The lowest bid received was for $40,000. One witness testified that it would cost $40,650. On April 12th defendant in error abandoned the vessel to the plaintiff in error, declaring it to be a total loss. Liability is denied on the ground that the vessel was unseaworthy.

The District Judge submitted the question of unseaworthiness of the vessel to the jury as one of fact. It resulted in a verdict for the defendant in error.

[1, 2] It is urged before us that it was error for the trial judge to submit the question of seaworthiness of the vessel to the jury as one of fact; the contention of counsel being that there is no evidence to sup-

port the claim of the defendant in error that she was seaworthy when insured. As between the owner and insurer, the burden of proving that a vessel is unseaworthy rests upon the insurer. Fireman Ins. Co. v. Globe Navi. Co., 236 Fed. 618, 149 C. C. A. 614; Thames Ins. Co. v. Pac. Ins. Co., 223 Fed. 561, 139 C. C. A. 101. There is evidence in the case which required the District Judge to submit the question of seaworthiness to the jury. The testimony of the former owner, the marine surveyor, and Capt. Stone all tend to show that the ship was seaworthy at the time she left Norfolk. Opposed to this was the testimony of the surveyors who examined the vessel, called by the plaintiff in error, some of whom examined her after she returned to Norfolk, and who declared her to be unseaworthy.

We agree with the instruction, given by the District Judge to the jury, that—

"Seaworthiness is a relative term, and it means the capacity of the vessel to resist or overcome the ordinary perils of the sea; that is, such perils that a vessel engaged in that business, and upon such voyages, and at that age, would probably encounter."

It was fairly left for the jury to determine whether the ship was seaworthy to the extent of being competent to weather the ordinary perils of the sea with the cargo she had. Their verdict, if found after a consideration of conflicting evidence, we are not at liberty to disturb. McLanahan v. Universal Ins. Co., 26 U. S. 170, 7 L. Ed. 98; Troxell v. D. L. & W. R. Co., 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586; Napier v. Greenzweig, 256 Fed. 196, 167 C. C. A. 412. The storms which the vessel encountered after she left Norfolk were a sufficient explanation for the condition of the vessel as found upon her return to Norfolk.

[3] There was a warranty of seaworthiness contained in the policy. The trial judge charged the jury that if the insurance company did not rely upon the warranty, but by its own inspection or other means had knowledge that the vessel was unseaworthy, and then issued its insurance policy with such actual knowledge, the plaintiff in error would still be liable. It is claimed this was error. We think that leaving this question to the jury as a question of fact, in view of the testimony in this record, was correct. There is evidence that the plaintiff in error knew the vessel had been transformed from a schooner to a barge. and used for storing fish. She was inspected by the plaintiff in error in December. 1917. She was inspected. and a report made to the plaintiff in error that she was unseaworthy. On January 20. 1918. she was again inspected by the insurance brokers. who reported her unseaworthy. A witness for the plaintiff in error. a clerk who signed the original policy on February 18. 1919. admitted that he knew the vessel was unseaworthy at the time, stating that a report made in December to him by the inspector of the plaintiff in error. had marked upon it "Keep off." When the risk was again offered in February, 1918, the witness testified that there was a report which contradicted the report of the earlier inspection made in December, 1917. This evidence was properly for the jury. If the plaintiff in error knowingly took the risk at a high premium, it should be held to its bargain, and

not be permitted to resort to terms of the policy to overcome the claim. Farmers' Feed Co. v. Insurance Co., 166 Fed. 112, 92 C. C. A. 95.

[4-6] We think the proof of loss is sufficient. The object of proof of loss is to give information to the insurance company as to the facts rendering it liable. A substantial compliance with the terms of the policy is sufficient. Globe & Rutgers Ins. v. Prairie Oil & Gas Co., 248 Fed. 452, 160 C. C. A. 462. On March 23, 1918, the plaintiff in error was advised of the fact that the vessel had been damaged and that extensive repairs were necessary. On March 26, 1918, they were again informed when a copy of a letter addressed to the cargo underwriters was sent to them advising about further loss. A copy of the survey of March 25 and April 9, showing that specifications were sent to them on April 11, and on April 12 formal notice of abandonment of the vessel was sent. Acknowledgment of such a letter was made by the plaintiff in error. All the bids upon the specifications were sent to the plaintiff in error. We think this was sufficient compliance with the terms of the policy as to notification of loss, since it further appears that liability was denied on the ground of unseaworthiness of the vessel by the plaintiff in error. Further proofs of loss were waived after such a position was assumed. Royal Ins. Co. v. Martin, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385.

We find no error, and the judgment is affirmed.

GRENADA COTTON COMPRESS CO. et al. v. OWEN.

(Circuit Court of Appeals, Fifth Circuit. January 18, 1921.)

No. 3526.

Indemnity ⇐9(2)—Covering fees and costs in resisting claims, held to cover fees in defending against loss by fire.

An agreement by cotton compress company to protect a carrier against attorney's fees and costs incurred in defending against claims for cotton for which bills of lading were issued while still in the compress company's possession applies where the claim defended against was for loss of cotton destroyed by fire, though the preceding paragraph of the contract required compress company to pay for insurance taken out by the carrier against loss of such cotton by fire, since insurance taken out would not have covered the fees and costs.

Bryan, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Suit by W. F. Owen, as receiver of the New Orleans, Mobile & Chicago Railroad Company, against the Grenada Cotton Compress Company and another. Decree for complainant, and defendants appeal. Affirmed.

Julian C. Wilson and Walter P. Armstrong, both of Memphis, Tenn. (W. H. & Robt. H. Powell, of Canton, Miss., on the brief), for appellants.

J. N. Flowers, of Jackson, Miss., and Ellis B. Cooper, of Laurel, Miss. (Jos. C. Rich, of Mobile, Ala., on the brief), for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The object of this suit, brought by the appellee as the receiver of the New Orleans, Mobile & Chicago Railroad Company, against the appellants, the Grenada Cotton Compress Company and the American Bonding Company of Baltimore, was to charge the latter with the amount of costs, lawyers' fees, and other expenses incurred by the former in successfully resisting a claim asserted against it by suit for the loss by fire of cotton, while in the possession of the Compress Company, after the Railroad Company's bills of lading therefor had been issued. The claim asserted by this suit is based upon a written contract entered into in November, 1911, between the Railroad Company and the Compress Company; the Bonding Company's relation to that contract being that of a guarantor of the covenants and agreements thereby made by the Compress Company. That contract dealt with transactions between the Railroad Company and the Compress Company with reference to cotton coming to the possession of the latter for warehousing or compression, and destined to be carried by the Railroad Company, including what was referred to in the contract as "billed cotton," which meant cotton delivered to the Compress Company, which was intended to be shipped over the line of the Railroad Company, and for which the Railroad Company's bills of lading, based upon certificates issued by the Compress Company, were issued before the receipt of the cotton by the Railroad Company. The claim successfully resisted by the Railroad Company was made in a suit by the owner of uninsured billed cotton, which was destroyed by fire while in the Compress Company's compress on February 4, 1912.

The above-mentioned contract contains the following provisions:

"The Compress Company agrees and binds itself * * *

"9. To pay to the Railroad Company the premiums, and any other expenses attending the same, within ten days after the account is rendered by the Railroad Company, on fire insurance policies covering all warehoused cotton in transit, loaded cotton and billed cotton, contained in the warehouse on the platforms or grounds, or under the sheds of the Compress, or in cars while on side tracks used for the Compress, said insurance to be taken out by the Railroad Company in such insurance companies as it may select, and for such amounts as the Railroad Company deems advisable to fully protect it against any and all loss. And all such policies of insurance shall be made payable to the Railroad Company and retained in its possession.

"10. To protect, defend and hold the Railroad Company harmless from any liability, damages, losses or claims that may arise from the loss or injury or delay of cotton in transit, warehoused cotton, loaded cotton or billed cotton, or any part thereof, from the time of the delivery to the Compress until the redelivery to the Railroad Company of cotton in transit and warehoused cotton, and from the time of the issue of bills of lading by the Railroad Company until the delivery to the Railroad Company of loaded cotton and billed cotton; and to pay all costs, lawyers' fees and expenses that the Railroad Company may have become liable for, or suffer in any suit or proceeding to recover on account of such loss or injury or delay."

In behalf of the appellee it is contended that the costs, lawyers' fees, and expenses for which the appellants are sought to be charged with liability were such as the terms of the above-quoted paragraph 10 obligated the appellants to protect, defend, and hold the appellee harmless from. In behalf of the appellants it is contended that the terms of that paragraph, when construed in connection with the terms of the immediately preceding paragraph 9, do not embrace costs, lawyers' fees, or expenses for which the Railroad Company becomes liable or suffers in consequence of the assertion of a claim against it for loss of cotton by fire. It is admitted that, standing by itself, the language of paragraph 10 is broad and comprehensive enough to cover claims arising from the loss of billed cotton by any cause whatsoever, including fire. The provisions of paragraph 9 are relied on as evidencing the absence of any intention to protect or indemnify the Railroad Company with reference to claims against it based on the loss of cotton by fire, while it is on the premises of the Compress Company, otherwise than as therein stipulated for.

If the billed cotton in question had been insured in pursuance of the stipulations on that subject the existence of such insurance would not have stood in the way of the owner of such cotton asserting a claim against the Railroad Company based upon its loss by fire. Article 9 provided for fire insurance in favor of the Railroad Company at the expense of the Compress Company. It did not provide for protection or indemnity to the Railroad Company against costs, lawyers' fees, or other expenses incurred by it in resisting a claim based on loss by fire made against it by an owner of cotton. If the cotton had been insured, and had been destroyed by fire under such circumstances as to make the Railroad Company liable to the owner and the insurer liable to the Railroad Company, the owner could have subjected the Railroad Company to costs, lawyers' fees, and expenses by suing it for the loss. Such suit could have been brought before the insurance money would have been payable by the terms of the policy or policies issued. Article 9 gives the Railroad Company no protection against outlays made or incurred by it, namely, for costs, etc., in consequence of claims arising from loss, etc., with reference to which article 10 evidences an intention to afford it indemnity. The language of the contract plainly discloses an intention to protect the Railroad Company from liability for a loss of billed cotton on the premises of the Compress Company, and also against expenses incurred by it in resisting claims against it arising from such loss. Nothing in the contract indicates that any mentioned expenses so incurred were excepted.

In so far as article 10 dealt with expenses incurred by the Railroad Company in consequence of the unsuccessful assertion of claims against it arising from the loss of cotton, it dealt with a subject which in no way was dealt with in article 9. The requirements of the last-mentioned article would have been fully complied with by the Compress Company paying for insurance taken out by the Railroad Company for such amounts as the latter deemed advisable to protect it against any and all loss by fire. The expressed intention to protect the appellee, not only against liability for loss of cotton on the premises

of the Compress Company, but also with reference to expenses incurred by it in consequence of claims against it arising from such loss, would be defeated by sustaining the contention made in behalf of the appellants. We are of opinion that a result of sustaining that contention would be to deprive the appellee of part of the indemnity for which it contracted.

It may be assumed that article 9 of the contract obligated the Railroad Company to take out insurance for such amounts as it deemed advisable to protect it against loss by fire. It was not averred or proved that the Compress Company was damaged as a result of the Railroad Company's failure to insure the cotton in question.

The rulings of the trial court were in conformity with the views above expressed. The decree is affirmed.

BRYAN, Circuit Judge. I dissent, because destruction of cotton by fire was not a "loss" of cotton within the meaning of the contract sued on, as I construe it.

Undoubtedly, loss is a term broad enough to include destruction by fire. The question is whether the parties have given a restricted meaning to the term by the provisions of the contract quoted in the majority opinion.

Insurance against loss of cotton by fire is the subject matter of paragraph 9, which authorizes the Railroad Company to procure fire insurance in such companies, and for such amounts as it might deem advisable "to fully protect it against any and all losses." The rights and obligations of the parties in the event of loss by fire, it seems to me, are fixed by this paragraph, and the losses, other than by fire, are covered by paragraph 10. Insurance against loss by fire is usually taken out in fire insurance companies.

I cannot escape the conclusions that paragraph 10 was intended to cover other than fire losses, and incidental expenses growing out of them, that the Railroad Company required fire insurance for losses by fire, and indemnity insurance for such other losses as might occur.

EARN LINE S. S. CO. v. MANATI SUGAR CO. et al.

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

No. 24.

1. **Shipping ⟸170—Risk of delay is on vessel, in absence of agreement.**
   Since the duty of carrying and delivering the cargo is that of the ship, the risk of delay lies upon her, in the absence of contract to the contrary.
2. **Shipping ⟸181—"Demurrage" for delay at port of call held not imposed on charterer, where unloading is within lay days.**
   "Demurrage," which is the sum agreed to be paid to the ship for delay caused without her fault, and which ordinarily does not begin to run until the lay days have been used up, is not imposed on the charterer for delay at port of call, where thereafter the vessel was discharged before the expiration of the lay days, though the charter provided that delay at port of call should be counted as demurrage days, since that provision

will be construed only to charge such demurrage in case thereafter the vessel is not unloaded within the lay days.

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

3. Shipping ⟸49(6)—Charterer not entitled to dispatch money in advance of charter agreement.

Though the regulation of the joint committee of the United States Shipping Board and Food Administration authorized dispatch money, the charterer waived his right to such dispatch money by accepting a charter party, prepared by the committee, which made no provision therefor.

4. Shipping ⟸118—Damages for closing refinery not chargeable against vessel carrying sugar.

The assignee of a charterer cannot recover from the vessel, for delay in delivery of the cargo of sugar, damages sustained by shutting down its refinery for want of raw sugar, since the parties could not have contracted with reference to such possibility.

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

Libel by the Earn Line Steamship Company against the Manati Sugar Company, which brought in the Federal Sugar Refining Company. From a decree disallowing the claim of libelant, and allowing the claims of respondents only in part, all parties appeal. Modified and affirmed.

Haight, Sandford, Smith & Griffin, of New York City (C. B. Smith, of New York City, of counsel), for libelant.

Sullivan & Cromwell, of New York City, for respondent Manati Sugar Co.

Ernest A. Bigelow, of New York City, for respondent Federal Sugar Refining Co.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. January 4, 1918, at the city of New York, the Earn Line Steamship Company chartered its steamer Harald to the Manati Sugar Company to carry a cargo of sugar from Cuba and to deliver it at Yonkers, N. Y. The material provisions of the charter party are as follows:

"Fourth. * * * Lay days for discharging to begin when the vessel arrives and reports ready to deliver cargo, whether berthed or not. Any time spent at the port of call or discharging port (New York deemed port of call if discharge to be at Yonkers) until receipt of orders to count as demurrage days; also any time spent waiting for the securing of necessary import licenses or documents of any kind whatsoever required by any governmental authority, or delay for any cause or reason for which the steamer, her owners and/or representatives, are not responsible, to count as demurrage days. Vessel to be discharged at the rate of not less than seven thousand five hundred (7,500) bags of 325 pounds each per working day. Lay days are not reversible. For each and every day's detention, the party of the second part shall pay to the party of the first part, or agent, demurrage, day by day, at the rate of forty-eight cents (48c.) United States currrency per ton of the vessel's gross registered tonnage.

"Fifth. The bills of lading on Earn Line Steamship Company form to be signed without prejudice to this charter and subject to this contract as to freight, dead freight, and all other conditions, including loading, discharging, and demurrage."

The charter party was on a form prepared and furnished by the Joint Committee on West Indies Transportation of the United States Shipping Board and United States Food Administration. No other form could have been used by the parties. Subsequently the Manati Company sold the cargo to the Federal Sugar Refining Company which received it as consignee and must have been holder of the bills of lading, which are not in evidence. The fifth article of the charter party, supra, required that they should incorporate all provisions of the charter as to discharge and demurrage.

The steamer was cleared in the custom house at New York, February 6th at 3:30 p. m., but did not start for Yonkers until 1 p. m. of the 7th, where she began discharging at 4:20 p. m. and finished February 9th at 1:30 p. m. It is conceded that the consignee had 4.3074 working days for discharging the cargo and used but 1.625, thus saving 2.6824.

The Steamship Company filed this libel against the Manati Company for a balance of freight, and afterwards amended it by adding a claim for demurrage incurred at New York between 3:30 p. m. February 6th and 1 p. m. February 7th.

The Manati Company brought in the Federal Sugar Refining Company under the fifty-ninth rule (29 Sup. Ct. xlvi), which set off its claim for dispatch money and for damages resulting from its refinery being closed down for want of raw sugar from the afternoon of February 6th until 4:30 p. m. of the 7th, when the steamer began to discharge.

The District Judge disposed of these claims as follows:

First. He disallowed the claim of the Steamship Company for demurrage on the ground that it was responsible for the delay in starting for Yonkers.

Second. He allowed the claim of the Federal Sugar Refining Company for dispatch money in discharging.

Third. He disallowed the Federal Sugar Company's claim for damages resulting from the shutting down of its refinery.

We agree with the learned judge's finding as to the first claim, but on a different ground, viz. that as demurrage begins to run only after expiration of lay days, and the steamer was discharged within the lay days, no demurrage is recoverable, whether the delay at New York was justified or not.

[1] As the duty of carrying and delivering the cargo is that of the ship the risk of delay would lie upon her in the absence of contract to the contrary. Demurrage is the sum agreed to be paid to the ship for delay caused without her fault. It has become usual by contract to impose the risk of delay in loading and discharging upon the charterer or cargo owner, and there is nothing to prevent the parties from doing the same thing in respect to delay incurred between the loading and discharging ports. Unquestionably such delay does prolong the voyage, even if the cargo be discharged within the stipulated lay days.

[2] Article 4 of this charter is susceptible of construction either way, and the question is which construction should we adopt. In it the parties agreed that delay at New York, which is the port of call, for any cause for which the shipowners are not liable shall be "counted

as demurrage days," and that demurrage shall be payable day by day. We think they could not have intended that demurrage should be collectible at the port of call, but only that delay there not imputable to the shipowners should be "counted" and collected as demurrage days at the port of discharge. Demurrage days as usually understood do not begin to run until the lay days have been used up. If the discharge of cargo uses all the lay days, or more than the lay days, then the days of delay at the port of call are to be counted as demurrage days. This is what demurrage usually means, viz. the amount agreed to be paid for the prolongation of the voyage by delay in loading or discharging cargo. If the parties had intended to put delay at the port of call upon the charterer absolutely, we think they ought to have expressed their meaning more clearly.

[3] We disagree with the learned judge as to the second claim. December 19, 1917, the Joint Committee on West Indies Transportation of the United States Shipping Board and United States Food Administration published and promulgated its first regulations for the importation of raw sugar from Cuba, the material provisions of this circular being:

Charter Party. "That uniform charter party and bill of lading shall be employed in Cuban and Santo Dominican trades.

Demurrage and Dispatch Money. "* * * That dispatch money shall be paid, if earned, at the rate of sixteen cents (16c.) per gross registered tonnage of vessel per day, to the party or parties responsible for the dispatch."

The committee furnished the blank for the charter party which was used in this case, and it must have been a form prepared at the time they issued these first regulations or before January 4, 1918, when it was used. There being no evidence whatever of any mistake, we are bound to assume that the committee deliberately omitted from the form they supplied the provision as to dispatch money. The charter party constitutes the contract between the parties, and, even if the libelant were entitled under the regulations to dispatch money, it must be taken to have waived this provision by signing the form of charter party which contained no such provision. We think it entitled to no dispatch money.

[4] The third claim, for consequential damages resulting from closing down the refinery, was rightly dismissed. When the charter party was executed January 4, 1918, the parties could not have contracted with reference to the possibility that upon arrival at New York some one of the many refineries in the United States which might purchase the sugar would have to shut down if delivery were delayed. They could not tell to what refinery the sugar would ultimately go, or what the supply of sugar such refinery would have on hand when the vessel arrived. Howard v. Stillwell & Bierce Manufacturing Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147.

The court below is directed to strike out the allowance for dispatch money, and, as so modified, the decree is affirmed, without costs of this court to either party.

ALASKA PACIFIC FISHERIES v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1921.)

No. 3491.

Criminal law ⟸603(7)—Discretionary power not abused in denying continuance.

In a prosecution for unlawfully fishing in Alaskan waters, the trial court did not abuse its discretion in denying a continuance, where defendant's affidavit alleged that its president, who was unable to be present at trial, alone had complete knowledge of the facts, and that it would interrupt defendant's business operations to produce the men who actually operated the traps involved, but did not state to what facts the president could testify, and none of the employees mentioned testified.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska; Robert W. Jennings, Judge.

The Alaska Pacific Fisheries was convicted of unlawfully fishing in Alaskan waters, and brings error. Affirmed.

Hellenthal & Hellenthal, of Juneau, Alaska, for plaintiff in error.
James A. Smiser, U. S. Atty., of Juneau, Alaska.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error corporation was tried and convicted under counts IX, X, XI, XIII, and XIV of an indictment charging it with unlawfully fishing in the waters of Alaska, over which the United States has jurisdiction, and within the First division of that territory, without having the tunnel of its traps—

"closed and without having 25 feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes."

The indictment was returned into the court below September 12, 1918, to which the defendant appeared by its attorneys and filed a demurrer, which was by the court overruled on the 24th of the same month, whereupon the defendant pleaded not guilty, and on the same day an order was entered setting the case for trial, "to follow cause No. 1307–B of the regular trial calendar." After the 24th day of September, 1918, the bill of exceptions recites:

"The case was not again called during the term on account of want of time to try it, and the cause passed over until April 18, 1919, on which date an order was entered setting said cause for trial on June 9, 1919. On June 9, 1919, the cause was not taken up on account of other business in which the court was engaged, and said cause was passed and not taken up again until June 14, 1919, on which date the defendant filed a motion for a continuance, and the case was passed until June 16, 1919, on which date another affidavit in support of its motion for a continuance was filed by O. F. Burckhardt, and in reply thereto there was filed on behalf of the United States the affidavit of Ernest P. Walker and the affidavit of James A. Smiser, United States Attorney."

In each of the counts of the indictment above mentioned, the unlawful fishing is alleged to have been done "between the hours of 6 o'clock post meridian on Saturday, August 17, 1918, and 6 o'clock

ante meridian on Monday, August 19, 1918," in certain designated waters, in and by means of a designated and numbered trap with the defects already specified. The record shows that the indictment originally contained 10 other similar counts, all of which were dismissed on motion of the United States attorney when the case came on for trial.

To the affidavit of the United States Attorney was annexed a copy of a letter that the affiant states he received from H. M. Smith, Commissioner of Fisheries, at Washington, D. C., dated March 7, 1919, "inclosing a typewritten copy of a letter from Charles A. Burckhardt, addressed to Henry O'Malley, United States Bureau of Fisheries, Seattle, Washington, and dated January 18, 1919, in regard to the matters and things complained of in the indictment herein," which letter of said Charles A. Burckhardt is as follows:

Alaska Pacific Fisheries.

"Seattle, Wash., January 18, 1919.

"Mr. Henry O'Malley, Field Assistant, U. S. Bureau of Fisheries, Seattle, Wash.—Dear Sir: Inclosed herewith please find copy of indictment returned against our company, 'The Alaska Pacific Fisheries,' by the grand jury of the United States for the District of Alaska, at Juneau, Alaska.

"In this indictment, you will note that we are charged with unlawful fishing our pile traps in the Ketchikan district, as follows: Trap No. 420, on Aug. 4th, 18th, and 25th; No. 418, on Aug. 4th, 18th, and 25th; No. 419, on Aug. 18th and 25th; No. 421, on Aug. 25th. These traps were operated by Chomley cannery.

"I am also inclosing herewith a letter, addressed to me, from our Mr. I. W. Kelly, superintendent of our Chomley cannery, and attached to Mr. Kelly's letter you will find several letters from our employees, all in reference to the above matter. The writer was in charge of Yes Bay cannery this past season, and at no time during the entire season did any one report to me that our traps were not closed satisfactorily; but, on the contrary, the watchman on the traps advised me that the warden had called at our traps and reported everything satisfactory to him.

"It is true that the hearts of our traps were not let down, but we closed the trap entirely by placing an apron at the entrance of the hearts; this effectively closed the same, so that it was impossible for a fish to enter. Our aprons were all 90 feet long, and were hauled down tight and to the bottom, effectively closing the entire entrance to the trap. If this method of closing had not been satisfactory to the warden, I can assure you we would have immediately changed same and complied with his changes, if he had requested any.

"The first knowledge that we had that this method of closing traps was not approved was when we received copy of the inclosed indictment, about September 20th, long after the fishing season. I now realize that our pile traps were not closed according to the letter of the law and that we are guilty of a technical violation. It was, however, not our intention to violate the law in any respect, and we were of the opinion that, when we had effectively closed our traps so they could not catch any fish, we were complying with the law.

"It hardly seems fair to me that we should be prosecuted on these charges, as we certainly did not fish our traps during the closed period, and, as stated before, would have gladly changed the method of closing our traps, if the method we used did not meet with the approval of the bureau. It has always been our policy to co-operate with your bureau and agents, and the records of both our Chomley and Yes Bay canneries will show this to be a fact. The Yes Bay cannery has been in continuous operation since 1906, operated by myself, and Chomley since 1911, under my supervision, and we have never been guilty of any violation of the fishing laws.

"I sincerely trust that you will give this matter your careful consideration, and, if you find the facts as stated herein, that you can conscientiously lay this matter before the honorable commissioner for his consideration.

"Very truly yours,

"CAB/L. [Signed] C. A. Burckhardt, President."

In support of the motion for the continuance asked for, the affidavit of O. F. Burckhardt was filed, in which he stated in substance that his knowledge of the operations of the business of the defendant company was limited to those in connection with the Chilkoot canneries and that his brother, C. A. Burckhardt, had charge of its operations in connection with the Yes Bay and Chomley canneries of the company; that the affiant was unable to say what C. A. Burckhardt could testify to, if present, and did not know of any person then in Alaska familiar with the facts—

"except the men who are now on the traps themselves, engaged in carrying on the operations, and that these men could not be taken from there and brought to Juneau unless a continuance were had for that purpose, and that it would result in great loss to the Alaska Pacific Fisheries to take these men from their post of duty at the present time, as they are there required to supervise the operations of that business. In this connection affiant avers that he [is] informed and believes that the work at the Chomley cannery is behind, owing to the bad weather, and that it is imperative that those traps be driven at the present time in order to put up the season's pack. Affiant further avers that he does not know to what extent the parties now in charge of the traps would be able to testify in this cause, if present, but knows that no one has a complete knowledge of the facts referred to in the indictment except C. A. Burckhardt; that he is the party who had general supervision and control over the operations; the other men referred to were merely employees under him, who might have knowledge of this or that detail, but who would not have knowledge of the facts as a whole. Affiant further says that it would be necessary for the said C. A. Burckhardt to be present in order to determine what witnesses might be called to prove facts in corroboration of his testimony, or to details not within his knowledge in relation to the matters charged in the indictment; that said C. A. Burckhardt has not been able for some time past to attend to matters of that character, because of the reasons set forth in the original affidavit filed herein."

The first affidavit of O. F. Burckhardt is equally barren of any statement of fact justifying an appellate court in interfering with the discretion of the trial court in denying the motion for a continuance. Not one of the persons shown to be competent to testify to the actual facts concerning the operation of the traps was called on behalf of the plaintiff in error, nor does it appear that any effort whatever was made to procure the attendance of any of them. The circumstance suggested in the affidavit of O. F. Burckhardt that such attendance would have resulted in loss to the defendant company is obviously without any force.

The objections made and exceptions taken to the rulings of the court regarding certain questions to and answers made by some of the witnesses have not, in our opinion, sufficient merit to justify specific reference thereto.

The judgment is affirmed.

MARYLAND DREDGING & CONTRACTING CO., Use of MARYLAND CASUALTY CO. et al., v. HINES, Director General of Railroads, et al.

(Circuit Court of Appeals, Fourth Circuit. December 21, 1920.)

No. 1830.

1. **Carriers ⇐280(1)—Owe highest degree of care to persons waiting to board train.**
   Persons waiting to board a train, or in the act of doing so, at a place where they are invited to be, are entitled to receive from the carrier the highest degree of care for their safety consistent with the mode of conveyance and its practical operation.
2. **Carriers ⇐302(1)—Must furnish police force sufficient to prevent anticipated crowding of passengers.**
   Though carrier is not required to furnish a police force sufficient to overcome all violence to passengers from strangers not reasonably to be expected, it must furnish sufficient force to protect the passengers from assaults or violence of other passengers or strangers, which are reasonably to be expected, including the protection against the rush of a crowd trying to board a train at a station.
3. **Carriers ⇐287(1)—Not liable for failure to police military reservation.**
   A carrier, which furnished to the United States government under contract a train to transport its workmen to a city from a station on the reservation, which was subject to exclusive control of military authorities and policed by them, is not liable for injuries to a passenger crowded under the train, because the police force furnished by the military authorities was insufficient to control the crowd.

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

Action by the Maryland Dredging & Contracting Company, for the use of the Maryland Casualty Company and Frank O. Stromberg, against Walker D. Hines, Director General of Railroads, and another. Judgment for defendants on a directed verdict, and plaintiff brings error. Affirmed.

Albert J. Fleischmann, of Baltimore, Md. (H. Mortimer Kremer, of Baltimore, Md., on the brief), for plaintiff in error.

Shirley Carter, of Baltimore, Md., for defendants in error.

Before KNAPP and WOODS, Circuit Judges.

WOODS, Circuit Judge. In December, 1918, the United States government was constructing a spur track as a military road from Aberdeen, a station on the Pennsylvania Railroad, into the proving grounds near by. The work was done under contract by the Maryland Dredging Company. The Director General, operating the Pennsylvania Railroad Company, ran a work train from Baltimore to Aberdeen to carry the men engaged in the construction of the road and other work in the proving grounds. When five or six miles of the military road had been built, the War Department contracted with the Director General to run from Aberdeen a work train on the government spur track to its end, so as to carry the workmen into the proving grounds and bring them back to Baltimore. The compensation for this service

into the proving grounds was not on a basis of fare for each workman, but was a fixed sum a day for the use of the locomotive and cars and the service of the crew. The Director General had no other right, authority, or duty connected with this military spur track beyond the running of this train and the carrying of the workmen. The military authorities ran on the same track a small locomotive and cars for other purposes. Within the proving grounds all the facilities for taking on and discharging passengers were under the control and direction of the War Department. About 2,000 men were carried on each work train, and every day, when the train arrived to take the workmen back to Baltimore, there was a rush to get on and secure seats. There were no platforms, no gates, no guard rails. The military authorities undertook to police the place where the workmen got on the cars with armed soldiers. This military police was never sufficient in number, however, to prevent the rush, and sometimes no police was provided.

On Saturday, December 17, 1918, the plaintiff Frank O. Stromberg, one of the workmen employed by the Maryland Dredging & Contracting Company, when trying to get on the train in the general rush, was thrown under the car by the crowd and had his foot cut off. This action was brought by him to recover damages, on the allegation that the Director General was negligent in failing to furnish a safe place for him as a passenger to take the train. On evidence, the substance of which is stated above, the District Judge directed a verdict for the defendant.

[1, 2] The general rule is well established. Persons waiting to board a train, or in the act of doing so at a place where they are invited to be, are entitled to receive from the carrier the highest degree of care for their safety consistent with the mode of conveyance and its practical operation. Carriers are not required to furnish a police force sufficient to overcome all violence of other passengers or strangers, when such violence is not to be reasonably expected; but the carrier is required to furnish sufficient police force to protect its passengers from the assaults or violence of other passengers or strangers which might reasonably be expected, and to see that its police perform their duty. This obligation extends to the protection of passengers against the rush of a crowd of persons trying to get on the train, where such a crowd is usual at the boarding place of the carrier. Kuhlen v. Boston, etc., Rrd. Co., 193 Mass. 341, 79 N. E. 815, 7 L. R. A. (N. S.) 729, 118 Am. St. Rep. 516; Dixon v. Great Falls, etc., Rrd. Co., 38 App. D. C. 591, 28 Ann. Cas. 571, and note.

[3] These duties and obligations depend, however, on the authority and power of the carrier to control and police the place where passengers take the train. Here the place for boarding the train was owned by the government, in the possession and control of the military authorities, and the carrier had acquired no right and assumed no duty, except to run a locomotive and cars safely on the military spur track, and to provide so far as it could for the safety of passengers after they had boarded the train and thus come under the protection of the train crew. The military authorities, so far from consenting to the carrier's exercising control of the place for boarding the train, had

themselves assumed the duty of policing it and restraining the crowd of workers.

The case is entirely apart from those cases holding one connecting carrier liable for the negligence of another, and a lessor liable for the negligence of a lessee, on the ground of imputed agency.

The plaintiff relies on Littlejohn v. Fitchburg R. Co., 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502, laying down this proposition:

"If the danger might have been discovered by * * * due care, the defendant will be liable, whether the defect was in the original construction of the road, or was due to a failure on the part of the commonwealth to make necessary repairs, or however otherwise it may have been caused. If the defendant carried its passengers into a place which it knew or ought to have known was dangerous, it was negligent, although it did not create, and had no right to remove, the danger."

As a general proposition this is sound; but surely it cannot be extended to require the refusal of the defendant to carry out its contract with the government to run its train in the reservation carrying workmen, because the government did not safely police a boarding station under its exclusive control.

The relation of the carrier to the boarding station was analogous rather to that of a surface street railway company to boarding places on the streets. Since the streets are not under its control, a street railway company is not ordinarily held responsible for the condition of the streets or for the crowds rushing to its cars. Cases on this subject are cited in 10 Corpus Juris, p. 913.

In Bryson v. Hines, Director General and Atlantic Coast Line Rrd. Co., 268 Fed. 290, cars were run into the government property at Camp Jackson, to be loaded with soldiers for transportation. There was a derailment, and actions for damages for the death of two soldiers. This court said:

"We think there can be no recovery for negligence in putting light wooden cars between heavy steel cars, in consequence of which the wooden cars were crushed by the derailment. The officers of the army had entire control of the arrangement of the cars, and for their negligence in this respect there was no right of action against either of the defendants."

So here, the military authorities having the entire authority and control of policing the station for boarding the train, there can be no recovery against the Director General for failure to perform that service.

Affirmed.

In re BRADLEY.

Petition of TODD.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 25

1. **Bankruptcy ⟸467—Strong presumption sustains findings of referee concurred in by court.**
   Where the District Court and the referee agree, their conclusion as to facts will be accepted by the Circuit Court of Appeals, unless justice requires a different conclusion.
2. **Bankruptcy ⟸267—Mortgage to minor children held valid.**
   In proceeding to determine right to proceeds of property sold free from lien of mortgages to bankrupt's daughters, findings of a referee, concurred in by the District Court, that the mortgage was valid as securing funds of the daughters, for which he had been trustee for more than 10 years, *held* sustained by the evidence.

Petition to Revise Order of the District Court of the United States for the District of Connecticut.

In the matter of Walter H. Bradley, bankrupt. James E. Todd, trustee, appeals from, and also petition to revise, order of District Court. Petition dismissed. Affirmed on appeal.

For opinion below, see 263 Fed. 446.

Stoddard, Goodhart & Stoddard and Bristol & White, all of New Haven, Conn. (Robert C. Stoddard and Frederick H. Wiggin, both of New Haven, Conn., of counsel), for appellant.

Slade, Slade & Slade, of New York City, and Harry W. Asher, of New Haven, Conn. (Benjamin Slade, of New York City, of counsel), for respondents.

Before WARD, ROGERS and MANTON, Circuit Judges.

MANTON, Circuit Judge. Appellant seeks to review the result below by a petition to revise, as well as an appeal. We are of the opinion that his proper procedure is by an appeal, and the petition to revise is therefore dismissed.

[1, 2] Walter H. Bradley was adjudicated a bankrupt on November 1, 1915, on a voluntary petition. He filed his schedules in bankruptcy and, under Schedule B, described as "Location and description of all real estate owned by the debtor or held by him," he described two pieces of property, giving the value of one as $20,000, with incumbrances thereon of $10,000 to Esther and Helen Bradley, and valued a second piece at $25,000, with incumbrances thereon of $10,000 to Barbara Ploegar and a $30,000 mortgage to Helen T. Bradley.

These second mortgages on each of the parcels named his minor daughters as mortgagees. They were aged, respectively, 12 and 17 years. On a petition of the trustee and on an order of the referee, the two pieces of property were sold free of the mortgages to the minor children of the bankrupt, and netted in proceeds above the first mortgages $20,050, and this sum is now in the hands of the trustee. The

question presented on this appeal is: To whom does this $20,050 belong? The trustee claims that the mortgages were placed upon the property to hinder, delay, and defraud the creditors of the bankrupt; the guardian appointed by the court contends that this surplus money belongs to the minor children of the bankrupt in satisfaction of their second mortgages.

The District Court has confirmed the determination of the referee in bankruptcy, holding that the mortgages were valid, and were not made to hinder, delay, or defraud the creditors, and that the surplus money properly belongs to the minor children in satisfaction of their mortgages. There are facts in this record which justify the findings below.

It appears that the bankrupt, for more than 10 years prior to the adjudication in bankruptcy, was trustee of his minor children's estate; that is, Esther A. and Helen T. Bradley. He bought and sold various properties and made investments of their funds. At the time of the purchase of the real estate in question, on which the two mortgages were placed, the bankrupt requested the deeds to be made in his name as trustee for the children; but upon legal advice, which he sought, the title of the property was taken in his individual name, and mortgages were executed to the children for an amount sufficient to cover the purchase price and cost of contemplated improvements of the property. The property in question was thus purchased with funds belonging to the children. It appears that in 1902 Mrs. Bradley, the wife of the bankrupt, with her own money, purchased a one-half interest in a hotel located at Ithaca, N. Y. This one-half interest she conveyed to her husband, as trustee, for her children under a trust agreement, in writing, which was dated March 11, 1902, and duly recorded in the county where the hotel property was located.

Between 1890 and 1907, the evidence indicates that the bankrupt lost a large sum of money in a business enterprise. Since 1907 he has had no property. The one-half interest in the hotel, covered by the trust agreement, netted a return of $3,500 per year. This was sold in 1913 for $40,000. Investments were then made in stocks and a large profit realized, and the fund in question grew to $100,000. It also appears that the bankrupt handled property belonging to the children in the capacity of a guardian, which came from their grandmother, and which was given to them during her lifetime. This he invested in real estate and stocks. The bankrupt, as such trustee and guardian, from time to time, collected the income and profits belonging to this trust estate and the guardian estate, and at times made other investments for them. He states that one of the reasons the real property in question was purchased was that, after advice and co-operation of his wife, it was agreed to purchase it for the purpose of starting one of the children in a musical studio with her teacher. For this purpose, a loan of $8,000 was obtained from a bank at Meridan and borrowed in his capacity as guardian, for which he gave the bank collateral security belonging to his wards.

Between January and February, 1915, the bankrupt, as trustee, received $20,000 due to his cestui que trusts, on a promissory note dated

July 1, 1909, and this for moneys due the bankrupt's children, loaned by them to the Bergen Company. And on January 1, 1915, the bankrupt, as trustee, received from the Bergen Company a check for $2,900 in part payment of moneys due from the Bergen Company to his children. On May 7, 1915, as trustee, he received from the Bergen Company a check for $4,000. It appears that these funds were used for the purchase price of the property in question. He paid $7,000 for the College street property and for the other property $11,000. He had procured toward the purchase price the additional sum, which was to be used for contemplated improvements on the property, part of which improvements were made prior to the bankruptcy. The referee has found that these funds, used in the purchase of the property, belong to the children. The District Court approved that finding. This record reveals a desire, abundantly proved, on the part of the bankrupt and his wife, to preserve this money for the benefit of their children, and the taking of the title in the way it was taken was pursuant to the advice of counsel. Where both the District Court and the referee agree, their conclusions will be accepted by the Circuit Court of Appeals, unless justice requires a different conclusion. Salsbury v. Blackford, 204 Fed. 438, 122 C. C. A. 624, 29 Am. Bankr. R. 320; In re Lawrence, 134 Fed. 843, 13 Am. Bankr. R. 798; Poff v. Adams, 226 Fed. 187, 141 C. C. A. 185, 35 Am. Bankr. R. 307.

It is further contended that the amount of the mortgages on the two pieces of property amounting to $40,000, was so much in excess of the purchase that it is an indication of fraud. The evidence disclosed, however, that at the time of purchase the bankrupt intended to improve the property. Even though the mortgage did not state the exact transaction as to future indebtedness, it recites a present indebtedness. It is clear here that the bankrupt did owe his daughters funds to the extent of $20,000. He was justified, if such was the fact, to give the mortgages for the amount owed as trustee. The past consideration was for this amount, and was sufficient. It was given four months before the filing of the petition, and is not a fraud as against creditors.

The decree below is affirmed.

RICHMAN v. MULCAHY & GIBSON, Inc., To Use Of NATIONAL SURETY CO.

(Circuit Court of Appeals, Third Circuit. January 26, 1921. Rehearing Denied March 3, 1921.)

No. 2601.

1. Judgment ⊂=942—In action on judgment of state court, it is assumed that party was properly substituted as plaintiff in state court, though record contains no specific order.

In an action at law in a federal court of a district in one state on a judgment obtained in the court of another state, the judgment against the defendant as substituted plaintiff on a counterclaim in the state court must stand, although the judgment roll from the state court contains no specific order of substitution, as in the absence of proof to the

contrary the recitals and decree must stand above unsubstantiated attack.

2. Trial ⊂⊃177—Both parties concluded by finding of court on joint request for finding.

Action of the parties in praying the court for binding instructions in their favor, respectively, on a matter involving a fact, was equivalent to a joint request for a finding of fact by the court, and when the court, acting upon such request, directed the jury to find for one of the parties, both are concluded by its finding.

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

Action at law by Mulcahy & Gibson, Incorporated, to the use of the National Surety Company, against Joseph A. Richman on a foreign judgment. Judgment for plaintiff (265 Fed. 733), and defendant brings error. Affirmed.

Paul Reilly and William W. Mentzinger, Jr., both of Philadelphia, Pa., for plaintiff in error.

C. Wilfred Conard and Conard, Middleton & Orr, all of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and BODINE, District Judge.

BODINE, District Judge. Mulcahy & Gibson, a corporation of the state of New York, to the use of National Surety Company, brought an action in the United States District Court for the Eastern District of Pennsylvania against Joseph A. Richman, a citizen and resident of the state of Pennsylvania upon a judgment obtained in the Supreme Court of the state of New York. The exemplified copy of the judgment record, upon which the suit was predicated, introduced in evidence at the trial, shows that Charles Somberg commenced a suit in the Supreme Court of the state of New York against Mulcahy & Gibson and others upon a written contract assigned to him by Richman. Mulcahy & Gibson filed a counterclaim, based upon an alleged liability of Richman to them. The issue raised by these pleadings, as appears from the decision and notice of filing entered in the New York court, was tried by the court, without a jury, for a period of five days. The decision and notice are captioned in the cause, and show Joseph A. Richman as substituted plaintiff, in place of Charles Somberg, plaintiff, and after naming the counsel appearing for Richman, and after reciting the acts done by Joseph A. Richman and the acts done by Mulcahy & Gibson, Incorporated, awards a judgment against said Richman. The judgment, as entered, likewise shows in the caption Joseph A. Richman as substituted plaintiff in place of Charles Somberg, and orders in formal language that Mulcahy & Gibson do recover a judgment against the plaintiff, Joseph A. Richman, naming him, upon the counterclaim pleaded.

[1] So much of the judgment roll in the Supreme Court has been referred to, for the reason that counsel for the plaintiff in error argued in this court that the judgment in the Supreme Court of the

state of New York was entered without notice to Richman and without his appearing in the cause. These assertions are at variance with the recitations in the New York proceedings, and although the proceedings in New York nowhere contains a specific order of substitution, the proceedings are of such a character that, if full faith and credit is to be given to them, it necessarily follows that, in the absence of proof to the contrary, the recitals and decrees must stand above unsubstantiated attack.

At the trial, the plaintiff rested upon proving an exemplified copy of the judgment roll in the New York action. The defendant, having offered in evidence the charter of the National Surety Company, for the alleged purpose of showing the limit of its corporate powers, rested. The learned trial judge directed a verdict for Mulcahy & Gibson on the judgment obtained in the state of New York. The errors assigned relate to this action.

A presumption naturally arises in favor of the validity of a judgment obtained in the courts of another jurisdiction; the plaintiff having offered in evidence the judgment roll, and the defendant having failed to offer any evidence affecting the validity, or, indeed, that neither personally nor by counsel did he have a hearing, there was no evidence upon which the trial judge could do otherwise than direct a verdict for the plaintiff.

[2] The action of the parties (in praying the court for binding instructions in their favor respectively on a matter involving a fact) was equivalent to a joint request for a finding of fact by the court, and when the court, acting upon such request, directs the jury to find for one of the parties, both are concluded on its finding. Beutell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; Williams v. Vreeland, 244 Fed. 346, 353, 156 C. C. A. 632.

CONNELLY v. ALLEN.

(Circuit Court of Appeals, Third Circuit. January 13, 1921.)

No. 2556.

1. **Master and servant ⇐88(5)—Volunteer assisting employé not fellow servant.**
   Where plaintiff railroad employé had voluntarily assisted defendant contractor's employé in unloading coal cars, and was seeking a place of safety when injured, he was not then a fellow servant of defendant's employé, since the voluntary service had terminated.

2. **Master and servant ⇐304—Moving crane held negligence as to volunteer assisting employé.**
   Where plaintiff railroad employé voluntarily assisted defendant contractor's employé in unloading a coal car, it was negligence for defendant's employé to move the crane, after promising not to do so, and while knowing that plaintiff was still in danger.

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Action by Andrew Allen against Patrick Connelly. Judgment for plaintiff, and defendant brings error. Affirmed.

Marshall Van Winkle, of Jersey City, N. J., for plaintiff in error.

Benjamin J. Spitz, of Paterson, N. J., and Joseph A. Shay, of New York City, for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and BODINE, District Judge.

BODINE, District Judge. Andrew Allen, the plaintiff below, a young man of 23 years of age, was employed on the evening of September 27, 1917, and for some time prior thereto, by the Erie Railroad Company as a checker in the Croxton yards in Jersey City. Patrick Connelly, the defendant below, had a contract with the Erie Railroad Company for unloading coal cars; the unloading being accomplished by means of a locomotive crane. Allen's duty was to check up the number of cars unloaded by Connelly—their capacity and weight. The work did not consume his entire time, but necessitated his presence in the yard during the period that he was on duty. At about 8 o'clock on the evening in question, Connelly's locomotive crane was in the lower part of the yard for the purpose of taking on water. The water was taken by means of a hose from a water tower. The testimony of Allen was to the effect that Connelly's fireman asked him to hand up the hose, so that the tank on the crane might be filled. To reach the hose, Allen was obliged to climb over coal, which was piled up about 3 feet high along the track. In order to facilitate the filling of the tank, the locomotive crane had been swung around, so that the boom, as well as the cab from which the crane was operated, was horizontally across the track. The tank being filled, the hose was handed to Allen by the fireman, and he shut off the water "and hollered at the engineer to wait a moment until [he] got out of the way," and he answered he would. Just as Allen cleared the machine, the engineer started up the engine to turn the crane back in place, and Allen was struck and seriously injured. Allen's story was controverted by witnesses called by the defendant.

[1 2] The learned trial judge charged the jury, in part, in the following language:

"If you find, therefore, that his [Allen's] account of how the accident occurred is the correct one and not the account as alleged by the defendant, then the defendant was under the duty to use that degree of care which a reasonably prudent person would have exercised under the circumstances, at that time and place, in order not to injure the plaintiff. * * * Now, if you turn to the other side and believe the statement of the plaintiff, that he told the engineer to wait until he got out of the way, and he was not upon the crane, then it was the duty of the defendant, through his agents and servants, to use the care and caution that a reasonably prudent man would have exercised in order not to injure the plaintiff; and if the servants and agents and employés did not use that care, and the plaintiff was injured in consequence, then the defendant is liable."

This charge, in the light of the testimony, was in all respects proper. Allen was in no sense the fellow servant of the defendant's employé at the time he was injured, if the jury believed his story. The

only thing that remained to be done was for Allen to gain a point of safety. The voluntary service he had rendered had terminated. The jury must have believed his story in this respect, and also when he said that the defendant's employé knew the danger Allen was in. It was, therefore, clearly negligent for the defendant's employé to put in motion a force which he promised not to do, which force, the jury found, caused the injury to Allen. These circumstances take the case out of the line of cases typified by Kierman v. New Jersey Ice Co., 74 N. Y. Law, 175, 63 Atl. 999, where a person is injured by the act of a servant while riding on a wagon or a street car, or other unauthorized place. There was clearly a duty upon the defendant's employé to use reasonable care under the circumstances, and the jury found that he did not.

The other assignments of error are without merit, in that they overlook the fact that Allen's service had terminated, and that he was seeking a place of safety, had apprised the defendant's employé of his position of danger, and secured the promise to delay until he gained a point of safety.

The judgment below is affirmed.

FOREIGN & DOMESTIC TRANSP. CORPORATION v. CURTIS.

(Circuit Court of Appeals, Third Circuit. January 13, 1921.)

No. 2569.

Appeal and error ⊂⊃215(1)—Instruction authorizing verdict of no cause of action, instead of nominal damages, held not reversible, in absence of objection.

In an action against the seller of a ship for the cost of repairs necessary to make the ship conform to the warranty of seaworthiness, where the evidence showed that some of the repairs were necessary for that purpose, but that other repairs were in the nature of improvements, and furnished no basis for determining the proportion of the necessary repairs, or their cost, an instruction, not objected to at the trial, that if the evidence did not enable the jury to calculate the cost of the necessary repairs with reasonable certainty, the verdict should be no cause of action, does not require reversal, although plaintiff was entitled at least to nominal damages.

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Action by the Foreign & Domestic Transportation Corporation against Asher Curtis. Judgment for defendant, and plaintiff brings error. Affirmed.

John M. Enright and McDermott & Enright, all of Jersey City, N. J., for plaintiff in error.

David A. Newton, of Jersey City, N. J., and George S. Hobart, of Newark, N. J., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and BODINE, District Judge.

BODINE, District Judge. Asher Curtis, the owner of a seven undivided sixty-fourths interest in the schooner Benjamin A. Van Brunt, for himself and others, on April 24, 1916, entered into a contract for the sale of the vessel. The contract contained a clause that the vessel was guaranteed sound and seaworthy. Mr. Curtis, having acquired the interest of the other owners in the meantime, delivered a bill of sale, without warranty, for the vessel, and she was accepted by the plaintiff corporation, which subsequent to the acceptance of her had certain repairs made, part of which were claimed to be necessary in order to render her sound and seaworthy.

The plaintiff brought this action for breach of the warranty contained in the contract for sale, seeking as damages the cost of such repairs. The jury having determined in favor of the defendant, there is no need to pass upon the propriety of the maintenance of the plaintiff's action, but by reason thereof no inference is to be drawn that the previous warranty was not merged in the bill of sale without warranty and the acceptance of the vessel by the plaintiff after inspection. During the course of the trial, it developed that the plaintiff's proof of damages showed that some of the expenses were incurred for improvements and betterments in the vessel and others for making her sound and seaworthy. There was no attempt made at segregating the expenses, nor were any witnesses called who could furnish the jury with any idea as to what part of the expenses were incident to making the vessel sound and seaworthy and what part were for betterments and improvements upon her.

The question of damages was submitted to the jury by the trial judge in the following language:

"If you should find that part of the work was necessary to make her sound and put her in a seaworthy condition, and the other part which was done by the plaintiff was not necessary, and you cannot separate them from the evidence which has been presented, so that you can calculate with reasonable certainty the cost of that which was necessary, then you would not be allowed to guess and estimate it upon some basis not presented to you here in the testimony; and in that event your verdict would be *'no cause of action,'* because you could not reach a conclusion as to what was necessarily required to make her sound and put her in a seaworthy condition."

The charge, in substance, correctly states the rule of damages in contract actions, except in the use of the words "no cause of action," which we have italicized. Error was assigned, in that the trial judge should have substituted "nominal damages" for the words "no cause of action." This inadvertence of the trial judge, if error, was not called to his attention. Had it been called to his attention, it no doubt would have been corrected, for it is obvious that the party who has proved a cause of action is entitled to at least nominal damages. The substitution, however, of such language in the charge, would have made no substantial difference in the findings of the jury, for the only difference which the use of the words "nominal damages" would have made would have been the carrying of a certain amount of costs.

No other error appearing in the record, and this now alleged error not having been brought to the attention of the trial judge, the judgment is affirmed, with costs.

SIGMUND ULLMAN CO. v. CABOT.

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

No. 44.

Sales ⇐81(6)—Contract for one year expired at end of year.

Under a contract by plaintiff to deliver to defendant five cars of carbon black during 1915, with privilege to defendant to cancel the contract for whatever quantity not required during the year, defendant *held* not entitled to subsequently demand delivery of the quantity not taken during the year.

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

Action at law by Godfrey L. Cabot against the Sigmund Ullman Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Paskus, Gordon & Hyman, of New York City (A. B. Hyman, of New York City, of counsel), for plaintiff in error.

James L. Putnam, of New York City, for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. July 21, 1915, the plaintiff, Cabot, agreed to deliver to the Ullman Company, defendant, five cars of carbon black during the year 1915 at 4½ cents per pound, upon the following terms:

"We hereby agree to take five cars of G Elf carbon black in addition to our contracts of May 1, 1913, and April 9, 1915. This black to be taken during the year 1915, same terms and conditions as on our contracts, the price to be 4½c. per pound.

"It is understood that if we do not require this quantity of black during the year 1915, we are privileged to cancel the contract for whatever quantity we have not taken."

September 26, 1917, Cabot agreed to deliver to the defendant and the defendant agreed to take 24 cars of carbon black at 20 cents per pound, subsequently reduced by agreement to 15 cents.

Cabot brought this action to recover the price of one car shipped in March, 1918, at 15 cents per pound, $4,826.25. The Ullman Company pleaded as a set-off that Cabot had failed to deliver two cars under the contract of July 21, 1915, to its damage $3,392.85, and tendered the difference between the amount of its damage aforesaid and the sum sued for, $4,826.25, viz. $1,433.40.

September 26, 1915, Cabot asked the Ullman Company for shipping instructions for the three cars then undelivered under the contract of July 21, 1915, but only an order of December 20, 1915, for one car was given in 1915.

Judge Mack held that the contract of July 21, 1915, gave the plaintiff an option to take any or all of five cars in 1915 and, no orders having been given in that year for the two undelivered cars, the option terminated, and they could not be ordered out subsequently. Accordingly

he directed a verdict for the plaintiff, and the defendant took this writ of error.

The Ullman Company contends that, as it did not expressly cancel the contract of July 21, 1915, it continued in force. We think the contract was rightly construed, because it was intended to meet the Ullman Company's requirements in 1915, and the cars were to be ordered in that year, after which it expired by its own limitation.

The judgment is affirmed.

PEOPLE'S NAV. CO., Inc., et al. v. TOXEY et al.

TOXEY et al. v. PEOPLE'S NAV. CO., Inc., et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

Nos. 1833, 1834.

Shipping ⇐203—Statute limiting liability should be liberally construed.

Rev. St. § 4283 (Comp. St. § 8021), limiting the liability of a vessel owner for loss incurred without knowledge to the value of the owners' interest in the vessel and her freight then pending, should be liberally construed in favor of shipowners, so as to encourage shipbuilding and the employment of ships in commerce.

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

Petition by the People's Navigation Company, Incorporated, and others for limitation of liability, opposed by A. F. Toxey and others. From a decree of the District Court (261 Fed. 797), denying the petition, both parties appeal. Affirmed.

Edward R. Baird, Jr., of Norfolk, Va. (Baird & White, of Norfolk, Va., on the brief), for People's Nav. Co., Inc.

S. M. Brandt, of Norfolk, Va. (John W. Oast, Jr., and H. A. Sacks, both of Norfolk, Va., on the brief), for administratrices of W. N. Kinsey and Freeman Coleman.

Leon T. Seawell, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., and E. F. Aydlett, of Elizabeth City, N. C., on the brief), for A. F. Toxey & Co., W. J. Woodley, C. W. Stevens & Co., Inc., executors of J. B. Flora, and W. H. Weatherly & Co.

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

WOODS, Circuit Judge. [1] Section 4283 of the Revised Statutes provides:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." Compiled Statutes, § 8021.

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

We not only recognize, but are in full sympathy with, the numerous authorities holding that this act should be liberally construed in favor of shipowners, so as to encourage shipbuilding, and the employment of ships in commerce. Providence & New York Steamship Co. v. Hill Manufacturing Co., 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; Butler v. Boston & Savannah Steamship Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334, 39 Sup. Ct. 292, 63 L. Ed. 631. In this case the testimony is conflicting as to the cause of the explosion, the condition of the boilers of the vessel and the knowledge of the owners of the alleged unsafe condition of the boilers. On all of these vital issues, however, the conclusion of the District Court is supported by very strong evidence—so strong that we are unable to say that even the preponderance is against his conclusion.

It follows that the decree of the District Court must be affirmed. Analysis of the testimony would be of no value.

Affirmed.

W. H. BAKER, Inc., et al. v. MONARCH WHOLESALE MERCANTILE CO.

(Circuit Court of Appeals, Fifth Circuit. January 6, 1921.)

No. 3615.

Bankruptcy ⇐63—Petition by corporation for dissolution under state laws does not authorize involuntary proceedings against it.

The filing by a Texas corporation, which had paid or was able to pay all its creditors, of a petition for dissolution under Rev. St. Tex. 1911, arts. 1205–1207, does not authorize the creditors to have the corporation adjudged an involuntary bankrupt.

Appeal from the District Court of the United States for the Eastern District of Texas; W. Lee Estes, Judge.

Involuntary petition in bankruptcy by W. H. Baker, Incorporated, and others, against the Monarch Wholesale Mercantile Company. From a judgment denying the adjudication and dismissing the petition, petitioners and intervening creditors appeal. Affirmed.

Hopkins & Jackson, of Denton, Tex. (George M. Hopkins, of Denton, Tex., of counsel), for appellants.

W. L. Hay, of Sherman, Tex., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Appellee, a Texas corporation, applied to the Secretary of State for dissolution, under the provisions of articles 1205, 1206, and 1207, Texas Revised Civil Statutes of 1911.

Appellants claimed to be creditors, and three of them seized upon this procedure by appellee for its corporate dissolution as an act of bankruptcy, and the other creditors intervened. Appellee promptly paid the petitioning creditors, other than W. H. Baker, Incorporated,

and paid into the registry of the court, after tender and refusal, the amount of $246.24 claimed to be due it, together with interest.

The court found that appellee had paid off and discharged its debts to intervening and all other creditors before either the application for dissolution or petition in bankruptcy. The evidence is not presented to us, and it is therefore assumed that the court decided correctly upon the issues of fact. The court also allowed, upon consent of appellee, an attorney's fee for W. H. Baker, Incorporated, of $250.

The utmost claimed by appellants is technical error in denying an adjudication and in dismissing the petition. Appellants have failed to show any injury resulting to any of them. If appellee committed any act of bankruptcy at all, it consisted solely in the circumstance that it availed itself of the laws of Texas, which provide a method for the dissolution of corporations.

The bankruptcy statute was not enacted for the purpose of enabling creditors to harass a debtor, or to prevent a debtor corporation from resorting to the laws of the state which created it for the purpose of winding up its affairs and procuring its dissolution. It would be mere officious interference with salutary statutory provisions of Texas to force the dissolution of appellee through bankruptcy proceedings.

The appeal is wholly without merit, and the judgment is affirmed.

In re CARLUCCI STONE CO.

(District Court, M. D. Pennsylvania. December 28, 1920.)

No. 2437.

1. **Bankruptcy ⇐372—Petition to reopen estate need not be formal, being sufficient if showing estate was closed before fully administered.**
   Under Bankruptcy Act, § 2, subd. 8 (Comp. St. § 9586), the proceeding to reopen an estate need not be formal, and a petition is sufficient to support an order to reopen, if it contains sufficient information to satisfy the court of the jurisdictional fact that the estate was closed before fully administered.

2. **Bankruptcy ⇐372—Where petition alleges assets of the bankrupt remain unadministered, court may reopen the proceedings.**
   When a petition contains allegations of fact satisfying the conscience of the court, prima facie, that assets of the bankrupt remain unadministered, the court in the exercise of its discretion may reopen the proceedings.

3. **Bankruptcy ⇐372—Order reopening the estate will be reversed only for abuse of discretion.**
   An order reopening the estate of a bankrupt will be reversed only for an abuse of the discretion of the court; that is, where the court acts arbitrarily or without apparent reason and authority.

In Bankruptcy. In the matter of the Carlucci Stone Company, bankrupt. Sur petition to reopen estate for further proceedings. On rule to set aside the order reopening the estate. Rule dismissed.

Lee P. Stark, of Scranton, Pa., for petitioner.
John Memolo, of Scranton, Pa., for bankrupt.

WITMER, District Judge. On examination of the petition it appears that the order opening and referring for further proceedings was orderly, and founded on a petition alleging the necessary jurisdictional facts. This is the only matter entitled to consideration. Whether the trustee has a meritorious and valid claim against the bankrupt, on which he is endeavoring to recover by bill in equity filed, is another matter, and will receive consideration in its order.

[1] Complaint is made that the opening order was ex parte. In answer it may be said that the proceeding to reopen, authorized by section 2, subdivision 8 of the Bankruptcy Act (Comp. St. § 9586), need not be formal. The order may be based on a petition without technical conformity of any kind, if it contains sufficient information to satisfy the court of the necessary jurisdictional fact, to wit, that the estate was closed before it was fully administered. In re Newton (C. C. A. 8th Cir.) 6 Am. Bankr. R. 52, 107 Fed. 430, 49 C. C. A. 399; In re Graff et al. (C. C. A. 2d Cir.) 250 Fed. 997, 163 C. C. A. 247.

[2, 3] When the petition contains allegations of fact satisfying the conscience of the court, prima facie, that assets of the bankrupt remain unadministered, the court, in the exercise of its discretion, may reopen the proceedings. Matter of Paine (D. C.) 11 Am. Bankr. R. 351, 127 Fed. 246. It is only for the abuse of discretion that the court will be reversed; that is, where the court acts arbitrarily, or without apparent reason and authority. In re Goldman, 11 Am. Bankr. R. 707, 129 Fed. 212, 63 C. C. A. 370.

Such has not been the case here. The petition on which the order was based contains the required information supporting the order entered, and the same will not be disturbed.

The rule to set aside is dismissed, at the cost of the petitioner

THE COCA-COLA BOTTLING CO. v. THE COCA-COLA CO.

(District Court, D. Delaware. November 8, 1920.)

No. 389.

1. **Evidence ⇐397(2)—Antecedent negotiations inadmissible to vary contracts.**
   Persons who put their contracts in writing must, in the absence of fraud, accident, or mistake, be taken to have embodied their whole engagement therein, so that its terms may not be varied or controlled by antecedent negotiations or declarations.
2. **Contracts ⇐169—Construed in light of conditions to give effect to intention of parties.**
   The court, in ascertaining and giving effect to the mutual intentions of the parties as expressed in a written contract, may, and should so far as possible, put itself in the position of the parties to the contract and examine into the circumstances under which it was made.
3. **Contracts ⇐147(3)—Construed as a whole.**
   The intentions of the parties as expressed in the contract must be ascertained from the agreement as a whole, and from all its terms considered together, since the entire intention of the parties was not expressed in any one clause.

4. Contracts ⇐143—Meaning not to be defeated by construction to accomplish good.
In construing contracts, the court must be on guard lest under the guise of construction to bring about some ultimate good, or to thwart an apparent wrong, or prevent hardship, a contract different from that made by the parties be built up.

5. Property ⇐2—Sales ⇐10—Secret process is salable property.
A secret process or formula for the manufacture of an article is one in which property rights can exist, and such rights can be sold in whole or in part, so long as the process remains valuable because it is secret.

6. Contracts ⇐118—Covenant not to use secret process sold is valid.
A sale of an interest in a secret process may be accompanied by a covenant that the seller will not thereafter use the process or communicate it to any other person, and such covenant is valid and binding.

7. Good will ⇐5—Is salable property.
The good will of a corporation engaged in the manufacture of a particular article is property, which may be bought and sold in connection with the business as an incident thereof.

8. Trade-marks and trade-names ⇐33—Trade-mark is property right, salable with business.
The right to a trade-mark is a property right, which may be sold in connection with the good will of a business, since it is the symbol of part or all of the good will; but it cannot be sold wholly dissociated from the business or merchandise with which it has become established.

9. Trade-marks and trade-names ⇐33—Trade-mark assignable between manufacturer and retailer.
The trade-mark of retailer may be assigned by him to the manufacturer, who makes the goods which he sold under that trade-mark; likewise the manufacturer of goods may assign his trade-mark to one who sells the goods for him.

10. Trade-marks and trade-names ⇐33—Owner of potential business may transfer it with trade-mark.
A manufacturer of syrup, which had theretofore been used only for the making of drinks at soda fountains, in connection with which its trade-mark had acquired a well-established meaning, has a potential business for the bottling of such syrup with carbonated waters, and sale thereof under the trade-mark, which it can transfer to another in connection with an interest in the trade-mark, though it had never yet engaged in such business.

11. Trade-marks and trade-names ⇐35—Contract held to transfer interest in trade-mark to business to be established.
In a contract whereby the manufacturer of a syrup for soda fountain drinks granted the exclusive right to bottle and sell beverages under its trade-mark within a specified territory to a corporation, which agreed to establish a bottling plant sufficient to meet demand for the product in the specified territory, and to purchase syrup for such drink from the manufacturer, who agreed to sell syrup for bottling purposes only to the bottling company within that territory, neither the conveyance of the interest in the trade-mark nor the provisions for the sale of the syrup form the controlling feature to which the others are incidental, but the contract as a whole transfers to the bottling company the potential business which the manufacturer had never developed of bottling its syrup for the trade, and all the provisions of the contract are adapted to carry out this intention.

12. Good will ⇐5—Transfer of good will held valid.
A manufacturer of syrup for soda fountain drinks, who had acquired a good will by reason of the public demand for that drink, can transfer an interest in such good will to a company which bottles the syrup and

carbonated waters for sale under the trade-mark of the syrup manufacturer, since the favor which the fountain drink had acquired with the public would inure to the benefit of the bottled drink.

13. **Trade-marks and trade-names ⟸33—"Grant" of interest in trade-mark to new business is not in gross.**

In a contract between a manufacturer of syrup for beverage flavoring and a bottling company, a grant by the manufacturer of the exclusive right to the bottling company to use the manufacturer's trade-mark in connection with bottled goods within restricted territory denotes a transfer of property, and such transfer of interest in the trade-mark is not invalid as a transfer in gross, though the potential business of bottling the beverage had never been developed by the manufacturer.

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

14. **Contracts ⟸10(4)—Agreement to sell syrup held not to lack mutuality; "consideration."**

In a contract whereby one party agreed to establish plants for the bottling of the syrup manufactured by the other party as a carbonated beverage, the promise of the manufacturer to sell the syrup at a stipulated price was not given alone in return for the agreement to buy at that price, which stated no quantity, so as to be void for want of mutuality, but was supported also by the agreement of the bottling company to establish plants, which it had performed, even though the title to those plants was retained by the bottling company, since the consideration is the matter of inducement to a contract whether it be the compensation which is paid, or the inconvenience which is suffered by the party from whom it proceeds.

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

15. **Sales ⟸1(4)—Agreement to sell quantity required by buyer's business is sufficiently certain.**

An agreement by a manufacturer of flavoring syrup to sell to a bottling company, which had agreed to establish sufficient plants to supply the demand for the beverage within its territory, all the syrup which was required by the bottling company for its business, is not invalid for uncertainty as to subject-matter.

16. **Sales ⟸84—Agreement to sell syrup for bottling under trade-mark held perpetual.**

An agreement by a manufacturer of syrup to sell the syrup required by bottling company's business contained in a written contract, which transferred an interest in the manufacturer's trade-mark and good will to the bottling company, which agreed to establish plants sufficient to supply the trade in its territory, is a perpetual agreement, which continues so long as the rights with which it was transferred continue, and is therefore not void for uncertainty as to the time, or terminable at the will of the bottling company.

17. **Monopolies ⟸17(2)—Contract for exclusive right to bottle syrup held not illegal.**

The contract whereby a manufacturer of flavoring syrup transferred its potential business of bottling such syrup with carbonated water for a beverage to a bottling company, to which it gave the exclusive right to bottle and sell under its trade-mark in a territory covering a large portion of the country, and whom it required to agree not to purchase its syrup from any other person, is not void as a monopoly under the law of Georgia, the Sherman Anti-Trust Act, or the Clayton Act, since its purpose was not to effect a merger or consolidation of businesses theretofore existing in severalty, but was to sever the bottling business from the business of supplying soda fountains, which were competing businesses, and the restrictions imposed in the contract were reasonable business regulations.

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

18. Courts ⊂=343—Subcontractors of complainant were persons with interest in subject-matter, and authorized to intervene to protect original contract.

In a suit by a bottling company to prevent the cancellation of its contract with the manufacturer, who furnished syrup for bottling, the subcontractors of bottling rights under the complainant were persons having an interest in the subject-matter of the action, within equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), and might have joined as plaintiffs in obtaining the relief demanded, and therefore can be permitted to intervene and seek the same relief as the original complainant, and, having done so, the defendant cannot object that complainant is not entitled to relief, because he had transferred his rights to the subcontractors.

In Equity. Suit by The Coco-Cola Bottling Company against The Coco-Cola Company. Hearing on motion by defendant to dismiss the bill and by the complainant for a temporary injunction. Motion to dismiss the bill denied, and decree for preliminary injunction ordered.

H. H. Ward, of Wilmington, Del., John A. Sibley and Charles T. Hopkins, both of Atlanta, Ga., and Frank Spurlock and James B. Sizer, both of Chattanooga, Tenn., for complainant.

William S. Hilles and Robert H. Richards, both of Wilmington, Del., Samuel B. Adams, of Savannah, Ga., and Clifford L. Anderson and Robert C. Alston, both of Atlanta, Ga., for defendant.

MORRIS, District Judge. The defendant, The Coca-Cola Company, a Delaware corporation, taking the position that a contract made between The Coca-Cola Company, a Georgia corporation predecessor in title of the defendant, of the one part, and J. B. Whitehead and B. F. Thomas, through whom complainant claims, of the other part, was a contract at will, with the right in either party to terminate the same upon reasonable notice, gave notice to the complainant that the contract would "stand terminated" on a specified subsequent day. Thereupon the complainant, denying the contract to be terminable at the will of either party without the consent of the other, filed its bill of complaint, praying for an injunction, a decree for specific performance, and other and general relief. The case is now before the court upon defendant's motion to dismiss the bill, under equity rule 29, and also upon complainant's motion for a preliminary injunction as prayed by the bill. The defendant's motion will be first considered, and, as it must be disposed of solely upon the allegations of the bill, the substance of such allegations, so far as deemed material to a proper consideration of this motion, will be stated.

The Georgia corporation was organized in 1892, and became the sole owner of a secret process or formula under which it manufactured from the time of its organization until the year 1919 a syrup used in making a drink which it called Coca-Cola. It also adopted and used the words "Coca-Cola" as a common-law trade-mark. By the year 1899 the Georgia corporation had become solely entitled to use the trade-name and trade-mark "Coca-Cola." Until the latter year the syrup manufactured by it had been used only as the base for a drink served at soda fountains for immediate consumption. During that

year a contract was made between J. B. Whitehead and B. F. Thomas, of the first part, and the Georgia corporation, of the second part, which, as amended shortly after its execution, reads (with the exception of the numbers preceding each paragraph, here added for convenience of reference), so far as material to the issues raised by the pending motions, as follows:

"Georgia, Fulton County.

"This agreement, made and executed in duplicate this the twenty-first day of July, 1899, between J. B. Whitehead and B. F. Thomas, of the first part, and The Coca-Cola Company, of the second part, witnesseth:

"(1) That the parties of the first part are to establish in the city of Atlanta, as soon as the necessary machinery and buildings can be obtained, a bottling plant for the purpose of bottling a mixture of Coca-Cola syrup and preparation with carbonic acid and water.

"(2) This plant to be established by said parties of the first part without any expense or liability of any sort against said party of the second part.

"(3) Said parties of the first part further agree to prepare and put up in bottles or other receptacles, a carbonated drink containing a mixture of the Coca-Cola syrup and water charged with carbonic acid gas under a pressure of more than one atmosphere. Said Coca-Cola syrup and said water in said mixture to be used in proportions of not less than one ounce of syrup to eight ounces of water.

"(4) Said parties of the first part further agree to put up and keep and cause to be kept in sufficient quantity to supply the demand in all territory embraced in this agreement, a supply of this carbonated drink. It is expressly agreed that if, receiving notice in writing from the said party of the second part, to do so the parties of the first part shall, not within a period of 90 days from date of receiving said notice, place and keep upon sale at the point designated in said notice a sufficient stock of such preparation or mixture to supply the demand therefor, then the rights herein granted within all the territory within a radius of 100 miles of said point shall be forfeited; and provided, further, that a failure on the part of the parties of the first part to keep and perform the conditions and provisions herein contained shall work a forfeiture of their rights hereunder.

"(5) Said parties further agree to buy all of the Coca-Cola syrup necessary to a compliance with this agreement at a price and upon terms set forth below, directly from the party of the second part.

"(6) The parties of the first part agree not to use any substitute or substitutes for or other syrup or substance, nor to attempt to use or imitate with any article made or prepared by them, Coca-Cola syrup.

"(7) Parties of the first part further agree not to sell or in any way dispose of without the written consent of the parties of the second part in every instance any Coca-Cola, except after it is carbonated and bottled.

"(8) In consideration of these agreements on the part of the parties of the first part the party of the second part agrees to sell Coca-Cola syrup to said parties of the first part at one ($1.00) dollar per gallon. * * *

"(13) Said party of the second part further agrees and hereby grants to said parties of the first part, the sole and exclusive right to use the name Coca-Cola and all the trade-marks and designs for labels now owned and controlled by said party of the second part, upon any bottles or other receptacles containing the mixture heretofore described, and the right to vend such preparation or mixture bottled or put up as aforesaid, in all the territory contained in the boundaries of the United States of America, except the six New England states and the states of Mississippi and Texas. This right to use the name Coca-Cola and the trade-mark and label furnished is to be applied only to the carbonated mixture described, and is not intended to interfere in any way with the business and use of the same as now operated by the party of the second part, nor to apply to the soda fountain business as now operated by various parties. The rights of the parties of the first part under this contract may be by them transferred to a company, the formation of which is

now contemplated by them to be known as the Coca-Cola Bottling Company, but no transfer of their rights under this contract to any other party or parties, shall be made without the consent of the party of the second part.

"In witness whereof each of the parties has hereunto affixed their signatures.

"J. B. Whitehead. [L. S.]
"B. F. Thomas. [L. S.]
"The Coca-Cola Company,
"Asa G. Candler, Pres. [L. S.]"

Coca-Cola Bottling Company, to which Whitehead and Thomas were authorized by the contract to transfer their rights thereunder, was organized under the laws of the state of Tennessee in December, 1899. Whitehead and Thomas conveyed to it all their rights under the contract and became its principal stockholders. Complying with the contract, Coca-Cola Bottling Company established a plant in the city of Atlanta, Ga., "for the purpose of bottling a mixture of Coca-Cola syrup and preparation with carbonic acid and water." It established another at Chattanooga, Tenn. At each of these plants it commenced at its own expense the production of carbonated bottled Coca-Cola. The demand for the bottled product rapidly increased, both in volume and as to territory. The two plants in Atlanta and Chattanooga were unable to do more than meet the demand in those two cities, and as the contract required that the increased demand should be supplied new plants were necessary. At this stage of the business, with the consent of the Georgia corporation, a division was made of the territory embraced in the contract. Coca-Cola Bottling Company retained the Chattanooga plant and certain of the territory, while the Atlanta plant and the remainder of the territory was acquired by the complainant, The Coca-Cola Bottling Company. Each of these bottling companies thereafter proceeded to carry out in its respective territory all the provisions of the contract. Within a few years the complainant, by the expenditure of much time, money, and energy, procured the establishment of many additional plants, now numbering 588, each supplying a defined area with the bottled drink. The additional plants were established under contracts made, with the consent of the Georgia corporation, between the complainant and the owners of the respective local plants. The value of the physical properties now held and owned by the local bottlers in the territory of the complainant is approximately $10,500,000 (and in the territory of Coca-Cola Bottling Company is approximately $10,000,000), while the value of the tangible properties of the defendant amounts approximately to only $5,000,000. On April 24, 1915, at which time a very large proportion of the local plants had been established, the contract above set out was by mutual consent amended (with the exception of the numbers prior to each paragraph which are here added for convenience of reference), thus:

By striking out paragraph 5 and substituting the following in lieu thereof:

(5) "Party of the first part agrees to buy from party of the second part such bottlers' syrup as may be necessary to fully supply said territory with bottled Coca-Cola; and party of the second part agrees to manufacture for and sell to party of the first part all of the Coca-Cola for bottling purposes that may be necessary for or used by said first party in supplying said territory with bottled Coca-Cola."

By substituting the following for paragraph 6:

(6) "In consideration of the consent of The Coca-Cola Company to the use of the name Coca-Cola as a part of the corporate name of party of the first part, and its further consent to use by first party of the trade-mark Coca-Cola on the product so sold, party of the first part agrees not to manufacture, deal in, sell, offer for sale, use or handle, nor to attempt to do so, either directly or indirectly, any product that is a substitute for or imitation of Coca-Cola."

By striking out paragraphs 8, 11, and 12, and substituting therefor the following:

(8) "For said syrup so sold, party of first part agrees to pay party of the second part the sum of ninety-two (92c.) cents per gallon. * * *"

By striking from the original contract (with the exception of the words "except the six New England states and the states of Mississippi and Texas") paragraph 13, and inserting in lieu thereof the following:

(11) "For and in consideration of the agreement to sell and agreement to purchase, party of the second part does hereby give and convey to the party of the first part the right to use the trade-mark name Coca-Cola, and all labels and designs pertaining thereto, in connection with the product bottled Coca-Cola, in the territory heretofore obtained by party of the first part, and agrees not to convey, assign, or transfer the right of usage of said name in said territory, to any other party whatsoever; and said party of the second part further agrees to only manufacture syrup for bottling purposes in sufficient quantities to meet the requirements of party of the first part, and of Coca-Cola Bottling Company, and for the requirements of the territory not conveyed by party of the second part to either of said companies. Nothing herein, however, shall give to party of the first part any interest in the name Coca-Cola, labels, etc., except the right of usage in connection with bottled Coca-Cola, nor shall this contract in any way interfere with the use of said name Coca-Cola, labels, etc., in connection with the fountain product of party of the second part; it being understood and agreed that the use herewith given shall be confined to the bottled product, the name, labels, etc., in connection with the fountain product to be used as party of the second part deems fit and advisable, in any and all territory. Party of the second part does hereby select party of the first part as its sole and exclusive customer and licensee for the purposes of bottling Coca-Cola in the territory heretofore acquired by said first party, and second party agrees not to sell its fountain syrup to any one, when party of the second part knows that said syrup is to be used for bottling purposes."

And by adding the following new paragraphs:

(12) "The rights of the party of the first part under this contract shall not be by it transferred in part or in whole, without the written consent of the party of the second part. Transfers heretofore made are hereby recognized, and confirmed by party of the second part."

(13) "Said party of the first part herein having heretofore transferred and assigned the bottling rights in portions of the territory leased and assigned to it, to subbottlers, it is understood and agreed by and between the parties hereto that party of first part shall use its best endeavors to have the provisions of this amended contract accepted by said subbottlers, in so far as this amended contract affects said subbottlers; but that if party of first part herein is unable to obtain the consent of any of such subbottlers to this amended contract, this amended contract shall not apply to any of such subbottlers refusing to accept this amended contract."

(14) "Except as herein provided for, the contract of July 21, 1899, as amended, shall remain in full force and effect; but this amendment shall only apply to the territory now owned or controlled by party of the first part, or

that may hereafter be owned or controlled by party of the first part, and nothing herein contained shall affect any territorial rights heretofore conveyed, given, transferred or assigned."

The old contracts between the complainant and its subbottlers were after the amendment surrendered and terminated, and the substituted, as well as all contracts subsequently made with new subbottlers, were made in a new form. The business of the complainant was at all times conducted without friction between it and the Georgia corporation, each in good faith observing the provisions of the contract. The business of the complainant resulted in very great profit to the Georgia corporation. Such was the situation until August, 1919, at which time the defendant, the Coca-Cola Company, a Delaware corporation, acquired the property, good will, and business of the Georgia corporation, and assumed all the outstanding contracts and liabilities of that corporation. Thereafter the Georgia corporation surrendered its charter. The Delaware corporation elected as its president, as chairman of its board of directors, and as its secretary, former officers of the Georgia corporation. It also made the general counsel of the latter company one of its directors. In the year 1919 the complainant and other persons holding similar rights from the Georgia corporation under the contract of 1899 were purchasing from the latter company and marketing as bottled Coca-Cola approximately 40 per cent. of its output of Coca-Cola syrup, to the very great profit of the latter company. The Delaware corporation, after August, 1919, applied to the complainant for temporary modifications of the contract in the matter of the price to be paid for the syrup, on the ground that the war conditions had so increased its cost of production that the syrup could not be profitably furnished by it at the contract price. The complainant on two different occasions agreed with the Delaware corporation to temporary modifications of the contract, by which the price paid for the syrup to the defendant was greatly increased; the last temporary modification expiring by its terms on March 1, 1920.

Shortly before the expiration of the last-named price modification agreement, negotiations for a third price modification were about to be entered into, when the complainant for the first time learned that the defendant had taken the position that the contract was terminable upon notice at the will of either party. The complainant thereupon refused to agree to a further modification of the price of the syrup unless the defendant would likewise agree at the same time to put forever at rest the question which it had raised as to the terminability of the contract. This the defendant refused to do. Thereupon the complainant on February 27, 1920, served upon defendant herein notice that complainant required compliance with the contract in accordance with its terms. Replying to such communication, the defendant on March 2, 1920, notified the complainant and other bottlers holding contracts similar to that of the plaintiff that the contract would stand terminated on May 1, 1920.

The bill charges that the contract, including amendments, in and of itself constituted a permanent and continuing contract, and not a contract terminable at the will of either party upon notice. The bill

also sets up facts intended to show that the understanding of the parties at the time of making the original contract was that the contract was of a permanent character, and that the subsequent statements and acts of the Georgia corporation were at all times confirmatory of that understanding. It is also alleged that the defendant, in attempting to terminate the contract, is acting in bad faith, and that the defendant desires to obtain contracts in its own interest with complainant's subbottlers for the purpose of securing for itself the benefit of the labor, skill, and money expended by the complainant in establishing and developing the bottling business throughout its territory. It is charged that, if defendant be permitted to breach the contract with complainant, the business of the latter will be annihilated and destroyed, to the irreparable injury of the complainant. The prayers of the bill are, in substance: (a) That complainant's rights under the contract be held and decreed to be continuing, permanent, and perpetual, and not terminable at the will of either party without the consent of the other; (b) for specific performance; (c) for an injunction preliminary and final, enjoining the defendant from violating any of the terms and conditions of the contract and particularly the negative covenants found in paragraph numbered 11 of the amendment of 1915; and (d) for general relief.

Of the grounds urged by the defendant in support of its motion to dismiss, those necessary, in the view I have taken of the case, to be now considered, are: (1) That the contract is a contract at will, terminable upon reasonable notice; (2) that, if perpetual, the contract is void under the law of Georgia, the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209), and the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730); and (3) that, if the complainant acquired any right, title, or interest in the trade-mark, good will, or business of the predecessor of the defendant, the complainant has disposed of all such rights to its subbottlers.

In the motion to dismiss, in the discussion at bar and in the voluminous briefs of the respective parties, numerous other questions have been pressed upon the attention of the court; but the pivotal controversy rests upon the ascertainment of the true meaning of the contract as amended. A decision upon this matter will of itself dispose of many questions, and render a consideration of the others, save only (2) and (3) above stated, unnecessary at this time.

[1] In determining the true import of the contract, certain basic rules of construction must be borne in mind. One of these rules is that, when persons put their contracts in writing, the writing must, in the absence of fraud, accident, or mistake, be taken as the embodiment of their whole engagement, and consequently that its terms may not be varied or controlled by antecedent negotiations or declarations. Bast v. Bank, 101 U. S. 93, 96, 25 L. Ed. 794; Manson v. Dayton, 153 Fed. 258, 262, 82 C. C. A. 588; National Bank of Commerce v. Rockefeller, 174 Fed. 22, 26, 98 C. C. A. 8.

[2] Another rule is that in the performance of the duty of ascertaining and giving effect to the mutual intentions of the parties, as expressed in the contract, the court, so far as possible, may and should

put itself in the position of the parties to the contract, and examine into the state of things existing at the time and the circumstances under which the contract was made. Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64; Gillett v. Bank of America, 160 N. Y. 549, 55 N. E. 292. Courts "are never shut out from the same light which the parties enjoyed when the contract was executed." Nash v. Towne, 5 Wall. 689, 18 L. Ed. 527.

[3] Still another settled rule of construction is that the intentions of the parties as expressed in the contract must be ascertained from the agreement as a whole, from all its terms considered together, for, where a contract has many provisions, it is manifest that the entire intention of the parties was not expressed by any single stipulation, but by every part so construed as to be consistent with every other part and with the contract as a whole. Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota, 121 Fed. 609, 611, 57 C. C. A. 635; Elliott on Contracts, § 1514.

[4] In applying these principles of interpretation, courts should be constantly on guard lest, unawares, under the guise of construction, and looking too intently for means of bringing about some ultimate good, thwarting an apparent wrong, or preventing hardship, a contract other than that made by the parties be built up. The first of these rules of interpretation carries one beyond the antecedent declarations and negotiations to the time of the making of the contract, the then existing condition of the parties, and the surrounding circumstances, which, under the second rule, are to be considered.

[5] The Georgia corporation was at the time of the execution of the contract the sole and exclusive owner of the secret process or formula under which it had long been engaged in the manufacture and sale of a syrup, theretofore used only as a base for a soda fountain drink that had become known to the public by the name Coca-Cola. It had acquired a good will. It was also the sole and exclusive owner of the trade-name and the trade-mark. In the secret process the Georgia corporation had property or property rights of value that were salable in whole or in part. Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67.

[6] A sale of the process might have been accompanied by a covenant that the seller would not thereafter use the process or communicate it to any other person. Such a covenant would have been valid and binding. Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 53, 11 Sup. Ct. 478, 35 L. Ed. 55. The process was valuable, however, only because it was a secret, and only so long as it remained a secret. Nims on Unfair Competition and Trade-Marks (2d Ed.) § 142; John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 29, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135.

[7, 8] In its good will, also, the Georgia corporation had property or property rights. Good will may be bought and sold in connection with a business as an incident thereof. Camden v. Stuart, 144 U. S. 104, 115, 12 Sup. Ct. 585, 36 L. Ed. 363; Metropolitan Nat. Bank v. St. Louis Dispatch Co. (C. C.) 36 Fed. 722, 724. The Georgia corporation likewise had property or property rights in its trade-mark.

Trade-marks and the good will of a business are inseparable. In fact, a trade-mark is merely one of the visible mediums by which the good will is identified, bought, and sold, and known to the public. Hopkins on Trade-Marks (3d Ed.) p. 227. Nims on Unfair Competition (2d Ed.) § 15.

"The trade-mark is the expression, the symbol, of part or all of the good will of the business using the mark. * * * Separate from the good will of the business it identifies, it is useless, valueless. * * *" Nims on Unfair Competition, p. 378.

[9] A trade-mark is not a right in gross or at large. As an abstract right, wholly disassociated from the business or merchandise with which it has become established, it is not property, and may not be assigned. United Drug Co. v. Rectanus Co., 248 U. S. 90, 39 Sup. Ct. 48, 63 L. Ed. 141. For no one may sell his goods as the goods of another. Such an act would be a fraud upon the public. But, where the trade-mark of a retailer is assigned by him to the manufacturer of the commodity to which the trade-mark was affixed, there is no false representation to the public, and such assignment is valid. Witthaus v. Braun et al., 44 Md. 303, 22 Am. Rep. 44. The last proposition arises, apparently, from the fact that a trade-mark does not as a matter of necessity and law import that the articles upon which it is used are manufactured by the user. It is sufficient that they are manufactured for him, that he controls their production, or that in the course of trade they pass through his hands. Nelson v. Winchell & Co., 203 Mass. 75, 89 N. E. 180, 23 L. R. A. (N. S.) 1150; McLean v. Fleming, 96 U. S. 245, 253, 24 L. Ed. 828. If a retailer may assign his trade-mark to the manufacturer of the article sold by the retailer, it would seem that the converse is necessarily true, and that the manufacturer may assign his trade-mark to another, who sells the goods of the manufacturer.

[10] The Georgia corporation was not at the time of the execution of the contract the owner of an actual bottling business, for theretofore it had not actually bottled the drink Coca-Cola. It was, however, the sole and exclusive owner of the secret process, was the sole manufacturer of the syrup made thereunder, and was the exclusive owner of the trade-mark and good will. The drink could be bottled. This fact appears from the contract itself. It follows that the Georgia corporation, though not then actually engaged in bottling the drink, was the sole owner of all the rights essential to the bottling and sale thereof as Coca-Cola. Out of these rights the business of bottling the drink and selling it as Coca-Cola could arise. Without these rights such business could not be established. From these facts it seems clear that at the time of the execution of the contract the business of bottling the Coca-Cola and selling it when bottled had a potential existence, that all rights in the potential bottling business were owned by the Georgia corporation, and that such business, though potential, and not actual, could be sold. Dickey v. Waldo, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449; Barron v. San Angelo Nat. Bank (Tex. Civ. App.) 138 S. W. 142, 144; Benjamin on Sales, § 78; 2 R. C. L. § 4, p. 596.

Having ascertained the surrounding circumstances and placed the

contract in its original setting, the next step is to apply to it the above-mentioned third rule of construction, and to search for the meaning of the contract from the agreement as a whole, from all its terms considered together, remembering that in a contract of many provisions the entire intention of the parties is not expressed by any single stipulation, but by every part so construed as to be consistent with every other part and with the contract as a whole.

The complainant contends that the agreement granted and conveyed or assigned to it the sole and exclusive right to use in its territory the trade-mark and trade-name upon bottled Coca-Cola; that this was a transfer of property or property rights to which the covenant of the Georgia corporation to manufacture for and to sell to the complainant Coca-Cola syrup was ancillary and incidental; and that therefore the contract is not at will but of perpetual duration. The defendant, on the other hand, insists that the contract was one for the purchase and sale of Coca-Cola syrup; that the remaining covenants are ancillary and incidental to the covenants for such purchase and sale; and that, consequently, the contract, if valid, was a contract at will.

What are the stipulations of the instrument? It begins with covenants dealing from various aspects with the establishment of the business "of bottling a mixture of Coca-Cola syrup and preparation with carbonic acid and water." Paragraph 1 requires the establishment in Atlanta by Whitehead and Thomas of a bottling plant; paragraph 2 requires that the plant shall be established without expense to the Georgia corporation; paragraph 3 prescribes the relative proportions of the ingredients of the bottled drink and the pressure under which the drink is to be bottled; and paragraph 4 specifies the extent to which the bottling business must be carried on under penalty of forfeiture. Paragraph 5 is a covenant by Whitehead and Thomas to buy all syrup "necessary to a compliance" with the agreement directly from the Georgia corporation; paragraph 6 prohibits the use by the bottlers of imitations and substitutes for the Coca-Cola syrup; and paragraph 7 is a covenant of the bottlers not to sell Coca-Cola "except after it is carbonated and bottled." In consideration of the foregoing stipulations of the bottlers, the Georgia corporation in paragraph 8 agreed to sell Coca-Cola syrup to the bottlers at a fixed price, and by paragraph 13 it "grants" to the bottlers "the sole and exclusive right to use the name Coca-Cola and all the trade-marks and designs for labels now owned and controlled by" the Georgia corporation "upon any bottles or other receptacles containing the mixture * * * described," and the right to sell the same in the prescribed territory.

The amendment of 1915, as I understand that amendment, makes no substantial change in the above-stated provisions, save in the price to be paid for the syrup. Otherwise it is, in substance, only an expression of what was expressed in or necessarily implied from the original contract. I am not overlooking that part of paragraph 11 of the amendment which says:

"Party of the second part [the Georgia corporation] does hereby select party of the first part [the complainant] as its sole and exclusive customer and licensee for the purpose of bottling Coca-Cola in the territory heretofore acquired by said first party."

This clause did not, however, in my view of the contract as a whole, either diminish the rights of the complainant obtained through the original contract or enlarge them.

[11] What was the paramount purpose of the contract, as ascertained from the agreement as a whole? In my opinion it was the establishment of the business of bottling the Coca-Cola drink by Whitehead and Thomas. As I understand the contract, the rights in good will and trade-mark name acquired under the contract by the bottlers were the same in character and as permanent as if the Georgia corporation had sold to them an established bottling business with its trade-marks and good will. A contract merely for the purchase and sale of syrup would not be a repository for covenants making obligatory on the part of the purchaser the establishment of bottling plants having a capacity sufficient to supply the greater part of the nation and restricting the resale of the syrup, "except after it is carbonated and bottled"; nor would it be a repository for a grant of the sole and exclusive right to use the trade-mark of the vendor, not upon the syrup, but upon the product of those bottling plants.

I find nothing in the contract or the circumstances attending its making to indicate that these covenants are subordinate or incidental to the covenant for the purchase and sale of syrup. On the other hand, the contract and the surrounding circumstances show that such covenants and the covenants to purchase and sell syrup are co-ordinate and of equal rank. A contract so constituted shows an essential object and purpose immeasurably broader than the mere purchase and sale of syrup. Its real purpose neither lies in nor is revealed by any single covenant or provision, but is evinced by the result obtained by combining all the covenants. That result is the sale and purchase of a potential business and the establishment of an actual business. This result is the whole, of which each covenant is merely a part. To this whole each covenant, when separately considered, is ancillary and incidental. In the transaction property rights passed from the Georgia corporation to the bottlers. The forfeiture clauses are also more in keeping with this conclusion, for while of themselves they may be an insufficient foundation upon which to base a conclusion that the contract does pass property or property rights, or is not a contract at will, yet it is manifest that in a contract passing property rights, or in a contract not at will, forfeiture clauses have a greater utility.

A sufficient consideration for this sale is the establishment by the purchaser of the plant or plants requisite to supply the demand of the specified territory. This has been done. The method and means by which these plants (other than the Atlanta plant, which was established in conformity with the contract) have been established is no concern of the defendant, and is irrelevant to the question as to the character and duration of the contract. The value of the tangible assets of the plants (aggregating in the territory covered by the original contract upwards of $20,000,000) necessary to comply with the covenants of the fourth paragraph of the contract may, however, be relevant to the question of duration of the contract, as showing an improbability that it was the intention of the parties that the contin-

uance of a business of such magnitude, requiring for its establishment such an enormous outlay of capital, should be dependent upon the arbitrary will of any one party. It is reasonable to infer that, in building up a bottling business "to supply the demand in all territory embraced in the agreement," Whitehead and Thomas desired to build that business upon a sound business foundation; otherwise, the agreement could have been limited to a contract for the purchase and sale of syrup. But it was not so limited.

To build upon a firm business basis, Whitehead and Thomas needed all rights of the Georgia corporation in its potential bottling business for the specified territory. Had the Georgia corporation, at the time of making the contract, been the owner of an actually established business of bottling the Coca-Cola drink, the language of transfer might aptly have been somewhat different from that used by the parties in the contract under consideration; but the bottling business not having been actually established by the Georgia corporation, and it being merely the owner of rights which gave to the bottling business only a potential existence, the language employed seems appropriate and fitting for the purpose of divesting the Georgia corporation of all rights that it had to convert the potential business into an actual business, and likewise to clothe Whitehead and Thomas with such rights.

The secret process or formula having a value only so long as it should be kept secret and the probability of its public disclosure increasing with the increase in the number of persons to whom it might become known by disclosures in the course of business, the Georgia corporation probably eliminated from consideration any question of an assignment of the secret process or formula to Whitehead and Thomas for use by them to the extent of their business needs in the manufacture of Coca-Cola syrup for bottling purposes. Had it adopted this method, it could have sold, either for a consideration then paid or upon a royalty basis, the secret process for use in making Coca-Cola syrup for bottling purposes. Such a sale could have been accompanied, as appears from the authorities hereinbefore referred to, by a covenant preventing the future use of the formula for making the syrup for bottling purposes by the Georgia corporation, its successors and assigns, and by a grant of the sole and exclusive right to use the trade-mark and trade-name upon the bottled product in the prescribed territory. Such a sale would have carried with it all rights of the Georgia corporation in the potential bottling business.

This method was, however, not adopted by the parties, for the Georgia corporation retained the secret, and consequently the legal title thereto. The owner of such potential business could, however, by contract based upon a valuable consideration, and without the sale of the process, confer upon a vendee all rights which it, the vendor, might have in such business. This could be accomplished by the grant of the use of the trade-mark and trade-name, accompanied by an agreement to sell to the vendee such syrup made under the formula as might be necessary to fully supply with bottled Coca-Cola the demand of the territory acquired by the vendee, embodying covenants that it would thereafter manufacture under the secret formula syrup

for bottling purposes only in sufficient quantities to meet the demand of the vendee's territory, and that it would not sell its fountain syrup to any one when the vendee "knows that said syrup is to be used for bottling purposes."

[12] Such an agreement the Georgia corporation, by the contract under consideration, made. Thereby it conferred upon the bottlers the right to acquire the syrup and it transferred to them an interest in its good will and trade-mark and trade-name, the cumulative effect of which was the transfer of the potential bottling business. The right to transfer the good will is clear. The Georgia corporation had acquired a good will and a trade-mark arising out of and connected with the fountain drink. It is to be assumed that the bottled drink and the fountain drink were substantially identical; the bottled drink, by reason of its being bottled, being merely more available for general use. Necessarily the favor which the Georgia corporation had won from the public for its fountain drink would, at least in part, inure to the advantage of the bottled drink, should the latter be labeled so as to identify it with the fountain drink. The Georgia corporation consented to this labeling, and granted and conveyed to the bottlers "the right to use the trade-mark name Coca-Cola, and all labels and designs pertaining thereto, in connection with the product bottled Coca-Cola" in the prescribed territory. The extent of the good will, symbolized by the trade-mark, so transferred, is disclosed by the grant of the "sole and exclusive" right thus to use the name and trade-mark, or, as expressed in the amendment, by the negative covenants of the Georgia corporation that it will "only manufacture syrup for bottling purposes in sufficient quantities to meet the requirements" of complainant and others holding similar rights under the contract, and that it will not sell its fountain syrup to any one when the complainant "knows that said syrup is to be used for bottling purposes." The good will so transferred was, as to the bottling business, perpetual and exclusive.

[13] The transfer of the interest in the trade-mark was not a transfer in gross. The right to transfer the good will and trade-mark under such circumstances is shown by the authorities hereinbefore referred to. As I see it, it is immaterial whether the interest in the trade-mark acquired by the bottlers was a legal title or merely a beneficial interest. Though not made the basis of the decision upon this matter, it may be noted that the defendant does not dispute the right of complainant to use the trade-mark during the continuance of the contract. Consequently the ultimate question touching the trade-mark would thus seem to be, not whether the trade-mark could be assigned, but merely the extent of the interest assigned. If a limited interest therein by way of license could have been assigned, no reason appears why, under the circumstances, an unlimited interest could not likewise have been assigned.

In view of the use of the word "grants," denoting a transfer of property, in the original contract, and the significance in the use of the words "give and convey," being of like import with the word "grants," in the amendment 15 years later, to confer upon the plaintiff or its predecessors in interest the right of user, in the absence of

words of limitation, and in the light of the fact that the essential object and purpose of the contract was the building up of the bottling business at much expense adequately to meet the contractual provisions, I am unable to find any sound principle upon which to base a conclusion that the right so conveyed was other than an absolute and unlimited right of user in the complainant to the exclusion of all others, including the Georgia corporation, its successors and assigns, in the territory in question. In fact the Supreme Court has held that—

"If the owner [of a trade-mark] imposes no limitation of * * * time [upon the right to use the trade-mark], the right to use is deemed * * * perpetual." Kidd v. Johnson, 100 U. S. 617, 619 (25 L. Ed. 769).

Did the contract confer upon the bottlers a right to acquire from the Georgia corporation the Coca-Cola syrup necessary to the establishment and conduct of the bottling business? Paragraph 5 of the amendment of 1915 provides:

"Party of the first part [the bottler] agrees to buy from party of the second part [the Georgia corporation] such bottlers' syrup as may be necessary to fully supply said territory with bottled Coca-Cola; and party of the second part agrees to manufacture for and sell to party of the first part all of the Coca-Cola for bottling purposes that may be necessary for or used by said first party in supplying said territory with bottled Coca-Cola."

The defendant, regarding the contract as one merely for the purchase and sale of syrup, insists that it is so lacking in mutuality of obligation and so indefinite as to time and subject-matter as to be void. Having concluded that the covenant to sell syrup is not the dominant covenant of the contract, to which all others are incidental and subordinate, but that it is merely one of a number of co-ordinate covenants, the objections as to mutuality and certainty become of less importance, yet they are not wholly eliminated.

[14] The objection that there is a lack of mutuality is based upon the assumption that the only consideration for the promise to sell the syrup is the reciprocal promise to buy. This assumption is not well founded. The express covenant on the part of the bottlers to erect a bottling plant, and their implied covenant to erect or cause to be erected bottling plants sufficient to supply the demand of the territory with the bottled drink, both of which have been performed, constitute sufficient consideration for the covenants of the Georgia corporation. Consideration has been defined as:

"The price, motive, or matter of inducement to a contract—whether it be the compensation which is paid, or the inconvenience which is suffered, by the party from whom it proceeds."

And again as:

"Any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small, if such act is performed or inconvenience suffered by the plaintiff by the consent, expressed or implied, of the defendant." Bouvier's Dictionary, Rawle's 3d Rev.

The Atlanta bottling plant was built, and the remaining 587 plants in complainant's territory have been built, equipped, and operated without expense to the Georgia corporation or the defendant. That the plants are not now owned by the complainant is a fact irrelevant to

the matter under discussion. "Want of mutuality is no defense to either party, except in cases of executory contracts." Grove v. Hodges, 55 Pa. 504, 516; Chicago, M. & St. P. Ry. Co. of Idaho v. United States, 218 Fed. 288, 301, 134 C. C. A. 84. In Wilson v. Clonbrock Steam-Boiler Co. (C. C.) 105 Fed. 846, Judge McPherson, quoting from Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372, said:

"Nor is it necessary that the consideration should exist at the time of making the promise; for if the person to whom a promise is made should incur any loss, expense, or liability in consequence of the promise, and relying upon it, the promise thereupon becomes obligatory."

[15] The contract is not wanting in mutuality of obligation. Has it sufficient certainty as to subject-matter and time of performance? When the provisions of paragraphs 4 and 5 of the agreement as amended in 1915 are read together, it is clear that the bottler is bound to buy, and the manufacturer of the syrup is bound to manufacture and sell to the bottler, not merely such syrup as the bottler may desire, but sufficient syrup to enable the bottler to supply the demand for the bottled drink in all territory embraced in the agreement. Manifestly the agreement is not of that class where the amount of the commodity to be furnished depends upon the wish, will or desire of either party. A contract to furnish goods, material, or other commodity sufficient for the needs of a specified undertaking is not invalid for uncertainty. Select Pictures Corporation v. Australasian Films (D. C.) 260 Fed. 296; Lima Locomotive & M. Co. v. National Steel C. Co., 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713. Mere indefiniteness as to the exact amount of material to be purchased or sold under a contract is not necessarily a fatal uncertainty. Elliott on Contracts, § 180. If the intention of the contract be clear, the mere uncertainty as to the exact amount involved does not invalidate it. Ramey Lumber Co. v. John Schroeder Lumber Co., 237 Fed. 39, 150 C. C. A. 241.

The manifest intention of the parties to the contract under consideration was that the demand of the granted territory for the bottled drink should be supplied. The exact quantity of syrup necessary to supply this demand could not in the very nature of things have been fixed at a specified number of gallons. A provision in the contract so fixing the quantity of syrup to be sold and purchased would not have been in keeping with the dominant intention of the parties. Having in mind the paramount object of the parties to the contract, it is difficult to find a measure of supply more suitable to the purposes of the contract or more definite than that employed by the parties themselves. That the quantity of syrup to be supplied was sufficiently definite for the purposes of the contract to enable the parties thereto to comply therewith has been fully demonstrated by a practical test of 20 years' duration.

Furthermore, as the business continued from year to year, and the extent of the demand for the bottled drink became known, such uncertainty as originally existed in the contract necessarily in large measure disappeared. It should be observed that the Georgia corporation, and not the bottlers, fixed the standard by which the supply was to be measured, and that this was the same standard under which the

bottler was required to establish or cause to be established, under penalty of forfeiture of all contractual rights, bottling plants adequate to manufacture the bottled drink in quantity sufficient to supply the demand of all territory embraced in the agreement. Much stress has been laid by the defendant upon the case of McCaw Mfg. Co. v. Felder, 115 Ga. 408, 41 S. E. 664; but that case involved a contract of a character radically different from the contract under consideration. Yet that and similar cases cited by the defendant required only that the contract be sufficiently definite, which necessarily means sufficiently definite under all the circumstances of the contract, having in mind its essential object and purposes. The contract is sufficiently definite as to subject-matter.

[16] Is it sufficiently definite as to time? This point was made, but scarcely pressed, for the defendant made its real defense upon the ground that the contract was a contract at will—a position inconsistent with that of a lack of certainty as to time. But, aside from the inconsistent attitude of the defendant, is it possible to say how long the covenant to supply syrup runs? Though essential to the contract, this covenant is but incidental to its main purpose. As the business established upon the faith of the contract could not continue without syrup, the period for which the syrup must be supplied is found by ascertaining the duration of the contract. From what has already been said it appears that the contract is not a contract at will, but that it is a contract permanent and perpetual in its nature. Manners v. Morosco, 252 U. S. 317, 40 Sup. Ct. 335, 64 L. Ed. 590; Western Union Telegraph Co. v. Pennsylvania Co., 129 Fed. 849, 858, 64 C. C. A. 285, 68 L. R. A. 968. The bottling business rests upon the joint existence of two things—the continued secrecy of the process for making the syrup and the continued demand for the bottled drink. So long as both of these conditions exist, the contract endures. The fact that no plan was provided for in the contract for changing the price to be paid for the syrup does not alter this result. It may well be that the price so fixed embraced such a large margin of profit that a fluctuating scale of prices was deemed unnecessary.

[17] It is next contended by the defendant that, if the contract be construed as it is now construed by the court, it is void under the law of Georgia, the Sherman Act and the Clayton Act. In this connection it should be observed that the effect of the contract was not a merger or consolidation of businesses theretofore existing in severalty, but was the complete severance of the bottling business from the business of supplying soda fountains with the syrup, while the result which the defendant seeks under statutes intended to prevent monopoly would give to the defendant a complete and exclusive monopoly of both the fountain business and the bottling business. The accomplishment of this result through the instrumentality of the anti-monopoly statutes would, indeed, be unique. That of necessity there is competition between the bottled drink and the fountain drink cannot be seriously questioned. The contract did not fix a price for the bottled drink. It did not fix a price for the fountain drink. The defendant may sell its fountain syrup for such price as it pleases subject to the inevitable result, if it

raises its price too high, that the demand for the fountain drink will decrease, and that for the bottled drink increase. The converse would, of course, be true, should the price of the bottled drink greatly exceed that of the fountain drink.

The defendant points out certain covenants of paragraphs 6, 7, 11, and 12 of the contract as amended in 1915 to show that the contract is in restraint of trade. It cites Floding v. Floding, 137 Ga. 531, 73 S. E. 729, and other cases, to show that the courts of Georgia refuse to recognize an agreement not to operate the same business in a territory very large in area as being in reasonable restraint of trade. But such cases have no analogy to the case at bar, where the effect of the contract was not to transfer the whole business of the vendor, but only an incidental and potential business arising out of the main business of the vendor. It is unnecessary to analyze the several covenants pointed out as being in unreasonable restraint of trade. Those covenants at most operate as a partial and not as a general restraint, and are "merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party," or were covenants necessary to protect the Georgia corporation in its retained business. Such provisions are valid. United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135. I find in the contract nothing having an effect or intended to have an effect to defeat or lessen competition or to encourage or tend to create a monopoly, nor do I find anything therein that may be said to be in unreasonable restraint of trade.

The defendant has also suggested, rather than urged, that even if the complainant acquired any right, title, or interest in the trademark, good will, or business of the predecessor of the defendant, the complainant has disposed of all such rights to its subbottlers. This objection is based upon the provisions of the contract between the complainant and its 588 subbottlers, each of such contracts so far as disclosed being in the same form. Under those contracts the bottler conveyed to the subbottler the right the former "received from The Coca-Cola Company to use the trade-mark name Coca-Cola, and all labels and designs pertaining thereto in connection with the product bottled Coca-Cola" in the territory of the subbottler. The bottler agreed to obtain and furnish to the subbottler at $1.20 per gallon sufficient syrup for bottling purposes to meet the requirements of the subbottler in his specified territory. The subbottler agreed, in substance, to buy of or through the bottler at the specified price all syrup required or used by the subbottler; to invest in and maintain a plant and equipment sufficient to meet the demands of the business in its territory; to allow the bottler to enter upon and examine the premises where the Coca-Cola should be bottled and prepared for market; and to allow the bottler to make any necessary examination to see that the provisions of the contract were complied with. It was further agreed that, so long as the subbottler should comply with the terms of its contract, the

rights, privileges, and immunities thereby granted to the subbottler should remain in full force and effect.

The obligations imposed upon the complainant by its contract with the Georgia corporation still rested upon the former, notwithstanding its contracts with the subbottlers. The complainant also retained a beneficial interest in the bottling business after making the contracts with its subbottlers. Whether the interest so retained makes the Coca-Cola Bottling Company "the real party in interest" within the contemplation of equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) is a question that need not now be determined, for some of the subbottlers, on behalf of themselves and all other subbottlers to whom defendant contends the complainant has sold all its interest in the business, good will, and trade-mark, have been granted leave to intervene, reserving to the defendant the right to raise any question with respect to such intervention.

[18] The right of the subbottlers so to intervene is supported by Osborne v. Wisconsin Cent. R. Co. (C. C.) 43 Fed. 824, and Prentice v. Duluth Storage & Forwarding Co., 58 Fed. 437, 7 C. C. A. 293. In the former case Mr. Justice Harlan, sitting at circuit, held that—

"Where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as coplaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone," one or more may sue for the whole.

In the latter case Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit said:

"That this suit was well and wisely brought admits of no discussion. Owners of lots in severalty, in possession under a common source of title, may join in a bill of peace to quiet their title, * * * the validity of which depends entirely upon the superiority of the title of their common grantor. The law and the facts which determine the validity of the title of one such owner also determine the validity of the title of every such owner. While they are owners in severalty, they are united in interest in the sole question at issue in such a case—the validity of the title of their common grantor. A suit based upon such a bill is of general equitable cognizance. It prevents a multiplicity of suits, and affords the only adequate remedy for such a multitude of several owners, * * * when their common source of title is assailed."

It is also provided by equity rule 37 that—

"All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs. * * *"

Both The Coca-Cola Bottling Company and the subbottlers have an interest in the subject of the action and in obtaining the relief demanded by the bill of complaint. The objection of the defendant to the intervention of the subbottlers cannot be sustained. It follows that all persons having an interest in the subject of the action and in obtaining the relief demanded are now before the court, seeking its aid in protecting the business, good will, and trade-mark rights, granted and conveyed by the contract of 1899 as amended in 1915, from viola-

tion by the defendant. It therefore becomes unnecessary now to determine the relative rights of such persons.

Inasmuch as it appears from the bill of complaint that the contract of 1899 granted and conveyed property rights in and to a business, good will, and trade-mark, and inasmuch as it also appears that such contract was valid, that it was not a contract at will, that all persons having any interest therein are before the court, and that the defendant is threatening to infringe those rights, the motion to dismiss the bill of complaint must be denied. Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, and, as to good will, 12 R. C. L. p. 988.

The complainant's motion for preliminary injunction remains to be considered, but as the numerous affidavits and voluminous documentary exhibits filed in support of and in opposition to this motion cast no doubt upon any of the facts upon which the denial of defendant's motion to dismiss the bill of complaint is based, it follows, without further consideration, that the complainant is entitled to a preliminary injunction enjoining and restraining the defendant from infringing the property rights in good will and trade-marks granted and conveyed by the contract of 1899 as amended. As an injunction so limited may tend to bring about a result fair and just to all parties, I deem it unnecessary now to consider whether the complainant is entitled to a decree, absolute or upon terms, directing compliance with the covenant of the owner of the secret process to manufacture for and sell to the bottler all of the Coca-Cola syrup for bottling purposes that may be necessary for or used by the bottler in supplying the prescribed territory, and consequently consideration of that matter will be deferred until final hearing, unless the complainant shall in the meantime find that an earlier determination is essential for its protection and renew its application for a mandatory injunction.

An order denying the motion of the defendant to dismiss the bill of complaint, and a decree for a preliminary injunction in accordance with this opinion, may be submitted.

HILLSBOROUGH MILLS v. BOSTON & M. R. R.

(District Court, D. Massachusetts. January 3, 1921.)

No. 753.

1. Commerce ⇐89—Claim for discrimination to be submitted to commission before action in court.

A claim by a shipper for damages occasioned by carrier's discrimination in absorbing in its rates switching charges from a pier used by the shipper's competitors, but not those from the shipper's pier, which had previously been held an unjust discrimination by the Interstate Commerce Commission, must be presented to the Commission before action thereon in the courts.

2. Carriers ⇐36—Discrimination in favor of competitors not sufficient evidence of damage.

An order of the Interstate Commerce Commission, finding an unjust discrimination by the carrier in making a separate charge against a

shipper for switching from the pier used by him, while absorbing such charge from piers used by his competitors, is not sufficient evidence to authorize recovery of damages by the shipper, since the measure of his damages is not the amount of the unjust discrimination, but the amount by which such discrimination had injured him.

At Law. Action by the Hillsborough Mills against the Boston & Maine Railroad. Judgment for defendant.

Hill, Barlow & Homans, of Boston, Mass., for plaintiff.

George L. Mayberry and Archibald R. Tisdale, both of Boston, Mass., for defendant.

MORTON, District Judge. The facts are not in dispute and are as follows: The Commonwealth Pier is connected with the defendant's line by tracks of the Union Freight Railway and the New York, New Haven & Hartford Railroad; the National Dock, by the tracks of the New York Central & Hudson River Railroad. Under a contract, to which the defendant and the commonwealth of Massachusetts were parties, the defendant paid to the railroads connecting its line with the Commonwealth Dock their charges for delivering cars from that dock to the defendant and "absorbed" this payment in its own charges; i. e., it charged no additional rate because of such payment, and made the same rate on freight from the Commonwealth Pier as from its own pier. But the defendant did not absorb the corresponding charges of the connecting road for delivering cars to it from the National Dock, such charges being added to the regular tariff.

Before the present action was begun the National Dock Company made a complaint to the Interstate Commerce Commission against the Boston & Maine Railroad, charging discrimination by reason of the defendant's absorption of the connecting line charges to the Commonwealth Pier and its nonabsorption of them to the complainant's pier. After a full hearing the Commission decided that the charges complained of were—

"unduly prejudicial to the complainant and to shippers and receivers of freight moving in interstate or foreign commerce using its docks, from which undue prejudice the defendant, by an appropriate order, will be required to cease and desist." McChord, Commissioner, 38 Interst. Com. Com'n. R. 650.

There is no finding that the total charges by the Boston & Maine for transportation from the National Dock, including the switching charge, were unreasonable; and the action of the Commission, in directing a discontinuance of the absorption, but not a reduction in the rate, amounts, I think, to a finding that the rate per se was reasonable. No order for reparation was made. The decision determines finally that there was discrimination against the National Dock and shippers and receivers using it, directs that the discriminatory absorption should cease, and leaves the matter there. The result was to increase the rate from the Commonwealth Pier and leave it unchanged from the National Dock.

The decision of the Commission is challenged by the defendant, and questions as to the conclusiveness and correctness of it were argued; but they have been disposed of by Spiller v. Atchison, Topeka & Santa

Fé Railway Co. et al., 253 U. S. 117, 40 Sup. Ct. 466, 64 L. Ed. 810 (May 17, 1920), and Seaboard Air Line Rwy. Co. v. U. S., 254 U. S. 57, 41 Sup. Ct. 24, 65 L. Ed. —— (Nov. 8, 1920). In the light of those cases the decision seems to me to have been clearly right.

The present plaintiff imported merchandise through the National Dock to its mills at Wilton, N. H., over the defendant's railroad; and it paid the charge for moving cars from the dock to the defendant's line. There is no question but what the amounts are as stated in the declaration. The plaintiff never made any complaint to the Interstate Commerce Commission; it proceeded directly against the defendant in this court after the decision by the Commission in the National Dock Case. The plaintiff has offered no evidence of damages, except the fact of the discrimination and the amounts of the switching charges which it paid.

The remaining questions are (1) whether the plaintiff has a right to proceed in this court without first complaining to the Interstate Commerce Commission; (2) whether there is sufficient proof of damages; and (3) whether the plaintiff's claim, if otherwise established, is barred by the special statute of limitations found in the act.

[1] As to (1): Discrimination against the plaintiff having been established, all that remains, aside from the statute of limitations, is the determination of the amount of damages, if any, which the plaintiff sustained. Must they be assessed in the first instance by the Commission? In Robinson v. B. & O. R. R., 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288, the rate in question, which made a distinction between coal loaded from wagons and coal loaded from tipples, had been held by the Commission to be unjustly discriminatory; and the railroad had been directed to desist from its enforcement. A shipper who had not been a party to the rate proceeding sued to recover his damages caused by the discrimination. It was held that he was not entitled to recover, because the record of the Commission—

"did not contain any finding or direction as to what if any, reparation should be made because of prior exactions of the rate which it condemned." Van Devanter, J., 222 U. S. 512, 32 Sup. Ct. 116, 56 L. Ed. 288.

It was further said that the distinction between a published rate which is unreasonable and one which is unjustly discriminatory was, upon the question whether the matter should be first submitted to the Commission, "immaterial."

In the later case of Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, the railroad made a difference in its charges between "free coal" and "contract coal." As the published rates made no such distinction, it was held to be unlawful on the face of the tariff. The Coal Company sued to recover damages therefor. The claim was not submitted to the Commission. It was held to come within section 8 of the Interstate Commerce Act (Comp. St. § 8572), and the railroad was held liable directly to action in the courts for damage caused by its departure from the published rate.

The plaintiff contends that this action is governed by the latter decision; the defendant, by the former. It seems to me that the defend-

ant is right. It did not depart from its published tariff; it acted in good faith, openly, and under a contract with the commonwealth of Massachusetts. The facts which distinguished the International Coal Mining Case from the Robinson Case, and led to a different result, do not exist here. The point under discussion is, I think, settled by the Robinson decision. It follows that the plaintiff, not having submitted its claim to the Commission, cannot maintain this action. In the recent case of Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, 38 Sup. Ct. 186, 62 L. Ed. 451, which was an action to recover damages caused by an unreasonable rate, an application for reparation was first made to the Commission; and the practice of so doing is passed without comment, as if correct.

[2] This is enough to dispose of the present case. But as the second question, whether the mere fact that unlawful concessions of stated amounts were made to other shippers is sufficient evidence on which to award damages to the plaintiff, may be regarded as involving a finding of fact by the trial court, it ought perhaps to be passed upon. In Penn. R. R. v. International Coal Mining Co., supra, where the plaintiff paid the legal rate, while other shippers were accorded an unlawfully preferential one, and the plaintiff sued for damages, it was held that the amount of the discrimination in favor of other persons was not the measure of the plaintiff's damages; that the damages must be proved, and the law "had not been so far developed as to settle what was the measure of damages" (Lamar, J., 230 U. S. 201, 33 Sup. Ct. 898, 57 L. Ed. 1446, Ann. Cas. 1915A, 315); that "the measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered" (230 U. S. 203, 33 Sup. Ct. 898, 57 L. Ed. 1446, Ann. Cas. 1915A, 315). Taking the opinion as a whole, the case holds, I think, that the amount of rebate alone—and this absorption was in effect an unlawful rebate—is not, as a matter of law, sufficient evidence on which to assess damages. As a matter of fact, I do not think it is sufficient in this case. The plaintiff paid no more than it was legally obliged to pay. There may have been disadvantages in using the Commonwealth Dock which more than offset the saving in transportation charges from it. Everything considered, it may have been as profitable to import over the National Dock and pay the switching charges, as over the Commonwealth Pier and not pay them. If so, the plaintiff's competitors, who used the Commonwealth Pier, gained no advantage by so doing, and the plaintiff sustained no damage because of the unlawful rate accorded them. See So. Pacific Co. v. Darnell-Taenzer Co., supra, 245 U. S. at page 534, 38 Sup. Ct. at page 186, 62 L. Ed. 451. It follows that on this ground, also, the plaintiff is not entitled to recover.

As all questions relating to the statute of limitations will be fully open on appeal, it is unnecessary for me to pass upon them.

My opinion has been delayed, because it seemed best to await the judgments of the Supreme Court in the Spiller Case, supra, and the Seaboard Air Line Railway Case, supra.

Judgment for defendant.

UNITED STATES v. DE LARGE et al.

(District Court, D. Nebraska, Omaha Division. February 17, 1921.)

1. **Internal revenue ⇐2—Volstead Act did not repeal revenue provisions relating to distilleries.**

Rev. St. § 3258 (Comp. St. § 5994), prescribing the penalty for possession of a still not registered with the collector, and section 3282 (section 6022), prescribing a penalty for making in a place other than an authorized distillery any mash fit for distillation, were not superseded by the Volstead Act, in view of provision of article 2, § 35, thereof, that inconsistent provisions of law were repealed only to the extent of such inconsistency, that the regulations therein for the manufacture or traffic in intoxicating liquor were in addition to existing laws, that double the existing tax should be imposed on any one engaging in the sale of intoxicating liquors, and that the act should not relieve any person from any liability, civil or criminal, theretofore or thereafter incurred under existing laws, since there is no irreconcilable inconsistency between prohibiting the possession of a still and under heavier penalty prohibiting such possession without reporting it to the collector and the possession in a place other than an authorized distillery of mash fit for distillation, and especially in view of the provisions of article 3, of the Volstead Act exempting industrial distillers from certain named sections of the Revised Statutes, including section 3258, but not section 3282, which indicate a recognition by Congress that those sections were still continued in force.

2. **Internal revenue ⇐2—Inflicting heavier punishment under revenue acts for separate offense in same transaction is valid.**

It was within the power of Congress to impose a penalty for possessing a still, as it did by the Volstead Act, and to continue to enforce the existing heavier penalties for possessing such still without registering it and for making a mash for distillation outside an authorized distillery, thus imposing different penalties upon acts which were made separate offenses, though they were all parts of one connected transaction.

Julius De Large and another pleaded guilty, the named defendant to an indictment for having in possession an unregistered still, and the other defendant to an indictment for making a mash for distilling liquor in a place not an authorized distillery, and they apply for a revision of the sentence, on the ground that the statutes defining those offenses were superseded by the Volstead Act. Application denied.

T. S. Allen, U. S. Dist. Atty., of Lincoln, Neb., and Lloyd A. Magney, Asst. U. S. Dist. Atty., of Omaha, Neb.

John Berger, of Omaha, Neb., for defendants.

MUNGER, District Judge. The defendant in this case pleaded guilty to an indictment charging him with a violation of section 3258, Rev. Stats. (section 5994, Comp. Stats.). An application for a revision of the sentence involves the question whether this section has been superseded by the National Prohibition Act, also known as the Volstead Act (41 Stats. 305, c. 85). A similar application in a companion case questions a sentence under section 3282, Rev. Stats. (section 6022, Comp. Stats.). The same or somewhat similar questions have been decided in reported cases. United States v. Sohm (D. C.) 265 Fed. 910; United States v. Windham (D. C.) 264 Fed. 376; United States v. Stafoff (D. C.) 268 Fed. 417; United States v. Puhac (D. C.) 268

Fed. 392; United States v. Fortman (D. C.) 268 Fed. 873. In the first case cited it was held that the Volstead Act did not supersede section 3258, Rev. Stats., or section 3282, Rev. Stats. In the other cases cited one or both of these sections were held not to be in force, as applied to the facts in those cases. The case of United States v. Yuginni (D. C.) 266 Fed. 746, also lends some weight to the holdings in the latter group of cases, while the cases of United States v. One Essex Touring Automobile (D. C.) 266 Fed. 138, and United States v. Turner (D. C.) 266 Fed. 248, strongly tend to sustain the decision in United States v. Sohm.

Section 3258, Rev. Stats. (section 5994, Comp. Stats.), provides a penalty for every person who has in his possession or custody or under his control any still or distilling apparatus set up which is not registered with the collector of the district, by duplicate statements in writing which the applicant has filed with the collector, setting forth the place where it is set up, the kind of still, its cubic contents, its owner, his place of residence, and the purpose for which it has been or is intended to be used.

Section 3282, Rev. Stats. (section 6022, Comp. Stats.), punishes several acts, among them the making or fermenting in any building or on any premises other than a distillery duly authorized by law of any mash, wort, or wash fit for distillation or for the production of spirits or alcohol.

[1] Notwithstanding the fact that the greater number of cases cited have held that these portions of the Revised Statutes are no longer in force, as applied to one who seeks to manufacture distilled liquor contrary to the Volstead Act, the conclusions reached in the case of United States v. Sohm appear to be the proper interpretation. The intent of Congress is the essential thing, and that intent is not left to conjecture. Section 35, art. 2, of the Volstead Act reads as follows:

"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 any one 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 any one from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

It is obvious from a reading of this section that the prior internal revenue laws, so far as they provided for paying taxes or charges imposed on the manufacture or traffic in intoxicating liquor, were not entirely superseded, because it is expressly provided that a tax shall be assessed and collected from the person responsible for the illegal manufacture or sale in double the amount previously provided by law. but the payment of such a tax cannot be made in advance; nor does the payment give any right to manufacture or sell such liquor. It

is also provided that all provisions of law that are inconsistent with the Volstead Act are repealed only to the extent of such inconsistency. There doubtless may be features of the prior revenue laws that are inconsistent with the Volstead Act, but there is no inconsistency in making it unlawful (section 25, tit. 2, Volstead Act) for one to possess property designed for the manufacture of liquor intended for use in violating that act and in also requiring the one possessing a still or distilling apparatus set up to file a statement seeking registration with the collector (section 3258, Rev. Stats.), or making it unlawful to make or ferment mash in any other premises than an authorized distillery (section 3282, Rev. Stats.).

If the two offenses were combined in a single section, providing that it should be unlawful to possess property designed for the unlawful manufacture of intoxicating liquor and providing a penalty, and also providing that if one should so possess such property and should also fail to register a distilling apparatus with the collector, or should also possess the mash fit for distillation elsewhere than in an authorized distillery, he should be punished more severely, it would seem quite illogical to say that the two acts were contradictory, mutually destructive, or inconsistent.

[2] The punishment is greater under sections 3258 and 3282, Rev. Stats., than is prescribed in the Volstead Act, but it is not a punishment for the same offense, because the mere unlawful possession is punished under the Volstead Act, while there must be a distilling apparatus set up and also unregistered or a mash, wort, or wash fit for distillation, and also on premises other than an authorized distillery to constitute an offense under the sections of the Revised Statutes cited. Separate acts, though part of a continuous transaction, may be made separate crimes by the lawmaking power, as in the case of one who unlawfully breaks and enters a building with intent to steal and thereupon does steal while so within the building. Morgan v. Devine, 237 U. S. 632, 638, 640, 35 Sup. Ct. 712, 59 L. Ed. 1153; Ebeling v. Morgan, 237 U. S. 625, 630, 35 Sup. Ct. 710, 59 L. Ed. 1151; Morris v. United States, 229 Fed. 516, 521, 143 C. C. A. 584; Morgan v. Sylvester, 231 Fed. 886, 888, 146 C. C. A. 189. As stated in Morgan v. Devine:

"The test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress."

In the case of Burton v. United States, 202 U. S. 344, 377, 26 Sup. Ct. 688, 697 (50 L. Ed. 1057, 6 Ann. Cas. 362), an agreement to receive a forbidden compensation and the act of receiving it were held to be separate offenses, if Congress elected to make them such, the court saying:

"But Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the Legisla-

ture must govern in the interpretation of a statute. 'It is the Legislature, not the court, which is to define a crime, and ordain its punishment.' United States v. Wiltberger, 5 Wheat. 76, 95; Hackfeld & Co. v. United States, 197 U. S. 442, 450."

Congress may therefore make an offense of the mere possession of a distilling apparatus or mash fit for distillation, as property designed for the manufacture of liquor intended for use in violation of the Volstead Act, and may also make or retain in force a statute making it a separate offense to have an unregistered distilling apparatus set up or a mash fit for distillation in a place other than an authorized distillery.

But Congress did not leave the question to depend merely upon the considerations which have been stated. In the last clause of section 35 of the Volstead Act it is provided "nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred, under existing laws." By this provision, if, after the Volstead Act is in force, one shall have an unregistered distilling apparatus set up or mash fit for distillation in an unauthorized place, the portion of the clause quoted "nor shall this act relieve any person from any liability * * * criminal * * * hereafter incurred, under existing laws," leaves him subject to sections 3258 or 3282, as portions of the existing internal revenue laws. It must be presumed that Congress knew what the existing laws provided as to the manufacture of distilled spirits, and especially the elaborate code of internal revenue regulations relating thereto. Not only did Congress fail to express any repeal of these acts, except in case of inconsistency, but it expressed its knowledge of their existence by expressly enumerating many of the sections of the internal revenue statutes, including section 3258, and excepting industrial alcohol plants and bonded warehouses established under the Volstead Act from the operation of those sections (section 9, tit. 3). Distilling and operation of stills are permitted for some purposes by the Volstead Act if a permit is obtained, and a bond is given (sections 3, 6, tit. 2), and the operator must make certain records and label the containers of the liquor (sections 10, 12, tit. 2). Distilleries are permitted for the making of industrial alcohol by the provisions of title 3.

The fact that 56 sections of the internal revenue laws, all of which relate to the operation of distilleries, and most of which contain penalties, are expressly stated not to apply to industrial alcohol manufactories, is in contrast to the statement in section 35, art. 2, applying to others than authorized distillers, that the Volstead Act does not relieve any person from criminal liability incurred under then existing laws, as to acts committed after the Volstead Law was in force.

Congress omitted section 3282, Rev. Stats., in its careful enumeration of these sections, thereby showing its intention that even those who are permitted under the Volstead Act to make distilled spirits shall be liable to the penalties of that section if the mash, wort, or wash is made at any place except an authorized distillery. Much less could it have been the intention of Congress to exempt illicit or unauthorized dis-

tillers from the penalties of that section. The express statement that section 3258, Rev. Stats., should not apply to the makers of industrial alcohol under the rule, "expressio unius est exclusio' alterius," indicates that Congress did not intend to exempt unlawful distillers from its provisions.

Neither the reports of the committees in Congress nor even the debates upon the passage of the Volstead Act bear directly upon the interpretation of section 35, art. 2, and it stands in the act with very slight verbal changes from the original draft as it was presented in section 37 of the original bill (Cong. Rec. 66th Cong. 1st Sess. 2291, 4850), but the language of the act is so clear that it must be held that these portions of section 3258, Rev. Stats., and section 3282, Rev. Stats. are not superseded by the Volstead Act. The applications for revision of sentences will be denied.

THE LORD BALTIMORE.

(District Court, E. D. Pennsylvania. January 5, 1921.)

No. 70.

1. **Maritime liens ⊂=30—Maintainable, though person in apparent authority did not have authority to bind vessel.**
   Under Act June 23, 1910 (Comp. St. §§ 7783–7787), a claimant may now maintain a maritime lien, though the person on whose apparent authority the supplies were furnished did not have authority to bind the vessel, if the claimant did not know, and could not with reasonable diligence have found out, such lack of authority.
2. **Maritime liens ⊂=17—Statute to be strictly construed, but not so as to defeat purpose.**
   As Act June 23, 1910 (Comp. St. §§ 7783–7787), relative to maritime liens, results in the possibility that one person may be called upon to pay the debt of another, it must be strictly construed; but it must not be given such a construction as to defeat its main purpose, which is to enable those in charge of a vessel to obtain all necessary supplies.
3. **Maritime liens ⊂=30—Claimant must know supplies reasonably necessary, and that person ordering has apparent authority.**
   One claiming a maritime lien for supplies furnished a vessel under Act June 23, 1910 (Comp. St. §§ 7783–7787), is bound to know that the supplies are in fact for the vessel, and in fact reach it, and are such as are ordinarily required on board a vessel, and thus reasonably necessary, and must at his peril make sure that the person ordering them has actual or apparent authority to bind the vessel.
4. **Maritime liens ⊂=23—Supplies are "necessaries," if within reasonable requirement of particular ship.**
   When supplies are furnished to a ship on the order of one in apparent authority, whatever comes within the reasonable requirements of the particular ship are "necessaries," for which a maritime lien may be had under Act June 23, 1910 (Comp. St. §§ 7783–7787).

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

In Admiralty. Libel by James T. O'Brien against the steamer Lord Baltimore. On trial hearing on libel, answer, and proofs. Decree for libelant.

Lewis, Adler & Laws, of Philadelphia, Pa., for plaintiff.
John Cadwalader, Jr., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. There are a series of cases of a like general character, which were all heard and argued as one. They are, because of this, disposed of in one opinion. The Fleishman libels, Nos. 47 and 48 of 1919, and the Tolman, Nos. 28 and 29 of 1919, are disposed of separately.

The respondent is the owner of the two passenger steamers Penn and Lord Baltimore. They were built specially to be and for a time were operated between Philadelphia and Baltimore, locking through the Delaware and Chesapeake Canal. Under a charter party, dated April 8, 1919, they went into possession ultimately of a corporation called the Washington & Southern Navigation Company, with the intention that they would be used on Chesapeake Bay and its tributaries. The charter party by its terms ran for four months from May 15, 1919. One of the stipulations of the charter party was that all expenses attending the operation of the steamers was to be met by the charterer, who also had an option to purchase, to be exercised within 90 days. Another stipulation was that a deposit of $10,000 was to be made to indemnify the owners against the payment of any liens which might be filed against the steamers.

The cause of action set forth in each libel is for repairs or supplies, for which a lien is claimed under the provisions of the act of Congress of June 23, 1910 (Comp. St. §§ 7783–7787). The answers, in addition to specific defenses to some of the liens, advance as a shield to be interposed for the protection of the owners the proposition that, as the act of Congress in effect makes the owner answerable for the debts of others, it should be strictly construed, and the claimants given no rights beyond what such strict construction would allow.

The general doctrine of the allowance of a maritime lien for supplies and repairs grew out of the policy of the law, prompted by the necessities of a ship. This policy and this necessity are obvious in the situation of a ship in a foreign port, but these considerations do not suggest a like right of lien for supplies furnished in a home port.

The act of Congress was intended to furnish a complete system in itself. The first section gives the right of lien to all who furnish repairs or supplies, without distinction as to whether the vessel is foreign or domestic, and imposing only the condition that they should be necessaries and furnished upon the order of the owner or by some person by him authorized, and provides further that this lien shall be enforced by a proceeding in rem, and exempts the claimant from any requirement to aver or prove that the repairs or supplies were furnished on the credit of the vessel. Section 2 of the act lists those who are presumed to possess the required authority, and denies such authority to those who are in physical possession or charge of the vessel, if their possession is tortious or unlawful. The third section somewhat extends the list of those who are thus presumed to have authority, but takes away the right of lien from any claimant who knew, or by the exercise of reasonable diligence might have learned that the

person on whose order the repairs or supplies were furnished was without authority to bind the vessel.

[1] It is thus made clear that a new statement of the policy of the law has been introduced. Those who make repairs or furnish needed supplies to vessels on the order of any one in apparent control are given the right of lien. There is thus wiped out the old distinction of work done or sales made on personal credit, and those made on the credit of the vessel, unless, of course, the right of lien has been waived. There is also wiped out the other distinction between vessels in a foreign and in a home port. A claimant may now maintain a lien, notwithstanding the fact that the person on whose apparent authority the supplies were furnished did not have authority to bind the vessel, if the claimant did not know, nor could with reasonable diligence have found out, such lack of authority.

[2] A construction must be given to the act which will afford a practical working rule to those dealing with vessels. The act of Congress results in at least the possibility that one person may be called upon to pay the debt of another, and any lien claimant is charged with notice of this possible result. A consequence is that the act must be strictly construed, and the claimant must do his part to minimize the danger of such a result. At the same time the act must be given such a construction as not to defeat its main purpose, which is to enable those in charge of a vessel to obtain all necessary supplies.

[3] It follows from this that every claimant is bound to know that the supplies are in fact for the vessel and in fact reached it; he is further put on guard to know that the supplies are such as are ordinarily required on board a vessel, and in this sense reasonably necessary, and he must further, at his peril, make sure that the person ordering these supplies is clothed with either the actual or the apparent authority to bind the vessel. When these features are present, the claimant may safely sell in reliance upon his right of lien. If any of them are absent, he is left to his other rights and remedies.

The above is the construction which has been given to the act of Congress in all of the adjudged cases. In these different cases some of these features are emphasized at one time and others at another. If, however, the cases are read with this rule of construction in mind they will be found to be consistent. Among them are the following: Piedmont v. Seaboard, 254 U. S. 1, 41 Sup. Ct. 1, 65 L. Ed. ——; The Sterling (D. C.) 230 Fed. 543; The Robert Dollar (D. C.) 115 Fed. 225; Coyle v. North America (C. C. A.) 262 Fed. 250; The Oceana (D. C.) 233 Fed. 139.

The Piedmont Case gives us a clear statement of the controlling principles which guide us in construing the act of Congress. There the supplies were of coal which was a "necessary." It was in fact supplied in reliance upon the claimant's right of lien in the sense that all parties to the contract thought the claimant had a right of lien against the ship. The coal was, however, neither sold nor delivered by the claimant to the ship. It was sold and delivered to an oil company, which owned the ship, and was afterwards—in fact, along with other coal—supplied by the owner to the ship. The right to a lien was de-

nied on the ground that, as the coal was neither sold nor delivered to the ship, the fact that it ultimately reached the ship gave the claimant no right of lien. The question determined there was not one of the credit extended, but whether the coal had been furnished to the ship.

[4] The Fleishman, as well as the Tolman, libels, are each in a class by themselves. All the other claims are disposed of by the findings that the libelants made repairs or furnished supplies to the steamer; that what was thus supplied were necessaries; that they were on the order of one presumptively authorized to act for the owner; and that the libelants did not know, nor could they, by the exercise of reasonable diligence, have ascertained, that the supplies were unauthorized by the owners. No hard and fast definition of "necessaries" can be given. When supplies are furnished to a ship on the order of one in apparent authority, whatever comes within the reasonable requirements, not of a ship, but of the ship to which furnished, are necessaries. The test is whether in kind and quantity what is furnished is within the reasonable needs of the ship's business.

In every instance of the furnishing of supplies, the situation speaks for itself to tell the claimant whether he has a right of lien. "Res ipsa loquitur." We must, however, know what the res is which is speaking. The ship tells the story of what she does. The thing to be supplied informs the claimant of whether or not it is reasonably within the ship's requirements. By holding that whatever is reasonably within the requirements of the ship are necessaries, it is not intended to rule that the owner assumes the burden of proving a negative. The lien is based upon the theory or presumption that the supplies are furnished to the ship and for the ship on the order of the owner. The natural inference is that the ship had need of them, unless something else appears. In the absence of anything contradictory of this, a finding of necessaries is prima facie called for and may be made.

Special findings of fact and conclusions of law were made in each case.

STÖHR v. WALLACE et al.

(District Court, S. D. New York. April 21, 1920.)

1. War ⇐12—Jurisdiction sustained under statute not claimed.

Where the bill to recover property seized by the Alien Property Custodian set forth a claim to the property by a naturalized citizen previously filed with the Custodian, the jurisdiction of the court over the bill can be sustained, under Trading with the Enemy Act, § 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), though plaintiff erroneously claimed jurisdiction for the court under Judicial Code, §§ 24, 57 (Comp. St. §§ 991, 1039).

2. War ⇐12—Custodian's seizure of property as enemy's determines right to possession, but not ownership.

A seizure of property by the Alien Property Custodian, under direction of the President, settles the Custodian's right to possession of property, under Trading with the Enemy Act, § 7c (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), but does not determine the ownership thereof, and a claim may be filed by a resident friend, and subsequently suit brought to recover the property, under section 9 (section 3115½e).

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

3. War ⊂=12—Court can prevent sale by Custodian pending determination of friendly claim.

Though Trading with the Enemy Act, § 12, as amended (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ff), gives the Alien Property Custodian general power to sell property seized by him, a suit to recover such property by a friend, if it does not automatically stay a sale, authorizes the court to stay the sale under section 9 (section 3115½e) of that act.

4. Constitutional law ⊂=319—Right to seize property as enemy property subject to claim of friendly owner is valid.

The provision of Trading with the Enemy Act, § 7c (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), authorizing the Alien Property Custodian to seize property he determines to be enemy owned, without the right to claimant friend to have his claim determined before seizure, is not unconstitutional, in view of the right of such claimant to bring suit under section 9 (section 3115½e) of that act to have his claim determined, which protects all his substantial rights and merely provides a different procedure.

5. War ⊂=12—Dry trustees for aliens cannot object to transfer of title to Custodian.

Citizens, who held corporate stock as dry trustees for the alien owners, cannot object to the transfer of the title of such stock on the books of the corporation to the Alien Property Custodian, after seizure by him of all the interest of alien owners therein.

6. War ⊂=12—Option by enemy to sell stock to domestic corporation held not to defeat seizure.

A contract was entered into shortly before the declaration of war with Germany, whereby German owners of corporate stock agreed to sell their stock for five annual payments, each to be determined by the book value of the tangible assets of the corporation the preceding year. The contract also provided that the failure to make any payment should not affect title to stock already transferred for previous payments, and gave merely option to purchase the stock. Such contract was manifestly not a commercial transaction, since it disregarded good will as an element of value, and was shown by the declarations and letters of the purchasers to be intended to prevent loss of control of the corporation by the incapacity of the alien owners to vote their stock, and to be made with no intention to avoid confiscation, which was not anticipated. *Held*, the contract did not prevent the Alien Property Custodian from acquiring title to the stock by seizure of all the interest therein belonging to the alien enemies.

7. War ⊂=12—Sale in transitu to avoid capture is void.

A sale to a neutral of goods in transitu, made to avoid loss by capture of the goods, is void, as a fraud on belligerent rights.

8. War ⊂=12—Enemy character of goods determined at outset of voyage.

The enemy character of goods shipped by sea is determined by their ownership at the outset of the voyage.

9. War ⊂=12—Sale of enemy property on land before declaration of war to avoid confiscation is valid.

Since the right to confiscate enemy property on land was not generally recognized by the law, but exists solely by virtue of the Trading with the Enemy Act, section 7b of which (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d) denies to any person any rights acquired by assignment of a chose in action by alien enemy, unless such assignment was made prior to the beginning of the war, an assignment of corporate stock which, though not technically a chose in action, is property of a similar nature, made before the declaration of war, even with intent to avoid confiscation, was valid as against the Alien Property Custodian.

In Equity. Bill by Max W. Stöhr, suing in his own behalf as a stockholder in Stöhr & Sons, Incorporated. and in behalf of all others similarly situated, against James N. Wallace and others. On final hearing. Bill dismissed.

Decree affirmed 254 U. S. —, 41 Sup. Ct. 293, 65 L. Ed. —.

Final hearing upon a bill in equity filed by the plaintiff, suing in his own behalf as a shareholder of Stöhr & Sons, Incorporated, and in behalf of all others similarly situated, against the Alien Property Custodian, the corporation and directors of Stöhr & Sons, Incorporated, and the corporation and directors of Botany Worsted Mills. Answers were filed by all the defendants and the cause came on for hearing before the District Court. Testimony was taken and arguments heard, and the case submitted for final decree.

The bill alleges: That the plaintiff is a shareholder of a New York corporation, Stöhr & Sons, Incorporated, and a naturalized citizen of the United States, residing in the county of New York. That on the 17th of February, 1917, and from then continuously until the present time, he was the owner of 44 shares of capital stock of Stöhr & Sons, Incorporated, which on the 20th day of February, 1917, became the owner of 14,900 shares of the capital stock of the defendant, Botany Worsted Mills, a New Jersey corporation. That on February 19, 1917, Stöhr & Sons, Incorporated, became and has since been the owner of 5,690 other shares of the Botany Worsted Mills (property which has now been eliminated from the suit). That all these shares were seized by the Alien Property Custodian on the 20th day of March, 1918, as enemy owned, and that pursuant to said seizure the Custodian caused to be elected the individual defendants as directors of the two corporations mentioned, and ordered the directors of the Botany Worsted Mill to issue to him as Alien Property Custodian all the shares of stock so seized. That he has assumed control and possession of the properties of such corporation and that the defendant directors have refused to recognize the rights of those who were former officers of said corporation, when the Custodian took charge. That the Custodian has in the daily newspapers of New York advertised these shares of stock for sale, although it was not necessary and never has been necessary to sell them, as both corporations are solvent and have large assets. That such sale would be in violation of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a–3115½j) and the Constitution of the United States as without due process of law and without any notice or opportunity given to Stöhr & Sons, Incorporated, to be heard in any judicial proceedings looking to the condemnation or sale of such shares. In especial that the Custodian has announced that he will exclude at such bidding any person who is not a citizen of the United States under section 12 of the act, which is unconstitutional. That he will allow no inspection of the plant, except to those who have deposited a certified check of $25,000, that the terms and conditions of sale are unreasonable and onerous, and that the sale of so large a quantity of the stock will necessarily result in a low price, especially as the sale will be conducted so as to exclude a number of prospective bidders, and result in undue sacrifice of the property sold. That Stöhr & Sons, Incorporated, is a domestic corporation, and not an alien enemy, and that the sale would therefore be in excess of the powers of the Custodian. That on November 23, 1918, nine days before the bill was filed, the plaintiff, under section 9 of the Trading with the Enemy Act (section 3115½e), filed a notice of claim with the Alien Property Custodian, demanding that the sale should not be made, which was disregarded. That the present directors of Stöhr & Sons, Incorporated, and the Botany Worsted Mills are creatures of the Alien Property Custodian, elected to carry out his interests, and that it would be useless to make a demand upon them to institute this suit.

The bill prays that the cloud on the shares of stock resulting from the capture be removed, that the capture be declared illegal and unconstitutional, and that the Custodian be enjoined from selling the shares. A copy of the contract through which Stöhr & Sons, Incorporated, acquired the shares of stock, is annexed to the bill.

Upon the hearing the following facts in substance developed:

Before February 15, 1917, there existed in the city of New York a partnership under the firm name of Stöhr & Sons, doing business as woolen merchants. The partners were Eduard Stöhr, the father, and his three sons, Hans E., Georg, and Max W. Their interest in the partnership was as follows:

Eduard	$420,000
Hans E.	80,000
Georg	50,000
Max W.	10,000

—amounting in percentages to approximately 75 per cent., 14 per cent., 9 per cent., and 2 per cent. Eduard and Georg were German subjects, living in Leipzig; Hans E. was a German subject, living in New York, who had formally declared his intention of becoming a citizen; Max W. was a native German, but had become naturalized in 1910, and lived in New York. On February 15th Max W. Stöhr, George Röhlig, and Alfred de Liagre (relatives of the Stöhrs), executed a certificate of incorporation, under the laws of New York, of Stöhr & Sons, Incorporated, with a share capital of $250,000, and on February 17th the necessary formalities of incorporation were completed. The directors named were Hans E. and Max W. Stöhr, Röhlig, and De Liagre, and they were also the officers. On February 19th the assets of the partnership, amounting to more than $1,000,000 in value, were transferred to the corporation in exchange for the shares of stock, all of which were issued to Max W. Stöhr, with the exception of 357 shares, issued to Hans E. At the same time these shares were transferred to Hans E. and Max W. Stöhr and Georg Röhlig as "voting trustees" for five years under the laws of New York, and "voting trust certificates" were issued in the same proportion as the original issue of shares; that is to say, Max W. held all the "certificates," except 357 shares, which went to Hans. However, of those which Max received, he held 1,875 in trust for Eduard Stöhr, and 223 in trust for Georg Stöhr. Kammgarnspinnerei Stöhr & Co. Actiengesellschaft was a German corporation doing a woolen business in the city of Leipzig, Germany, and organized by Eduard Stöhr in 1880. It had a share capital of 12,000,000 marks, of which the ownership does not definitely appear. Hans owned something over 1,000,000, Georg between 1,500,000 and 2,000,000, Max 600,000, and Eduard more than any of them; but the total is not given. There were many other shareholders as the shares were listed on the Berlin Boerse and had been generally distributed to an extent not disclosed. On last information, Eduard Stöhr was president of the "aufsichtsraht," corresponding generally to the board of directors of an American corporation; Hans E. was a member of that body, and Georg was a managing "director"—i. e., one of the two "procuristen."

This corporation for long had held 14,900 shares in the Botany Worsted Mill, one of the largest and best equipped mills in the United States, doing a profitable business at Passaic, N. J., in the manufacture of yarns and woolens. In 1915 10,000 of these shares were transferred on the books of the company to Hans E. Stöhr and 4,900 shares to Max W. Stöhr, each as trustee for the Leipzig company, and so they remained until the 20th of February, 1917. On that day Hans E. Stöhr, in New York, assuming to act for the Leipzig corporation, made a contract with Stöhr & Sons, Incorporated, through Röhlig, its vice president, a copy of which follows:

"Agreement made at Passaic, in the state of New Jersey, on the 20th day of February, 1917, between Kammgarn-Spinnerei Stöhr & Co., Aktiengesellschaft of Plagwitz-Leipzig, Germany, hereinafter called the 'Leipzig Company,' party of the first part, and Stöhr & Sons, Incorporated, hereinafter called the 'New York Company,' party of the second part, witnesseth:

"Whereas, the Leipzig Company is beneficially interested in fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills, a New Jersey corporation, which said shares of stock are now standing in the name of Hans E. Stöhr and Max W. Stöhr, and are represented by the following certificates, each certificate being for five (5) shares of said stock: * * *—and

"Whereas, the Leipzig Company is desirous of selling and said New York Company is desirous of purchasing said interest on the terms and conditions hereinafter set forth:

"Now, therefore, in consideration of the premises and of five thousand ($5,000) dollars paid by the New York Company to the Leipzig Company on account of the purchase price, the receipt whereof is hereby acknowledged, and in further consideration of the mutual promises of the parties as herein set forth, it is hereby agreed as follows:

"First. The Leipzig Company hereby sells, assigns and transfers unto the New York Company all of its interest in said shares, and said shares of stock shall be forthwith transferred upon the books of the Botany Worsted Mills and placed in the name of the said New York Company.

"Second. The terms of the sale and the purchase price for said shares shall be determined as follows and paid in the following installments:

"(a) The purchase price shall be determined by and shall be equal to the book value of said shares as shown by the books of the Botany Worsted Mills. The price shall be payable in five (5) installments, the first installment being payable one year from date and the subsequent installments respectively in two, three, four and five years from date. From the last or fifth installment the sum of $5,000 paid on account as hereinbefore recited, with interest at 6 per cent. from date, shall be deducted.

"(b) The first annual installment shall be based upon and shall be equal to the book value of said shares, as shown by the books of the Botany Worsted Mills according to the last previous closing of its books on November 30, 1917; and the four subsequent annual installments shall be similarly based upon and shall be equal to the book value of the shares as shown by the last previous closing of the books of the Botany Worsted Mills on the 30th of November preceding the falling due of each of said annual installments.

"(c) In arriving at the amount of each installment for each of said years the net worth of the hard assets of the Botany Worsted Mills, after deducting the total liabilities, shall be taken as the basis for the computation of the value per share, and no allowance or increase shall be made on such installment for good will.

"(d) In addition to the book value of said shares there shall be taken into consideration and account the amount of the dividends received by the New York Company during the said five years from date in the following manner:

"During the first year the amount of the entire dividends received by the New York Company on the said shares shall be added to the purchase price and shall be paid with the first installment, during the second year four-fifths of the entire dividends received on said shares of stock by the New York Company, during the third year three-fifths of said dividends, during the fourth year two-fifths of said dividends and during the fifth year one-fifth of said dividends so received on said shares shall be added to the annual installments of the purchase price and shall become part of said purchase price and shall be payable with each of said installments at the end of each of said respective years.

"Third. That the certificates of stock for said fourteen thousand nine hundred shares sold and transferred as hereinbefore provided shall be placed in the possession of the Leipzig Company as collateral security for the amount of the purchase price; but as each annual installment with said additions provided for in paragraph second, subdivision (d), is paid, the New York Company shall have the right to require the redelivery of, and the Leipzig Company will contemporaneously with the payment of each installment redeliver to the New York Company, one-fifth of said shares, and thereupon the Leipzig Company shall continue to retain the remaining shares as collateral security for the balance of the purchase price still payable.

"Fourth. The New York Company shall have the right at any time to require the deposit of the entire shares of stock or any balance thereof remaining in the hands of the Leipzig Company, with a bank or trust company to be selected by the Leipzig Company, such deposit to be made with such bank

or trust company in escrow, to be held until the purchase price or the balance remaining unpaid shall have been fully paid or (in case of nonpayment of any installment) until the Leipzig Company shall be entitled to said stock under the provisions of paragraph fifth of this agreement.

"Fifth. In the event that any of the said annual installments with said additions provided for in paragraph second, subdivision (d) hereof, shall not be paid when due, then the Leipzig Company shall notify the New York Company in writing that it requires the payment of the installment then due, together with the said additions, and in the event that the New York Company shall not within sixty (60) days after said demand pay the said installment, with the additions, then the said shares of stock or any remaining balance of said stock shall be forthwith retransferred to the said Leipzig Company on the books of the Botany Worsted Mills and all rights on the part of the New York Company to said stock or any such balance shall cease, and the Leipzig Company shall retain the five thousand ($5,000) dollars, paid on account as hereinbefore recited, in full settlement of any claim against the New York Company, and thereupon neither of said companies shall have any further claim against the other arising under or by reason of this agreement; it being understood that the nonpayment of any subsequent installment shall not affect the portion or portions of the stock which may have been fully paid for by a previous installment or installments."

At that time Hans E. Stöhr was himself president of Stöhr & Sons, Incorporated, a director and shareholder as above set forth. On the same day, through the direction of Hans E. Stöhr, a transfer was recorded upon the books of the Botany Worsted Mills of all these shares from the name of Hans E. Stöhr and Max W. Stöhr, as trustees, to the name of Stöhr & Sons, Incorporated. The certificates themselves remained in Leipzig and have never been returned to this country, and in such case the by-laws of the Botany Worsted Mills provided that, in order to be transferred, notice must be sent from a local official in Leipzig that the transfer had there been made upon the certificates. No such notice was in fact received or has been received from that day to this. The transfer was therefore not in accordance with the by-laws of the Botany Worsted Mills. The Botany Worsted Mills had itself been founded by Eduard Stöhr in 1889. It had a capital stock of $3,600,000, divided into 3,600 shares, and at the time of the execution of the contract Eduard, Georg, Hans, and Max Stöhr were all directors, and Hans, as treasurer, was very active in its management although one Thomas Prehn was its president.

On October 6, 1917, Congress passed the Trading with the Enemy Act, and vested in the President the power to capture all enemy property. Section 7a of that act (section 3115½d) required all corporations who had any enemy shareholders to file a list of them as of February 3, 1917, and in December, 1917, Hans E. Stöhr and his counsel, one Heyn, an American, in accordance with the duty so imposed, made a report on behalf of Stöhr & Sons, Incorporated, and the Botany Worsted Mills. Correspondence and several interviews ensued, and on February 9, 1918, Heyn wrote a letter to the Custodian purporting to set forth all the facts. As to the 14,900 shares, he said as follows: "These shares were in the name of H. E. Stöhr and M. W. Stöhr, as trustees for Stöhr & Co., the Leipzig corporation, the beneficial interest being in Stöhr & Co. Regarding the contract for the purchase of said 14,900 shares of Stohr & Sons, Incorporated, from Stöhr & Sons, of Leipzig, it has been fully explained that the control of Botany might be imperiled by a state of war, because the voting right on stock of alien enemies, or in which alien enemies had a beneficial interest (as was the case with said 14,900 shares), was doubtful under the decisions of the courts, and if deprived of the voting right the control of Botany might be lost. This contract was made with reference to the control of Botany as between its stockholders, and had, of course, no reference to the status of such control so far as the Alien Property Custodian is concerned. Such status is not affected, whether such shares are in Stöhr & Co., the Leipzig corporation, or in Stöhr & Sons, the New York corporation. As we also stated verbally, there have been no resolutions or other corporate action by Stöhr & Co. with the Leipzig corporation in confirmation

of this transaction." Later in the same letter he said: "Considerably more than a majority of the stock (of Botany) is controlled by enemy alien interests within the meaning of the Alien Enemy Act. The total of the stock thus controlled (directly or indirectly) being 30,080 shares."

A copy of this letter at some time not definitely stated was approved in writing by Hans E. Stöhr. Before Heyn wrote it Hans E. Stöhr, who was himself not allowed to go to Washington, had written to Heyn two letters on February 5, 1918. In one he gave a list of the stockholders of the Botany Worsted Mills, and among the foreign stockholders he listed the Leipzig corporation for 14,900 shares; the other read as follows: "I herewith wish to state that the majority of the stock of the Botany Worsted Mills, Passaic, N. J., and of Stöhr & Sons, Incorporated, New York, is held by parties who are alien enemies under the Trading with the Enemy Act. (This information is given by me as treasurer of the Botany Worsted Mills and as president of Stöhr & Sons, Incorporated.)" A majority of the shares of the Botany Worsted Mills necessarily included the shares here in question.

On April 5, 1918, the Alien Property Custodian served a demand under section 7c of the Trading with the Enemy Act and sections 2a and 2b of the executive order of February 26, 1918, assuming to capture all the right, title and interest of the Leipzig company in the shares of stock of the Botany Worsted Mills. This was followed by a second demand later, and in February, 1919, he served another demand to capture all the interests of the Leipzig Company in the contract of February 20, 1917. By virtue of the transfer so effected, the Custodian obtained the registry in his own name upon the books of the Botany Worsted Mills of the shares of the Leipzig corporation and elected the individual defendants as directors of the company and of Stöhr & Sons, Incorporated. Both corporations have been under the control of such directors or their successors from that time until the present. In the autumn of 1918 the Custodian, as allowed by section 12 of the Trading with the Enemy Act as amended (section 3115½ff), advertised for December 2, 1918, the sale of a large number of shares of the Botany Worsted Mills, including the Leipzig Company's shares. Section 12 prevents any person not an American citizen from bidding at such a sale. He also in his advertisement annexed those conditions described in the bill. The bill was filed on December 2, 1918, and the sale was postponed. Heyn and Hans E. Stöhr have since died.

Upon the trial the plaintiff insisted that Hans E. Stöhr was authorized to execute the contract of February 20, 1917, in the name of the Leipzig Company, and prayed that the trial should be postponed until it were possible to obtain evidence of that fact in Germany. The court reserved decision upon that question until it could learn whether the issue was material to a disposition of the case, meanwhile requiring of the plaintiff to submit by affidavit the particulars of such proof as he could make if permitted.

Louis Marshall and Louis J. Vorhaus, both of New York City, for plaintiff.

George L. Ingraham, of New York City, and Lee C. Bradley and William H. Sadler, Jr., both of Birmingham, Ala., for Alien Property Custodian.

John Quinn and Paul Kiefer, both of New York City, for other defendants.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] This suit, in spite of its claim under sections 24 and 57 of the Judicial Code (Comp. St. §§ 991, 1039), must be regarded as dependent for jurisdiction upon section 9 of the Trading with the Enemy Act. The plaintiff filed a claim, avowedly made under that act, a few days before bill filed, which he made a part of the bill itself, and there is, therefore, no procedural condition lacking to his rights. The fact

that he has claimed jurisdiction erroneously need make no difference, if the evidence falls within that section, and especially if he has no other possible remedy. That he had none appears from a consideration of the purpose and structure of the act itself. Under section 7c the President may seize all property which he decides to have enemy character, and under section 7e all who comply with his demands get immunity in all courts. But nothing is settled by the capture itself except bare sequestration of the property in the hands of the Alien Property Custodian.

[3] It is quite true that under section 12 as amended his powers are extended to include the general power to sell, but under section 9 any claimant friend may file a bill such as this, and either the bill automatically stays the sale, or at least the court may stay it in a proper case, and such a suit section 9 makes the sole remedy of claimants. Thus it is apparent what the scheme of the act was. The reduction to possession of enemy property should be absolute, final and incontestable; it was to proceed by ex parte investigation and without right of review; it should include all property that the Alien Property Custodian decided to have enemy character. But it adjudicated nothing and its effect upon any right but that of possession was nil. In a suit under section 9 the investigation and decision are irrelevant. Instead of an original libel of information to condemn the property upon capture, which places the initiative upon the captor, the initiative in restoration is given to claimant friends, who, as soon as they choose within a fixed period, may reclaim under section 9; until they do the Alien Property Custodian is free to manage and even to sell under section 12 as amended. In the reclamation suit the validity of the capture is for the first time to be tested, and the question of title to be adjudicated. If the fixed period passes without any suit, the title by capture becomes good by a kind of prescription or limitation.

[4] Such being the plainly disclosed plan of the act, it is apparent that the plaintiff here has no standing, unless as it be under section 9, or unless the act be unconstitutional. The plaintiff does attack it as unconstitutional and this objection must first be considered. Cases like McVeigh v. U. S., 11 Wall. 259, 20 L. Ed. 80, and Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914, are not pertinent. They arose under the Civil War Confiscation Acts, which did not forfeit the property of all Confederates by virtue of their status, but of only six specified classes. There was no way for a claimant, even though an avowed Confederate, to prove that he was not within those classes except by appearance in the suit. To strike out his appearance in limine, on the ground that he was an enemy, as was done, was therefore to deny him the legal procedure accorded him by the statute. Section 9 is the precise equivalent of this right, at least so far as concerns claimant friends, who are alone concerned here.

The sole basis for the plaintiff's claim of unconstitutionality comes down, therefore, to the Custodian's power of initial sequestration ex parte. But how does this differ in substance from the customary right upon libels of information in rem to arrest whatever property officials may decide to be forfeit? Such property may not be reclaimed pen-

dente lite by filing a bond; the claimant must endure the temporary loss of possession until the innocence of the res is adjudicated. The public purpose of the statute so far overrides this incident of his rights of property. How much more is this the case in time of war where the interests are vital? The difference is one merely of procedure; the substantial rights are the same, for capture effects no more than an arrest in rem. The right to sell is the only addition, and I have shown that this is at least subject to judicial control in the event of a bill filed under section 9. The act, therefore, affords a complete remedy to all claimant friends, and is constitutional. As to claimant enemies, I have already considered its validity in Kahn v. Garvan (D. C.) 263 Fed. 909, but the point does not arise here.

The purpose of this suit is to prevent the sale of 14,900 shares of stock in the Botany Worsted Mills formerly owned by Kammgarnspinnerei Stöhr & Co., a German corporation doing business in Leipzig. All right of this corporation was captured under section 7c and sections 2a and 2b of the executive order of February 26, 1918, by the Alien Property Custodian's demand on April 5, 1918, and all its rights under the contract of February 20, 1917, mentioned below, were later captured in February, 1919. Nobody questions, as I understand it, that these demands effectively divested, whatever rights the Leipzig Company had against Stöhr & Sons, Incorporated, but the dispute is as to what these were. I shall assume for argument's sake that a shareholder may bring a representative suit in the right of his corporation under section 9, and that the plaintiff here has shown a situation justifying his recognition in that capacity. I shall further assume, though the fact is no way proved, that Hans E. Stöhr had a general authority which would cover the execution of contracts for the sale of such property as this for a consideration such as this. This assumption is all that the plaintiff has suggested he could prove, if he had the chance to take proof in Germany.

[5] The precise issue then becomes, what rights the Alien Property Custodian got by his symbolic act of capture, and whether they gave him a right to sell under section 12. This question has nothing directly to do with the statute; it concerns, first, the rights of the Leipzig company; second, whether the belligerent rights of the United States were greater than the rights of the Leipzig company inter partes. If, then Stöhr & Sons, Incorporated, has no interest in the shares which forbids the sale, the capture made the Custodian an unconditional cestui que trust by substitution under the transfer of 1915 to Hans and Max Stöhr. They, being dry trustees, cannot complain of the transfer of legal title to the Custodian's name, and section 12 authorizes the sale. The question in the end turns upon the effect of the contract of February 20, 1917, which, viewed merely within its four corners, purported to convey to Stöhr & Sons, Incorporated, the shares, which were registered as such on the Botany Worsted Mills books in professed compliance with its terms. I shall assume that "title" to the shares thereby vested in Stöhr & Sons, Incorporated, in spite of irregularity under the by-laws of Botany Worsted Mills.

The contract, verbally taken, was one of two kinds—either a sale

with the purchase price payable in five future annual installments, the Leipzig Company meanwhile reserving a vendor's lien, or an option granted Stöhr & Sons, Incorporated, to buy one-fifth of the shares in five successive years, provided they made each payment within sixty days after due date. If the contract is valid at all against the United States, and if it was intended as written, on either interpretation the plaintiff is entitled to some relief, because, under the first, the Leipzig Company must sell under its vendor's lien, and such a sale would be free from the limitations of sales under section 12 as amended. If, on the other hand, Stöhr & Sons, Incorporated, has only an option, then it can be terminated only on 60 days' notice, and no such notice has been given. Therefore, if the contract is valid against the right of capture, the Alien Property Custodian must prove that it was not the true intent of the parties, and that the equitable right of the Leipzig Company is unclogged by any equity of redemption or option. I shall first assume that it would be valid against the United States.

[6] In order to ascertain the real intent of the parties on February 20, 1917, it is necessary first to consider their situation and the events of the day before. The firm of Stöhr & Sons was composed of three Germans and one naturalized American, whose interest amounted to less than 2 per cent. It was for all practical purposes, therefore, a German firm doing business in New York, and it was obvious, after February 3, 1917, the day when Count von Bernstorff received his exequatur, that its existence was imperiled by the almost certain event of war. On February 15, 1917, Max, the American partner, and De Liagre and Röhlig, also naturalized Americans, executed a certificate to form a New York corporation of 2,500 shares. In the certificate of incorporation Hans Stöhr was made a director, and he became president at once. All the stock was by several transfers issued to Hans E. and Max W. Stöhr and to Röhlig in exchange for the firm property, having a net value of over $1,000,000, and they held it when issued as "voting trustees" under the New York statute for five years. "Trust certificates" were issued by these trustees to the four Stöhrs in proportion to their interests in the old firm, except that Max, the American, held the certificates of Eduard and Georg residing in Germany, in trust for them, a trust upon a trust.

The result was that on February 19, 1917, the share of the German partners had not been put beyond the reach of capture any better than if the firm had remained in existence. All that was accomplished, and in my opinion all that was desired, was to secure the firm against dissolution in the event of war, and to insure the voting right in two Americans on whom Hans could rely, if his own right to vote on the shares became affected by his enemy character. I doubt whether the parties then or later thought of any possible confiscation at all; but, if they did, it is clear either that they despaired of any successful evasion of it, or that they were constrained by motives of prudence or conscience. In any event they left the substantial interests of the partners susceptible to capture and confiscation.

On the following day Hans E. Stöhr, assuming to act for the Leipzig Company, made the contract here in question with Stöhr & Sons,

Incorporated. The plaintiff argues that it effected an immediate change of title to the shares here in suit and that it left in the Leipzig Company no interest save a vendor's lien. The execution of that contract could have been actuated as little by a desire to escape capture by the United States as were the transactions on February 19, 1917, and for the same reason. From the point of view of the Leipzig Company nothing was gained. The first payment was a year in the future, and the rest succeeded annually. If the United States were to confiscate enemy property, the consideration was as easily discovered as the shares; it would equally be lost. From the point of view of Stöhr & Sons, Incorporated, nothing was gained, because while the shares became the property of a New York corporation, all but 2 per cent. of its shares, controlling the substantial interest in the assets, was equally lost. Hence the contract was not tabula in naufragio; some other motive must be found.

On the other hand, it is clear, of course, that the contract was not a commercial transaction. The occasion is enough to prove this and the events leading up to it. Besides, the contract itself proves that it could not have been due to ordinary commercial motives. The Botany Worsted Mills had been a successful business, already 28 years in existence and one of the largest and best equipped in the United States. No possible reason can be suggested for the sudden sale of nearly a majority of its shares, which was not based upon an emergency. Moreover, the consideration was inadequate. It expressly omitted the good will, which must have had a substantial value, and it fixed no present price at all, so that it insured nothing to the Leipzig Company except a sale of one-fifth each year at the then book value of its "hard assets." If the shares fell in value the Leipzig Company bore the loss, both in general value and in book value; if they rose, it did not share the gain, except in so far as that was reflected in book values. Possibly it is legitimate to observe, also, that our entrance into the war was likely to have that advantage to woolen mills which the event proved.

Now, Hans E. Stöhr was not acting alone for himself and his family. The record does not show how many outside shareholders there were in the Leipzig Company, but they were many. He was in the position of selling for an apparently inadequate consideration, to his family, property in which other persons were interested as well as they. The contract, if not, therefore, justified upon the principle of selling to Crassus a burning house, could not be justified at all; it was apparently a fraud. And even if not clearly such, it was voidable at the instance of any single German shareholder who chose to protest. It was not likely that Heyn, a capable adviser, should have seriously expected a contract with such infirmities to stand; indeed, it is not credible that the parties could have intended it as a commercial bargain at all, except it were, what is was not, a desperate catch at salvage.

Besides, to give even a colorable plausibility to the bargain, the plaintiff's position requires the assumption that the contract was mutual in its obligations. The point is not in any sense critical, but perhaps worth notice, because it was pretty clearly not a contract of purchase, but only an option. Of course, I am aware of the doctrine that bilateral

obligations are generally presumed in like cases, and that the courts will light on such words as "agreed" and the like, when they need them, but all such canons are only guides to the interpretation of general intent. I should perhaps think that the obligations were mutual, were it not for article 5; but, that being there, the omission of any express promise to pay may well have been deliberate. Article 5 in terms provides that the remedy of the Leipzig Company on default shall be one which is in substance strict foreclosure, and that after strict foreclosure there shall be no further right of action on either side. It is quite true that it does not expressly say that this shall be the only remedy; but in view of the conclusion of the article I should be disposed so to construe it, especially when, as I have said, there are elsewhere no express covenants to pay the purchase price. It is unexpected, to say the least, that an experienced lawyer like Heyn should have introduced a clause of strict foreclosure in a genuine contract of sale, knowing it to create a forfeiture. The structure of the contract, therefore, if the case turned on it, would lead me to call it an option.

The surroundings confirm that conclusion. As I have shown, while the contract was heavily weighed against the Leipzig Company, conceivably it might involve Stöhr & Sons, Incorporated, in embarrassing obligations, because the transaction was large. After the annual appraisals, the shares might fall; the company might be on an obvious decline. Some recalcitrant Leipzig shareholder might insist upon ratification of the bargain and place Stöhr & Sons, Incorporated, in an awkward predicament. But, if it were only an option, all this would be avoided. The omission to include any promise to pay at least fits with that purpose not to induce the Leipzig Company to call for performance, which may be inferred from the unequal inducements of the contract to either party. If the contract were never intended to be enforced, and if some of the Leipzig shareholders were not altogether reliable, we should look for a contract in substance and in form not dissimilar.

But as an option for $5,000 to purchase during a period of five years $5,000,000 of shares at prices which confessedly omitted an important element of value, the contract is too open a fraud upon the Leipzig Company to admit even of argument. Hans E. Stöhr and Heyn were not engaged in any such enterprise; the plaintiff would be the last to suggest that they were. Therefore I think I may say that it is demonstrated that neither was the contract intended to sell out in an emergency so as to escape putative capture, nor was it a genuine business transaction dependent upon an estimate of the mutual advantages of the parties. There remains only the possibility that it was not intended to represent the real purpose of the parties at all, but to serve as a cover for another purpose.

We are, moreover, not left to surmise as to what that purpose was, because the written statements of Hans E. Stöhr and Heyn just before the capture very frankly disclose it. It was merely the continuation of what they had done in 1915, when they put the legal title in the name of Hans E. and Max W. Stöhr for convenience of management, and what they had done in the case of the partnership just before February

20, 1917, for the same reason. They wished to put their house in order against the disabilities and inaccessibility of their German associates during the period of a war which could certainly not go more than five years. This they did, so far as I can see, without the slightest anticipation of any confiscation of enemy property, which had, indeed, been generally supposed for over a century to be obsolete.[1]

Hans E. Stöhr wrote two letters to Heyn on February 5, 1918, while Heyn was in Washington, arranging, so far as he could, the affairs of the Stöhrs with the Alien Property Custodian. In one letter he said that the shares in question were owned by the Leipzig Company; in the other that the majority of the Botany Worsted Mills was enemy owned. Each was probably intended for transmission to the authorities, and each flatly contradicted the contract of February 20, 1917, at least unless it was an option, which, as I have shown, is incredible. When Heyn came to make his final statement, cumulative upon the earlier reports under section 7a—a statement which Hans expressly approved—he specifically mentioned the contract of February 20, 1917, and referred it exclusively to the supposed danger to the voting control of the Botany Worsted Mills. It "had," said he, "of course, no reference to the status of such control so far as the Alien Property Custodian is concerned. * * * Considerably more than a majority of its stock is controlled by alien enemy interests within the meaning of the Alien Enemy Act."

This information was given in compliance with section 7a, the second paragraph of which requires a statement as of February 3, 1917, of all enemy shareholders who the corporate officer had cause to suppose then or later owned any shares. Heyn would have had to disclose that Hans E. and Max W. Stöhr were trustees on February 3, 1917, for so the books would show. The section in addition required him to say what shares were enemy owned though standing in the name of another when the report was filed. He was therefore positively required to state the character of the relations arising under the contract of February 20, 1917, and his account of it was authoritative. There can be no question that, had the Leipzig Company had only a vendor's lien, it would have been a wrong upon Stöhr & Sons, Incorporated, to fail to state its full rights. In saying that the "control" for purposes of the act was in the Leipzig Company, I may fairly suppose that he had in mind those provisions of section 7a under which he was acting; he used "control" as "owned."

Heyn and Hans S. Stöhr are now dead, but the aspect which the plaintiff seeks to put upon the contract is an apocryphal afterthought, which there is no reason whatever to suppose that they, were they alive, would now have the disposition, or the hardihood, to adopt. Their

[1] Oppenheim, International Law, vol. 2, § 102; Halleck, International Law, c. 19, §§ 12–21; Wheaton, International Law (5th Eng. Ed., 1916) pp. 417, 416, 419, 424, 425, 426; Hall, International Law (6th Ed. 1909) pp. 431–435; Twiss, The Law of Nations, §§ 53–56; Westlake, International Law, vol. 2 (1907) pp. 36–44; Hague Second Conference, art. 53, "Regulations Respecting the Laws and Customs of War on Land." Magna Charta, § 41, seems to have contained the germ of the same idea.

declarations ante litem motam fit that interpretation, which alone acquits them at once of any purpose to defraud either their associates or the United States in its right as captor. I have no question that the beneficial ownership of the Leipzig shares was always intended to remain in the Leipzig Company.

[7] The question whether the contract was invalid as a fraud on the belligerent rights of the United States is not, therefore, of critical consequence, in view of the completeness of the proof that there never was any transfer at all. The nearest authorities I have been able to find are those relating to prize. It was well settled before the Great War that under French law no transfers of cargo or bottoms, flagrante bello, were valid; this being recognized as in diminution of the belligerent's right of capture, though under American and British law the same doctrine did not obtain.[2] In those countries such transfers are valid, but only if made while the goods or vessel are not in transitu. The Benito Estenger, 176 U. S. 568, 20 Sup. Ct. 489, 44 L. Ed. 592; The Bawean [1917] Prob. Div. 58; The United States [1916] Prob. Div. 30.

[8] The claimant must, moreover, even when the goods were not in transitu, establish an unconditional transfer, and the scrutiny as to this point is especially severe; any retention of enemy interest being sufficient to prevent its being regarded as absolute. The Benito Estenger, supra; The Sechs Geschwistern, 4 Ch. Rob. 100; The Jemmy, 4 Ch. Rob. 31. If the sale were absolute of a vessel or cargo not in transitu, being good flagrante bello, it was a fortiori good, imminente bello. But if the sale be imminente bello, and in contemplation of war and to avoid capture, the same limitations applied. The Daksa [1917] App. Cas. 386; The Southfield [1917] App. Cas. 390, note (Sir S. E. Evans); The Tommi [1914] Prob. Div. 251; The Jan Frederick, 5 Ch. Rob. 115; The Vrow Margaretha, 1 Ch. Rob. 337; The Baltica, 11 Moore, P. C. 141. Thus, an absolute sale of goods in transitu, or a sale with reservation, is void, if made to avoid capture. In general, it is the rule that the enemy character of the goods depends upon their character at the outset of the voyage. The Packet de Bilboa, 2 Ch. Rob. 133; The Ann Green, Fed. Cas. No. 414.

It is quite true that the right of capture on land depends upon the action of Congress (Brown v. U. S., 8 Cranch, 110, 3 L. Ed. 504), and is not a part of our customary law arising from a state of war. Yet the incidents of sea capture might, in the absence of contrary legislative expression, be perhaps looked to as a fair analogy. The reason of the rule which makes the transitu a test of the validity of a transfer, imminente bello, was considered by the Privy Council in The Baltica, supra, and it was held to be the difficulty involved in detecting reserved enemy interests. Therefore a ship was restored when delivery was made to the transferee at an intermediate port. The theory was

[2] Oppenheim, International Law, War, §§ 91, 92; Westlake, International Law, part 2 (Ed. 1907) p. 150; Hall, International Law, part. 3, c. VI (6th Ed.) 499, 500; Wheaton, International Law (5th Eng. Ed.) 576, 577; Twiss, Law of Nations, part 2, §§ 162, 163. The Declaration of London, §§ 56, 57, made certain modifications in the British and American rule.

repudiated that while at sea the belligerent's rights are already inchoate, and that the ship has come, as it were, already into the jurisdiction of the captor.

[9] In spite of The Baltica, supra, it might still be that sales of goods within enemy territory, imminente bello, and to avoid capture, ought to be regarded as in fraud of belligerent rights, if the statute said nothing. A serious argument might be made in favor of such a result, once a policy of land capture be inaugurated; but under this act it appears to me that section 7b effectively closes any such discussion. A part of the first paragraph of that section reads as follows:

"No person shall by virtue of any assignment * * * to him of any * * * chose in action by * * * an enemy * * * have any right or remedy against the * * * obligor * * * unless said assignment * * * was made prior to the beginning of the war."

It might indeed be open to a good deal of question whether this included an assignment of equitable interests in shares of stock (Brown v. Fletcher, 235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374), though shares are analogous to choses in action (Jellenik v. Huron Copper Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647), and a fortiori equitable interests in shares. But I think that the purpose of the statute is pretty clearly indicated, even if its letter do not cover this precise case. It can scarcely be supposed that an exception would be made in favor of ante bellum transfers of choses in action which did not apply to property so nearly akin as this, or indeed to all property, and it is clear that absolute transfers of choses in action before April 6, 1917, would be valid. Apparently the United States meant not to inquire into such transfers as in fraud of its rights. There is no reason to extend the application of so penal a statute beyond its fair import; therefore the capture must stand upon the ground that the contract conveyed nothing to Stöhr & Sons, Incorporated. Upon that ground it finds sufficient support.

It becomes unnecessary to consider the prayer of the plaintiff for letters rogatory.

Upon the understanding that this suit now concerns only the 14,900 shares of the Leipzig Company, the bill will be dismissed, with costs.

COAST FISHERIES CO. v. LINEN THREAD CO.

(District Court, D. Massachusetts. January 6, 1921.)

No. 1195.

1. **Principal and agent ⊂=190(1)—Party claiming to be undisclosed principal of party to contract must prove agency.**
   One suing for breach of warranty on a sale of goods to a third party as the undisclosed principal of such third party must prove the agency.

2. **Principal and agent ⊂=143(2)—Undisclosed principal cannot recover, if circumstances preclude substitution for agent.**
   An undisclosed principal cannot recover on a contract made with its agent, if the nature of the contract and the circumstances surrounding

it are such as to preclude the principal from substituting itself in place of the agent.

3. **Corporations ⊜432(12)—Evidence held to show buyer of goods for plaintiff was not acting as its agent.**
Evidence *held* to show that one of plaintiff's stockholders, in buying goods from defendant for its use, which were delivered to it, after defendant had refused to sell them to plaintiff because its credit was not satisfactory, did not act as agent for plaintiff.

4. **Contracts ⊜186(1)—Person cannot be put into contractual relation with another, with whom he refuses to deal.**
In private affairs, everybody has a right to choose with whom he will contract, and one person cannot be put into contractual relations with another, with whom he has refused to deal by any arrangement or understanding between the other party to a contract and a third person.

5. **Principal and agent ⊜143(2)—Undisclosed principal cannot substitute itself for agent, when personal qualities or responsibilities involved.**
In executory contracts involving personal qualities or responsibility, an undisclosed principal cannot substitute himself for his agent without the assent of the other party to the contract.

6. **Corporations ⊜431—Undisclosed principal held not entitled to recover, where other party had refused to deal with it on credit.**
Assuming that one of plaintiff's stockholders, in buying goods to be manufactured by defendant on 60 days' credit, was the agent of plaintiff, as his undisclosed principal, plaintiff could not recover on the contract, where defendant had declined to sell to plaintiff, because its credit was not satisfactory.

At Law. Action by the Coast Fisheries Company against the Linen Thread Company. Judgment for defendant.

Carver & Schell and Martin Gilbert, all of Boston, Mass., for plaintiff.

Carlton W. Wonson, of Beverly, Mass., for defendant.

MORTON, District Judge. This action is brought to recover damages for an alleged breach of warranty on a sale of goods by the defendant to the plaintiff. The defendant contends, inter alia, that it did not sell the goods in question to the plaintiff, and made no contract with the plaintiff with respect to them, and that the plaintiff is therefore not entitled to recover. A jury having been waived, the evidence on this issue has been completed, and the question argued and submitted, without the defendant being required to rest on its other defenses.

The facts are as follows:

The defendant is a large manufacturer of gill netting. The plaintiff is a fishing company, in which Eugene P. Carver, Esq., was the principal stockholder. The defendant, not being satisfied with the credit of the Fisheries Company, declined to sell to it. Thereupon Mr. Carver arranged with the defendant that goods wanted by the Fisheries Company should be ordered by and charged to him. This arrangement covered the transaction here in question.

The contract on which this action rests is not in dispute, being contained in the correspondence between Mr. Carver and the defendant. On its face it appears to be between Mr. Carver and the defend-

ant; the defendant's letters are addressed to Mr. Carver personally; his letters are written on his personal letter heads and signed by him personally; the correspondence contains no suggestion that he was acting as agent. The goods were billed to Mr. Carver, and by his direction were shipped to the plaintiff at Gloucester. The sums which he paid for the goods were credited to him on the plaintiff's books. The defendant understood that the goods were procured by Mr. Carver for the use of the Fisheries Company.

After the alleged defects in the netting for which this action is brought had become manifest, Mr. Carver wrote to the American Net & Twine Company, with which the defendant is affiliated, complaining that the gill netting was not proper, and that the defect had resulted in "great expense and loss to me." His letter also stated that—

"You [the defendant] will therefore not receive any orders from me or any one purporting to represent me * * * until such time as you are willing to take the matter up in what I consider to be a businesslike way."

When the defendant brought suit in the state court against Mr. Carver for the balance of certain bills, Mr. Carver brought a cross-action against it in his own name to recover the damages now sued for by the plaintiff. The action in the state court antedated the present one by about six months, and at the time when this action was heard was still pending.

[1, 2] The ground upon which the plaintiff now claims to recover is that Mr. Carver acted as its agent in making the purchases in question, it being his undisclosed principal. This contention involves: First, a question of fact. The plaintiff, alleging the agency, must prove it. Shields v. Coyne, 148 Iowa, 313, 127 N. W. 63, 29 L. R. A. (N. S.) 472, Ann. Cas. 1912C, 905. And, second, the nature of the contract and the circumstances surrounding it must be such as not to preclude the principal from substituting itself in place of the agent. Moore v. Vulcanite Co., 121 App. Div. 667, 106 N. Y. Supp. 393; Birmingham Club v. McCarty, 152 Ala. 571, 44 South. 642, 13 L. R. A. (N. S.) 156, 15 Ann. Cas. 237; Shields v. Coyne, supra; Arkansas Valley Smelting Co. v. Belden, 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246.

[3] Mr. Carver was undoubtedly acting in the interest of the plaintiff; the goods were purchased for its use, and were delivered to it; he made no profit on the transactions, and entered into them only to assist the plaintiff, in which he was heavily interested. But it does not necessarily follow that he made the contract as its agent, nor that the transaction was so understood between them. Whiting v. Crawford Co., 93 Md. 390, 49 Atl. 615. Indeed, it sems fairly clear that Mr. Carver, at the time when the contract was completed, did not understand that he was binding the Fisheries Company to the defendant. Both he and the defendant had in mind that the latter was unwilling to contract with the plaintiff. Its offer was made to Mr. Carver personally, and was accepted by him personally. The bills were rendered to him, and were paid by him, or at his direction. When trouble arose about the quality of the goods, he spoke of the loss as to "*me*,"

and said *he* would not deal with the defendant until the latter was straightened out in what he considered a businesslike way; and he refused to pay personal bills to the defendant. When sued by the defendant, he counterclaimed for the very damages which the plaintiff now seeks to recover.

Nobody contends that Mr. Carver took the position of guarantor of the Fisheries Company's bills to the defendant; and it is clear that he did not, and that the defendant dealt directly with him. Giving Carver's deposition the careful consideration to which it is entitled, the transaction seems to me to have been one in which he bought the goods and turned them over to the Fisheries Company, rather than one in which the Fisheries Company bought from the defendant through him as agent; and I so find.

Moreover, even if it be assumed that, as between Mr. Carver and the plaintiff, the latter was understood to be the contracting party, I do not think that, as against the defendant, this understanding can be given effect.

[4, 5] It is not easy to state a general inclusive rule of law covering the rights of an undisclosed principal to substitute himself for his agent in a contract, and to sue on it in his own name; but it is clear that in private affairs everybody has the right to choose with whom he will contract or will not contract, and that one person cannot be put into contractual relations with another with whom he has refused to deal by any arrangement or understanding between the other person and a third person. And it is also clear that, in executory contracts involving personal qualities or responsibility, an undisclosed principal cannot substitute himself for his agent without the assent of the other party to the contract. Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93; Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; Boulton v. Jones, 2 Hurlst. & Nor. 564; Arkansas Smelting Co. v. Belden, supra. See, too, note to Shields v. Coyne, supra, in 29 L. R. A. (N. S.) 472.

[6] These principles seem to me decisive of the present case. The defendant had, as all parties understood, explicitly refused to deal with the plaintiff (see Moore v. Vulcanite Co., supra, where a similar ground of refusal to deal with a person is discussed); the goods ordered were to be manufactured by the defendant; and the sale was the buyer was an important factor, as both parties recognized. With not for cash, but on 60 days credit. The personal responsibility of the defendant it was a decisive factor.

Upon the facts stated, I am of opinion that the plaintiff is not entitled to recover; and I so find and rule.

Judgment for defendant.

In re WILSON.

(District Court, D. Maryland. December 23, 1920.)

No. 3275.

1. **Bankruptcy ⟸415(3)—Court has discretion to determine dischargeability of only substantial debt.**
   In determining the right of the bankrupt to a discharge, the court has discretion to determine whether the only substantial debt scheduled by the bankrupt is one which would be barred by the discharge.

2. **Bankruptcy ⟸424—Injury caused by illegally driving automobile is not willful and malicious.**
   A judgment for personal injuries caused by illegally driving an automobile while intoxicated is not one for willful and malicious injury to the person, since it does not involve the intent to cause the injury, so that such judgment is barred by a discharge in bankruptcy.

3. **Bankruptcy ⟸408(1)—Bankrupt's testimony held not willfully and knowingly false.**
   Bankrupt's testimony that he did not have a bank account at time of petition, that he was not his father's partner, and that he had never had a bank account, was not willfully and knowingly false, so as to bar his discharge, where he had never had such account in his own name, though there had been an account in the joint names of himself and his father and mother and he had testified in a previous action that he had paid for an automobile with his own money, which he took from the bank for that purpose.

In Bankruptcy. In the matter of William Griffith Wilson, bankrupt. On specifications in opposition to discharge in bankruptcy. Discharge granted.

Seth, Shehan & Marshall, of Easton, Md., for objecting creditors.
N. E. Clark, of Easton, Md., and Addison E. Mullikin, of Baltimore, Md., for bankrupt.

ROSE, District Judge. On a Sunday afternoon towards the close of July, 1918, the bankrupt, in his Ford car, ran into another automobile on the Peach Blossom road, near Easton, in Talbot county, in this state. A Miss Lednum, a passenger in the other machine, was severely and permanently injured. She brought suit in the circuit court for Talbot county against the bankrupt and his father, apparently upon the theory or hope that the machine belonged to a partnership, consisting of the bankrupt and his father, and was being used at the time in the business of the firm. The declaration counted on negligence, violation of traffic laws, excessive speed, etc.

In the course of the trial the bankrupt testified that the machine was his own, that it did not belong to his father, and that it was paid for in part to the amount of nearly $400 with his own money, which he had taken out of bank for that purpose. The case against the father was dismissed. The facts were such as led the court to grant the plaintiff's prayer that the jury would be entitled to award punitive damages against the bankrupt, and they returned a verdict against him for $4,750, upon which judgment was duly entered.

The money which the bankrupt used in the purchase of the machine which did the harm was withdrawn by him personally from an account in the Workmen's Permanent Building & Loan Association, which has a savings department and acts as a savings bank. That account had been opened on July 2, 1915, in the name of the bankrupt, William Griffith Wilson, his mother, Fannie R. Wilson, and his father, George M. Wilson, in trust for all, and subject to the order of either (sic) the balance at death of either (sic) to belong to the survivor.

The account was opened by a deposit of $665, the ownership of which the testimony leaves in doubt. The father says it was his, and so at times apparently does the son; but the son testifies that before that time he had been giving his father money to keep for him. He subsequently deposited small amounts in the account, and his father says he would sometimes give him small sums to deposit for the elder's account. The withdrawals, prior to the accident, except $381.50, used in the purchase of the automobile in question, were in small amounts, and apparently were all made by the bankrupt for his own purposes.

Some 10 days after the accident the father went to the bank and closed the account by the withdrawal of the balance, then amounting to $922, which he deposited in another banking institution in his own name. About the time the verdict was rendered, the bankrupt gave a mortgage on the automobile for $500 to his counsel to secure their fee. The father, very shortly thereafter, purchased the mortgage, apparently for its face value, from the lawyers, and then the son filed his petition in bankruptcy, scheduling as his only asset the automobile, worth, he said, about $200, and subject to the mortgage for $500.

[1] Some of the evidence given during the trial of the damage case has been reproduced in these proceedings. It indicates that the accident was the result of the bankrupt's driving his car while intoxicated. At the hearing, and in one of the briefs of the bankrupt, it was suggested that the nondischargeability of a debt, even if it were the only substantial one scheduled, was no ground for withholding a general discharge. That, it was said, should be granted, and the question of whether it had the effect of extinguishing a particular debt should be determined in whatever proceedings might subsequently be had to enforce payment. On second thought, however, the bankrupt united with the creditor in asking that the question of dischargeability should be here determined, as in the discretion of the court, it may be. In re Colaluca (D. C.) 133 Fed. 255.

[2] Is the judgment in question a liability for a willful and malicious injury? The creditor, relying on Ex parte Cote (Vt.) 44 Am. Bankr. R. 43, 106 Atl. 519, in which the facts are very similar, asserts that it is. There the Supreme Court of Vermont, with great ability, argues that any damage resulting from the intentional violation of law is willful and malicious, within the meaning of the act, whether the intent to cause the injury, or any injury, existed or not. I find it difficult, however, to resist the conclusion that Congress

wished to draw a hard and fast line between cases in which the bankrupt intended to do harm and those in which no such intention existed. Such would seem to be the opinion of the Supreme Court, for after an elaborate review of the reasons why, in its view, a liability for criminal conversation with the wife of the creditor was a willful and malicious injury to his person and property, it said:

"One who negligently drives through a crowded thoroughfare, and negligently runs over an individual, would not, as we suppose, be within the exception." Tinker v. Colwell, 193 U. S. 489, 24 Sup. Ct. 505, 48 L. Ed. 754.

That such reckless driving might often be a violation of a state statute or a municipal ordinance could scarcely have been overlooked by the court, but there is no suggestion that, if it was, the rule would be different. The first specification must therefore be overruled.

[3] A like fate must attend the second and third. Until the accident, father, mother, and son doubtless felt that the bank account belonged to the last named, and, had it not happened, they would doubtless feel so still. That the father never relaxed some measure of control over it is typical of his masterly way of dealing with those dependent upon him. If the money had been his son's, he then thought himself entitled to take it away, and in that view both mother and son acquiesced without cavil or question. A finding at the time of the filing of the bankruptcy petition that the bankrupt thought that the money was his would not be justified.

Nor does the evidence enable me to agree with the referee in sustaining the fifth specification. I cannot believe that he was his father's partner. When the father's father was alive, the firm name was William H. Wilson & Son. After the grandfather died, the bankrupt's father changed the firm sign and its stationery by substituting his Christian names for those of the deceased, but left the "& Son" as it had been. The bankrupt was then a small boy, and it was not reasonable to suppose that any one would have seriously thought of then admitting him to the firm. The incident of the issuance, some four years ago, of a trader's license to both father and son, is sufficiently explained.

The fourth specification raises a closer question. The bankrupt, when examined before the referee, swore that he never had a bank account. He never had, in a sense that there ever was one in his own name, and in that alone. Nevertheless his testimony in this respect was far from candid. The objecting creditor stresses the fact that, in testifying in the damage case in the Talbot county court, the bankrupt had said that the automobile was his, paid for with his money, which he had taken out of bank for the purpose; but it would scarcely, however, be safe to hold that, upon all the facts, he can be found to have made willfully and knowingly a false oath.

It follows that the discharge must be granted. I am frankly sorry that it is so. The bankrupt, by his recklessness, has caused the objecting creditor injuries which she will carry to her grave. He has come into this court for no other purpose than to make sure that she will never get a cent of his money, and yet, if he outlives his father, he

will, in all probability, be a well-to-do man. In this particular case, the result is to be regretted; but no other can be reached in accordance with well-settled principles, the application of which, in the overwhelming majority of cases, is at once necessary and salutary.

UNITED STATES v. KRUMM.

(District Court, E. D. Pennsylvania. February 8, 1921.)

No. 8.

1. **Food ⟸20(3)—Restriction to unbroken packages does not apply to shipper.**
   The restriction of the application of the Food and Drugs Act (Comp. St. §§ 8717–8728) to original unbroken packages applies only to those who receive in interstate commerce and thereafter deliver adulterated or misbranded articles, not to those who ship or deliver for shipment, so that an information charging that defendant shipped misbranded food in interstate commerce need not allege that it was shipped in original unbroken packages.
2. **Food ⟸20(3)—Indictment charging article branded "macaroni" was made of flour, and not "semolina," is not sufficient.**
   Since "macaroni" is defined as made from a paste from the flour of hard glutinous wheat, and "semolina" is defined as the hard grains retained in the bolting machine after the fine flour has passed through, an indictment charging interstate shipment of an article labeled "macaroni," which was adulterated and misbranded because made of flour, not of semolina, is not sufficiently definite, even though macaroni must not contain the fine flour which passes through the bolting machine.
3. **Indictment and information ⟸140(1)—Whether brand had acquired meaning contrary to that alleged is not to be determined on demurrer.**
   Whether the word "macaroni" had, in the course of manufacture, trade, and public use, come to have an accepted meaning different from that alleged in the information, is a trial question, not to be determined on demurrer to the information.
4. **Food ⟸15—Adulterated or misbranded article need not be harmful.**
   It is not necessary that an article of food, in order to be unlawfully adulterated or misbranded, within the Pure Food and Drugs Act (Comp. St. §§ 8717–8728), be dangerous to the public.

Albert C. Krumm, Jr., trading as A. C. Krumm & Son, was charged by information with violating the Food and Drugs Act, and he demurs to the information. Demurrer sustained.

Charles D. McAvoy, U. S. Atty., and Edward S. Kremp, Asst. U. S. Atty., both of Philadelphia, Pa.

Frederick L. Breitinger, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The United States attorney filed an information against the defendant, charging violation of the Food and Drugs Act (Comp. St. §§ 8717–8728) in shipping and delivering from Philadelphia, Pa., to Baltimore, Md., a number of packages, each containing an article of food labeled, marked, and branded as "Krumm's Macaroni." The first count charged that the article of food was adulterated, "in that a substance, to wit, a product pre-

pared from flour, had been substituted in whole or in part for macaroni, to wit, a product prepared from semolina, which the article purported to be." The second count charged that the article of food was misbranded, in that the word "macaroni" "was false and misleading, in this: That it represented that said article was macaroni, to wit, a product made from semolina, whereas, in truth and in fact, said article was not macaroni, to wit, a product made from semolina, but was a product made from flour."

The defendant demurs, upon the ground that the information does not set out any offense against the United States; that it is not averred that the packages were original unbroken packages; that it is not averred that semolina is not flour, or a product made from flour; that it is not averred that macaroni is a product wholly prepared from semolina; that the definition of the word "macaroni," as given in the information, is not in consonance with its meaning as accepted by the general public; and that it is not set forth that the article of food contained in the packages was dangerous to the health or welfare of the people, or intended to deceive the purchaser.

[1] The first ground of demurrer may be dismissed, for the reason that, while the Food and Drugs Act prohibits shipping or delivering for shipment in interstate or foreign commerce any article of food which is adulterated or misbranded, it does not restrict the offense of shipping or delivering for shipment to articles in original unbroken packages; the restriction to original unbroken packages applying only to those who receive in interstate commerce and, having received, deliver in original unbroken packages any adulterated or misbranded articles.

[2] As to the averments in relation to the substance contained in the packages, I think they are lacking in that particularity in both counts which should be observed to inform the defendant with certainty of the charge he is to meet at the trial. The offense under the first count, adulteration, arises, in the case of food, "if any substance has been substituted wholly or in part for the article," and the offense of misbranding arises, "if the packages containing it or its label shall bear any statement, design, or device, regarding the ingredients or substances contained therein, which statement, design, or device shall be false or misleading in any particular." According to the Century Dictionary, macaroni is a paste or dough prepared originally and chiefly in Italy from the glutinous granular flour of a hard variety of wheat. According to the Standard Dictionary, it is an Italian paste made into slender tubes from the flour of hard glutinous wheat mixed with water. Semolina is defined to be the hard grains retained in the bolting machine after the fine flour has passed through.

If the article in question, as averred in the first count, was prepared from flour, or, as averred in the second count, was made from flour. it was apparently macaroni. But if it is intended to charge that macaroni is not made from the whole of the flour which comes from the mill, but in order to be macaroni must be made from the large, hard grains retained in the bolting machine after the fine flour had passed through, the counts are lacking in averments that semolina is not a

part of the substance known as flour. Flour may be fine or coarse, it may be made from the whole grains of the wheat, as "whole wheat flour," or it may be the fine bolted flour. If it is meant by the indictment to charge that, in order for a substance to be macaroni, it must be made wholly from semolina, and not contain any of the fine flour which, upon passing through the bolting machine, leaves a residuum of semolina, the information should plainly so state.

It is of vast importance to the public that foodstuffs shall be what they purport to be through the labels, marks and brands upon the packages. It is a matter of common knowledge that in the fine wheat flour of commerce much of the nutritive property of the grain is absent, which remains in "whole wheat flour." A purchaser of an article labeled "whole wheat flour" is entitled to receive what he is led to believe he is purchasing from what appears upon the label. Similarly, one who is purchasing an article labeled "macaroni" is entitled to receive the article containing nutritive ingredients which genuine macaroni is known to contain. Otherwise, the party substituting some other substance for the proper ingredients, or designating it by names which falsely represent the contents or mislead the public, is liable to the penalties of the act. If, however, one is charged under the act with adulteration and misbranding, he must be informed with sufficient particularity and certainty of the charge against him to enable him to prepare his defense. This particularity and certainty are obviously lacking in the information filed.

[3] It may be that in the course of manufacture, trade, and public use the name "macaroni" has come to mean an article made from flour, without regard to its containing semolina alone, and it may be that the word as accepted by the general public is not consonant with what was intended to be set out in the information. These, however, are trial questions.

[4] As to the remaining ground of demurrer, it is not necessary under the Pure Food and Drugs Act that an article, in order to be unlawfully adulterated or misbranded, must be dangerous to the health of the people.

Demurrer sustained.

THE PEMBROKESHIRE.

(District Court, D. Maryland. December 27, 1920.)

No. 485.

Collision ⇐95(5)—Burdened ship held solely at fault for collision with tow.

A ship passing out through the Cut-Off Channel at night which was the burdened vessel, *held* solely at fault for collision with a barge in a tow of five barges; the evidence not sustaining the ship's claim that the tow was extending diagonally across the channel, which would have made it a fault for the tug to give assent to the passing signal.

In Admiralty. Libel by the J. B. Blades Lumber Company against the steamship Pembrokeshire. Decree rendered for libelant.

John Henry Skeen, of Baltimore, Md., for libelant.

Burlingham, Veeder, Masten & Fearey, of New York City, and George Forbes, of Baltimore, Md., for respondent steamship Pembrokeshire.

Howard M. Long, of Philadelphia, Pa., and Edward E. Blodgett, of Boston, Mass., for tug Helen.

ROSE, District Judge. About 9 o'clock on the evening of August 28, 1918, the British steamship Pembrokeshire, outward bound from Baltimore, was in collision in the Cut-Off Channel with the lumber-laden barge, Joseph W. Janney, which was the fourth of five barges then being towed from Norfolk to Baltimore by the tug Helen. The steamer was unhurt, but the barge and its cargo suffered injury.

From the bow of the tug to the stern of the rearmost barge was a half mile or more. There was no moon, but it was a good night for seeing lights. The regulation lights were burning on board the steamer, the tug, and upon every one of the five barges, the last of which carried on a yardarm aft the statutory two white lights, showing all around the horizon. In addition, the war being at its height, the powerful searchlights of Ft. Howard were kept continually playing over the channel. There can be no question that everybody saw everybody else, or with any ordinary vigilance should have done so.

Only one person who was on the steamship at the time has been produced as a witness. He was the Maryland pilot then in charge of its navigation. According to his story, while still in the Brewerton Channel, he saw the tug and its tow, but could not make out accurately the position of the barges with reference to the channel buoys until he had completed his turn into the Cut-Off Channel. He then perceived that, while the tug was on the eastern side of the channel, the two rearmost barges were to the westward of it, so that the tug and its tow, in their course diagonal to the channel, were occupying the whole of it. To this cause he ascribes the collision. His explanation is not sufficient. His was the burdened vessel, and, whether the tow was or was not out of its place, he had ample opportunity to see where it was. He does not seriously claim that it changed its course after he first saw it.

The only question about which there can be controversy is whether the tug or the barge, or both, were also to blame. The fault alleged against them by the steamship is the failure to observe the narrow channel rule. In view of what was said by the Circuit Court of Appeals for this circuit in The Howard Reeder, 207 Fed. 935, 125 C. C. A. 377, it may be doubtful whether fault can be predicated merely upon the fact, if it were a fact, that the tug and its tow were crossing the channel diagonally, and if the position of the tug and its tow were as the steamship claims it to be, that must have been what the tug was trying to do.

The tide in that part of the Chesapeake, under such conditions as prevailed on the night in question, may be dismissed from consideration. What wind there was might have had some tendency to cause the rearmost barges to sag a little to the westward, but, the tug being where all sides admit that it was, not enough to have put them in the position in which the steamship located them.

The tug, with one blast, answered the one blast signal of the steamship, and by so doing it said that in its opinion it was safe for them to pass port to port. If the flotilla were completely blockading the channel, such signal should not have been given. The tug should have answered the one blast of the steamer with the danger signal, but there is no sufficient reason to believe that any of the barges were at that time, or at any time, to the westward of the channel.

A half dozen or more witnesses, who were on the tug or on the barges, insist that all of them were at the time of the collision, and for an indefinite time before, on the eastern side of the channel. On this question they are definite, precise, and particular. Most of them, to my apprehension, leaving aside for a moment the point presently to be mentioned, stood the test of direct examination and cross-examination better than did the steamship pilot. Nevertheless it is urged, on behalf of the steamer, that what these men testify to shows that it is impossible that the rearmost barges could have been on the eastern side of the channel. For some time before the collision, the tug and the three barges nearest it saw the steamer's red light only, while those on the two rearmost barges saw its green light, and not its red. It is said that this would have been impossible, had all the barges been on the easternmost side of the channel.

When this point was made at the hearing, I regarded it of sufficient importance to request the respective parties to furnish diagrams, each illustrating from its own standpoint what the testimony on this point really indicated. An examination of the charts furnished in compliance with this request shows that it would have been perfectly possible, until the briefest possible time before the collision, for the steamer to have shown her red lights to the tug and to the three foremost barges, and her green light to the two rearmost, even if they had all been on the east side of the channel, and even if they had been, as they say they were, directly in the tug's wake. It is, of course, possible that they may have been a trifle out of line, and yet have been far enough to the east to have left the steamship ample room to

pass in safety. If they had been, they would have seen the green light all the longer.

In what has been said, moreover, no account has been taken of the probability that the green light was visible for a very few degrees across the steamship's bow. Knight's Modern Seamanship, 338.

The pilot admits that it is not usual to take heavy steamers out of the Baltimore harbor at night. He objected to doing so on this occasion. He knew that he was likely to meet tows and that a steamer of the weight, size, and draft of the Pembrokeshire would be hard to control under such conditions. He consented to make the attempt because Admiral Jones, at that time in charge for the British Admiralty of its merchant ships, strongly urged him to do so, stating that war exigencies made it imperative that the steamship should arrive at Hampton Roads in time to join a convoy about to sail. He was overtaken by the danger he had feared. He met a long tow. He did not take proper precautions in time, and when he did at last what he should have done some time sooner he found that he could not handle his steamer so as to prevent the collision.

The ship must be held solely to blame.

UNITED STATES v. MOONEY et al.

(District Court, E. D. New York. December 11, 1920.)

Criminal law ⇐365(4), 921—Court may exclude, on objection of codefendant, testimony of witness who disregarded rule; new trial held not required.

It is within the discretion of the trial court to exclude the testimony of a witness who disregarded the rule excluding him from the courtroom, if the particular circumstances justify it, and the exclusion of the testimony of such witness, when he was called by a defendant who did not subpœna him, on the objection of the codefendant who did subpœna the witness, but who did not desire his testimony, does not require the granting of a new trial, especially where the testimony, if not actually immaterial, would not have been sufficient to justify disturbing the verdict.

One Mooney and others were convicted of conspiring to steal property belonging to the United States. On motion by defendant Rosenberg for a new trial. Motion denied.

Leroy W. Ross, of Brooklyn, N. Y. (Charles J. Buchner, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

K. Henry Rosenberg, of New York City, for defendant Rosenberg.

GARVIN, District Judge. Four defendants have been convicted, after a trial by jury, of the charge of conspiring to steal property belonging to the United States of America. The defendant Rosenberg moves to set aside the verdict and for a new trial, upon the ground that he has been deprived of his constitutional right to be heard and fully present his defense.

At the beginning of the trial counsel for all defendants and for the government joined in asking the court to exclude from the trial all witnesses except the one under examination. This application was granted. As the testimony of the government was presented, reference was made from time to time to one Fox. As the defense proceeded the defendant Rosenberg called in his own behalf said Fox, to be sworn as a witness. Fox, however, had been brought to the trial as a witness for one of the other defendants. Whereupon one of the jurors called attention to Fox having been present in the courtroom while testimony was being received and in violation of the direction of the court. The defendant Sonand, who had not subpœnaed the witness, objected to the testimony, and it was excluded.

No authority has been brought to the attention of the court bearing directly upon the proposition whether the right of one defendant to have a direction of the court (concededly within its power) enforced may be disregarded, in order that another attorney may take the testimony of a witness who has disregarded the court's direction. Holder v. United States, 150 U. S. 91, 14 Sup. Ct. 10, 37 L. Ed. 1010, involved only one defendant. Furthermore, in that case the witness was permitted to testify without objection, and upon being recalled objection was interposed and overruled; the court holding that the weight of authority is that a witness cannot be excluded merely on the ground that he has remained in the courtroom, although the right to exclude under particular circumstances, which are within the discretion of the trial court, may be supported. Other authorities cited by the defendant have to do with striking out pleadings, a proposition which is not here involved. The Holder Case, supra, seems to do no more than to decide that a witness is not disqualified, if in the discretion of the court his testimony should be received, and that the admission thereof is not reversible error. That case cites Wilson v. State, 52 Ala. 299, in which it is stated that it is in the discretion of the court to permit or refuse the examination of a witness who violates the order of exclusion, and the exercise of the discretion is not reviewable. citing 1 Greenl. Ev. § 432.

In the case at bar, where a codefendant asserted that he would be prejudiced by admission of the testimony of the witness, a clear case is presented for the exercise of this discretion. The "particular circumstances," referred to in the Holder Case, are present. The defendant Sonand, not expecting to call Fox, was under no duty to see that he remained without the courtroom. If Rosenberg desired to call him, it was his duty to see that the order was obeyed.

The court is of the opinion that the case at bar is to be distinguished from the Holder Case, supra, in that the witness Fox did not testify at all, and because of the fact that the rights of a codefendant are involved. It was the duty of defendant Rosenberg to make it his business to see that no man to whom reference was made, and whose testimony therefore might be important, should remain in the courtroom during the trial. He failed to take the necessary precautions to see that Fox followed the direction of the court after having been put on guard.

Therefore now he cannot be heard to object, when a codefendant is prejudiced by his conduct.

Furthermore, it is clear that the testimony in question, if not actually immaterial, would not have been sufficient to justify disturbing the verdict of the jury.

Motion of the defendant Rosenberg to set aside the verdict as to him, and for a new trial, is denied.

In re ORONA MFG. CO.

(District Court, D. Massachusetts. January 4, 1921.)

No. 26533.

Bankruptcy ⟸361—Trustee cannot raise objection that unclaimed dividends escheated to state.

A trustee in bankruptcy cannot oppose an order directing him to pay unclaimed dividends into court for distribution among the other creditors, if still unclaimed and if sufficient for such purpose, as is required by Bankruptcy Act, § 66a (Comp. St. § 9650), on the ground that that section is unconstitutional, because money paid into court and remaining unclaimed is required by the Revised Statutes to be paid to the United States, instead of escheating to the state, as it should, since the provision of the Bankruptcy Act is merely a reasonable method of disposing of unclaimed dividends to permit the final settlement of estate, and if the commonwealth desires to claim such funds it should do so in its own name.

In Bankruptcy. In the matter of the Orona Manufacturing Company, bankrupt. Petition by the trustee for review of an order by the referee directing him to pay into court dividends unclaimed by creditors. Order affirmed.

William M. Prest, of Boston, Mass., for trustee in bankruptcy.

MORTON, District Judge. Checks for two dividends, amounting, respectively, to $96.54 and $97.12, were mailed by the trustee to the last known addresses of the creditors. The checks were returned by the post office with the statement that the addressees could not be located. The trustee, not being able to discover their whereabouts, retained the checks. After waiting more than six months, he petitioned for instructions, and was ordered by the referee to pay the money into court, under Bankruptcy Act, § 66a (Comp. St. § 9650). From this order the present review was taken.

The section in question provides that dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court, and that dividends which have remained unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed, but not paid in full. There are further provisions which are immaterial for the present case.

The trustee admits that the case comes within the statute; but he contends that the statute is unconstitutional, because moneys deposited

in court which remain unclaimed for a certain period are, under the provisions of the Revised Statutes, paid over to the United States. According to his contention, such funds belong to the state as property which has escheated.

The dividends in question are not being dealt with in a final way. The referee has merely ordered that they be paid into court, where they can still be claimed by the creditors entitled to them, and, if not claimed, will, according to the usual practice, be eventually divided among other creditors of the estate, unless too small in amount to justify the expense and trouble of so doing. This method of disposing of such funds seems to me reasonable, and to be unobjectionable on constitutional grounds. It serves a very useful purpose in enabling trustees to close out estates completely and finally, and concentrates unclaimed funds in the hands of the court, instead of scattering them among many trustees. The power to direct the disposition of small residues in bankruptcy cases is incident to the general power over bankruptcy conferred upon Congress by the Constitution. If the Commonwealth of Massachusetts desires to claim such funds, it should do so in its own name, and in connection with the proceeding to turn them over to the Treasurer of the United States.

Order of referee affirmed.

ARNAUD v. LANGELLOTTI.

(Court of Appeals of District of Columbia. Submitted December 8, 1920. Decided January 3, 1921.)

No. 3405.

1. **Appeal and error ⇐1050(1)—Testimony that plaintiff, suing for false arrest, was always sane, held not prejudicial, in view of other evidence.**
In an action for false arrest and imprisonment, where plaintiff had been charged with being insane, and where a witness, who had known plaintiff intimately during the year in which he was arrested for insanity, testified without objection that during that period he was of sound mind, further testimony by the witness that plaintiff was always of sound mind was not prejudicial to defendant.

2. **Trial ⇐296(2)—Objection to instruction "as standing by itself" insufficient, where whole charge was correct.**
In an action for false arrest and imprisonment, where the court at plaintiff's request had charged that the jury could infer malice from want of probable cause, an objection to that instruction "as standing by itself," but finding no other fault with it, presents no question for review, where the court on his own motion had charged fully with respect to the same matter, to the satisfaction of defendant.

3. **False imprisonment ⇐4—Malice may be inferred from want of cause.**
In an action for false arrest and imprisonment, the jury may infer malice from the fact that there was no probable cause for plaintiff's arrest, though want of probable cause does not establish malice.

4. **Appeal and error ⇐1033(3)—Recitals in habeas corpus judgment held favorable to defendant in false imprisonment action.**
In an action for false arrest and imprisonment, recitals in a judgment on habeas corpus proceedings, introduced to prove plaintiff's release from arrest, that the warrant on which plaintiff was arrested was void and affidavit of lunacy insufficient, because not accompanied by a physician's certificate, tended to show plaintiff was released because of defects in the proceedings, not for want of probable cause, and were therefore favorable, and not prejudicial, to defendant.

Appeal from the Supreme Court of the District of Columbia.

Action by Frank Langellotti against Joseph J. Arnaud for false arrest and imprisonment. Judgment for plaintiff, and defendant appeals. Affirmed.

E. F. Colladay, of Washington, D. C., for appellant.

Charles V. Imlay and George W. Offutt, Jr., both of Washington, D. C., for appellee.

SMYTH, Chief Justice. The appellee brought action against the appellant for false arrest and imprisonment, malicious prosecution, and assault. He recovered judgment, and the defendant appeals.

[1] Plaintiff was arrested August 10, 1917, on complaint of the defendant, in which he was charged with having made threats of personal violence against him and with being insane. A witness, having told of his intimate acquaintance with the plaintiff in the year 1917, testified that during that period he was "of sound mind and he could never have thought of him as of unsound mind." The witness was then permitted, over the objection of the defendant, to say

that in his opinion the plaintiff was "always of sound mind." It is claimed that this was prejudicial, because it covered, not only the date on which the plaintiff was arrested, but also a time subsequent thereto. The first answer went in without objection. It covered, not only August 10, but the whole period of 1917. If any harm was done by it, it was done with the implied consent of the defendant, and we are unable to perceive how the second answer could have added anything to it; hence it did not prejudice him.

[2, 3] The court, at the request of the plaintiff, charged the jury that if they found that the defendant had instituted the prosecution against him for threats and for insanity, or either, without probable cause, and that the same terminated in plaintiff's favor, the fact that there was no probable cause was evidence from which the jury might infer malice on the part of the defendant. The latter objected to it "as standing by itself." He found no other fault with it. But it did not stand by itself, for the court, on his own motion, charged fully with respect to the same matter, and counsel for defendant at the close of the entire charge stated that he was satisfied with the charge. The objection, therefore, presents no question for our decision. Even if it did, the result would be the same, for the instruction is correct in point of law. Rosen v. Stein, 54 Hun, 179, 7 N. Y. Supp. 368. It will be noted that the court did not say want of probable cause established malice, but that the jury might infer malice from it, which is quite a different thing.

[4] A writ of habeas corpus was sued out to test the legality of plaintiff's arrest on the charges lodged against him by the defendant, and, after hearing, he was released. To prove the release, the judgment in the proceedings was introduced. This, appellant says, prejudiced him, because of certain recitals therein, which are that the warrant upon which the plaintiff was arrested on the charge of having made threats was void, and that the affidavit of lunacy was insufficient, because not accompanied by the certificates of two physicians. These recitals tended to show that the plaintiff was released, not because there was no probable cause for the charges made against him, but because of defects in the proceedings. They had, therefore, a tendency to aid, rather than to injure, defendant. No prejudice could have resulted to him from them.

We find nothing in Feld v. Loftis, 240 Ill. 105, 88 N. E. 281, relied on by appellant, which conflicts with the view we have just expressed.

There being no error in the record, the judgment is affirmed, with costs.

Affirmed.

DENVER GAS & ELECTRIC LIGHT CO. v. ALEXANDER LUMBER CO.

(Court of Appeals of District of Columbia. Submitted November 8, 1920. Decided January 3, 1921.)

No. 1324.

1. **Trade-marks and trade-names ⇐43—Portable buildings manufacturer may have same trade-mark as building material manufacturer.**
Portable buildings, ready-cut frame buildings, and knockdown frame buildings do not possess the same descriptive properties as building construction materials, such as roofing pitch, roofing compounds, paints, and other products, so that a manufacturer of the portable buildings can have registered as a trade-mark a mark similar to that used by the manufacturer of the building materials.

2. **Trade-marks and trade-names ⇐44—Enumeration of uses substantially excludes other uses.**
An applicant for a trade-mark, who enumerates the articles to which the mark is to be applied as knockdown frame buildings, portable buildings, and ready-cut buildings, substantially complies with the opposer's request that the applicant state that no claim is made to the mark in connection with building materials similar to opposer's.

Appeal from the Commissioner of Patents.

Application by the Alexander Lumber Company for registration of a trade-mark, opposed by the Denver Gas & Electric Light Company. From a decision of the First Assistant Commissioner of Patents, dismissing the opposition, the opposer appeals. Affirmed.

E. G. Borden and W. H. Small, both of New York City, for appellants.

George B. Jones, of Chicago, Ill., for appellee.

SMYTH, Chief Justice. This is an appeal from a decision in a trade-mark case. The appellee applied for registration of a mark for portable buildings, ready-cut frame buildings, knock down frame buildings, and other frame buildings ready to set up. The mark of the opposer is applied to building construction materials, such as roofing pitch, roofing compounds, heat-insulating compounds, boiler covering compounds, building paints, paints for wood preservation, paints for roofing purposes, and other products which are made from by-products of the distillation and treatment of gas tar.

[1] It is conceded that the marks are similar and that the only question which we are called on to decide is as to whether the goods upon which the marks are used possess the same descriptive properties. The First Assistant Commissioner held that they did not, and sustained a motion to dismiss the opposition. We think he was right. Applicant's mark, according to the application, is applied to the building; opposer's mark is not applied to the building but to building material. A portable or knockdown building does not possess the same descriptive properties as the material of which it is composed. A structure is one thing and the materials out of which it was erected, when considered apart from the building, are quite different things.

The controller in an electric street car or the paint on the car does not possess the same descriptive properties as the car, yet each is a part of its composition. We have held that rubber tires used on an automobile, when considered by themselves, do not possess the same descriptive properties as the automobile. G. & J. Tire Co. v. G. J. G. Motor Car Co., 39 App. D. C. 508, 511. In Rookwood Pottery Co. v. A. Wilhelm Co., 43 App. D. C. 1, 4, the applicant sought registration of the word "Rookwood" as a trade-mark for use in connection with enamel paint of the kind used in glazing pottery. Opposer used the same mark on pottery which was glazed with the same enamel. In rejecting the opposition the court said:

"While it is true that enamel is an element used in manufacturing the product of appellant, yet the completed article is of a nature manifestly different from the enamel used. They cannot be applied to the same general use We have no difficulty in agreeing with the Commissioner of Patents that the paint of appellee and the pottery ware of appellant are not merchandise of the same descriptive properties."

[2] Appellant, through its counsel, says it will be satisfied if the appellee states in its application that—

"No claim is made to the mark sought to be registered in connection with the specific building materials as distinguished from completed buildings."

We think the appellee has done that substantially, for it enumerates the things to which the mark is to be applied, and they do not include building material before being worked into buildings or parts of buildings. It seems that the appellee has a prior registration of the same mark for composition roofing and lime, and the opposer says that these materials, or some of them, do possess the same descriptive properties as the merchandise upon which it is entitled to apply its mark. But with this we have nothing to do in the present proceeding. That may be a matter for a future contest. We decide only that the merchandise specified in the application which we are now considering does not possess the same descriptive properties as that mentioned in the opposition paper. Therefore the opposition is not well founded.

The decision of the First Assistant Commissioner of Patents is affirmed.

Affirmed.

SMITH v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted December 6, 1920. Decided January 3, 1921.)

No. 3286.

Criminal law ⇐829(6)—Requested charge on intoxication as affecting intent held covered by instructions given.

In a prosecution for homicide, a charge given by the court of its own motion that voluntary intoxication was generally not a justification for crime, but that if defendant was so intoxicated he could not entertain the specific intent, he would not be guilty of murder in the second degree,

sufficiently and correctly covered the instructions requested by accused on the issue of intoxication as affecting intent, so that it was not error for the court to refuse to give the instructions requested in the language of accused.

Appeal from the Supreme Court of the District of Columbia.

Isaiah Smith was convicted of murder in the second degree, and he appeals. Affirmed.

Hannis Taylor, Jr., of Washington, D. C., for appellant.

J. E. Laskey, Morgan H. Beach, and J. P. Schick, all of Washington, D. C., for the United States.

SMYTH, Chief Justice. Smith was convicted of murder in the second degree and sentenced to imprisonment in the penitentiary. There is testimony that at the time of the homicide he was intoxicated, and it is contended that his condition was such that he was incapable of forming an intent, was utterly unconscious of what he was doing, and therefore not guilty of any crime.

There are two assignments of error, both relating to the failure of the court to grant certain instructions requested by the defendant. He asked that the jury be told that drunkenness "tends to excuse" a crime, "by negativing the mental capacity necessary for the specific intention known in the law as malice, which is necessary for the commission of the crime of murder in any of its degrees"; that motive was one of the facts for the jury to consider along with the other facts as bearing on the mental condition of the defendant, in order to determine whether the act was due to his mental condition "as affected by intoxication or otherwise"; that "intoxication may reduce or wipe out guilt, depending on its degree"; and "that what would constitute murder in the first or second degree may be reduced to manslaughter by partial intoxication"; also "that the defendant might be completely excused by intoxication which entirely destroys for the time being the reason and the will." Thus it appears that all the requests dealt with the effect of the defendant's intoxication upon his mental condition and his ability to form an intent at the time of the homicide.

The court, on its own motion, after stating the contentions of defendant's counsel as outlined in his requests, said to the jury that voluntary intoxication, speaking generally, was "no excuse or justification for crime," and that it is only to be considered "when the evidence in the case tends to show that the condition of the man's mind produced by the intoxication was of such a character as rendered him quite incapable of forming such an intent as is requisite where the charge of murder in the second degree is made"; that if the defendant was so intoxicated that he could not entertain the specific purpose required by the statute where murder in the second degree is charged, he would not be guilty of that offense and should be acquitted of it, but, notwithstanding this, if he was moved to sudden passion and anger, and in that state struck down his victim, he would be guilty of manslaughter. However, if his intoxication was such "that he could entertain no rational idea at all," "could not have had an intent to kill," and did not strike the blow in sudden passion and anger, he should be acquitted.

Counsel for the appellant does not challenge any of these instructions, and we do not see how he could have well done so, in view of the settled condition of the law upon the subject.

A comparison of the court's instructions with the requests of the defendant will reveal that the former embrace the substance of the latter. Where that is so, no error follows from a failure to give the requests. The circumstance that the court expressed the same principles in his own language, rather than in the language of the defendant's counsel, is immaterial. Pickford v. Talbott, 28 App. D. C. 498, 510; Travers v. United States, 6 App. D. C. 450, 462; Finney v. District of Columbia, 47 App. D. C. 48, 52, L. R. A. 1918D, 1103.

The case was well defended, and every right of the accused was carefully guarded by the court. In consequence we must affirm the judgment, with costs; and it is so ordered.

Affirmed.

REPLOGLE v. KIRBY.

(Court of Appeals of District of Columbia. Submitted November 15, 1920. Decided January 3, 1921.)

No. 1327.

1. **Patents ⟸91(1)—Junior applicant, filing after senior patent issues, has heavy burden of proof.**
   An applicant, who filed his application two months after an interfering patent was issued, has a very heavy burden to establish his priority.
2. **Patents ⟸91(4)—Evidence held to show junior applicant first conceived invention.**
   In a patent interference proceeding, evidence *held* to show that the junior applicant, whose application was not filed until two months after the issuance of patent to the senior applicant, was the first to conceive the invention in issue, and that he reduced his conception to practice and commercial exploitation with reasonable diligence.
3. **Patents ⟸109—Junior applicant has two years within which to copy claim of senior application.**
   The junior applicant has two years after the issuance of the senior patent within which to copy the claim in issue from the senior patent without being estopped to claim priority.

Appeal from the Commissioner of Patents.

Interference proceeding between Daniel Benson Replogle and James B. Kirby, as assignee of Shujei Noguchi. From a decision of the Commissioner of Patents, awarding priority to Noguchi, Replogle appeals. Reversed.

Daniel Benson Replogle, of Berkeley, Cal., in pro. per.
Harold E. Smith, of Cleveland, Ohio, for appellee.

VAN ORSDEL, Associate Justice. Appeal by Replogle from the decision of the Commissioner of Patents awarding priority to Noguchi for an invention relating to dust collectors for pneumatic cleaning devices as defined in the following count:

"A porous paper bag adapted to be secured to the discharge pipe of a penumatic cleaner, in combination with a mesh bag adapted to loosely envelop the paper bag, and means for securing the bags to the discharge pipe."

[1] Noguchi was granted a patent May 9, 1916, upon an application filed May 1, 1914. Replogle filed his application July 5, 1916. It will be observed that Noguchi's patent was issued over two months before his opponent filed. This, of course, casts a very heavy burden upon the junior party, Replogle. Noguchi took no testimony, but relied upon his filing date for his date of conception and reduction to practice.

[2] It appears that Replogle made and tested the device in issue in March, 1914. This, we think, is conclusively established by the testimony. The Board of Examiners in Chief, in a very able opinion in which we concur, after a full review of the evidence, reached the following conclusion:

"We must hold, therefore, that Replogle was the first to conceive the invention in issue, and that he followed his conception with a final reduction to practice and commercial exploitation of his invention with reasonable and commendable diligence. Therefore, Replogle is entitled to prevail unless he has in some manner become estopped from receiving a patent with the claim in issue."

[3] The Board, however, decided against Replogle on the ground of estoppel, in that he had not copied the claim in issue from the Noguchi patent until fifteen months after the patent was issued. This ruling was based upon the cases of Rowntree v. Sloan, 45 App. D. C. 207, and Wintroath v. Chapman, 47 App. D. C. 428, in which we held that such an amendment must be made within one year. Since the present case left the Patent Office, the Supreme Court has reversed this court, extending the period to two years. Chapman v. Wintroath, 252 U. S. 126, 40 Sup. Ct. 234, 64 L. Ed. 491. Therefore, Replogle's amendment incorporating the claim of the issue into his application was timely, and the rule of estoppel does not apply.

With this obstacle removed, we adopt the opinion of the Board of Examiners in Chief, and hold that Replogle is entitled to the award of priority.

The decision is reversed.

Reversed.

The cost of printing the return to certiorari will be paid by the appellee, Kirby.

KIRBY v. REPLOGLE.

(Court of Appeals of District of Columbia. Submitted November 15, 1920. Decided January 3, 1921.)

No. 1350.

Patents ⇐113(8)—Senior party awarded priority on two counts on which interference was dissolved.

Where the Commissioner of Patents awarded priority of invention to R. as to two counts of an interference, but dissolved it as to other counts, holding two of said counts not patentable over the issue of another interference to which R. was a party and in which priority of invention was decided against him. *Held* that, where both interferences were appealed, and R. was successful in both cases, he was entitled to an award of priority on said two counts, as well as on the others.

Appeal from the Commissioner of Patents.

Interference proceeding between James B. Kirby and Daniel B. Replogle. From a decision of the Commissioner of Patents, awarding priority on two counts to Replogle and dissolving the interference as to the other four counts, Kirby appeals. Reversed as to two of the counts as to which the interference was dissolved, and affirmed as to the other counts.

Harold E. Smith, of Cleveland, Ohio, and George E. Tew, of Washington, D. C., for appellant.

Daniel Benson Replogle, of Berkeley, Cal., pro se.

VAN ORSDEL, Associate Justice. This is a companion case to Replogle v. Kirby (No. 1327) — App. D. C. —, 269 Fed. 862, decided this day. The cases were heard together. It is unnecessary to set out the counts of the issue, inasmuch as, with the exception of one point hereafter considered, we approve the disposition of the case made by the Commissioner of Patents. The issue is in six counts. The Commissioner awarded counts 2 and 3 to Replogle, and dissolved the interference as to counts 1, 4, 5 and 6. The Commissioner, however, in his opinion states that—

"Counts 5 and 6 are clearly unpatentable over Noguchi and should never have been included in this interference. Kirby has been defeated in an interference with Noguchi and of course cannot be granted these claims, and unless Replogle wins in the Replogle v. Noguchi interference, he cannot be allowed these claims. This interference therefore is dissolved as to counts 1, 4, 5 and 6."

Inasmuch as we have held in the former case that Replogle is entitled to priority over Noguchi, it follows that he should also be awarded counts 5 and 6.

The decision is affirmed as to counts 1, 2, 3 and 4, and reversed as to counts 5 and 6.

Affirmed as to counts 1, 2, 3 and 4, and reversed as to counts 5 and 6.

HUGHES v. FALVEY et al.

(Court of Appeals of District of Columbia. Submitted December 6, 1920. Decided January 3, 1921.)

No. 3390.

1. **Intoxicating liquors ⇐236(5), 255—Only small quantity of seized liquors can be retained, and is as complete evidence as entire amount.**
Where a large quantity of whisky was taken from the possession of one who was subsequently charged with unlawfully importing the whisky into the District, a small quantity of the whisky is as complete evidence of the offense as the entire quantity seized, so that only such small quantity can be retained by the officers for use as evidence in the prosecution.

2. **Intoxicating liquors ⇐256—Whether manner of seizure makes liquor inadmissible as evidence cannot be determined on replevin.**
In an action to replevy a quantity of whisky seized from plaintiff's possession, which the defendants petitioned to retain for use as evidence against plaintiff, the question of whether the manner of seizure was such that the liquor could not be used as evidence is not to be determined, but will be left for determination by the trial court, when the liquor is offered in evidence.

Appeal from the Supreme Court of the District of Columbia.

Replevin by Fred J. Hughes against William F. Falvey and others, to recover whisky taken by defendants, as police officers, from the possession of plaintiff. From an order dismissing the petition of defendant Falvey, that the writ be suspended and the whisky returned to him, pending the disposition of the charge against plaintiff for which it was retained as evidence, but ordering the marshal to retain the whisky until further order, plaintiff appeals. Reversed and remanded.

Alvin L. Newmeyer and William E. Leahy, both of Washington, D. C., for appellant.

John E. Laskey, of Washington, D. C., for appellees.

SMYTH, Chief Justice. The appellees, police officials of the District of Columbia, in conjunction with internal revenue officers of the government, seized 197 cases of whisky found in the possession of Hughes, who shortly afterwards instituted an action in replevin against the appellees for its recovery. The marshal executed the writ by taking the whisky into his possession. Subsequently Falvey, a member of the police force, filed a petition in the replevin action, alleging that the whisky came into the possession of himself and Hesse, property clerk of the police department, as evidence of crime; that there was pending against Hughes in the police court the charge of having unlawfully imported the whisky into the District; and asking that the writ be suspended and the whisky returned to Falvey pending the disposition of the charge. The court dismissed the petition, but ordered that the marshal retain the whisky until the further order of the court. The case is here on special appeal.

[1] In Dorsey v. District of Columbia and Edwin B. Hesse, 49 App.

D. C. 365, 265 Fed. 1005, the facts were quite similar to those in the case before us. We there said:

"Assuming that detention, followed by prompt action on the part of the officers, is authorized, there seems to be no justification for holding a large quantity of liquors merely as evidence of crime, since a pint bottle of the whisky would furnish as complete evidence of the offense alleged to have been committed as would the entire shipment seized and detained. The offense consists in bringing the liquor into the District, and is as complete by bringing in a pint bottle as a barrel."

That decision rules this case. The appellees may retain a small quantity, say a quart, and the rest should be returned to Hughes.

[2] Hughes urges that, because of the way the liquor was seized, it cannot be used as evidence against him; but that is a question to be disposed of by the trial court, when the liquor is offered in evidence. We express no opinion concerning it.

The order appealed from is reversed, at the cost of the appellees, and the case remanded for further proceedings in harmony with this opinion.

Reversed and remanded.

KISOVITZ v. ROSENBERG.

(Court of Appeals of District of Columbia. Submitted November 12, 1920. Decided January 3, 1921.)

No. 1349.

1. **Patents ⟸90(5)—Foreign patent, disclosing interference claim, held constructive reduction to practice.**
   An application for a foreign patent, which discloses the invention in issue in an interference proceeding and contains a claim broad enough to include the issue, is a constructive reduction to practice of the invention in issue, though there was no claim of the specific device of the issue.

2. **Patents ⟸90(5)—Application within limited time after foreign application is effective on date of foreign application.**
   Where an inventor filed his application for a United States patent within the time limited by Rev. St. § 4887 (Comp. St. § 9431), after his application for a foreign patent was filed, the United States application has the same effect as if it had been filed on the date the foreign application was filed.

Appeal from the Commissioner of Patents.

Interference proceedings between Samuel Kisovitz and Benjamin Rosenberg. From a decision of the Commissioner of Patents, awarding priority to Rosenberg, Kisovitz appeals. Affirmed.

C. P. Goepel, of New York City, and W. G. Henderson, of Washington, D. C., for appellant.

William F. Nickel, of New York City, for appellee.

VAN ORSDEL, Associate Justice. This is an appeal from the decision of the Commissioner of Patents in an interference proceeding, and was determined by all of the tribunals below in favor of appellee. The invention is described in count 2 of the issue as follows:

"2. A box comprising a body portion, and a cover therefor hinged to the rear end of said body portion, said cover being formed of transverse unequal sections connected by a hinge line, and the forward section being longer than the body of the rear section and capable of being folded thereon and therewith turned into a substantially vertical position supporting the body of the box in an inclined display position, and said forward section being formed integrally with a hinged lip adapted to engage said body portion and lock said cover thereto when said cover is in its folded prop position."

[1] The case turns upon the right of appellee to claim the filing date of a British application as his date of constructive reduction to practice. This is contested chiefly upon the ground that neither the British application nor the patent issued thereon contained a claim commensurate to the claims here in issue. It is true there is no claim in the British patent to the specific device of the present issue, nor is such claim in the United States application. But the same disclosure appears in each application, and each contains a claim broad enough to include the present issue. It therefore follows that the date of filing the British application constituted a constructive reduction to practice of the invention in issue.

[2] Appellee's British application, filed February 9, 1916, and his United States application, filed January 16, 1917, fell within the limitations of section 4887, Rev. Stats. (Comp. St. § 9431). This gives the United States application the same force and effect as it would have if it had been filed on the date the British application was filed. Inasmuch as the preliminary steps leading up to the filing of the British application were found by the tribunals below to have occurred at a time prior to any date to which appellant can lay claim, and we concur in this finding, appellee must prevail.

The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as by law required.

Affirmed.

EVERETT v. FORST.

(Court of Appeals of District of Columbia. Submitted December 6, 1920. Decided January 3, 1921.)

No. 3444.

1. **Guardian and ward ⇐103—Inadequacy of price insufficient ground for refusing confirmation of sale.**
   Mere inadequacy of price is not in itself sufficient to justify the court in refusing to ratify guardian's sale of land, but it must appear that such inadequacy is due to surprise, fraud, mistake, or some unfairness practiced at the sale.

2. **Guardian and ward ⇐105(1)—Increased offer held insufficient to authorize reopening sale.**
   After the court had entered an order nisi for the sale of property by guardian for $37,500, a new offer of $39,000 is insufficient in itself to authorize the court in its discretion to reopen the sale.

3. **Guardian and ward ⇐105(1)—Reservation by court cannot enlarge discretion to reopen sale.**
   A reservation by the court, at the time an order nisi approving a guardian's sale was made, that he would not reopen the sale unless a specified

increase of price was offered, does not enlarge the discretion fixed in him to reopen the sale.

4. **Guardian and ward ⟸105(1)—Bidder at first sale must submit best bid.**
A bidder, who was represented at a guardian's sale by an agent, must authorize her agent to submit her best bid at that sale, and cannot, after ascertaining the limit of rival bidders, have the sale reopened by making an offer of a larger price.

5. **Guardian and ward ⟸103—Resale to new bidder at increased price confirmed.**
Where the result of reopening the bid after an order nisi for the sale of property by a guardian had been made was an offer 20 per cent. greater than the best bid at the first sale from one who had no opportunity to bid at the first sale, the sale to the new bidder must be confirmed, in consideration of the rights of the infant, though the sale was reopened because of an increased offer by another, which was insufficient to justify that action.

Appeal from the Supreme Court of the District of Columbia.

Proceeding by Frances E. Forst, as guardian, for the sale of real estate. From an order dismissing the petition of Louis A. Everett, that his bid be accepted and the property conveyed to him, and directing the conveyance to another, petitioner appeals. Affirmed.

Harry F. Kennedy, of Washington, D. C., for appellant.

Wade H. Ellis and A. H. Ferguson, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This case arose through the sale of real estate by a guardian under an order of court.

It appears that appellee, as guardian for an infant, was directed by the court to sell certain lots in the city of Washington belonging to the estate. After a number of offers for the property had been submitted, the guardian reported that appellant had made an offer of $37,500, whereupon the court entered an order nisi, to "become final and absolute on the 26th day of January, 1920, unless cause to the contrary shall be shown on or before said date."

On January 27th, one day after the date when the order nisi was decreed to become final, appellant petitioned the court for ratification of the order. On the same day the guardian reported that, on January 24th, she had received an offer of $39,000 from one Doyle, representing one Daisy Edelin, and called attention to the fact that when the order nisi was made—

"the court stated that he would ratify the sale at $37,500 nisi, with the understanding that he would not reopen the matter unless a material increased offer was made for the property, and thereafter the court stated to counsel that he would not consider any offer of less than $1,500 above the offer of said Everett as a substantial increase."

Upon this report, the court entered an order vacating and setting aside the order nisi, dismissing appellant's petition, and directing the guardian to receive further bids for the property. From this, appellant appealed to this court, where the appeal was dismissed, for the reason that the order appealed from was not a final order. When the mandate went down, the court renewed the order directing the guard-

ian to receive bids for the purchase of the property from the former bidders and from such others as might be interested in the purchase of the property. Accordingly the guardian reported a bid of $45,600 from one Louis Tashof. Appellant then petitioned the court that his bid of $37,500 be accepted, and the guardian authorized and directed to convey the property to him.

The court dismissed the petition of appellant and ordered the guardian to accept the offer of Tashof and to convey the property to him. From this order the case was appealed.

[1] The sole question is whether the court erred in refusing to confirm the order nisi. The early English rule in chancery sales upheld the reopening of the sale to bidders prior to confirmation upon a mere offer to advance the price 10 per centum, but this practice was condemned by Lord Eldon as tending to diminish confidence in judicial sales. White v. Wilson, 14 Ves. 151. Adopting Lord Eldon's view, the Supreme Court, speaking through Mr. Justice Bradley, in Graffam v. Burgess, 117 U. S. 180, 191, 6 Sup. Ct. 686, 692 (29 L. Ed. 839), announced the following rule:

"It was formerly the rule in England, in chancery sales, that until confirmation of the master's report the bidding would be opened upon a mere offer to advance the price ten per centum. 2 Daniell's Ch. Pr. (1st Ed.) 924: Ed. (2d Ed. by Perkins) 1465, 1467; Sugden on Vendors & Purchasers (14th Eng. Ed.) 114. But Lord Eldon expressed much dissatisfaction with this practice of opening biddings upon a mere offer of an advanced price, as tending to diminish confidence in such sales, to keep bidders from attending, and to diminish the amount realized. * * * In this country Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal that a sale will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness, being very much the rule that always prevailed in England as to setting aside sales after the master's report had been confirmed. Livingston v. Byrne, 11 Johns. 555, 566 (1814); Williamson v. Dale, 3 Johns. Ch. 290, 292 (1818); Howell v. Baker, 4 Johns. Ch. 118 (1819); Tiernan v. Wilson, 6 Johns. Ch. 411 (1822); Duncan v. Dodd, 2 Paige, 99 (1830); Collier v. Whipple, 13 Wend. 224, 226 (1834); Tripp v. Cook, 26 Wend. 143; Lefevre v. Laraway, 22 Barb. 167, 173; Seaman v. Riggins, 1 Green's Ch. (2 N. J. Eq.) 214; Eberhardt v. Gilchrist, 3 Stockt. (11 N. J. Eq.) 167; Campbell v. Gardner, 3 Stockt. (11 N. J. Eq.) 423; Marlatt v. Warwick, 3 C. E. Green (18 N. J. Eq.) 108; Kloepping v. Stellmacker, 6 C. E. Green (21 N. J. Eq.) 328; Wetzler v. Schauman, 9 C. E. Green (24 N. J. Eq.) 60; Carson's Sale, 6 Watts, 140; Surget v. Byers Hempst. 715; Byers v. Surget, 19 How. 303; Andrews v. Scoton, 2 Bland, 629; Glenn v. Clapp, 11 G. & J. 1; House v. Walker, 4 Md. Ch. 62; Young v. Teague, 1 Bailey, Eq. 13, 14; White v. Floyd, Speer's Eq. 351; Hart v. Bleeght, 3 T. B. Mon. 273; Reed v. Carter, 1 Blackford, 410; Pierce v Kneeland, 7 Wis. 224; Montague v. Dawes, 14 Allen, 369; Drinan v. Nichols, 115 Mass. 353. From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the conscience, or, if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason, misled or surprised, then the sale will be regarded as fraudulent and void or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud."

And in the case of Pewabic Mining Co. v. Mason, 145 U. S. 349, 356, 367, 12 Sup. Ct. 887, 888, 892 (36 L. Ed. 732), the court said:

"The question in this case is whether the master's sale shall stand. It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and conditions of such a sale, as well as to ordering or refusing a resale. The chancellor will always make such provisions for notice and other conditions as will in his judgment best protect the rights of all interested, and make the sale most profitable to all; and after a sale has once been made, he will, certainly before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted. Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto. * * * The master's action was unquestionably proper, and if the party desired the intervention of the court, his duty was to apply at once and not wait until after confirmation; for then the rights of the purchaser are vested, and something more than mere inadequacy of price must appear before the sale can be disturbed. Indeed, even before confirmation the sale would not be set aside for mere inadequacy, unless so great as to shock the conscience."

Adopting the foregoing rule, this court has repeatedly held that mere inadequacy of price is not in itself sufficient to justify the court in refusing to ratify a sale. It must appear that such inadequacy is due to surprise, fraud, mistake, or some unfairness practiced at the sale. Hunt v. Whitehead, 19 App. D. C. 116; Auerbach v. Wolf, 22 App. D. C. 538. In the Wolf Case, as here, an order nisi was made, and, before ratification was had, the trustees reported a much larger offer, amounting to an increase of 67 per cent., and prayed that the approved bid be rejected and a resale ordered, which was accordingly done. The court, adhering to the established rule that a sale will not be set aside or ratification refused for a mere inadequacy of price, in the absence of fraud, mistake, surprise, or unfairness, said:

"In this case, there is no suggestion of fraud, mistake, or unfairness in making the sale. But the settled principle is that in chancery sales, the contract of sale, made between the court as the vendor of the property, through the agency of a trustee, and the purchaser, is never regarded as consummated until it has received the sanction and ratification of the court. Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660.

The court then held that the second report of the trustee presented a question calling for the exercise of judicial discretion, which, unless abused, will not be controlled or disturbed on appeal. But this liberal construction of the discretionary power of the lower court was qualified as follows:

"We must not be understood, however in so holding, that we intend to give any sanction to the old English practice of opening biddings in chancery sales, upon the mere offer of an advance upon the purchaser's bid. That practice has never obtained in this District, nor in the courts of Maryland. Cohen v. Wagner, 6 Gill, 251."

[2] Coming to the present case, had we before us only the offer of $39,000, we would have no hesitancy in holding, in the light of the decisions above quoted, that the court below abused its discretion in reopening the sale. The increased offer was only 4 per cent. above the one made by appellant, an advance less than one-half that required by the old English rule, which has been condemned "as tending to diminish confidence" in judicial sales.

[3, 4] Furthermore, it appears from the record that, on the day the sale to appellant was ratified nisi, the court had received bids in open court from appellant and Doyle, as agent; appellant making the higher bid. Doyle then asked for an opportunity to call his client on the telephone, to ascertain if she was willing to bid any higher. This the court refused, stating that the sale would not be reopened unless an advance of $1,500 was offered. Of course, this reservation could not enlarge the discretion vested in the court. Edelin having had an opportunity to bid, it was her duty at that time to instruct her agent to submit the highest offer she was willing to make. She should not be permitted to ascertain the limit of her opponent's bid, and then upset the sale to him by an advanced offer.

"At that time each party knew that a sale was to be had, and that, if it intended to buy, it must make all its arrangements therefor, and in such arrangement must be included a determination of the full amount it was willing to bid for the property. It cannot be tolerated that it be in the contemplation of either to wait until after the property has been struck off to the other, and then open the bidding and defer the sale by an increased offer." Pewabic Mining Co. v. Mason, supra.

[5] But in this case, however, the result of the reopening of the bidding was an offer of an advance of $8,100 from one who, so far as the record discloses, had not had an opportunity to bid before. Considering, as we must, not only the question of public policy involved, but the rights of the infant, we feel that the order ratifying the sale to Tashof should be sustained.

The decree is affirmed, with costs.

Affirmed.

PAYNE, Secretary of the Interior, v. UNITED STATES ex rel. MOSIER et al.

(Court of Appeals of District of Columbia. Submitted October 6, 1920. Decided January 3, 1921.)

No. 3422.

1. Indians ⇐16(7)—Bonus for oil lease to be paid to minors' parents as "royalty."

Under Act June 28, 1906, § 7, providing that parents of minor members of the Osage Tribe shall have the control and use of the minors' lands, with the proceeds thereof, and that interest on funds held in trust shall be paid to the parents, and royalty from oil and other mineral leases paid in the same manner, a bonus paid by the successful bidder for an oil lease is to be paid to the parents, as the word "royalty" is not used in a restricted sense, but in the sense of "proceeds."

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

2. Gifts ⇐5(1)—"Bonus" is not a gift.

A "bonus" is not a gift or gratuity, but a sum paid for services, or upon a consideration, in addition to or in excess of that which would ordinarily be given.

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

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3. Indians ⟸16(7)—Commissioner not authorized to withhold payments to minors' parents, because not used exclusively for their benefit.

Under Act June 28, 1906, § 4, providing that interest on funds held in trust for minor members of the Osage Tribe of Indians may be withheld by the Commissioner of Indian Affairs, if it is being misused or squandered, royalties on oil leases paid to a minor's parents may be used in the upkeep of the family and on an increasing scale of comfort, as the increasing income justly warrants, and the commissioner cannot limit the payments because they are not being used exclusively for the minor's benefit.

4. Indians ⟸23—Use of minors' funds in hazardous undertakings or extravagant expenditures may be restrained; "misuse;" "squandering."

The use of the funds of minor members of the Osage Tribe of Indians in hazardous or speculative undertakings, or in lavish or extravagant expenditures, is a "misuse" or "squandering" of them, which the Commissioner of Indian Affairs may restrain, under Act June 28, 1906, § 4.

[Ed. Note.—For other definitions, see Words and Phrases, Misuse; Squandered.]

5. Indians ⟸23—Commissioner may require statement of expenditures by parents of minors' moneys.

Under Act June 28, 1906, § 4, the Commissioner of Indian Affairs may require the parents of minor members of the Osage Tribe to furnish periodical statements of expenditures of the moneys of the minors received by them, in order that he may determine whether such moneys are being misused or squandered.

Smyth, Chief Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Mandamus by the United States, on the relation of W. T. Mosier and another, against John Barton Payne, Secretary of the Interior. From a judgment granting the writ, defendant appeals. Affirmed.

C. Edward Wright, and Charles D. Mahaffie, both of Washington, D. C., for appellant.

F. W. Clements, of Washington, D. C., and T. I. Leahy, of Pawhuska, Okl., for appellees.

ROBB, Associate Justice. Appeal from a judgment in the court below directing the issuance of a writ of mandamus, requiring the Secretary of the Interior to pay appellees moneys derived as interest on a trust fund belonging to their minor children and moneys received from the shares of those minors as royalties and income from oil, gas, and other minerals belonging to the Osage Tribe of Indians, to which appellees belong.

Being satisfied with the reasoning and conclusions of the learned trial judge, we adopt his opinion, as follows:

"This case came on for final hearing upon the pleadings and an agreed statement of facts, and was argued by counsel for the respective parties and submitted.

"The action is one for a writ of mandamus to require the Secretary of the Interior to pay to the relators, as the parents of certain minor children who are duly enrolled members of the Osage Tribe of Indians, 'all moneys derived as interest on the trust fund of said minors from oil and gas and other minerals belonging to said tribe of Indians.'

"Two questions are presented by the case. One is whether money derived from the successful bidder for an oil lease of land belonging to the minor

children of the relators, such money being called 'bonus money,' is payable to the relators, as the royalty prescribed in the lease itself is payable to them. And the other question is whether the respondent can limit the amount of moneys that may be received by the parents of said minor children or require the relators to render statements of account of moneys received by them, in order that the Commissioner of Indian Affairs may satisfy himself that such moneys are not being misused or squandered by the relators, or that if they are that further payments may be withheld.

"These questions to be answered by a consideration of the provisions of the Act of Congress approved June 28, 1906 (34 Stat. p. 544). This act is a comprehensive piece of legislation having for its object the division of the lands and funds of the Osage Indians on the then territory of Oklahoma, and it is so entitled. In effecting its object striking evidence of its policy with respect to the interests of minors having living parents is manifest. By section 2 of the act it is provided that selections of the lands belonging to such minors 'may be made by said parents'; and by the proviso of section 7 it is enacted 'that parents of minor members of the tribe *shall have the control and use of said minors' lands, together with the proceeds of the same,* until said minors arrive at their majority.' (Underscoring by the court.) Section 4 provides that the interest to be paid by the United States on certain funds and moneys belonging to minors and held in trust for them by the government 'shall be paid quarterly *to the parents* until said minors arrive at the age of twenty-one years.' And by the same section it is provided that royalty received from oil and other mineral leases upon the land selected and divided as stated above, and moneys received from the sale of other specified lands shall be distributed to the individual members of the Osage Tribe 'in the same manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States.'

[1] "It seems clear from the foregoing résumé of the material portions of the statute under consideration that it was the intention of the Congress to give to the *parents* of minor members of the tribe the *beneficial use* of so much of their children's property as is to be divided and distributed under the terms of the law, during the children's minority. But it is insisted by the respondent that the so-called bonus money was not included in the distribution thus directed. Not in terms, it is true, but at the time of the enactment of the statute the practice of obtaining bonus money had not made its appearance, and did not do so until a decade later when the increasing demand for oil, which it was believed existed in large and paying quantities under the surface of these Indian lands, suggested the plan of requiring prospective oil lessees to bid for leases, and the sums paid by the successful bidders for leases constitute the bonus money. This money may not be royalty in the strict sense of the word, but it is certainly money derived from 'oil * * * leases upon the lands,' to quote the language of the statute. No leases, no royalty. No leases, no bonus. Leases, bonus certainly, royalty perhaps, if the minerals are discovered to exist in paying quantities.

[2] "The Supreme Court has furnished us with a legal definition of the word 'bonus.' In the case of Kenicott v. Wayne County, 16 Wall. 452, 471 (21 L. Ed. 319), the court says: 'But, secondly, the meaning of the word "bonus" is not that given to it by the objection. It is thus defined by Webster: "A premium given for a loan or a charter or other privilege granted to a company; as, 'The bank paid a bonus for its charter;' a sum paid in addition to a stated compensation." It is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given.'

"Applying that definition in the instant case, it is apparent that the bonus derived from the leases is 'a sum paid * * * upon a consideration in addition to or in excess of that which would ordinarily be given,' the latter being royalty in its strict sense.

"But did the Congress use the word in the restricted sense? It was providing in a complete manner for the making of oil and other mineral leases upon the lands of the Indians, and directed that the proceeds be distributed to the owners thereof and in the case of minor owners the proceeds were to

go, during their minority, to the parents of such minors. There is no evidence in the statute that any proceeds derived from the leases were not to be distributed as directed, except as enacted in the first proviso of section 4, hereafter to be considered in connection with the second of the two questions which this case raises.

"The court is of the opinion that Congress did not use the word 'royalty' in the restricted sense, but used it in the sense of the word 'proceeds,' to be distributed in the way directed. The whole scheme and structure of the act justifies and requires this interpretation. What reason of the apparent policy of the law suggests a different interpretation? None. It gives to the parents of minors the control and *use* of the minors' lands and as well the proceeds of the same. It gives to them the royalty received from the oil leases and all other mineral leases upon said lands. What else more could it give, except complete ownership and title?

"This in effect is the conclusion reached by the Comptroller of the Treasury in the following language: 'I am constrained to decide that, within the purpose and meaning of the act, bonus money received from the sale of leases for oil, etc., *should be classed with royalties* and which is required by the second exception to section 4 *to be placed in the Treasury* to the credit of the members of the Osage Tribe of Indians as other moneys of said tribes are to be deposited, for distribution to the individual members of said Osage Tribe, and therefore that said bonus moneys do not bear interest.' 23 Decisions of Comptroller of the Treasury, Pages 483, 486. (Underscoring by the court.)

"For the foregoing reasons the answer to the first of the two questions propounded is that the so-called bonus money is payable to the relators as a part of the royalty received from oil leases.

[3-5] "Coming now to the second question to be answered, it is to be observed that the contention of the respondent in this respect rests upon his interpretation of the first proviso of section 4 of the statute. That proviso is in the following language: 'Provided, that if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest.'

"The respondent's interpretation of this proviso takes the form of a limitation upon the use by the parents of a minor of the money of the latter paid to the former, both in respect of the amount and its application. He insists that such money can be used only for the benefit of the minor exclusively, and if not so used it would be deemed by the Commissioner of Indian Affairs as a misuse or a squander of said money, and further payments would be withheld except to the amount of $40 per month.

"In the opinion of the court this is an unwarrantable interpretation. It is plain that the Congress intended that the parents of minors should have the use of this money, as they are to have the use of the minors' lands and the proceeds of the same. A use, no doubt, that shall be wise, and calculated to improve the standards of their lives, to insure the education and maintenance of their children, and to produce a home environment tending to make better and more contented citizens.

"To use these funds in hazardous or speculative undertakings or in lavish and extravagant expenditures would be to misuse or squander them, and in that event the restraining hand of the Commissioner of Indian Affairs could and should be laid upon them. These are the possibilities that the limitation of the proviso is designed to guard against. It was not intended to clothe the Commissioner or the respondent with authority to dictate the limit of the amount that the parents could expend *exclusively* upon their minor children from these moneys. The statute makes the parents, not the Commissioner or the respondent, the judges in the first instance of the judicious use of the moneys in question. They may be used in the upkeep of the family and on an increasing scale of comfort as an increasing income may justly warrant. But in order that the Commissioner may inform himself as to whether the limitation of the proviso, *as its boundaries have been marked out herein*, are observed by the parents of the minors, it will not be an unreasonable exaction to require them to furnish him periodically with full

statements of the expenditure by them of the moneys of their minor children received by them pursuant to the provisions of the statute that we have been considering.

"The conclusion is that the second question must be answered to the effect that the respondent cannot limit the amount to be paid to the relators as the parents of their minor children from the moneys distributable to them under the law, but can require from them the submission of periodical statements of accounts showing in detail the expenditure of the moneys so received. With this limitation on the scope of the writ of mandamus prayed for, it will issue as prayed.

"And it is so ordered. F. L. Siddons, Justice."

The judgment is affirmed, with costs.

SMYTH, Chief Justice (dissenting). This appeal is not for the purpose of determining finally the rights of the parents and the children to the money in question. We may inquire only as to whether the Secretary's decision has any support in the record. If it has, then his judgment, not ours, must prevail; in other words, unless he acted arbitrarily, we may not disturb his conclusion. Ashley v. Roper, 48 App. D. C. 69; Brougham v. Blanton Manufacturing Co., 249 U. S. 495, 39 Sup. Ct. 363, 63 L. Ed. 725; United States ex rel. Sykes v. Lane, 48 App. D. C. 48, 258 Fed. 520. In the recent case of United States ex rel. Hall v. Payne, 254 U. S. —, 41 Sup. Ct. 131, 65 L. Ed. —, decided December 13, 1920, the Supreme Court of the United States said that, where the action of the Secretary "was not arbitrary or capricious, but rested on a possible construction of the act," it would be affirmed.

The controversy seems to hinge upon whether or not a bonus is necessarily within the meaning of the word "royalties." It is according to the opinion of the court, but the definition of a bonus given therein does not support its conclusion. It says that a bonus may be considered as a "sum paid * * * upon a consideration in addition to or in excess of that which would ordinarily be given." The record shows that royalty is what would ordinarily be given. A bonus is something in excess of it. Does not the statute lend itself to this interpretation?

Moreover, is there not room for the belief that, as applied to oil lands, a royalty does not include a bonus? A writer upon the subject says:

"The consideration which the lessee pays for the lease must not be confounded with the consideration which the lessor is to receive for the oil and gas. The cash consideration, *bonus*, or whatever it may be called, paid or agreed to be paid by lessee for the lease, is a consideration for the exclusive privilege of entry for exploration. * * * When lessee discovers oil or gas in paying quantities, his right to produce them becomes a vested right. He is then, for the first time, authorized and obligated to pay the consideration to lessor for the exclusive vested right to produce the oil and gas, the true consideration for such minerals being the *royalty* of oils and cash rental for gas, as the case may be." Archer's Law and Practice in Oil and Gas Cases, p. 44.

This clearly indicates that there is a wide difference between a royalty and a bonus.

See also Brookshire Oil Co. v. Casmalia Oil & Development Co., 156 Cal. 211, 103 Pac. 927, and Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732.

For the purpose of interpreting the act we may look at the conditions existing, and presumably known to Congress, at the time it was passed. United States v. Union Pacific R. R. Co., 91 U. S. 72, 23 L. Ed. 224; Siemen's Administrator v. Sellers, 123 U. S. 276, 8 Sup. Ct. 117, 31 L. Ed. 153; Smith v. Townsend, 148 U. S. 490, 13 Sup. Ct. 634, 37 L. Ed. 533. At that time bonuses were not resorted to in the Osage country. They did not come into existence until the expiration in 1916 of what is known as the Foster leases; hence were not within the contemplation of Congress at that time. Of course, if the language used clearly embraces them, the fact that they were not then in vogue would be, perhaps, immaterial; but. if it does not, the Secretary, as the person charged with the administration of the act, would be justified under the circumstances, to be noticed immediately, in refusing to stretch the language so as to include them.

When the act was passed the portion which each child derived from its lands annually was about $256, not more than was necessary for its support; but in 1920 the sum coming to it from interest and royalty alone was about $3,551, and from bonuses $4,730, making a total of $8,821 a year. May it not be said with reason that, while Congress was willing to intrust to the parents annually $256, or thereabouts, for each minor child, to be used for its benefit—for we cannot assume, in the absence of a specific direction on the subject, that Congress intended that the child's money should be used for any other purpose—it was not within its contemplation that the parents should have more than the support and education of the child required. The act provides in specific language for the payment to the parents of the royalties, and that must be done, though the amount is now much greater than then. But, unless bonuses come clearly within the definition of "royalties," and I have shown they do not, would it not be greatly in the interest of the child if this fund arising from bonuses, like other funds covered by the act, should be conserved by being deposited on interest until the child had reached its majority? Why did Congress provide for the payment of some of the child's money to the parents, and for the deposit of the remainder during the child's minority, unless it was intended that only so much as was necessary for the purposes of the child should be available to the parents? Considering the statute in the light of these circumstances I do not think it can be correctly said that the Secretary acted arbitrarily in holding that it would be more in keeping with the congressional purpose, as expressed in the act, to treat bonuses as a fund, not to be distributed as royalties, but to be deposited in the Treasury as other funds are required to be deposited under the act, or to be conserved in some other way, during the minority of the child.

The proviso giving to the Commissioner of Indian Affairs the right to withhold payments from the parents if he becomes satisfied that the money is being misused or squandered, carries with it the inciden-

tal right to make such rules and regulations as may be necessary to effectively carry out the purposes of the act. "Misused" means not used for the proper purpose. It is the minor's money that is paid to the parents, and, if used for the benefit of any one else, it is misused. To require that an account should be rendered to the Commissioner showing the purposes for which the money was spent seems to be within the scope of the Secretary's authority under the statute, and hence he would be justified in withholding payments so long as the parents refused to make such statements.

Believing that the Secretary did not act arbitrarily, but within the discretion lodged in him by Congress, I think the judgment of the lower court should be reversed, and hence I dissent.

WALKER et al. v. FORD et al.

(Court of Appeals of District of Columbia. Submitted December 6, 1920. Decided January 3, 1921.)

No. 3409.

1. **United States ⇐125—Immunity extends to suit against property.**
Immunity of the United States against suit, except by its consent, extends to its property, and applies where its rights are affected, either by a suit directly against it or against its officers or agents.

2. **United States ⇐125—Ejectment not maintainable against Public Printer for encroachment of printing office on adjoining lot.**
The owner of lots adjoining the Government Printing Office cannot maintain ejectment against the Public Printer and his chief clerk, because the wall of the office encroached upon their lots, since the officers were not unlawfully in possession of the strip encroached upon, and the suit, in effect, was one to compel the removal of the wall of the building.

Appeal from the Supreme Court of the District of Columbia.

Ejectment by Frank H. Walker and another against Cornelius Ford and another. Judgment for defendants on a directed verdict, and plaintiffs appeal. Affirmed.

Reeves T. Strickland, of Washington, D. C., for appellants.

H. H. Glassie, of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. This is a suit in ejectment to recover possession of the eastern 4 feet 11 inches, by the full depth, of lots 75 and 76, Square 624, in the city of Washington.

The claim is based upon the extension of the concrete foundation of the west wall of the Government Printing Office 4 feet and 11 inches beyond the line under plaintiffs' property. In other words, the government, in erecting the west wall of the printing office, constructed a concrete base upon which the wall rests. The base, the top of which is several feet underground, extends 4 feet 11 inches, beyond the wall under plaintiffs' property for the full length of the lots.

At the conclusion of plaintiff's testimony, the court, on defendants' motion, directed the jury to return a verdict for defendants. From the judgment thereon, plaintiffs appealed.

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[1] The case can be disposed of by consideration of the single point that this is, in effect, a suit against the United States. The defendants are employees of the United States. Defendant Ford is the Public Printer, and defendant Alverson is the chief clerk of the government Printing Office. It is clear the action is against property owned by the United States and used for a public purpose. The immunity of the United States against suit, except by its consent, is not only personal, but extends to its property. It applies to the same extent, whether the rights of the United States are affected in a suit directly against it, or against its officers or agents.

"The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered." Minnesota v. Hitchcock, 185 U. S. 373, 387, 22 Sup. Ct. 650, 656 (46 L. Ed. 954).

Plaintiffs, however, rely upon the case of United States v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, as sustaining the right of ejectment in the instant case. In the Lee Case, two army officers, Strong and Kaufman, were in unlawful possession of the Arlington estate. Ejectment was brought under the laws of Virginia. The officers defended upon the ground that their possession was the property of the United States. Judgment was rendered against them for possession, without finally determining the question of title. The decision, however, turned to a large extent upon the question of the validity of a certificate of sale of the property to the United States for taxes, as affecting the jurisdiction of the court to turn the defendants out of possession.

The ground upon which the case is distinguished from the general rule forbidding suit against the United States, except by its consent, is clearly stated in Cunningham v. Macon & Brunswick R. R. Co., 109 U. S. 446, 452, 3 Sup. Ct. 292, 296 (27 L. Ed. 992), as follows:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. See Mitchell v. Harmony, 13 How. 115; Bates v. Clark, 95 U. S. 204; Meigs v. McClung, 9 Cranch, 11; Wilcox v. Jackson, 13 Pet. 498; Brown v. Huger, 21 How. 305; Grisar v. McDowell, 6 Wall. 363. To this class belongs also the recent case of United States v. Lee, 106 U. S. 196, for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff is part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession."

[2] It will be observed that the present case is in no respect analogous to the Lee Case. Defendants have not committed trespass. They are not in possession of plaintiffs' premises, nor in a position to be "turned out of their unlawful possession." The fancied ouster of

which plaintiffs complain results, not from any action or possession of defendants, but from the fact that the foundation of a building belonging to the United States in which they are employed extends 4 feet 11 inches into the soil underneath plaintiffs' premises. Defendants are not in possession, and cannot, therefore, be put out. They are in the printing office, beyond the reach of any process that could possibly be issued, in the light of plaintiffs' broadest contention. What, then, would result from yielding to plaintiffs' demand? The destruction of the wall of a building belonging to the United States and in use by it. On any theory, therefore, the action is a suit against the United States.

With this disposition of the case, it is unnecessary to consider other objections raised, which clearly preclude ejectment, even if the suit were not against the United States.

The judgment is affirmed, with costs.

Affirmed.

DEWSON et al. v. TOMLINSON.

(Court of Appeals of District of Columbia. Submitted November 16, 1920. Decided January 3, 1921.)

No. 1357.

Patents ⇐106(2)—Counts in interference must be given broadest possible interpretation.

It is the universal rule in interference cases that the counts shall be given the broadest interpretation of which they are susceptible, so that the first inventor is entitled to priority over the objection that the counts contained limitations not found in his disclosure, where the disclosure was sufficient, if the counts were broadly construed.

Appeal from the Commissioner of Patents.

Interference proceeding between Edward H. Dewson and another and Charles H. Tomlinson. From the decision of the Commissioner of Patents, awarding priority of invention to Tomlinson, Dewson and another appeal. Affirmed.

E. A. Wright, of New York City, and Howard A. Coombs, of Washington, D. C., for appellants.

F. T. Brown, C. M. Nissen, and A. J. Crane, all of Chicago, Ill., for appellee.

ROBB, Associate Justice. Appeal from concurrent decisions of the Patent Office tribunals in an interference proceeding awarding priority of invention to the senior party, Tomlinson.

Of the four counts in issue, counts 1 and 4 are sufficiently illustrative and are here reproduced:

"1. In a car coupling, the combination with a casing containing a plurality of fixed contacts connected to train line circuits, and a movable carrier having corresponding contact bars, of fluid pressure means for projecting said carrier to electrically connect the corresponding contacts of counterpart couplers, and a valve device for controlling the return movement of said carrier."

"4. In a car coupling, the combination of a casing having an opening and containing electrical contacts connected to train line circuits, a movable carrier having corresponding contact bars, mechanism for projecting said carrier through said opening to electrically connect corresponding contacts of counterpart couplers, and a movable shutter for protecting said opening when said carrier is withdrawn."

No testimony has been taken; the contention of appellants being that the counts contain limitations not found in the Tomlinson disclosure. The tribunals of the Patent Office, in carefully prepared opinions, have ruled that, giving to the counts the broadest interpretation of which they are susceptible, the universal rule in interference cases, Tomlinson's disclosure is sufficient. We adopt this view and affirm the decision. See Brown v. Tomlinson, 49 App. D. C. 310, 265 Fed. 460, April 5, 1920.

Affirmed.

DOYLE v. TOMLINSON.

(Court of Appeals of District of Columbia. Submitted November 17, 1920. Decided January 3, 1921.)

No. 1362.

Appeal from the Commissioner of Patents.

Interference proceeding between Edward P. Doyle and Charles H. Tomlinson. From a decision awarding priority of invention to Tomlinson, Doyle appeals. Affirmed.

John S. Barker, of Washington, D. C., and Donald M. Carter, of Chicago, Ill., for appellant.

F. T. Brown and C. M. Nissen, both of Chicago, Ill., for appellee.

ROBB, Associate Justice. Appeal from concurrent decisions of the Patent Office tribunals in an interference proceeding awarding priority of invention to the senior party, Tomlinson.

Count 4 of the four counts of the issue sufficiently illustrates the invention, and is as follows:

"4. A coupling device for vehicles comprising an electrical coupler element carried thereby, a cylinder, a piston therein connected with said electrical coupler element, and means for admitting air into said cylinder to move the coupler element."

Every question raised in this appeal has been carefully considered by the various tribunals of the Patent Office, and, being satisfied with their reasoning, we affirm the decision from which the appeal was taken. Our decision in Hartsough v. Gile, 49 App. D. C. 354, 265 Fed. 994, March 10, 1920, is directly in point.

Affirmed.

DELAWARE & HUDSON CO. v. BOYDEN et ux.

(Circuit Court of Appeals, Third Circuit. January 31, 1921.)

No. 2593.

1. **Negligence ⇐93(2)—Of husband or wife chargeable to the other.**
Where a husband and wife, riding in a vehicle driven by the husband, were engaged in a joint enterprise, the negligence of either was chargeable to the other under the law of Pennsylvania.

2. **Railroads ⇐327(8)—Traveler must continue to look and listen.**
Under the law of Pennsylvania, one crossing a railroad track must continue to look and listen after he is committed to the crossing.

3. **Railroads ⇐350(16)—Construction of testimony as to "looking" held for jury.**
Where plaintiff testified that, when his wife screamed while they were crossing a railroad track, he looked to the north and then to the south, his testimony on cross-examination that he "wasn't really looking for a train" was not conclusive that he did not look while crossing, as its meaning was doubtful, and the jury was justified in concluding that he meant he was not really expecting a train.

4. **Railroads ⇐350(13)—Contributory negligence question for jury.**
Where there is any evidence on the subject from which the fact of due care during the crossing may be found, the question whether plaintiffs exercised due care while crossing a railroad is for the jury.

5. **Railroads ⇐350(23)—Evidence held to make question for jury as to view obtained by alighting.**
In an action for injuries sustained at a railroad crossing, where plaintiffs, when they stopped before crossing, had a view of the track for 140 to 208 feet, evidence *held* to make a question for the jury whether there was a clear prospect from any point to which one of them might have walked by alighting and going ahead of the vehicle.

6. **Railroads ⇐327(8)—Traveler must stop, look, and listen at place where such acts are effective.**
Under the law of Pennsylvania, it is the duty of parties crossing a railroad track to stop, look, and listen at a place where stopping, looking, and listening would be effective.

7. **Railroads ⇐350(23)—Contributory negligence, in failing to alight and go ahead to look, held question for jury.**
Where plaintiffs stopped before crossing a railroad track at a point where they could see the track for 140 to 208 feet, and there was evidence that there was no other available stopping place before crossing, and that the best view was there obtainable without alighting, and it was not shown without contradiction that there was a clear prospect from any point to which one of them might have walked by alighting and going ahead of the vehicle, the court properly refused to rule as a matter of law that one of them should have gone forward.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Action by George Boyden and wife against the Delaware & Hudson Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Paul Bedford and Frank A. McGuigan, both of Wilkes-Barre, Pa. (Lewis E. Carr, of Albany, N. Y., James H. Torrey, of Scranton, Pa. and Walter C. Noyes, of New York City, of counsel), for plaintiff in error.

R. L. Levy and Leon M. Levy, both of Scranton, Pa., and Allan D. Miller, of Susquehanna, Pa., for defendants in error.

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

THOMPSON, District Judge. George Boyden and Annie Boyden, his wife, brought suit against the Delaware & Hudson Company to recover damages alleged to have been suffered by the plaintiffs on July 31, 1916, through a collision between a vehicle in which they were crossing the defendant's tracks and a locomotive and train of the defendant railroad company. The plaintiffs alleged negligence in running the train at excessive speed and without warning of its approach by bell or whistle.

The plaintiffs, on the day in question, had left their home for the purpose of fishing, and were riding in a surrey drawn by a pair of horses. Mr. Boyden was seated in front driving, and Mrs. Boyden was seated in the rear. The highway upon which they approached, from the north, the grade crossing where the accident occurred, runs parallel with the double railroad tracks of the defendant to the place of crossing, where it turns at a right angle to the left. At this place the right of way and tracks curve to the right of one approaching from the north; the curve continuing to a point about 600 feet south of the crossing. The curve extends around an embankment covered with trees and bushes, which obstruct a view of the tracks by one traveling south upon the highway. The plaintiffs were thoroughly familiar with the crossing, having crossed frequently for many years. When they reached the turn of the road at the crossing, Mr. Boyden stopped the horses with their heads 5 or 10 feet from the tracks, which placed him, seated in the surrey, a distance from the first track of from 15 to 25 feet. At 15 feet from the tracks a view to the south of 208 feet could be had; at 25 feet, a view of 140 feet. Having stopped, and neither seeing nor hearing any train, the plaintiffs proceeded, with the horses on a walk, to cross the tracks. After they started to cross, Mrs. Boyden screamed, whereupon Mr. Boyden looked to the north and saw nothing, and, looking to the south, he saw a locomotive and train approaching. He slapped the horses with the reins. They broke into a gallop, and cleared the track; but, according to the plaintiffs' testimony, the locomotive struck the rear end of the surrey. The plaintiffs were thrown out and Mrs. Boyden sustained severe injuries.

The jury returned a verdict for both plaintiffs, thus finding against the defendant upon the questions of collision, of its negligence in running the train at an excessive rate of speed, of its failure to give warning of the train's approach by bell or whistle, and the plaintiffs' contributory negligence, all of which questions were in issue under the evidence. The defendant assigns error to the refusal of the court to give binding instructions as to both plaintiffs (1) because Mr. Boyden, who was driving, failed to look or listen while crossing the tracks; (2) because neither plaintiff alighted and went forward to a point where a better view of the tracks could be obtained, and, in either

case, the plaintiffs being upon a joint enterprise, the negligence of one is also chargeable to the other.

[1] There can be no controversy about the latter proposition (Brommer v. Penna. R. R., 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. [N. S.] 924; Phila. & Reading R. R. v. Le Barr [C. C. A.] 265 Fed. 129), and the defendants' request to that effect was affirmed by the trial judge. We will first dispose of the question whether the evidence so clearly showed contributory negligence in failing to look and listen while crossing the track that the case should have been taken from the jury.

The evidence showed that Mr. Boyden heard his wife scream and looked to the north, and then looked to the south and saw the approaching train. As was said in a recent case, he could not look in both directions at once, but he could turn his head in the fraction of a second. The fact is in evidence that he did look in both directions, as it was his duty to do.

[2] What the law requires is that one must exercise his senses to discover danger. He must continue to look and listen after he is committed to the crossing. Kipp v. Central R. R. of N. J., 265 Pa. 20, 108 Atl. 175; Gasser v. Philadelphia & Reading R. R., 266 Pa. 493, 109 Atl. 760.

[3] In insisting that Mr. Boyden failed in this duty, the defendant lays stress upon his testimony wherein, on cross-examination in relation to what he did when his wife screamed and he looked to the north, he testified:

"Q. But you couldn't see anything of the train in that direction? A. *I wasn't really looking for a train.*"

It is urged that this answer foreclosed the plaintiffs' case, by conclusively showing that Mr. Boyden did not look to see whether a train was approaching. But this is a familiar commonplace expression, frequently used to mean, and the jury would have been justified in accepting it as meaning: "I wasn't really *expecting* a train." If he had been *looking* for a train, in the sense of expecting one at that time, he would have been guilty of negligence in attempting to cross, and we do not feel justified in construing the language against him in the sense contended for. Its meaning is at the most doubtful, and its construction was for the jury.

[4] Assuming for the present that the stop of the plaintiffs before crossing was such as to justify them in proceeding, it is well settled that, where any evidence on the subject is present from which the fact of due care during the crossing may be found, the question is for the jury. Witmer v. Bessemer, L. E. & W. R. R., 241 Pa. 112, 88 Atl. 314; Moore v. Penna. R. R., 242 Pa. 541, 89 Atl. 671.

In considering the next question, whether one of the plaintiffs should have descended from the vehicle and gone ahead of the team, we quote from the opinion of the Supreme Court of Pennsylvania in the case of Siever v. Pittsburgh, C., C. & St. L. Ry. Co., 252 Pa. at page 7, 97 Atl. at page 118, where the subject is thoroughly discussed and the effect of the cases summarized as follows:

"In Kinter v. Penna. R. R. Co., 204 Pa. 497, relied upon by appellant, we ruled, following the logio of Penna. R. R. Co. v. Beale, 73 Pa. 504, that when a driver stops at a point where an obstruction prevents a proper view of the railroad he is about to cross, he must descend from his vehicle and, if necessary, walk to a point where the prospect is clear. See also Mankewicz v. Lehigh Valley Co., 214 Pa. 386; Bistider v. Lehigh Valley R. R. Co., 224 Pa. 615; Craig v. Penna. R. R. Co., 243 Pa. 455; Follmer v. Penna. R. R. Co., 246 Pa. 367. While we have not departed from the rule just stated, yet in Messinger v. Penna. R. R. Co., 215 Pa. 497, where the plaintiff stopped at a point from which, at the time, he had a view of only about 80 feet in the direction of the approaching train, we held that, since he had stopped at the customary place, it was for the jurors, and not for the court, to say whether he had exercised due care (see also Hanna v. Philadelphia & Reading Ry. Co., 213 Pa. 157); and in Calhoun v. Penna. R. R. Co., 223 Pa. 298, 300, we said: 'Where a driver has stopped at the usual place for stopping, from which he has a view of the tracks, whether he should go forward in advance of his team to a better place to look is a question to be determined by the circumstances of the particular case.' In short, when all the cases on the subject are read together, it appears that the rule may now be stated thus: When a driver stops at a place where he cannot get a good view of the railroad he is about to cross from the vehicle in which he is riding, he must get out and walk to a spot where he can secure such a view, and his failure so to do constitutes contributory negligence in law, for stopping 'where an approaching train cannot be seen * * * is not an observance of the duty to stop, look, and listen' (Mankewicz v. Lehigh Valley R. R. Co., supra); but when he comes to a standstill at a usual stopping place, where he can get some view of the tracks, whether he should go forward to a 'better place to look' is a question for the jury to determine."

[5, 6] Mr. Boyden stopped at a place where the embankment and the curve of the railroad did not prevent his obtaining a view which the jury may have estimated, from the testimony of the witnesses who made measurements, at anywhere from 140 to 208 feet. If he or Mrs. Boyden had descended from the surrey and gone to a point 5 feet from the track, a view of from 360 to 400 feet would have been had. An advance to a point between the north and south tracks would have afforded a view of greater extent, not definitely fixed by the testimony. It was their duty to stop, look, and listen at a place where stopping, looking, and listening would be effective. Phila. & R. Ry. Co. v. Le Barr, supra.

We are asked to rule as a matter of law, not only that the place where the plaintiffs stopped was not a place where stopping, looking, and listening was effective, but also that stopping, looking, and listening at a place nearer the tracks or between the tracks would have been effective, for it would be futile to hold that the plaintiffs, having stopped at a place where a clear view could not be obtained, must alight and proceed to another place where also a clear view which would be effective could not be obtained. It is apparent that the circumstances of the present case were such that the court could not hold as a matter of law that stopping, looking, and listening at a place closer to the first track, or between the first and second tracks, would have been effective.

What bearing the curve of the tracks, the embankment alongside of the tracks, the speed of the train, and other circumstances would have upon the probability of the plaintiffs being able to cross safely after having descended and proceeded to a place further advanced upon

the right of way, was for the consideration of the jury. That the jury could have found that even midway between the tracks looking and listening would not be effective is apparent from the testimony of the fireman, who was called by the defendant. He testified that he was looking out of the left side of the cab, and just as the train came around the curve he saw the team upon the north-bound track, that on which the train was approaching. If that is the fact, Mr. Boyden's view could not have extended further than where the train was when the fireman saw the team, and he could not have seen the train at a point where the accident could have been avoided, for the jury has found that the vehicle was struck before it left the tracks. Since the train may have come into view after they were committed to the act of crossing, the question of contributory negligence was for the jury. Kauffman v. Penna. R. R. Co., 237 Pa. 227, 85 Atl. 138.

[7] It has been urged that there was no evidence in the case to show that the plaintiff stopped at a usual or customary stopping place. There is evidence from which the jury could find that there was no available stopping place before crossing the tracks, other than where the plaintiffs stopped, and that was where the best view obtainable without alighting before crossing could be had.

The trial judge rightly declined to rule as a matter of law under the circumstances of this case that it was necessary in the exercise of due care that one of the plaintiffs should descend from the surrey and go forward for a better place to look and listen, for it cannot be concluded as an uncontradicted fact from the evidence that there was a clear prospect from any point to which one might have walked which would have prevented the accident.

We find no error in the refusal to charge as requested by the defendant, and the judgment is affirmed.

WALKER, Collector of Internal Revenue, v. GULF & I. RY. CO. OF TEXAS.

(Circuit Court of Appeals, Fifth Circuit. January 12, 1921.)

No. 3589.

1. **Internal revenue ⇐9—Interest accrued, but not collected, not subject to corporate excise tax; "income."**
   Interest accrued, but not actually collected, was not "income," subject to the excise tax imposed by Act Aug. 5, 1909.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

2. **Internal revenue ⇐9—Money advanced subsidiary company to pay operating expenses not deductible in computing excise tax.**
   Where a railroad company organized a terminal company and was practically the sole stockholder, but the terminal company was a separate legal entity, with separate books and accounts, and managed by a separate set of officers, and its operations were separately conducted, money advanced by the railroad company to the terminal company with which to pay operating expenses, which the terminal company's income was insufficient to pay, could not be deducted by the railroad company as a part of the ordinary and necessary expenses of the operation of its

business and properties, in computing the excise tax imposed by Act Aug. 5, 1909.

3. **Appeal and error ⊜173(4), 719(1)—Demand as condition precedent to action must be urged in lower court and assigned as error.**
In an action to recover back taxes paid under protest as illegally collected, the objection that the record fails to show a demand for a refund of the tax, as required by Rev. St. § 3226 (Comp. St. § 5949), cannot be raised in the appellate court, when not raised in the District Court or by the assignments of error.

4. **Appeal and error ⊜1140(2)—Reduction of judgment may be directed without new trial.**
Where the case was tried by the court, and the facts were agreed upon and found specially by the court, the Circuit Court of Appeals may direct a reduction of the judgment without remanding the case for a new trial.

In Error to the District Court of the United States, for the San Antonio Division of the Western District of Texas; Duval West, Judge.

Action by the Gulf & Interstate Railway Company of Texas against A. S. Walker, Collector of Internal Revenue, Third District of Texas. Judgment for plaintiff, and defendant brings error. Affirmed.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex. (Carl A. Mapes, Solicitor of Internal Revenue, and John M. Sternhagen, Sp. Atty., of New York City, on the brief), for plaintiff in error.

J. W. Terry and Grady B. Ross, both of Galveston, Tex., and N. A. Stedman, of Austin, Tex., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. On May 21, 1915, the defendant in error, the Gulf & Interstate Railway Company of Texas, hereinafter styled Railway, brought suit against A. S. Walker, collector of internal revenue of the United States for the Third district of Texas, to recover the sum of $1,049.45 alleged to have been illegally collected from the Railway by said collector as excise taxes for the years 1911 and 1912 under the Act of Congress of August 5, 1909. 36 Stat. 11, 112. Said sum had been collected from said Railway on an increase in its returns, ordered by the government officials on the ground that the Railway should have included in its return of gross income for the year 1911 $37,087.49, the interest due to it on the note of the Santa Fé Dock & Channel Company (hereinafter styled Terminal Company), said interest not having been actually paid, and that said Railway had also deducted as a part of its expenses of maintenance and operation during said year the sum of $27,478.91 advanced by said Railway to said Terminal Company to meet the deficit in its operating expenses. Had said interest been added to the gross income, and said advance not been deducted as operating expenses, the return of the Railway would have shown a net income, after the specific deduction of $5,000 allowed by law, of $32,737.68, upon which an excise tax of 1 per cent., or $327.38, was due. As to the year 1912 said Railway had not included in its original return of gross income the sum of $47,087.34

representing interest due by said Terminal Company to it upon its indebtedness, and had deducted as a part of its ordinary and necessary expenses of maintenance and operation the sum of $29,338.14 advanced during said year 1912 to said Terminal Company to meet its operating expenses. That had said sum of interest been included and said deduction not been made, it would have left the net income of said Railway, after the specific deduction of $5,000 allowed by law, $72,206.67, upon which the tax of 1 per cent. was due, to wit, $722.07. The said Railway had made a return for each of said years, excluding said interest and including said deduction of said advances to said Terminal Company, which returns showed no net income in excess of the specific deduction of $5,000 allowed by law. It was ordered to amend each of said returns, by including said amounts of interest due, but not collected, and by excluding said advances to said Terminal Company.

On the 11th day of January, 1912, it filed a claim for remission of taxes alleged to be due for the year 1911, and on the 11th of January, 1915, filed a like claim for remission of taxes for the year 1912. On February 1, 1915, it was notified that its claims for remission were rejected. On February 12, 1915, said Railway paid the sum of $327.38 as taxes for the year 1911 and the sum of $722.07 for the year 1912. At the time of making said payment it filed with the internal revenue collector its written notification in regard to each of said taxes, claiming that the same were erroneous, alleging that its original return, showing that it had no taxable income, was correct, but said taxes were paid under protest to avoid the incurring of penalties, and an action would be brought by said Railway to recover the same. Suit was brought, setting up the foregoing facts, and alleging the following as the relations between the Terminal Company and the Railway:

That on or about August 1, 1910, the Railway was the owner of certain docks at Port Bolivar, in Galveston county, Texas, and conveyed the same to the Santa Fé Dock & Channel Company, which was incorporated about October 1, 1910, under the laws of Texas, for the purpose of constructing and operating channels and docks at Port Bolivar and other places on the Texas coast. Said corporation was organized with a capital stock of $50,000, divided into 500 shares, of $100 each. In consideration of said transfer of said docks, said corporation issued to said Railway 495 shares of its said capital stock, and executed to it its note, on October 10, 1910, for $618,124.86, said note bearing interest at the rate of 6 per cent. per annum. Thereafter, on or about January 30, 1912, said Railway made an additional advance to said Terminal Company of $166,664.13, and received from it therefor, and in place of its first note, a note for $784,788.99, bearing interest at 6 per cent. per annum. A large proportion of the business handled by the Railway Company over its railroad during the years 1911 and 1912 was lumber intended for export through Port Bolivar, and to handle said lumber it was necessary for plaintiff either to own or to secure the use of dock facilities at Port Bolivar, Texas. That at all times since the 1st of October, 1910, and during the years 1911 and 1912, the income of the Terminal Company was not sufficient to pay

the expenses necessarily incurred in operating its property, and was insufficient to pay to the Railway any interest on the notes held by it, or any dividend upon its stock, and that it made the advances above mentioned in said several years to enable the Terminal Company to pay its expenses of operation. That these sums were necessary to enable said Terminal Company to continue its operations and to provide dock facilities at Port Bolivar for the use of the Railway. That the Railway was not authorized under the laws of Texas to own and operate docks and channels, and therefore caused said Terminal Company to be incorporated, and the Railway's terminal and dock property to be transferred to it. That practically all of the business done by the Terminal Company has been furnishing and operating said dock facilities for handling freight and passengers transported by said Railway, and that while in some instances a separate charge was made by said Terminal Company against freight handled through said facilities, the handling thereof was necessary to the transaction of said Railway's business, as also was the use of the property and facilities of said Terminal Company.

These averments were all incorporated in an agreed statement of facts and found by the court to be true, and it was also agreed and found that the Terminal Company did not at any time up to the date of said finding, to wit, January 27, 1920, pay any part of the indebtedness evidenced by said note, nor any interest due thereon, nor had it ever repaid to said Railway any part of the amounts advanced to it by said Railway to meet its deficit in operating expenses for the years 1911 and 1912; nor has it since 1912 collected sufficient revenue to pay its expenses of operation, and in each of said years plaintiff has advanced to said Terminal Company additional sums to pay said deficits. The case was submitted to the court without the intervention of a jury upon the above statement of facts, which were found by the court, which thereupon found in favor of the Railway against the collector for the entire amount of the taxes paid for each of said years.

The case is brought here on two assignments of error: First, that the court erred in rendering judgment in favor of the plaintiff; second, that the court erred in holding that the sums advanced by the Railway to the Terminal Company during the years 1911 and 1912 were properly deducted as legitimate expenses of operating the business of a Railway during the said years, and in holding that such deductions should have been allowed by the defendant as collector of internal revenue.

[1] In the court below it was conceded that interest which had accrued, but had not been actually collected, did not constitute taxable income under the said act of Congress. We do not understand that it is contested here. The question has been clearly put at rest, and the concession is sustained, by the case of Maryland Casualty Co. v. United States, 251 U. S. 342, 354, 40 Sup. Ct. 155, 64 L. Ed. 297.

In the return of 1911 it is necessary to include the amount of interest due, but not collected, to wit, $37,087.49, in order to show any net income over and above the $5,000 exemption, even if the $27,478.81 advanced to the Terminal Company should not have

been deducted as a part of the operating expenses of the Railway. The above decision that interest not actually received is not required to be included in return of gross income disposes of so much of the case as rests upon the taxes of 1911, and shows that the sum collected therefor, to wit, $327.38, was not due, and that a judgment for this sum was properly awarded the plaintiff.

Likewise, in regard to the taxes for 1912, $47,087.72 of the amount, upon which the taxes for that year were computed, consist of interest not collected. Deducting this sum from the return as revised by the collector will leave a net income (after the specific deduction of $5,000 allowed by the statute) of $25,119.33, 1 per cent. of which would be $251.19. If, therefore, the contention of the government that the amount of advances made to the Terminal Company by the Railway as a part of its operating expenses is sound, the Railway Company was liable for $251.19, and the judgment rendered against the collector for the year 1912, instead of being for the full amount, should be only for $470.87, namely, the 1 per cent. computed upon the amount of the interest item erroneously added.

[2] We do not think that the facts of this case warrant the conclusion of law that the amounts advanced by the Railway to the Terminal Company can be properly charged by it as a part of the ordinary and necessary expenses of maintenance and operation of its business and properties. While the Railway Company is practically the sole stockholder and was the organizer of the Terminal Company, so far as this record shows, the operations of the Terminal Company are separately conducted, and, as stated by the Internal Revenue Collector, it is a separate legal entity, its books and accounts are kept separately, and it is managed by a separate set of officers. The sums appear to be charged on the books of the Railway Company as advances to the Terminal Company and as a debt due by it, and to be so carried on the books of the Terminal Company.

We do not think that its facts bring this case within the principle of Southern Pacific Co. v. Lowe, 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. 1142, or Gulf Oil Corporation v. Lewellyn, Collector, 248 U. S. 71, 39 Sup. Ct. 35, 63 L. Ed. 133. In Southern Pacific Co. v. Lowe, the Southern Pacific Company was the lessee of the property of the Central Pacific Railroad Company. All of the money from which the dividends were declared had been collected and was held by the lessee. The lessee was the sole stockholder of the lessor. Early in 1914 dividends were declared and paid out of the earnings accumulated prior to January 1, 1913, and consisting principally of a debit against the Southern Pacific Company.

"But the payment was only constructive, being carried into effect by bookkeeping entries which simply reduced the apparent surplus of the Central Pacific and reduced the apparent indebtedness of the Southern Pacific to the Central Pacific by precisely the amount of the dividends. The question is whether the dividends received under these circumstances and in this manner by the Southern Pacific Company were taxable as income of that company under the Income Tax Act of 1913."

In holding that the dividend was not taxable as income accruing commencing with the 1st day of March, 1913, the court say:

"We base our conclusion in the present case upon the view that it was the purpose and intent of Congress, while taxing 'the entire net income arising or accruing from all sources' during each year, commencing with the 1st day of March, 1913, to refrain from taxing that which, in mere form only, bore the appearance of income accruing after that date, while in truth and in substance it accrued before, and upon the fact that the Central Pacific and the Southern Pacific were in substance identical because of the complete ownership and control which the latter possessed over the former, as stockholder and in other capacities. While the two companies were separate legal entities, yet in fact and for all practical purposes they were merged, the former being but a part of the latter, acting merely as its agent and subject in all things to its proper direction and control. And, besides, the funds represented by the dividends were in the actual possession and control of the Southern Pacific, as well before as after the declaration of the dividends. The fact that the books were kept in accordance with the provisions of the lease, so that these funds appeared upon the accounts as an indebtedness of the lessee to the lessor, cannot be controlling, in view of the practical identity between lessor and lessee. * * * The case turns upon its very peculiar facts, and is distinguishable from others in which the question of the identity of a controlling stockholder with his corporation has been raised. Pullman Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587, 596; Peterson v. Chicago, Rock Island & Pac. Ry. Co., 205 U. S. 364, 391."

The case of Gulf Oil Corporation v. Lewellyn, Collector, 248 U. S. 71, 39 Sup. Ct. 35, 63 L. Ed. 133, rests on the same principle, to wit, that the dividends did not represent, in fact, income arising or accruing since March 1, 1913.

"We are of opinion that the decision of the District Court was right. It is true that the petitioner and its subsidiaries were distinct beings in contemplation of law, but the facts that they were related as parts of one enterprise, all owned by the petitioner, that the debts were all enterprise debts due to members, and that the dividends represented earnings that had been made in former years and that practically had been converted into capital, unite to convince us that the transaction should be regarded as bookkeeping rather than as 'dividends declared and paid in the ordinary course by a corporation.'"

The companies had no money, all of their funds were invested in properties or actually required to carry on their business, and the dividends were merely a method of transferring to the books of the parent company the earnings and surplus on the books of the subordinate companies. The court say:

"The earnings thus transferred had been accumulated and had been used as capital before the taxing year. Lynch v. Turrish, 247 U. S. 221, 228."

In this case, however, there is a loan from one company to another. It is carried on the books of each company as an advance by one still owed by the other, and the question here is: Can the creditor company deduct it from its gross income as a part of its ordinary expenses of operation, simply because of its stock ownership in the other company and their intimate business connection? We conclude that the two corporations were separate legal entities (Peterson v. Chicago, Rock Island & Pac. Ry., 205 U. S. 364, 391, 27 Sup. Ct. 513, 51 L. Ed. 841; Pullman's Palace Car Co. v. Missouri Pac. Co., 115 U. S. 587, 597, 6 Sup. Ct. 194, 29 L. Ed. 499), and that the sum advanced by the Railway to the Terminal Company was not properly deducted as a part of the Railway's operating expenses.

[3] The question was raised in this court that the record failed to show a demand for a refund of the tax after its payment as required by Rev. St. § 3226 (Comp. St. § 5949). This case is not like that of Rock Island, Arkansas & Louisiana R. R. Co. v. United States, 54 Ct. Cl. 22, recently affirmed by the United States Supreme Court. 254 U. S. 141, 41 Sup. Ct. 55, 65 L. Ed. ——. There as both courts point out, the payment was without protest, or any notice that the refusal to abate was not acquiesced in. Here, when making the payments, the Railway filed its written notice, claiming that each assessment was erroneous, that the original return showing no tax to be due was correct, that the tax was paid under protest to avoid incurring the penalties, and that an action would be brought by the Railway to recover the same. This might well be considered a demand for a refund on payment under protest. But, regardless of that, no such question was raised in the District Court, nor by the assignments of error. Had it been, it might have been met by further allegation and proof, if such were necessary. We do not think it can be raised here for the first time. Retzer v. Wood, Collector, 109 U. S. 185, 3 Sup. Ct. 164, 27 L. Ed. 900; Green County v. Thomas' Executor, 211 U. S. 598, 602, 29 Sup. Ct. 168, 53 L. Ed. 343.

[4] This case being tried by the court, and the facts being agreed upon and specially found by the court, there is no reason for remanding the case for a new trial; but the judgment rendered can be directed to be modified in accordance with the above ruling as to the advances made by the Railway to the Terminal Company. Fellman v. Royal Ins. Co., 184 Fed. 577, 106 C. C. A. 557; Fort Scott v. Hickman, 112 U. S. 150, 165, 5 Sup. Ct. 56, 28 L. Ed. 636.

The judgment in favor of the plaintiff should be reduced to the extent of deducting $251.19 from the amount of taxes paid, thus making the sum for which judgment should have been entered $798.56, with interest thereon to date of judgment (June 14, 1920), to wit, $1,054.97, and the judgment reduced to this amount, and, so modified, is affirmed.

MILLER v. HAMNER.

(Circuit Court of Appeals, Third Circuit. December 28, 1920.)

No. 2581.

1. **Banks and banking ⇐248(2)—Comptroller can conclusively assess stockholders' liability.**
   The Comptroller of the Currency can order an assessment upon the shares of an insolvent national bank, which is conclusive upon the shareholders, and enforce payment thereof through a receiver of his appointment.

2. **Banks and banking ⇐250(1)—Suit for fractional part of stockholder's liability is in equity.**
   A suit to enforce a fractional part of a shareholder's liability on assessment to pay the debts of an insolvent national bank, though based on the statute, is in equity.

3. **Banks and banking ⟸248(6)—Estate liable for stock held by it when insolvency occurred.**
Under Rev. St. § 5151, superseded by Act Dec. 23, 1913, § 23, the estate of a deceased shareholder in a national bank is liable on the stock held by it, though insolvency of the bank occurs and assessment on the policy is made after his death.

4. **Courts ⟸375—State limitation statutes apply to suits to enforce national bank stockholder's liability.**
In the absence of federal provisions, state statutes of limitation apply to suits brought to enforce payments on assessment against the stockholders of an insolvent national bank.

5. **Executors and administrators ⟸282—Personally liable for settling estate without paying statutory liability.**
An executor, who settles an estate without making provision for or disposing of a liability imposed thereon by statute, may in a proper action seasonably brought be held personally liable for devastavit.

6. **Equity ⟸427(1)—Relief must conform to bill.**
The relief granted in equity must conform to the case made by the bill.

7. **Equity ⟸427(3) —Personal decree not authorized in suit against executor as representative.**
A bill charging the defendant with liability only as executor of an estate does not authorize a decree against him personally, though he is personally liable, and though the bill contains a prayer for general relief, since such prayer does not vary the rule against relief inconsistent with the case made by the bill.

8. **Limitation of actions ⟸127(17)—Recovery on supplemental bill stating new cause of action is barred.**
When a supplemental bill in equity to hold an executor personally liable for devastavit states a new cause of action, that action is subject to the operation of an applicable statute of limitations.

Appeal from the District Court of the United States for the District of Delaware; Charles B. Witmer, Judge.

Suit by George C. Rankin, as receiver of the First National Bank of Alma, Kan., for whom was substituted Charles D. Hamner, as receiver, against Charles R. Miller and others. Decree for complainant against the defendant Miller (263 Fed. 956), and that defendant appeals. Reversed and remanded.

See, also, 266 Fed. 236.

Willard Saulsbury and Richard S. Rodney, both of Wilmington, Del., for appellant.

Barber, Watson & Gibboney, of New York City (Stuart G. Gibboney and Walter C. Sheppard, both of New York City, of counsel), for appellee.

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

WOOLLEY, Circuit Judge. In this litigation, instituted by a receiver of an insolvent national bank to collect an assessment from the executors, trustees, legatees or devisees of a deceased shareholder, culminating after eighteen years in a decree against one of the executors personally on his individual liability as a tort feasor, many questions have been raised and decided, which, as we regard the case, do

not require discussion on this appeal. We shall therefore give in outline only so much of the extended and complicated record as will bring to view the matter on which we think the case turns and will show the reasons for our judgment. For more detailed statements reference is made to opinions delivered at different stages of the case, reported at 130 Fed. 229; 199 Fed. 342; 207 Fed. 602; 266 Fed. 236; 263 Fed. 956.

The First National Bank of Alma, Kansas, was incorporated in 1887 under the National Bank Act (13 Stat. 997). Robert H. Miller, owner of 150 shares of its capital stock, died August 31, 1890. In the following November the bank closed its doors and was declared insolvent by the Comptroller of the Currency.

The shares of stock owned by the decedent passed to Charles R. Miller and James Baily, executors named in his will, and were accounted for in the inventory and appraisement of his estate. Charging themselves with the amount of the appraisement, the executors, in October, 1892, passed their first and final account showing a distributive balance of $18,991.75. This balance, as evidenced by releases and acquittances of record, was fully distributed to the legatees named in the will. These embraced Charles R. Miller, trustee under the will of Robert H. Miller, Deceased, and Charles R. Miller and sundry other named children of the testator. As the distribution was made conformably with the laws of Delaware, it does not appear whether the shares of stock—then having become valueless—remained in the hands of the executors as a part of the testator's estate not administered, or had been distributed by them to the legatees.

In January, 1893,—that is, in the year following the final settlement of the estate of Robert H. Miller,—the Comptroller of the Currency ordered an assessment of $44 upon each share of the capital stock of the bank. This assessment on the shares of the testator was not paid by the executors or distributees of his estate nor was payment thereof demanded by suit. Action therefor has for a long time been barred by statute of limitations. In December, 1900, a second assessment, amounting to $14.60 on each share, was ordered and demand therefor was duly made upon shareholders as provided by Sections 5151 and 5234 of the Revised Statutes of the United States.

In April, 1902, George C. Rankin, the third receiver of the bank, filed a bill in the Circuit Court of the United States for the District of Delaware to enforce the collection of the last assessment against Charles R. Miller and James Baily, Executors of the estate of Robert H. Miller, deceased; Charles R. Miller and James Baily, Trustees under the will of Robert H. Miller, deceased; The Equitable Guarantee & Trust Company, a corporation under the laws of the State of Delaware, as surety for Charles R. Miller and James Baily, Executors of Robert H. Miller, deceased; Wilmer W. Miller, Annie M. Baily, Elizabeth M. Baily, Charles R. Miller and R. Miller Baily. By this bill the present litigation was begun. Between the date of filing the bill and the next pertinent date presently to be named, Rankin resigned and Scott Nesbitt was appointed receiver. Although apparently Nesbitt was not a party to the suit, the case proceeded. Sun-

dry demurrers were filed and ruled on; motions were made and disposed of; and testimony was taken before a Commissioner. In the meantime James Baily, co-executor and co-trustee with Charles R. Miller, died. On the completion of the testimony and without joining Baily's personal representatives, Judge Bradford, on July 15, 1913, handed down an opinion (which for convenience we shall refer to as the opinion of 1913) dealing with many questions raised by the defendants. 207 Fed. 602.

On this opinion no decree was entered. In December, 1915,—more than two years after the opinion of 1913 had been filed (a motion for a decree nunc pro tunc having been made and denied),—a supplemental bill was filed by Charles A. Korbly, the receiver succeeding Nesbitt. The filing of this bill was followed by the defendant's motion for its dismissal, followed later by confusion in the record out of which arose a question of abatement of the suit, disposed of adversely to the defendant by Judge McPherson in 1918 by an opinion reported at 266 Fed. 236.

On Korbly's resignation, Charles D. Hamner, the last of six receivers, was appointed, and in August 1918, he was granted leave to file still another supplemental bill, which, being connected by reference with the preceding Korbly supplemental bill and the Rankin original bill, was acted on by Judge Witmer in January, 1920, in an opinion (to which we shall refer as the final opinion) following that of Judge Bradford in 1913, and filed preliminary to the entry of the decree now appealed from, holding Charles R. Miller individually liable for the assessment on the stock of his ancestor.

[1-5] While the decree appealed from was not entered until 1920, it was based, as shown by the final opinion, on the opinion of Judge Bradford rendered in 1913 on the original bill of 1902, as well as on the Hamner supplemental bill. With many of the matters decided by Judge Bradford in his opinion of 1913 there can be no valid dispute, as, for instance, the power of the Comptroller of the Currency, conclusive upon shareholders, to order an assessment upon the shares of an insolvent national bank, and, through a receiver of his appointment to enforce payment thereof, Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476; Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168; Studebaker v. Perry, 184 U. S. 258, 22 Sup. Ct. 463, 46 L. Ed. 528; when a fractional part of a shareholder's liability to assessment is sought, the action, though on the statute, is in equity, Kennedy v. Gibson, supra; Casey v. Galli, supra; the individual responsibility of a shareholder, when living for the contracts, debts, and engagements of a banking association to the extent of the amount of his stock therein (Section 5151 of the Revised Statutes [superseded by Act Dec. 23, 1913, c. 6, § 23, 38 Stat. 273] and section 5152 of the Revised Statutes [Comp. St. § 9690]), and the responsibility of his estate therefor, when holding the shares, though insolvency of the bank occur and assessment on the shares be made after his death, Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; and, in the absence of Federal provisions, the applicability of state statutes

of limitations to suits brought to enforce payment of an assessment. McClaine v. Rankin, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500. Also, there can be little doubt that an executor who settles an estate without making provision for or disposing of a liability imposed by statute may, in a proper action seasonably brought, be held personally liable for devastavit. But the questions which arise from the decree, based in part on reasons first announced in the opinion of 1913, are, whether in the action as originally instituted against Charles R. Miller and others as executors, trustees, and legatees or devisees, a decree can be entered against Charles R. Miller individually for a devastavit; and whether, in the action as changed by the Korbly supplemental bill, declaring on another cause of action and asserting a different liability, Miller was not protected on his individual responsibility for a devastavit by the applicable Statute of Limitations of the State of Delaware. Answers to these questions require an investigation into the pleadings and a determination of the theory of the bills and of the remedies sought and granted.

The original bill of complaint was brought, as we have said, against sundry persons, among whom was Charles R. Miller in his several capacities of co-executor, co-trustee, and co-distributee under the will of the deceased shareholder of an insolvent national bank, to enforce the liability prescribed by Sections 5151 and 5152 of the Revised Statutes. By force of Section 5151 liability was fastened on the estate. This section provides that,

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Realizing from the terms of Section 5152 that

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders,"

the draftsman of the bill framed it on the theory, first, that complainant would find the estate of the deceased shareholder sufficient in assets or in the executors' surety to meet its statutory liability; and, if not, then he would follow the estate in the hands of those to whom it had been distributed. Pursuing this theory, the bill prayed that the amount of the assessment "be declared a lien upon all the estate of the said Miller that may have been received by the beneficiaries under the will of the said Robert H. Miller, deceased, or by the executors or trustees as aforesaid;" and that, "the executors, trustees and beneficiaries may be restrained from spending or disposing of any part of the said estate which may be held by said executors, trustees and beneficiaries;" and that the court may decree that they are "collectively and severally indebted" to the complainant in the named sum; and that the complainant may be granted "such other and further relief as the circumstances and the nature of the case, and equity, may require." It thus appears, not from the bill alone but also from the contention of counsel for the receiver, referred to by

the court in its opinion of 1913, that the action was against the estate of a deceased shareholder and the remedy sought was against the proceeds of the estate wherever found, whether in the hands of executors, of trustees, or of legatees. But on the bill so framed and on the evidence taken, the court (in the opinion of 1913, construing Section 5152 not to embrace "legatees or devisees" among those in whose hands the "estates and funds" of the deceased shareholder shall be liable) declined to enter a decree against the estate wherever found and against whomever held it,—that is, against the executors, trustees, and legatees or devisees,—but directed a decree against Miller and Baily jointly and severally as tort feasors, upon the theory that in settling the estate of their testator in 1892, with knowledge of the testator's liability on the shares of stock then held by the estate, they committed a devastavit which gave the receivers a right to recover from them individually the amount of the assessment afterwards ordered in 1900.

As the complainant did not, by his original bill, declare on a devastavit and did not pray that the defendants be held to individual liability therefor, it appears that the court by its opinion of 1913 granted relief not prayed for in the original bill on a case not made in that bill. As the court's theory of relief shown in that opinion was carried into the decree by the final opinion, we must pause here and examine the first opinion for error.

[6] Admittedly, "the relief granted in equity must be agreeable to the case made by the bill." Bebee v. Bank, 1 Johns. (N. Y.) 559, 3 Am. Dec. 353; Mitford's Pleading, 38.

[7] In Cloud, Adm., v. Whiteman, Ex., 2 Har. (Del.) 401, the Court of Errors and Appeals of Delaware in affirming the Chancellor (2 Del. Ct. 23) held, that a bill against one charging him *as executor* will not authorize a decree against him personally, though he be chargeable personally. Nor is the case aided by a prayer for general relief, for such prayer does not vary the rule against relief inconsistent with the case made by the bill. Cloud, Adm., v. Whiteman, Ex., 2 Del. Ch. 23; Bebee v. Bank, 1 Johns. (N. Y.) 559, 3 Am. Dec. 353; Smith v. Ardis, 49 Ga. 602; Hiem v. Mill, 13 Ves. Jr., 114; 33 Eng. Reprint, 237; Franklin v. Osgood, 14 Johns. (N. Y.) 527; Wilkin v. Wilkin, 1 Johns. Ch. (N. Y.) 114; Mitford & Tyler, Pleading and Practice in Equity, 133.

We are of opinion therefore that there was error in the relief awarded by the opinion of 1913 against Miller individually on the case made against him in the original bill, and that, in so far as the decree entered years afterward grants this relief on the original bill, as distinguished from the relief granted on the supplemental bill, it should be reversed.

We now come to that part of the decree which gives the same relief against Miller under the supplemental bills.

For some reason not entirely clear, no decree was entered on the opinion of 1913. But two years later, another receiver, Charles A. Korbly, evidently doubting the stability of a decree awarding relief inconsistent with the case made by the bill, filed a supplemental bill quoting expressly from that part of the court's opinion of 1913 in

which the court declined to hold the defendants liable as legatees or devisees, but held Miller and Baily jointly and severally liable as tort-feasors, and, setting up a case squarely within the terms of the opinion as delivered, prayed for a decree against Charles R. Miller alone holding him individually liable for the assessment because of his tort in closing out the estate of his testator without providing for the payment of assessments that might subsequently be made. It was in the Korbly supplemental bill, filed in December, 1915, that Miller was first charged with a tort in the nature of a devastavit, and it was in this supplemental bill that recovery of the assessment ordered in 1900 was first sought against him on his individual liability. As the supplemental bill of Korbly, filed in 1915, was followed in 1918 by a like supplemental bill filed by Hamner, the last receiver, on which the decree now appealed from was entered, there arises squarely the question whether the Delaware Statute of Limitations which began to run when the assessment was ordered in 1900 was arrested by the filing of the original bill in 1902, or continued to run, and consequently to bar the action against Miller on a tort declared on for the first time by the Korbly supplemental bill of 1915.

We do not understand it to be questioned that the case made and relief granted under the Korbly and Hamner supplemental bills were different from the case made and relief sought by the original bill.

Whether the Statute of Limitations runs against the action declared on in the Korbly supplemental bill and ultimately decided by the decree depends on the practice in Delaware of allowing amendments and supplemental bills changing the cause of action in a pending suit. The policy of the law with reference to amendments in suits at law, prevailing in Delaware and elsewhere, was discussed at length by the Superior Court and the Supreme Court in Gatta v. P., B. & W. R. R. Co., 1 Boyce (24 Del.) 293, 76 Atl. 56; and P., B. & W. R. R. Co. v. Gatta, 4 Boyce (27 Del.) 38, 85 Atl. 721, 47 L. R. A. (N. S.) 932, Ann. Cas. 1916E, 1227. While the decision in that case does not rule this case, the discussion there pursued throws light on the question now under review. There it appears from the cases cited that whether a new action declared on by amendment is barred by a statute of limitations depends largely on the form of the action, that is, whether instituted by summons to be followed by declaration or complaint showing the cause of action, in which case the statute ceases to run upon the bringing of the suit; or, whether commenced by bill of complaint or petition showing the cause of action, to be followed later by summons or subpœna, in which case the statute continues to run and operates as a bar to an action subsequently pleaded by amendment at a period beyond its limit. Applying this distinguishing principle to the practice in Delaware where suits are begun by summons and followed by declaration, the Delaware courts have held that an action subsequently declared on by amendment is not barred, though the amendment be made after the statute has run its limit. But the same policy that governs in suits at law applies with equal reasoning to the reverse procedure in suits in equity, where, as here, the initial

proceeding is by bill of complaint stating the cause of action to which the respondent is summoned to answer by the subpœna that follows.

[8] While this case does not require of us an expression of opinion on rules of equity with reference to the allowance of a supplemental bill showing a cause of action differing in whole or in part from that of the original bill and praying relief different from that sought by the original bill, we do express the opinion that, when an entirely new cause of action is declared on by supplemental bill it is equivalent to the bringing of a new action and is therefore open to the operation of an applicable statute of limitations.

We find that the relief granted by the decree was not agreeable to the case made by the original bill; and that, though agreeable to the case made by the supplemental bills, it was granted on a new case there made against which the Statute of Limitations had run and had for many years barred recovery.

On this ground, without reviewing or deciding other questions raised on the appeal, we find error and direct that the decree below be reversed and the case remanded to be disposed of in a manner not inconsistent with this opinion.

OREGON SHORT LINE R. CO. v. AMERICAN SMELTING & REFINING CO.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1920.)

No. 5546.

Carriers ⇐35—Cannot recover for switching done under agreement alleged to be illegal as rebate, in violation of Interstate Commerce Acts.

An interstate railroad company cannot recover for switching done in the yards of a smelter plant, under an agreement and understanding that, as provided in its tariff schedules duly published and filed with the Interstate Commerce Commission, such switching was a part of the transportation and should be free, as absorbed in freight charges, on an allegation that such provision of its tariff schedules was illegal and void, as in effect granting a rebate, in violation of the Interstate Commerce Acts.

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

Action at law by the Oregon Short Line Railroad Company against the American Smelting & Refining Company. Judgment for defendant, and plaintiff brings error. Affirmed.

George H. Smith, of Salt Lake City, Utah (J. V. Lyle and R. B. Porter, both of Salt Lake City, Utah, on the brief), for plaintiff in error.

F. W. Lehmann, of St. Louis, Mo. (E. M. Bagley, of Salt Lake City, Utah, on the brief), for defendant in error.

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

CARLAND, Circuit Judge. Plaintiff in error, hereafter plaintiff, brought this action against defendant in error, hereafter defendant, to recover the reasonable value of work, labor, and services performed for the defendant at its request in the switching and movement of cars. A jury was waived in writing, and the action tried by the court upon the pleadings and certain stipulated facts. The trial resulted in a judgment of dismissal of plaintiff's cause of action, and it brings the case here on writ of error. The material facts are as follows:

The complaint alleged that plaintiff was a corporation of Utah, and the defendant of New Jersey; that plaintiff at all times mentioned in the complaint was engaged in the operation of a line of railroad extending from Huntington, Or., through the state of Idaho, to Salt Lake City, Utah, and thence to and beyond Murray, Utah, and also of lines of railroads connecting with the line aforesaid extending into the states of Wyoming and Montana, and that it was a common carrier in the interstate transportation of freight and passengers over said line; that the defendant was engaged in the operation of a smelting plant and reduction works at said Murray, Utah, and occupied for said purpose approximately 128 acres of land; that said plant was connected by spur and switching tracks with the railroad operated by plaintiff; that defendant maintained within its said plant grounds a system of railroad tracks and switches connecting the various buildings and other parts of said plant designed and used as means and facilities for the convenient and economical transportation from point to point within said plant of coal, ore, and other materials used in the operation of said plant; that defendant was a shipper over plaintiff's railroad of large quantities of ore, coal, and other materials from points outside the state of Utah to its said plant, and also a shipper over said railroad of large quantities of the products of said plant from said plant to points outside the state of Utah; that defendant had paid for all interstate transportation the rates prescribed therefor by the tariffs published by the plaintiff; that between December 1, 1912, and October 31, 1916, both inclusive, plaintiff at the request of defendant performed intra-plant switching services for said defendant in the said intra-plant yard of the defendant, consisting of the switching and movement of cars, both loaded and empty, by means of a switch engine furnished and operated by plaintiff and the labor of an engine crew and yard crew furnished by plaintiff, from point to point within the said plant as directed by the agents of defendant, and over the trackage facilities constituting said intra-plant yard, said switching and movement of cars being separate and apart from and in addition to any services rendered by plaintiff in and about the delivery to or acceptance from said plant of loaded cars in connection with and as a part of the transportation from or to points beyond the plant's limits, and separate and apart from and in addition to the delivery to the said plant of empty cars for loading or the removal from said plant of said empty cars after unloading in connection with transportation to or from said plant; that the reasonable value of the aforesaid intra-plant switching service was

$60,378.71. For the purpose of this opinion it is not deemed necessary to mention the allegations of the complaint in regard to other lines of railroad.

The defendant by its answer admitted the performance of the services mentioned in the complaint and that the reasonable value was as stated. It then pleaded, among other defenses, the following:

"That at all the times mentioned in the complaint the said plaintiff * * * had adopted and published regular switching tariffs covering switching rates and absorptions at points on their lines and at Murray in the state of Utah, and the same had been duly filed and were at all times on file with the Interstate Commerce Commission of the United States, and had been and were approved by said commission, and by said tariffs it was provided that all movements 'from track to track within smelter plants' should be free; and defendant alleges that all the services mentioned in the petition, and for which compensation is claimed, were movements of cars of the kind mentioned in the said tariffs so adopted, published, approved, and filed as aforesaid—that is to say, of cars containing freight which had paid transportation charges to the plant, and plaintiff and its assignors have no right to further compensation for said service."

The plaintiff in its reply admitted:

"That during all of the times mentioned in the complaint herein the tariff schedules of the plaintiff and of each of the other railroads mentioned, all of which were established and posted according to law and filed with the Interstate Commerce Commission as required by the Act to Regulate Commerce of February 4, 1887, and the acts amendatory thereof and supplemental thereto, provided in substance and effect that switching from track to track within the smelter plant of the defendant of cars containing freight on which transportation charges had been paid to the plant over the line of the plaintiff or the other railroads hereinabove mentioned would be performed free of any other charge"

—and alleged as follows:

Paragraph VI: "As a further reply to the amended answer of the defendant herein, this plaintiff alleges that if any agreement, understanding, or practice, such as alleged by defendant in its answer, existed or obtained respecting said tracks and facilities, or the use thereof, or the compensation for the use thereof, by which the service for which compensation is sought in this action was to be performed without other or different compensation than the alleged use of said tracks and facilities, or without additional payment therefor over and above the charge for the line haul on shipments to the smelting plant, said agreement, practice, and understanding was during all the times mentioned in this action, and still is, void, invalid, and of no force or effect, and against public policy, by reason of the terms and provisions of the act of Congress of the United States regulating interstate and foreign commerce, approved February 4, 1887, and the acts amendatory thereof and supplemental thereto, commonly called the Interstate Commerce Act [34 Stat. 584], and particularly sections 2 and 3 of the Hepburn Act, amending said Interstate Commerce Act, and section 1 of the Elkins Act, amending said Interstate Commerce Act."

Paragraphs VII and X of the agreed statement of facts are as follows:

Paragraph VII: "That during the entire period from December 1, 1912, to October 31, 1916, the plaintiff and each of its assignors duly certified and posted, according to law, and duly filed with the Interstate Commerce Commission of the United States, switching tariff schedules which provided, among other things, that switching movements from track to track within the American Smelting & Refining Company's plant at Murray, Utah, of cars

containing freight which had paid transportation charges to said plant, should be free; that the same provision for free switching at said plant had been carried in the published and filed switching tariffs of the plaintiff ever since on or about May 23, 1908, on intrastate traffic, and on or about June 27, 1908, on interstate traffic, and continued in effect in subsequent issues thereof until the institution of this suit."

Paragraph X: "That for such intra-plant service as described in paragraph IX defendant made no payment, save as payment was made by paying the transportation charges on the freight to the plant, and no payment was ever demanded for such service by plaintiff until just before this suit was brought; said service being dealt with by both parties as provided for in said switching tariff and being 'switching from track to track within smelter plants, served by Oregon Short Line Railroad of cars containing freight which has paid transportation charges to plant.' Such switching movements within the plant were made from time to time and place to place as directed and requested by defendant."

It appears from the foregoing statement that plaintiff stated a prima facie case without reference to an unlawful rebate, but when the defendant pleaded that by the duly published and filed tariff schedules of plaintiff the intra-plant services performed by plaintiff as alleged were to be free, the defendant was compelled to and did plead that the provision in the tariff of plaintiff that the intra-plant switching services should be free was void as being in violation of sections 2 and 3 of the Hepburn Act (Comp. St. §§ 8597, 8582) and section 1 of the Elkins Act (Comp. St. § 8597). Paragraph X of the agreed statement of facts also states:

"Said service being dealt with by both parties as provided for in said switching tariff."

It therefore appears that it was the understanding and agreement of the parties that the intra-plant switching service should be free. Plaintiff, therefore, is in this position. If the free switching agreement was valid, it cannot recover; if it was void, as being in violation of the laws above mentioned, as plaintiff contends, then it cannot recover for services performed pursuant to such an agreement. Plaintiff made out a prima facie case when the defendant admitted the allegations of its complaint. Defendant by the agreed statement of facts established the understanding and agreement of the parties and the plaintiff's tariff schedule. These facts answered completely the plaintiff's prima facie case. Up to this point no illegality in the transaction had been suggested. On the evidence defendant was entitled to judgment. To meet this situation plaintiff contended, in accordance with the allegation of its reply, that the agreement as to free switching constituted an unlawful rebate under the sections of the Interstate Commerce Law above mentioned, and for the first time this question was brought into the controversy. The plaintiff was obliged, therefore, to rely on the unlawful agreement just the same as if it had pleaded it in the first instance. Mathews v. Wayne Junction Trust Co. (D. C.) 197 Fed. 237.

It is elementary that a party to an illegal contract cannot set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. This rule is the same in law or equity, and applies to contracts, whether executed or executory. 13 C. J.

493, 494, 495. If the contention of the plaintiff is true, both the plaintiff and defendant were guilty of a misdemeanor punishable by a fine of not less than $1,000 nor more than $20,000, and their officers, in addition to the fine, to imprisonment not exceeding two years, in the discretion of the court. The plaintiff and defendant are in pari delicto, and the law will leave them where it finds them. 13 C. J. supra. In Higgins et al. v. McCrea, 116 U. S. 671, 6 Sup. Ct. 557, 29 L. Ed. 764, it appears that the plaintiffs in error brought a suit in the Circuit Court for the Northern District of Ohio to recover $31,644.31 from McCrea for moneys paid by them, as they alleged, in executing the orders of McCrea, for the purchase of certain lots of pork and lard in the exchange of the Chicago Board of Trade. McCrea pleaded as a defense that the plaintiffs in error were engaged in carrying on for themselves and others gambling transactions in pork and lard and other commodities on said Board. McCrea also set up a counterclaim for the amount of $19,895, which plaintiffs in error had required him from time to time to pay, and which he had paid into their hands, in order to promote and carry on such gambling transactions. The Supreme Court in this case decided that McCrea could not recover, saying:

"We do not see on what ground a party, who says in his pleading that the money which he seeks to recover was paid out for the accomplishment of a purpose made an offense by the law, and who testifies and insists to the end of his suit that the contract on which he advanced his money was illegal, criminal, and void, can recover it back in a court whose duty it is to give effect to the law which the party admits he intended to violate."

We regard the performance of the services for which plaintiff claims judgment in the present case the same as if it had paid the defendant the value of these services in cash and was seeking to recover it back. In Holman v. Johnson, Cowper, 341, 343, it was stated by Lord Mansfield that:

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: Ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or 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 that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for, where both are equally in fault, potior est conditio defendentis."

The language used by Lord Mansfield and the Supreme Court in the cases cited was approved in White v. Barber, 123 U. S. 392, 8 Sup. Ct. 221, 31 L. Ed. 243. We know of no statute which would allow the plaintiff to recover under the facts in this case, nor does the case come within any exception to the general rule. It is not a case where the carrier is suing to recover the full tariff rate, which by inad-

vertence or mistake had not been paid on some shipment. The parties were bound to know the law, and if plaintiff's contention is true they entered into a contract in direct violation of it. The case of A. S. & R. Co. v. Union Pacific, 256 Fed. 737, 168 C. C. A. 83, was a somewhat similar case against defendant. In that case we decided that there could be no recovery by the Union Pacific, for the reason that the evidence did not show the transaction in that case to have been an unlawful rebate. It is claimed, however, that the facts in this case are much stronger, and do show that the transaction in this case constituted an unlawful rebate. We find it unnecessary to determine whether the transaction constituted a rebate or not, as the plaintiff cannot recover, in our opinion, whichever way we might find on that question. If the contract was valid, the plaintiff could not recover; and if it was a rebate, and invalid, it cannot recover for the reasons stated.

Judgment below affirmed.

MUNGER, District Judge, concurs in result.

NATIONAL PUB. CO. v. INTERNATIONAL PAPER CO.

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

No. 11.

1. **Contracts ⟸147(2)—Only expressed intention enforced.**
   It is only the intention of the parties, which the contract itself expresses, that the courts may enforce.
2. **Sales ⟸71(4)—Contract construed as requirement contract.**
   A contract by which defendant agreed to furnish plaintiff with "the entire supply of half-tone newspaper required to print rotogravure supplements * * * during the period of one year, * * * estimated at 400 tons, to be ordered and delivered in installments of approximately ——— tons per month," plaintiff being, at the time it was made, engaged in the business of printing newspaper supplements, and, although not then using rotogravure, intending to install a rotogravure press, as it did soon after, *held* a requirement contract, under which plaintiff was not entitled to demand, nor defendant obligated to supply, 400 tons, without regard to plaintiff's requirements during the year for rotogravure work.
3. **Sales ⟸71(4)—Insertion of estimated total does not change requirement contract.**
   In a contract to supply so much of a commodity as required in the purchaser's business during a specified time, the insertion of an estimated total does not, per se, change the nature of the contract.

Ward, Circuit Judge, dissenting.

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

Action at law by the National Publishing Company against the International Paper Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Action is for breach of a contract in writing, which plaintiff set forth in the complaint according to its supposed legal effect, as follows: That said contract was one "whereby defendant [Paper Company] agreed to sell to plaintiff [Publishing Company], and plaintiff agreed to buy from defendant, 400 tons of half-tone newspaper"; that plaintiff delivered only 83 tons, and refused to deliver the balance, wherefore damages were demanded for the breach thus pleaded.

At trial it appeared without denial that the contract executed December 31, 1915, was that Paper Company would sell and Publishing Company buy "the entire supply of half-tone newspaper required to print rotogravure supplements printed in the city of St. Louis, Mo., during the period of one year beginning February 1, 1916, and ending January 31, 1917, both inclusive, estimated at 400 tons, to be ordered and delivered in installments of approximately ——— tons per month." At date of contract Publishing Company had a "regular business," carried on in St. Louis and consisting in "manufacturing comic supplements, magazine sections, and things of that sort for other papers." The company, however, had never used the rotogravure, and was in the act of installing a machine suitable therefor.

Paper under the above contract was demanded and received, but the rotogravure branch of the business did not require as much as 400 tons in a year; indeed, down to October 25, 1916, less than one hundred tons had been demanded, and of that amount more than half was sold, and not used by the vendee. At date last given, Publishing Company demanded delivery of the difference between what had already been received and 400 tons. Refusal of this demand produced the action before us.

It further appeared without contradiction that Paper Company had received all and more of the paper it bargained for than was needed by it for "rotogravure supplements"; that the blank for monthly deliveries in the written contract existed because Publishing Company did not know and could not estimate its wants with sufficient accuracy to give a definite figure; and that the insistence of October 25, 1916, on further deliveries, was solely for the purpose of selling again on a rapidly rising market.

At the close of evidence, both parties moved for a direction, the court granted defendant's motion, and plaintiff brought this writ.

Walter C. Noyes and Henry Pearlman, both of New York City, for plaintiff in error.

Stetson, Jennings & Russell, of New York City (Theodore Kiendl, Jr., Lee McCanliss, and Frederic W. Girdner, all of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Plaintiff's position, as defined by pleading, is that the contract before us is one for 400 tons of paper, and every word in it unnecessary to express this thought is mere surplusage. Its position, as outlined by conduct, and never disavowed to our knowledge, is that it was entitled to take as much or as little as it wanted, and whenever it wanted, provided all was demanded within the year, and the total did not exceed 400 tons. But never has plaintiff asserted the writing to be no contract, or (as the phrase is commonly used) a void contract.

[1] The meaning of this written agreement is to be gathered from its simple words. No "secret intention can be imported into contracts whose terms and meanings are plain and unambiguous and do not express" such secret intent; it is only the intention of the parties which the contract itself expresses, that the courts may enforce. Cold Blast, etc., Co. v. Kansas City, etc., Co., 114 Fed. 80, 52 C. C. A. 25, 57 L.

R. A. 696. We can give effect to the intention of the parties "only through the words they employ." Woolsey v. Ryan, 59 Kan. 605, 54 Pac. 664. Nor does this document afford the slightest reason for invoking parol or other extraneous evidence for its explanation, interpretation, modification, or enlargement. Cf. Church v. Proctor, 66 Fed. 240, 13 C. C. A. 426.

[2] If the parties' words mean that Publishing Company was expected to demand what paper it wanted, when and if it wanted the same, up to 400 tons in one year, the contract is open to the fundamental objection noted in Burgess, etc., Co. v. Broomfield, 180 Mass. at page 284, 62 N. E. 367:

"When the only consideration is one by way of mutual promises, if the plaintiff [vendee] is under no obligation in the matter, there is no consideration for the promise of defendant [vendor], and his promise is nudum pactum."

And the language of Crane v. Crane, 105 Fed. 869, 45 C. C. A. 96, is very apt, for where the so-called contract "leaves it practically optional with the purchaser to increase or diminish his orders with the rise or fall of prices, as may be most to his advantage and the corresponding disadvantage of the seller," it is void for lack of mutuality.

Apart from all other considerations, the contract is not to be voided, except of necessity; "ut res magis valeat," etc., is a good rule, even in respect of private writings. But the same rule works against plaintiff's position as pleaded and avowed in argument; for if the agreement is merely for the sale of 400 tons of paper, why were so many words employed, which the parties must once have thought possessed of meaning, and why are they now to be cast aside?

Yet this document is clearly either what plaintiff says it is, or it is a requirement contract. It is said that it cannot be the latter, because Publishing Company had never made rotogravures, and, as its press was not quite ready at date of contract, there was then no business in being, having any demand for which the paper would be a supply. This is refining too much on the phrase "requirements of a business." Plaintiff had a business appropriate for rotogravure work, in the sense that such enterprise would be a legitimate natural department thereof. If a merchant long dealing in plain cottons concludes to stock also with colored cottons, he would be fully justified in contracting for his "requirements" in colors. His old business furnishes a measure or standard; and the same must be true in this business.

If, as was certainly then thought by its officers, plaintiff had a business with legitimate requirements, the words used plainly import a requirement contract, unless the words "estimated at 400 tons" have taken all meaning out of the rest of the document. It has not hitherto been necessary to consider this point in this circuit. The record in Munson v. Grimwood, 249 Fed. 722, 161 C. C. A. 632, only enabled us to point out that a contract might be for requirements when certain testimony excluded at trial was considered; and Manhattan, etc., Co. v. Richardson, etc., Co., 113 Fed. 923, 51 C. C. A. 553, was a plain requirement contract without estimated limit.

When by formal contract or a series of writings more than one measure of an amount or quantity is given, it is the duty of the court to

ascertain, in Justice Holmes' happy phrase, what is the "obviously dominant measure" to be applied in respect of such amount or quantity. Smoot v. United States, 237 U. S. 42, 35 Sup. Ct. 540, 59 L. Ed. 829. We think that this contract itself furnishes as the dominant measure the quantity Publishing Company's rotogravure business needed during the contract year. That what was needed could not be exactly defined at the year's beginning is the very essence of a requirement contract.

[3] Nor does the insertion of an estimated total change, per se, the nature of the agreement. In Marx v. American, etc., Co., 169 Fed. 582, 95 C. C. A. 80, there was such a total more accurately stated than in the present instance, yet it was held that the vendee was entitled to his requirements, though they exceeded the estimate; while in Tancred v. Steel Co., 15 A. C. 125, the contract was for the steel required in the construction of a great bridge, whereof the "estimated quantity" was an exact number of tons, and it was held that the vendor had thereby secured the right to supply all the steel required for the bridge, though it turned out to be far more than the engineer's estimate. See, also, for numerous citations, Loudenback, etc., Co. v. Tennessee, etc., Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402. The agreement before us, not being void, is a requirement contract, under which plaintiff in error received more than it was entitled to.

The judgment below was right, and is affirmed, with costs.

WARD, Circuit Judge (dissenting). The general rule is that an executory contract of sale must state the quantity of goods to be delivered in order to be binding upon the parties. There is an exception that, where there is an established business, the parties may make a binding contract for the supply of articles necessary to the requirements of that business. This is on the principle that the quantity is not left in the air, but is capable of a more or less reliable estimate. "Certum est quod certum reddi potest." Such a contract is not a mere wish, will, or want contract.

In the language of the contract under consideration there is pure surplusage, whether it be construed as a requirement contract or as a contract for 400 tons of paper with a reasonable variation one way or the other. In the former case the estimate is perfectly useless. Brawley v. United States, 96 U. S. 172, 24 L. Ed. 622; Smoot v. United States, 237 U. S. 42, 35 Sup. Ct. 540, 59 L. Ed. 829; Marx v. Malting Co., 169 Fed. 582, 95 C. C. A. 80. In the latter case the reference to requirement is perfectly useless. Budge v. Smelting Co., 104 Fed. 498, 43 C. C. A. 665; Munson v. Grimwood, 249 Fed. 722, 161 C. C. A. 632.

This contract, executed December 31, 1915, covered a year from February 1, 1916, to January 31, 1917. I think it cannot be regarded as a requirement contract. The adventure was a new one. Although the Publishing Company had published supplements, it had never done so on a rotogravure press. When it made the contract, it had no such press, and did not get one ready to print for some three months after the contract was executed. How much paper would be required depended upon how many orders the company could get for this particu-

lar form of supplement. Of course, any estimate on the part of the Paper Company at the time the contract was executed would have been pure conjecture, and the Publishing Company could come very little nearer. It thought 400 tons would be less than its requirements, and that it would need three rotogravure presses; whereas the event proved that it only used about 83 tons for these supplements, and never needed more than one press.

The Paper Company drew the contract and inserted the quantity as 450 tons, which the Publishing Company before execution changed to 400 tons, saying that, if more were needed, it "would take up the matter with you later." Subsequently the Paper Company wrote, complaining that the Publishing Company had taken but 112 tons, while "the contract is for 400 tons of paper, which is at the rate of 33 tons a month." The Publishing Company wrote that the contract was for 400 tons for the year; no monthly delivery being specified. It appears, therefore, that at the time the contract was executed and for months afterwards the parties treated it as for 400 tons of paper, and not as for the requirements of the Publishing Company's business, whatever they might be. Indeed, not until November did the Paper Company claim that its obligation was to deliver, not 400 tons of paper, but only so much as the rotogravure business of the Publishing Company required.

I think the judgment should be reversed.

NEW YORK, N. H. & H. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 11, 1920.)

No. 30.

1. **Internal revenue ⇐9—Corporation tax; "paid-up capital stock" does not include premium received above par value.**

In Corporation Excise Tax Act, § 38(2), authorizing corporation to deduct from gross income interest paid within the year on indebtedness not exceeding its paid-up capital stock outstanding at the close of the year, "paid-up capital stock" means its outstanding capital stock at par value, plus any amount received as partial payment for stock not yet issued, and does not include any premium it may have received for stock sold above par value.

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

2. **Constitutional law ⇐229(3)—Equal protection of laws not denied by tax on corporations depending on method of issuance of stock.**

The provision of the Fourteenth Amendment, which entitles all persons to equal protection of the laws, as applied to taxation, only requires that a statute shall operate on all alike under the same circumstances, and a statute imposing a tax on corporations is not invalid because the tax is greater on one corporation than another, owing to the difference in the methods of issuing their stock.

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

Action by the United States against the New York, New Haven & Hartford Railroad Company. Judgment for the United States, and defendant brings error. Affirmed.

For opinion below, see 265 Fed. 331.

This suit is brought by the government to recover for excise taxes for the taxable years ending December 31, 1909, 1910, 1911, and 1912. The taxes were levied pursuant to section 38 of the act of Congress approved August 5, 1909 (36 Stat. 112).

The plaintiff in error is a railroad corporation organized and existing under the laws of the state of Connecticut and commonwealth of Massachusetts. In 1889 the Legislature of the state of Connecticut authorized the plaintiff in error to increase its capital stock, with a proviso that no stock should be issued for less than $100 per share. It is provided by the general laws of the state of Connecticut that the capital stock should be issued in such a manner as might be provided by the Railroad Commission of that state. Title 26, § 3664, Rev. 1902. The capital stock was issued at the par value of $100 per share, but a very considerable number of shares were issued to stockholders for sums in excess of $100 per share. These shares were sold to the public generally and stockholders who subscribed. The prices at which they were sold varied from $144 to $58 per share. The moneys were paid into the treasury of the company; the purchaser not receiving a stock certificate until the full amount thereof, as subscribed, was paid to the corporation. Some were paid for in installments, and, in the interim, negotiable part-paid receipts were issued for the sums as paid.

In four counts, the complaint alleged amounts were received by the plaintiff in error over and above the price of $100 per share in the years mentioned, and it is upon the basis of these total sums that the government claims the plaintiff in error wrongfully deducted from its full tax (in making up its tax returns) interest, as actually paid within the year, on its bonded or other indebtedness, claiming the premium paid constituted part of the paid-up capital stock. Prior to July 1, 1909, which was the date on which the first uniform rules of accounting issued by the Interstate Commerce Commission became effective, no uniform method of accounting was followed by the railroad corporations relative to setting up or disposing of the excess amount over the par value received from sales of their capital stock.

The regulations of the Interstate Commerce Commission required that after July 1, 1909, all sums received by steam railroads in excess of $100 a share for capital stock should be set forth in a "premium account." This the plaintiff in error did. Its profit and loss account disclosed the amounts paid in excess of $100 per share prior to such date. The plaintiff in error claimed the right of deducting for interest actually paid within the year to the full extent of this sum.

H. J. Hart, of Bangor, Me., and W. W. Meyer, of New Haven, Conn., for plaintiff in error.

Edward L. Smith, U. S. Atty., and Allan K. Smith, Asst. U. S. Atty., both of Hartford, Conn.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge (after stating the facts as above). [1] By an act of Congress approved August 5, 1919, it was provided:

"That every corporation * * * organized for profit and having a capital stock represented by shares * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year," * * * and that "such net income shall be ascertained

by deducting from the gross amount of the income of such corporation, * * * received within the year from all sources, * * * (3) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, * * * outstanding at the close of the year."

The question presented is: What did Congress intend by the phrase "paid-up capital stock outstanding at the close of the year"? The plaintiff in error contends Congress intended to include as part of the paid-up capital stock all the moneys paid by the stockholders for their stock, including the sums paid in excess of $100 per share. The defendant in error claims the term "paid-up capital stock" refers to the total par value; that is, $100 for each share. The plaintiff in error treated the surplus above $100 as a premium paid for; before 1909, in its books, it was accounted for in its "profit and loss account." After that, it was treated as in its "premium account." The excess paid in price is, in fact, a premium paid for the stock; for when such shares of stock are at face value, they are at par, and when more is paid, they are above par or at a premium. The total of the par value has always been considered capital stock. The term "capital stock" has thus been used, not only in banking and commerce, but in the corporation acts in the several states. Full force and effect must be given to the term "paid-up" as used in the statute, and its use in connection with "not exceeding." We think the employment of these words made the intention of Congress clear as obviously meaning paid up to par value, and not exceeding that. The premiums received were used, in carrying on the business of the corporation, as if surplus. The Circuit Court of Appeals for the First Circuit has recently had the same question presented, and approved the reasoning and conclusion of the District Judge below. B. & M. R. R. v. U. S. (C. C. A.) 265 Fed. 578, opinion below U. S. v. N. Y. N. H. & H. R. R. Co. (D. C.) 265 Fed. 331.

[2] But it is argued, on this writ of error, that the interpretation placed upon the provisions of the Excise Tax Law is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it denies to the plaintiff in error equal protection of the law; the contention being that the interpretation results in gross discrimination as between corporations of the same class and engaged in the same kind of business. It results, it is claimed, in unequal and ununiform taxation as between similar corporations merely because of the manner in which such corporations may have issued to them their shares of capital stock, even though such corporations may have received identically the same amounts of money from their shareholders and are engaged in identically the same kind of business.

It is said that under this ruling a corporation in the same kind of business, which has stated its par value of stock as $100 per share, but issues 10,000 shares at $150 per share, or for a total of $1,500,000, can, under this interpretation, deduct from its gross income interest on an indebtedness of but $1,000,000, whereas a competitor in the same business and locality, without par value, and which has received

from its stockholders for 10,000 shares a total of $1,500,000, can deduct interest on an indebtedness of $1,500,000, or on 50 per cent. more of its indebtedness than its competing corporation; and it is further contended that if a third corporation has stated $200 per share as the par value of its stock, and has issued part-paid stock certificates for 10,000 shares at $150 each, it will have received from its stockholders $1,500,000, or on 50 per cent. more indebtedness than the first competitor named. Thus the contention is advanced that the difference in the detail and issuing stock results in substantially greater tax burden on one corporation than on a competing corporation engaged in the same business.

There must be no discrimination of one as against the other in the same class, and the method for the assessment and collection of taxes must be consistent with natural justice. Mich. Central v. Powers, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. Ed. 744. The quality and uniformity in taxation means only that the same means and methods of taxation shall be applied. It does not require that it shall operate uniformly on everybody. The purpose is to secure geographical uniformity. Kentucky Tax Cases, 115 U. S. 337, 6 Sup. Ct. 57, 29 L. Ed. 414. Assuming that Congress had the power to enact a corporation excise tax, it could, if it so desired, allow deductions from the gross amount of the income of any corporation when an excise tax was being laid, the mode of accomplishing this under the statute is due process of law. That being so, the provisions as to securing equal protection of the laws is not violated by any diversity in the jurisdiction. All the persons within the territorial limits of the operation of the law have equal right, in like cases and under like circumstances, to resort to them for redress. The fact that there exist so many inequalities due to the method employed by the particular incorporation did not invalidate the act. Giozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599.

Congress may impose different specific taxes upon different trades and professions and vary the rates of excises upon various products. It may tax real estate and personal property in a different manner. It may tax visible property only and not tax securities for payment of money. It may allow deductions for indebtedness or not allow them. Such regulations of this character, so long as they proceed within reasonable limits and general usage, are within the discretion of Congress. There is no precise application of the rule of reasonableness of classification, and the rule of equality permits of many practical inequalities. The rule of equality under the Constitution only requires that the law imposing it shall operate on all alike under the same circumstances. The differences here permitting deductions are not arbitrary, because it is determined by an established value, namely, the par value of the capital stock.

We are of the opinion that the act of Congress has been properly interpreted and applied by the court below.

The judgment is affirmed.

McGOVERN et al. v. McCLINTIC-MARSHALL CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 22.

1. **Reformation of instruments ⇐45(2)—Proof authorizing for fraud or mistake.**
   A written contract may be reformed in equity on the ground of fraud or mistake only on clear proof of the fraud or mistake or that complainant was deceived and injured thereby.
2. **Reformation of instruments ⇐45(2)—Changing contract for lump sum into quantity contract.**
   A finding sustained that defendants were not entitled to reformation of a contract by plaintiff to fabricate and furnish to defendants the structural steel for construction of a section of subway, for a lump sum, so as to change it into a quantity contract at a ton price, because plaintiff's proposal contained an estimate of the quantity "for erection purposes" for defendants' benefit which was greater than the quantity actually required, where it appeared that in such estimate allowance was made for variations and waste, as was proper and customary, that defendants had equal opportunity to make the computation, and that in making their bid on which they obtained the work they figured the cost of the steel at the lump sum given by plaintiff.

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

Action at law by the McClintic-Marshall Company against Patrick McGovern and Charles L. Perrin. Judgment for plaintiff, and defendants bring error. Affirmed.

Thomas E. Conway and Thomas E. O'Brien, both of New York City, for plaintiffs in error.

Kellogg & Rose, of New York City (Abraham J. Rose and Alfred C. Pette, both of New York City, of counsel), for defendant in error.

Before WARD, ROGERS and MANTON, Circuit Judges.

MANTON, Circuit Judge. The plaintiff below has recovered a judgment of $35,100.96 damages and costs in an action brought to recover a balance due upon a contract between the plaintiff below and the defendants below for furnishing and fabricating, by the plaintiff below, structural steel for a part of route 61 of the Broadway-Fourth Avenue Rapid Transit Railroad which was constructed in the city of New York according to the plans and specifications furnished by the Public Service Commission.

The first cause of action of the complaint alleged the making of a contract whereby the plaintiff below agreed to furnish and fabricate the structural steel for this part of the subway as per plans and specifications of the Public Service Commission, for the sum of $173,000, and alleged that the plaintiff below duly performed and carried out the said contract on its part, and furnished, fabricated, and delivered all the structural steel required under said contract, and that the defend-

ant below accepted the same after inspection by the Public Service Commission. It is alleged that the amount sued for is the balance due.

In a second cause of action a claim for services rendered and materials furnished amounting to $2,538.36 is sued for. The answer admits all the allegations of the complaint, but sets up as a partial defense that the plaintiff below, having knowledge of the intention of the defendants below to make a bid for constructing route 61, solicited from the defendant below and contracted for the structural steel work required in the event that the defendants below obtained the contract. It proposed a lump sum contract of $173,000 and represented to the defendants below that it had accurately calculated the tonnage required by the Public Service Commission's plans and specifications, and that the amount required was 1,966 tons, divided as follows: 500 tons for subway; 1,310 for the elevated; and 156 tons for air shafts—making the price per ton about $88, which it is alleged, is a fair and reasonable market value therefor. It is alleged that the representations were made for the purpose of inducing the defendants below to rely thereon, and that the defendants below, relying thereon, after the award of the construction contract to them, entered into this agreement, for a breach of which this suit is brought. It is alleged that these representations were false in that the tonnage required was only 1,589 tons and only that number of tons was delivered; further, that 48 tons were discovered by the defendants below after the execution of the contracts to be unnecessary, and that the defendants below consented to disregard this amount of tonnage as a reasonable variation and agreed to accept 1,918 tons in fulfillment of the contract and to pay therefor $173,000 making a rate of $90.20 a ton, and that upon discovery that the actual tonnage was only 1,589 tons, the defendants below demanded that the plaintiffs below accept in fulfillment the sum of $143,409, representing a price of $90.20 per ton for 1,589 tons, and tendered to the plaintiff below the balance due and unpaid, which was then only $1,559.21. It is alleged that the plaintiffs below refused to accept said sum. The answer then prays that the defendants below be entitled to a reformation of the contract so as to make the price named $143,408.98, instead of $173,000. To this a reply was interposed setting forth a denial of this partial defense.

The district judge, as a chancellor, heard the proofs offered to sustain this defense on the plea for a reformation of the contract. He thereafter directed a judgment to be entered in favor of the plaintiff below.

The contract sued upon consists of a proposal contained in a letter of the plaintiff below dated July 12, 1916, and its acceptance a letter of the defendants below dated August 12, 1916. The offer of the plaintiff below was for the—

"new structural work covering the subway and elevated work of route 61 for the New York Public Service Commission * * * for $173,000 for which we will fabricate and furnish the new structural steel work in accordance with the plans and specifications prepared by the Public Service Commission, f. o. b. cars, our works, with present rate of freight allowed to New York."

The proposal included:

"The structural steel work in the subway from Vernon avenue to Hancock street, and in the elevated portion from abutment west of Marion street to the approach of the Queensboro Bridge, east of William street. * * * For the benefit of the erection we give subdivision of the weight:

Air shafts	156 tons
Subway	500 tons
Elevated work	1,310 tons

"For your information the quantities and lump sum bid are based on the steel work shown as 'new work' only on the bidding plans. We have included none of the work shown on the dotted lines in the plans."

The defendants below were successful in having awarded to them this work for $4,494,797. The contract between the city of New York and the defendants below was executed on April 11, 1916. The next day, the defendants below wrote:

"We hereby accept your proposal to us dated July 12, 1916, for furnishing and fabricating the structural steel for route 61, part of the Broadway-Fourth Avenue Rapid Transit Railway. Said proposal includes and requires you to furnish structural steel for the

"Subway from Vernon avenue to Hancock street.

"Elevated portion from abutment west of Marion street to the approach of the Queensboro Bridge, east of William street.

"Shafts on the Manhattan side and Blackwell's Island shaft.

"Sump west of the Blackwell's Island shaft.

"All as per plans and specifications included in our contract with the Public Service Commission for the First District for constructing the subway route aforesaid. * * *

"All for the sum of one hundred and seventy-three thousand dollars ($173,000), f. c. b. cars at your works, with freight allowed to include lighterage limits New York City."

It is not questioned by the defendants below that the structural steel was supplied for route 61, as required by the plans and specifications referred to in the contract. Bills were tendered on a per ton basis during the progress of the work and payments were made. This was pursuant to the terms of payment, to wit, cash within 45 days from the date of each shipment.

On July 12, 1917, the defendants below offered objection for the first time to the bill rendered, calling to the attention of the plaintiff below that tonnage was figured at $96 per ton, whereas the contract implied in the summary of a lump sum bid was $90.20, to which letter the plaintiff below replied that its estimating department had used a different pound price on different classes of the work, but that it was a lump sum contract and that this difference would be adjusted in the final invoice. Later, on October 5, 1917, the defendants below wrote to the plaintiff below requesting that a final bill be sent and stating that the original estimate was for 1,966 tons, and later revised as 1,918 tons at 4⅕cents a pound, making a total of $173,000 or $90.20 per ton, and that such unit prices so given were based upon an estimate of 1,918 tons, and that the total tonnage would not exceed 1,607 tons, which, at $90.20, would bring the total to $144,000 instead of $173,000 when the estimated figure of 1,918 was used, to which letter the plaintiff below replied that the contract was on a lump sum basis and that it would not change it to a pound price job. There was con-

siderable correspondence thereafter, but the above was the attitude assumed by each and payment was not made. This action was then instituted.

[1] The liability of the defendants below is clear, and the judgment was correctly directed unless the evidence offered to support the partial defense required the judge below to reform the contract. The burden rested upon the defendants below to overcome the presumption that the contract was actually made and conformed to the intention of the parties and was not entered into by mistake or fraud. Atlantic Co. v. James, 94 U. S. 207, 24 L. Ed. 112; Howland v. Blake, 97 U. S. 624, 24 L. Ed. 1027. It is only in a clear case and only when the fraud is made to appear clearly that the court should cancel an executed contract or reform it in a court of equity, and, where false representations are relied upon, their falsity must be proved with a certainty, and it must appear that the claimant has been deceived and injured by them. If the proofs are doubtful and unsatisfactory, or if there is a failure to overcome this presumption by testimony plain and convincing beyond reasonable controversy, the contract will be held to express correctly the intention of the parties. Howland v. Blake, 97 U. S. 624, 24 L. Ed. 1027. The mistake or fraud claimed must be shown clearly, unequivocally, and convincingly. Chicago R. Co. v. Belliwith, 93 Fed. 437, 28 C. C. A. 358. A mistaken prophecy or an opinion or a mistaken belief relative to an uncertain future event is not sufficient. One who contracts and relies upon opinions or beliefs must necessarily take the risk of the conjecture and mistake which may be embodied in the agreement he makes. Chicago R. Co. v. Wilcox, 116 Fed. 913, 54 C. C. A. 147.

[2] A review of the happenings as disclosed by the evidence preceding the making of the contract indicates some conjecture and uncertainty as to the tonnage. Evidence was offered in support of the claim of the defendants below that the true intention of the parties was otherwise than expressed in the contract, also that there was a mistake in reaching the price expressed in the contract, also tending to show that the agent of the plaintiff below solicited the order for the sale in question, and that a lump sum bid was agreed upon providing the defendants below would accept such without competition, and that the plaintiff below would give the very lowest market price for the steel and would submit to the defendants below the shop estimates showing, in detail, how the prices that they bid had been reached. Upon these conditions, the defendants below say they entered into the contract. It will be observed that no such conditions were incorporated in the offer and acceptance which make up the contract. Further, it is said that in conversation with one of the defendants below the agent of the plaintiff below stated, over the telephone, that he had made a written memorandum while standing at the telephone and that the price would be $88 per ton, furnishing 1,966 tons of steel. The defendants below never received the shop estimates, although one of them claimed that, after complaining about it, they were promised to him. One of the defendants below testified that, after requesting a copy of the shop estimate, he did receive it, and that the paper showed a total tonnage

of 3,836,000 pounds, which, at $4.10, produced $157,000, and with the 10 per cent. added made up the total sum of $173,000. Later it appeared that there was a discrepancy amounting to 48 tons as to the estimated weight, and allowance therefor was made. It was also testified on behalf of the plaintiff below that prior to entering into the contract the defendants below did not figure the tonnage as required by the plans of the Public Service Commission, but depended upon the weight which was given by the plaintiff below, and this was their only means of determining the fairness of the price.

The defendants below offered further proof of an expert character that the plans and drawings furnished by the Public Service Commission were sufficient for an actual estimate of the tonnage to be made, and that the outside variation for a competent estimator to make would be limited to 5 per cent. Much of the testimony given by the defendants below was denied by the agent who brought about the contract. He denied soliciting the business, but stated, on the contrary, that the defendants below sought the plaintiff below to make a lump sum bid and afterwards a lump sum bid was submitted.

It was denied that a condition was imposed that the defendants below should accept the bid of the plaintiff below without competition, or that by reason thereof the very lowest price for steel was to be submitted to them, together with the shop estimate showing in detail how the price has been reached.

The agent of the plaintiff below testified that when one of the defendants below stated that he would need the weight for the erection, and that since the erection was to be made by the defendants below, the weight was given for their sole benefit, and that the quotations contained in the letter of acceptance above as to tonnage was for this purpose. The agent of the plaintiff below further denied that he stated the price was fixed at $88 a ton in estimating as to the lump sum. The engineer of the plaintiff below testified in detail as to how he made up his estimate of the steel required, amounting to 3,947,261 pounds, and also as to how he accounted for 767,529 pounds therein which did not appear in the shipping weight. The tabulation is as follows:

Original estimate		3,947,261 lbs.
Shipping weight		3,179,732 "
Difference		767,529 lbs.
Material saved in detailing	148,580 lbs.	
Material estimated longer than required	92,545 "	
Deductions due to use of old material	75,260 "	
Material lost in fabrication	68,760 "	
Mill underrun	8,996 "	
Error in estimate	12,300 "	
Material added to take care of condition of uncertainty of old work	180,000 "	
Difference due to 5 per cent. variation in estimating	119,071 "	
Material estimated but not furnished	87,270 "	792,782 lbs.
Excess		25,253 lbs.

It was upon these contingencies that the plaintiff below figured in making its lump sum bid, and it is stated the bid was made up as care-

fully as could be done under the plans given to the plaintiff below and in the time allowed. The engineer testified that he believed the bid to be true and honest, and that it was necessary for him to take into consideration these contingencies together with the broad interpretation of the specifications, which was permitted to the engineers who passed upon the work for the Public Service Commission.

There are some other circumstances which establish abundantly the claim of the plaintiff below that the bid was for a lump sum price and the parties so intended it, and that there was no mutual mistake by either of the parties, or misrepresentations by the plaintiff below.

In addition to the presumption that the contract was fairly executed and represents the intention of the parties, there was no evidence to indicate that it was hastily drawn or that opportunity was not afforded for deliberate action and a full consideration and understanding of its terms. After negotiations were commenced for the submission of a bid, it was eight days later before the bid was submitted, and it was not until a month later that the bid was formally accepted by the defendants below. The figure of $173,000 was used by the defendants below in their bid to the city. The estimate sheets offered in evidence indicate that the work was estimated in the ordinary course of business of the plaintiff below in its estimating department, by men it had employed for this class of work. The allowances which were made for contingencies seem to have been proper and usual. It also appears that the plaintiff below submitted a similar bid to a competing bidder for the city's work. And it is expressly provided in the letters of acceptance of the bid that the tonnage quoted was for the purpose of erection. Undoubtedly this was submitted as an accommodation to the defendants below for the defendants below performed this work.

This evidence presented a question of fact for the District Judge. Although the findings of fact of the judge sitting in equity are not conclusive on us on appeal, they are presumptively correct and persuasive unless an error of law or the finding is clearly against the weight of the evidence. Such findings will not be disturbed. This rule is especially applicable where the evidence was heard orally by the chancellor and he had a chance to observe the witnesses and their demeanor while testifying, and thus be able to determine their credibility and the weight to be given to their testimony. U. S. v. Grasscreek Oil & Gas Co., 236 Fed. 481, 149 C. C. A. 533; Espenschied v. Baun, 115 Fed. 793, 53 C. C. A. 368; Estep v. Kentland Coal & Coke Co., 239 Fed. 617, 152 C. C. A. 451. After entering into a solemn contract assuming obligations, where opportunity was afforded the defendants below to avail themselves of estimating to determine the tonnage required, which was equal to that of the plaintiff below and as available to them, they should not now be relieved of their obligations in a court of equity because of their inattention or carelessness.

In Slaughter v. Gerson, 80 U. S. (13 Wall.) 379, 20 L. Ed. 627, it was said:

"Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will

not be heard to say that he has been deceived by the vendor's misrepresentations."

Apparently the defendants below are a substantial contracting firm which succeeded in obtaining a very large contract from the Public Service Commission, and are not in a position to readily complain that they have been overreached by the plaintiff below. They willingly signed an acceptance of a lump sum bid, and if they did that, without examining the plans and determining the amounts required by themselves, their failure so to do cannot now be said to be a mistake or an imposition upon them perpetrated by the plaintiff below.

The judgment is affirmed.

THE LAFAYETTE (five cases).

Appeals of COMPAGNIE GENERALE TRANSATLANTIQUE.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

Nos. 15–19.

1. **Collision ⇐99—Steamship in fault for running down sailing yacht.**
   A steamship, which, when going at a speed of 14 miles in New York Bay on a calm, clear, moonlight night, ran down and sank a small sloop yacht on a crossing course and carrying proper lights, *held* in fault for not keeping an efficient lookout; the yacht, which kept her course and speed, as required by the rules, *held* not in fault for not showing a flare, as permitted, but not required, by article 12 of the Inland Rules (Comp. St. § 7885), her navigator, who saw the steamship when two miles away, having the right to suppose, until too late to prevent collision, that she also saw his vessel and as the burdened steam vessel would keep out of his way.
2. **Collision ⇐49—Steamer in fault must make strong case against sailing vessel.**
   Where a steam vessel was clearly in fault for a collision with a sailing vessel, a strong case must be made out, if the sailing vessel is to be held also in fault.
3. **Collision ⇐108—Unskillful navigation in extremity not fault.**
   If one vessel places another in a position of extreme danger through wrongful navigation, the other is not to be held in fault if she is not navigated with perfect skill and presence of mind.
4. **Negligence ⇐93(1)—Contributory fault of navigator not imputed to passengers.**
   The negligence of the navigator of a private yacht, contributing to a collision, cannot be imputed to other persons on the vessel by his invitation, but who had no control over its management.
5. **Admiralty ⇐51—Suit in rem for personal injuries in collision does not abate by death of libelant.**
   A suit in rem against a vessel for personal injuries sustained in a collision does not abate by the death of the libelant.
6. **Admiralty ⇐26—Rights arising from maritime tort governed by maritime law.**
   A suit in rem arising out of a maritime tort, giving rise to a maritime lien, is not subject to the rules of the common-law courts, nor to state statutes.

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

Separate suits in admiralty for collision by Augustus S. Meeker, by G. Malcolm Knox, by Harold Haas, by Charles Haas, as executor of Henry Haas, deceased, and by Augustus S. Meeker, as administrator of Mary Agnes Meeker, against the steamship Lafayette; the Compagnie Generale Transatlantique, claimant. Decrees for libelants, and claimant appeals. Affirmed.

Joseph P. Nolan, of New York City, for appellant.

Choate, Larocque & Mitchell, of New York City (Joseph Laroçque, of New York City, of counsel), for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The five cases grew out of the same collision, were tried together, were argued in this court together, and will be now determined in one and the same opinion. These cases arose out of a collision in New York Harbor on the night of August 20, 1916. The collision was between the steamship Lafayette and the sloop Drifter, which was struck on the starboard side just forward of the cockpit and cut through, dividing her into two parts and causing her to sink immediately. The libelant Meeker was the owner of the sloop yacht Drifter. She was 34½ feet in length, and her beam was 11½ feet. She is described as having been a heavily built boat, with oak timbers and a cedar bottom. The jib was rather small, and the mainsail was a very large one.

The steamship Lafayette is an ocean-going steamship, registered under the laws of the republic of France, and engaged in the carriage of mails and passengers between ports in France and the port of New York. The steamship is owned by the Compagnie Generale Transatlantique, which filed a petition under the fifty-ninth rule (29 Sup. Ct. xlvi).

The libelant Meeker, who was engaged in business in New York City, was accustomed in the summer, after business hours, to sail his boat in the evening, and to sleep on board her at night On the afternoon of August 20, 1916, he left Bensonhurst Yacht Club, in Brooklyn, about 4:30 o'clock for a sail on the yacht. He was accompanied by his wife and his nephew, Malcolm Knox, and by two friends, Henry Haas and the latter's son, Harold Haas. At about 7 p. m. the Drifter put into South Beach, where she remained for one hour. She started to return to Bensonhurst at 8 p. m., and her side lights had been set and were burning brightly, and so continued at the time of the collision. They were the regulation lights; the green light on the starboard side, and the red light on the port side. They were placed on the side and at the top of the after end of the cabin, about 7½ or 8 feet above the water. At 11 o'clock the libelant's wife, his nephew, and Henry Haas went below to the cabin to rest, while Harold Haas lay down on the seat in the cockpit and went to sleep. The libelant Meeker was at the wheel, and from the time he left South Beach to the time of the collision he made no change in the wheel, and kept his jib and mainsail

flying all the time and his bow pointing straight at Norton's Point Light. At about 11:30 he saw what proved to be the Lafayette approaching as he testified from a direction slightly forward of abeam. When he first saw the Lafayette, she was two or three miles away, and at that time he could see both her side lights, starboard and port, and up to the moment of collision, according to his testimony, he was able to see both her lights, and during the entire period the steamer kept going on straight.

On the night in question the moon was shining, the sky was clear, and the wind was practically calm. There was no fog. The records of the Weather Bureau recorded no haze, and if there had been a haze sufficient to obscure vision it would have been recorded. The pilot of the Lafayette was asked as to the weather conditions, and testified that it was a pleasant night. The following is an excerpt from his testimony:

"The Court: What is your recollection of the other weather conditions? A pleasant night?

"Witness: A pleasant night.

"The Court: A nice warm evening?

"Witness: Beautiful.

"The Court: Any moon?

"Witness: Yes, sir.

"The Court: The moon showed up well?

"Witness: Yes, sir. About half or three-quarters of a moon; no fog or haze; there was a slight haze on the water.

"The Court: Any haze that prevented seeing lights, if they were good lights?

"Witness: No; I had no trouble in seeing anything; if there was any light, I would have seen it immediately, if it had been shown in my direction."

And:

"Q. Did you see this Drifter before the Lafayette came into collision with her? A. Just the moment before that.

"Q. How did you discover that there was this vessel before you finally struck her? A. I was keeping a very sharp lookout ahead and on both bows for some small boat that might be there, and I discovered a small, dark object, about a point on the bow. Immediately I ordered the engines half stopped, helm hard aport; I spoke French, that's the only French I do know, 'Babord' and 'Tribord,' I said 'Tribord tout,' which means, in English, 'Hard aport.'

"Q. That would make her head swing to starboard? A. I told them to stop the engines; I myself took the starboard telegraph and stopped; and the officer took the port telegraph and we stopped full speed astern at once; and we stopped the engines again as quick as I can tell the story.

"Q. Did you see any light on this vessel before you struck her? A. After I'd given the order 'Tribord tout,' I discovered the green light.

"Q. Before that, was she showing any light? A. I did not see any light before that; only the sail.

"Q. Could you distinguish the sail? A. I saw a dark object; I couldn't see what it was.

"Q. How close were you to the dark object when you gave this order, 'Tribord tout'? A. I should say from between 500 to 1,000 feet; I should judge that, I wouldn't say positively, he was going so quickly.

"Q. The Lafayette was making good speed? A. Pretty good.

"Q. About what, would you say? A. I should say, well, probably 12 through the water.

"The Court: And the tide with you?

"Witness: Yes, sir; through the water.

"The Court: Then you were making that and the tide?

"Witness: And the tide.
"Q. Twelve miles plus the tide? A. Yes, sir; the tide runs probably one knot or a knot and a half."

The evidence shows, however, that the Drifter's lights were properly set and burning, as required by the Act of Congress, approved June 7, 1897. 30 Stat. p. 96, c. 4 (Comp. St. §§ 7874–7909). The above act, in article 20 (section 7894), provides that—

"When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

And article 21 (section 7895) provides that—

"Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed."

[1] The Lafayette should have seen the Drifter, and the fact that she did not discover her until just before the collision shows that she did not have a proper lookout. She cannot exculpate herself under the circumstances of this case upon the plea that she did not see her. She was in fault in not seeing her, and in fault in not keeping out of the Drifter's way; and her fault in this case is clear and gross, and she must answer in damages therefor.

But it is said that the libelant Meeker, who owned the Drifter, was not free from fault and should not be entitled to recover more than half damages. It is said that he saw the Lafayette 10 minutes before the collision, and that she must have been at that time 2 or more nautical miles away, and that he did nothing until just before the collision, when, seeing that a collision was inevitable, he screamed to those who had gone below to sleep in the cabin, "For God's sake, jump!" It is said that he should have shouted to the steamer or burned a flare light to have attracted her attention, when he saw that his boat was not observed, and that he could not have had in mind article 10, or article 12, or article 27 of the Rules (sections 7883, 7885, 7901), which appear in the margin.[1] But the Drifter was a privileged vessel, and it was her right and duty to keep her course and speed, and Meeker had the right to assume that the Lafayette would obey the law and not run him down.

Article 10 applies to a vessel which is being overtaken, and the Drifter was not an overtaken vessel. Whether articles 12 and 27 have application to the facts of this case will be considered presently. The only other article which in express terms refers to a flare-up light is

[1] Article 10: "A vessel which is being overtaken by another, except a steam vessel with an after range light showing all around the horizon, shall show from her stern to such last-mentioned vessel a white light or flare-up light."
Article 12: "Every vessel may, if necessary, in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal."
Article 27: "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

article 8 (section 7881) and that portion of it which relates to that subject may be found in the margin.[2] That article relates to pilot vessels, and it is without application to the Drifter.

Articles 12 and 27, as found in the Act of June 7, 1897, were not incorporated into the regulations for the first time in that act, but are found in totidem verbis in the Act of August 19, 1890, c. 802, 26 Stat. p. 320 (Comp. St. §§ 7837–7870), and were in force therefore when the case of The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, about to be considered was decided by the Supreme Court in 1894. But the collision in that case occurred in December, 1889, and the court, in deciding it, assumed that the Code of 1864 applied to it. 13 Stat. c. 69, p. 58. That Code required sailing vessels to carry, as now, a green light on the starboard side, and a red light on the port side. And article 20 provided:

"Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

The court held that the failure to use a torch under the circumstances of the case did not constitute neglect of any precaution required by the ordinary practice of seamen or by the special circumstances of the case.

In The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, a collision had occurred between the British ship Clan Mackenzie, a sailing vessel, and the steamer Oregon, in the Columbia river, which resulted in the sinking of the Clan Mackenzie. The latter boat at the time of collision was at anchor on the edge of the ship channel, which at that point, was nearly half a mile wide. Her anchor light was burning brightly and was properly hung in the rigging as required by the International Rules. The pilot and lookout of the Oregon mistook this light for the Coffin Rock light, and did not discover the mistake until within 300 feet of the Clan Mackenzie when the helm of the Oregon was immediately put to port, but too late to avoid the collision. The light of the Clan Mackenzie should have been seen and distinguished for at least a quarter of a mile. There was a watch on board the Clan Mackenzie, who saw the light of the Oregon when she was about three-fourths of a mile away, and her hull when about one-fourth of a mile. The court below found that, when the watch perceived that the Oregon was heading directly for the Clan Mackenzie, he did not ring a bell or show a torch or a flash light. He simply shouted and continued shouting until just before the collision. The District Court held both vessels in fault, the Clan Mackenzie being in fault for the want of a proper lookout, for failure to ring her bell and

[2] Article 8: "Pilot vessels when engaged on their station on pilotage duty shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes. * * *"

for the omission to exhibit a torch. The Supreme Court reversed the decree.

In the argument before the Supreme Court it was insisted that the Clan Mackenzie was bound to make use of every precaution which the exigencies of the case called for; that she had no right to rely upon her statutory light, but was bound either to exhibit a torch, ring a bell, or in some other equally efficient manner call the steamer's attention to the fact of her presence in the river, and stress was laid upon the article of the International Code which provided that nothing should exonerate a ship from the consequences of the neglect of any precaution which might be required by the special circumstances of the case. The Supreme Court, however, said that the lookout on the Clan Mackenzie was not called upon to act until it became manifest that the Oregon had not observed his light. He had a right to assume that she would not run directly down upon him but would see his light and give it a proper berth; that when it became manifest that his light had not been observed it was then too late to light a torch, if he had had one at hand, or perhaps even to ring a bell. The court added that—

"In view of the finding of the Circuit Court that, if a torch or flash light is not already prepared and at hand and ready for use, it would take five minutes to obtain one from the place where they are usually kept and light it, we are unable to understand how the court could have held the Clan Mackenzie liable for the nonexhibition of a torch, unless upon the theory that it was her duty to keep one lighted all the time."

Also the court said:

"As we have already observed, it is not sufficient for the Oregon to cast a doubt upon the management of the Clan Mackenzie. In view of the clearness of her own fault, it is not unreasonable to require that she should make the fault of the other equally clear. This she has fallen far short of doing."

The foregoing case appears to dispose of the question as to the alleged negligence of Meeker in the instant case in not making use of a flare-up. He was not bound to do anything until it became manifest to him that he was about to be run down, and then he had no time to get it. The exigencies of the case did not admit of his doing anything except to shout, and that he did.

In The Furnessia, 154 Fed. 348, 83 C. C. A. 126, the mate of a sailing vessel, just prior to a collision in a fog, took the light from the binnacle and placed it on the top of the house, where it was mistaken by the steamer for the stern light of an overtaken vessel, in consequence of which the steamer ported when she should have starboarded. If she had starboarded, she would have passed in safety. Judge Lacombe, writing for this court, said:

"But, whatever lights were seen, the schooner obeyed the rules in maintaining her course and speed unchanged until the crash came."

And he also declared that—

"We are not inclined to hold the schooner in fault because the mate, terrified in the presence of impending peril, lost his head so completely as to do the one thing which made the threatened catastrophe certain."

In The Helen G. Moseley, 128 Fed. 402, 63 C. C. A. 144, there was a collision at sea on a clear night between a steamer and a schooner on crossing courses. The lights of the schooner were properly set and properly burning. The steamer contended, and three of her officers, as well as the lookout, that the schooner was on such a course that her lights could not be seen in time to have prevented the collision. They did not see her lights until immediately before the collision. The court, composed of Judges Wallace, Lacombe, and Coxe, held the steamer, as the burdened vessel, solely in fault. Those on the schooner saw the steamer, but thought she would change her course and keep clear, and the schooner held her course. The steamer, however, came on without apparent change, and collided with the schooner, which did nothing to avoid the collision. The necessity in such a case of a flare-up light is not referred to, although it is said that, if the steamer had been approaching the schooner abaft her beam, she would have been in fault for not exhibiting a flare-up light or a torch to a vessel so approaching.

In The Howard B. Peck (D. C.) 48 Fed. 334, there was a collision with a vessel at anchor in Hampton Roads on March 26, 1891. It was alleged as a fault that the anchored vessel was at fault, in that it did not display a torch, although her lights were properly set and burning. Article 12, in the exact language in which it now appears in the act of 1897, was in the act of 1890 then in force, and provided that every vessel might, if necessary to attract attention, show a flare-up light. The vessel at anchor could see the lights on board the approaching steamer, and the court held that therefore there was no reason why those in command should suppose that the lights of the anchored steamer were invisible to the approaching vessel, or that there was occasion for a torch. The vessel was held not in fault for not resorting to it. And in the case at bar Meeker, on the Drifter, had no difficulty in seeing the lights on the Lafayette, and he had a right to suppose that she saw his lights and there was no occasion for a torch.

The court below has stated in his opinion that the use of a flare in this case would have been positively unlawful. No reason for this opinion is given, and no authorities are cited. As this is not a case of an overtaken vessel, we suppose the statement was based upon the theory that a flare can be used on the stern of an overtaken vessel, but is not to be used elsewhere, and where the vessels are approaching each other with all lights burning. It has been held repeatedly that the showing of a flare-up light to a steamer approaching from forward of the beam is a fault. In The Algiers (D. C.) 38 Fed. 526, Judge Benedict stated the rule that it was a fault for a schooner to display a flare-up light to an approaching vessel, except when she was being overtaken by such vessel. The decision was under the statute of March 3, 1885. 23 Stat. p. 438. The same doctrine is asserted in Brigham v. Luckenbach (D. C.) 140 Fed. 322, 329. In the latter case the collision occurred in November, 1904, and therefore under the Act of March 3, 1897, 29 Stat. p. 690; but no notice of that fact was taken in the opinion, although the language of the two acts differs in important particulars. It was said in that case, that, as those on the schooner saw

the steamer approaching, they had a right to suppose that the steamer had the schooner in view, and that as she was approaching from forward of the beam it should have exhibited a flare-up light to the steamer. "But it is contended," said the court, "that when the steamer was very close to the schooner then, under article 12, the schooner should have shown a flare-up light to the steamer, to attract her attention. The tendency of the courts is to hold that the exhibition of irregular lights by a vessel to an approaching vessel is attended with great danger, as such action might tend to very greatly mislead." The court held that the schooner was not in fault in failing to show a flare-up light to the steamer at any time during her approach, or at the time when the vessels came together. In the view we take of the case it is not necessary to pass upon the question whether under the rules now existing the use of a flare would have been unlawful. It is enough in the present case to say that under the circumstances here existing the failure to use a flare, even if its use would have been lawful, was not in itself such an omission as should be attributed a fault leading to a division of the damages.

In The Robert Graham Dun and The Excelsior (D. C.) 102 Fed. 652, it was decided that a schooner is not to be held in fault for a collision with a steamer in the night because of her failure to exhibit a flare-up light, where her other lights were burning brightly. It was said:

"The conclusion that the schooner's light was neither dim nor obscured must be followed by a finding that it is not chargeable with fault for omission to exhibit the flare-up light. The rule permits the use of a flare-up light, but does not make it obligatory upon the schooner, unless perchance the circumstances were such that prudence would require it."

In The Gate City (C. C.) 90 Fed. 314, 320, there was a collision at night between a steamer and a sailing vessel. The steamer was where she was by her own gross fault. The sailing vessel was where she was of right. The lights of the sailing vessel were not seen; those of the steamer were. The steamer, sailing on a course a half point off the schooner's port bow, changed her course to one directly across the bows of the schooner, which kept its course. The fault of the steamer was obvious but it was claimed the schooner was also in fault, and that she should have shown a flash light. The court held otherwise, and said:

"She was carrying the lights required by law, and was not required to have a flash light in readiness, so that it could be sent off if a steamer chanced to run across her course, with scarcely more than a minute's and possibly a few seconds' warning."

Meeker kept his course and at no time changed it. In The Nacoochee, 137 U. S. 330, 340, 11 Sup. Ct. 122, 34 L. Ed. 687, it was claimed that a sailing vessel made no change in her helm up to the very moment of collision, and was in fault for not putting her helm hard aport when the steamer was seen to be within 40 or 50 feet of her, and that the collision might have been avoided if that course had been taken. The court answered it by saying that it was the primary duty of the schooner to keep her course, and that even if it was an error of judgment to hold her course it was not a fault, being an act resolved upon

in extremis, a compliance with the statute, and a maneuver produced by the fault of the steamer. The steamer was seen when 400 or 500 feet away.

[2] It is to be observed, in determining the question of whether or not there was mutual fault, that this case is one of collision between a steamer and a sailing vessel. In this class of cases the rule is that a strong case must be made out if the sailing vessel is to be held in fault. This rule was stated in Crockett v. Newton, 18 How. 581, 15 L. Ed. 492, where Mr. Justice Curtis said:

"It must be remembered that the general rule is, for a sailing vessel, meeting a steamer, to keep her course, while the steamer takes the necessary measures to avoid a collision. And though this rule should not be observed when the circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing vessel in the wrong for obeying the rule. The court must clearly see, not only that a deviation from the rule would have prevented collision, but that the commander of the sailing vessel was guilty of negligence or a culpable want of seamanship, in not perceiving the necessity for a departure from the rule, and acting accordingly."

[3] It is also to be observed that, if one vessel places another in a position of extreme danger by wrongful navigation, the other ship is not to be held to blame if she does something wrong and is not navigated with perfect skill and presence of mind. The Maggie J. Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175; The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687. In The Nichols, 7 Wall. 656, 666 (19 L. Ed. 157), the court declared that—

"Mistakes committed in such moments of peril and excitement, when produced by the mismanagement of those in charge of the other vessel, are not of a character to relieve the vessel causing the collision from the payment of full damages to the injured vessel."

And in The Carroll, 8 Wall. 302, 306 (19 L. Ed. 392), the court said:

"If there was fault on the part of the schooner, the steamer committed a far greater fault in suffering the vessels to get in such dangerous proximity at the moment preceding the collision, and as she has furnished no excuse for this misconduct, is chargeable with all damages resulting from this collision."

And if in the present case Meeker was guilty of a fault in not using a flare, when at the last he saw that a collision was imminent, his slight fault, due to the gross misconduct of the Lafayette, cannot be used as a justification for this court's relieving her from responding in full measure for all the damages she inflicted.

When a vessel is put in great peril without any fault of her own, the question of her negligence in a sudden emergency does not depend upon whether she did everything she might have done or pursued the best possible course. In such cases the rule is that a mistake made in the agony of almost certain collision is regarded as an error for which the vessel that caused the peril should alone be held responsible.

[4] If, however, we are in error, and Meeker be blameworthy the error cannot by any possibility prejudice the claimant in any of the cases now before the court, except that brought by him suing in his individual capacity. His negligence cannot be imputed to those who who were by his invitation upon the yacht at the time. In the well-

known case of Thorogood v. Bryan, 8 C. B. 115, decided in 1849, a passenger in a public vehicle was held chargeable with any negligence of its managers which contributed to his injury, notwithstanding the fact that he had no control over the driver. That case has been overruled in England and rejected in the courts of this country. The theory that one who rides in a private conveyance thereby makes the driver his agent and is responsible for his negligence, even though without power to control him, is maintained in a few states. Lauson v. Town of Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30; Kane v. Boston Elevated Ry. Co., 192 Mass. 386, 78 N. E. 485; Omaha, etc., R. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599; Whittaker v. Helena, 14 Mont. 124, 35 Pac. 904, 43 Am. St. Rep. 621. In 1 Shearman & Redfield on Negligence (6th Ed., 1913) § 66a, the learned authors, speaking of this doctrine, say:

"The notion that one is the 'agent' of another, who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. The theory is universally rejected, except in three states mentioned, and it must be soon abandoned even there."

The doctrine of Thorogood v. Bryan was not followed by the English High Court of Admiralty. In The Milan, Dr. Lushington, of the Admiralty Court, in speaking of that case, said:

"With due respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment; but I decline to be bound by it, because it is a single case, because I know, upon inquiry, that it has been doubted by high authority, because it appears to me not reconcilable with other principles laid down at common law, and, lastly, because it is directly against Hay v. La Neve and the ordinary practice of the court of admiralty." Lush. 388, 403.

The Supreme Court in Little v. Hackett, 116 U. S. 366, 375, 6 Sup. Ct. 391, 29 L. Ed. 652, declared that Thorogood v. Bryan rested upon indefensible ground and disapproved and rejected it. The doctrine of imputed negligence, by which a person in one ship, though not identified with its management or navigation, can be chargeable with the negligence of that ship, and deprived of any right to proceed against the other negligent vessel, is too unreasonable to command respect. Indeed, it is laid down as the law now stands that a person injured on a vessel in collision can proceed against either or both, if both are negligent. Hughes on Admiralty, p. 192.

[5] It appears that Henry Haas commenced his suit on September 18, 1917, and while the suit was pending, on September 4, 1918, he died. Charles Haas was appointed executor of his estate. On the facts being made to appear by his affidavit, the court entered an order upon his request, on January 31, 1919, substituting the executor as libelant in the suit for the purpose of further prosecuting the action.

It also appears that Mary Agnes Meeker commenced her suit in like manner on September 18, 1917. Her death occurred on October 24, 1918, and Augustus S. Meeker was appointed administrator of her estate. On February 17, 1919, the court entered an order substituting him as libelant in her place and stead in the suit which she had commenced.

It is a long-established principle of the common law that a personal action dies with the person; and if a personal action was commenced, and before judgment the death of either the plaintiff or the defendant occurred, the action abated; but if death occurred after judgment, and during an appeal or writ of error, the suit did not abate. Roberts v. Criss (C. C. A.) 266 Fed. 296; 1 C. J. 169. The principle, however, that death before judgment abates an action for personal injuries, has no application to the facts of this case, which is not a proceeding in personam, but one in rem.

In cases of a maritime tort, the law gives to the party wronged a right to look to the ship for his remedy. A ship has no fixed abode, but is a wanderer, and visits places where her owners are not known, or, if known, are not accessible. The master is usually a person of insufficient financial responsibility to meet all the money demands which may arise out of the voyage. Hence the necessity of treating the ship as security for the demands which the voyage occasions. In such cases the law gives the lien, and vests in the creditor a special property in the ship at the time the debt or claim comes into existence; and it is held accordingly that a suit in rem against a vessel for personal injuries sustained in a collision does not abate by the death of the libelant. The Ticeline (D. C.) 208 Fed. 670; Id., 221 Fed. 409, 137 C. C. A. 207. In accordance with that principle, the substitution of parties, which the court below permitted to be made, was in accordance with the law.

[6] Our attention has been called to a number of New York decisions that a claim for personal injuries does not survive the death of the injured party; and we are also informed that in pursuance of the New York statutes causes of action for personal injuries abate upon the death of the parties. But what has been already said must have made it clear that these actions, arising out of a maritime tort and giving rise to a maritime lien, are not subject to the rules of the common-law courts or to the statutes of the state of New York. We are dealing with a maritime tort, and the rights of the parties are to be determined upon the principles of the maritime law. The lien which is claimed is not one created by any state. The damages which are sought are not damages for causing death.

The decree is affirmed in all five cases.

CARMEN v. FOX FILM CORPORATION et al.*

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 29.

Equity ⇐65(2)—Inequitable conduct bar to relief.

When about 20 years of age complainant contracted her services as a motion picture actress to defendants for a term, including options for renewals, of some 4 years. A few months later, while still under 21, representing herself free to do so, she made contracts with another for her services covering the same time. *Held* that, whether or not as matter of law she might avoid her contracts with defendants on the ground of her minority, her conduct was such that a court of equity would grant her no relief against them.

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

Suit in equity by Jewel Carmen against the Fox Film Corporation and the William Fox Vaudeville Company. Decree for complainant, and defendants appeal. Reversed.

For opinion below, see 258 Fed. 703.

Saul E. Rogers, of New York City (E. Henry Lacombe, of New York City, of counsel), for appellants.

Nathan Burkan, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff seeks to have certain contracts declared void which she alleges that she made with the defendants during her minority, and she prays that an injunction be issued restraining the defendants from asserting that the contracts are valid and from interfering with her contract relations with any person, firm, or corporation in employing the plaintiff and availing himself or itself of her services under any contract of employment entered into with her. Damages are also asked.

The court below has adjudged that the contracts were duly rescinded by her and have been null and void since July 15, 1918, and has issued a perpetual injunction as prayed, and awarded her damages in the sum of $43,500.

The plaintiff is a moving picture actress, and in her complaint alleges that at all the times mentioned therein she was and still is a citizen and resident of the state of California. The defendants are corporations organized under the laws of the state of New York, and are each engaged in the business of manufacturing and producing photoplays.

The contract with the Fox Film Corporation, which is one of the contracts the plaintiff repudiated and asks to have declared void, provided employment for a period of one year, commencing October 17, 1919. The compensation agreed upon was $175 per week. In consideration of $1,300, which was to be paid in weekly installments of $25, an option was given to continue the employment for further

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 323, 65 L. Ed. —.

periods of six months each until said employment extended over to October 17, 1921. The salary stipulated, if the options were exercised, was $200 per week for the first year, $225 per week for the first half of the second year, and $250 per week for the second half of the second year until October 17, 1921, the termination of the contract.

The contract with the William Fox Vaudeville Company which the plaintiff also repudiated, provided employment for six months with the option in the company to employ her for a further six months until the employment extended over to October 17, 1919. The salary, if the options were exercised, was $125 per week for the first six months; $150 per week for the second six months; $200 per week the last six months and until the termination of the contract. The consideration for the several options was $650 for each of the options.

Each of these contracts was executed on July 31, 1917, and in each of them the plaintiff is described as of the city of Los Angeles in the state of California.

Prior to the plaintiff's repudiation of the agreements above mentioned and while they had still several years to run, and on March 28, 1918, a few months before she attained her majority, the plaintiff entered into a contract with the Frank A. Keeney Pictures Corporation for her exclusive appearance in motion pictures under its employment for a period of two years commencing on or about July 15, 1918. Under this agreement the Keeney Corporation was to pay to the plaintiff at the end of each week for 46 consecutive weeks the sum of $450. And for the first six months during the year commencing July 15, 1919, she was to be paid $500 for each week, and for the last six months she was to be paid the sum of $550 per week. The contract also gave to the Keeney Corporation an option on her exclusive motion picture services for one year commencing July 15, 1920, the corporation agreeing to pay her if it availed of the option $600 per week for the first six months, and $650 per week for the last six months. The contract also provided that the corporation should have a further option for her exclusive services for the year commencing July 15, 1921, her compensation to be $700 per week for the first six months, and $750 for the last six months. It granted the corporation a further option for the year commencing July 15, 1922, the compensation for the first six months to be $800 per week, and for the last six months $850 per week. It granted the corporation the further option for the year commencing July 15, 1923, her compensation to be $1,000 per week for each and every week.

The negotiations leading up to the signing of the agreement with the Keeney Corporation were opened by Frank A. Keeney, the president of that corporation, who telegraphed the plaintiff asking whether she was open to an engagement. Her reply was that she was free to accept employment. Thereupon he sent to her the contract as prepared. It was submitted by her to her attorney in Los Angeles, and then was signed by her in California. At the time this contract was made Keeney had no knowledge that the plaintiff had contracts with these defendants extending beyond July 15th, and if he had known the facts he would not have made any contract with her. When later

on Keeney learned what the facts were, he having been informed by Fox that his corporations had contracts with the plaintiff which still had several years to run, he refused to recognize the contract which he had made or to proceed under it. He testified:

"I would have entered into no negotiations with Miss Carmen unless I thought that she was absolutely free to come to me on July 15th, free and clear in every manner, shape, or form without any technicalities."

He also testified:

"* * * I wanted Miss Carmen's services, but I didn't want her services if there was any litigation about it; that is what I was trying to keep out of, that is, litigation."

It appears that defendants on receipt of the plaintiff's notification of her repudiation of her contracts with them, on the ground of her infancy, instructed their lawyers to inform the plaintiff that they intended to hold her to the performance of the contracts, and that they would seek adequate and proper relief to restrain the violation thereof. This information they communicated to her on July 17, 1918. And on July 12, 1918, the William Fox Vaudeville Company, through its attorneys, had informed Keeney as follows:

"We hereby serve you with notice that we still claim our rights to her services under her contract, and that we will hold her strictly to the performance of her contract, and will hold you if you permit her to breach her contract by performing any services for you.

"We are giving this notice to you in advance of her rendering any services for you, so that, if you engage her services after this notice, you will do so with full knowledge of all the facts."

On September 19, 1918, the William Fox Vaudeville Company and the Frank A. Keeney Pictures Corporation and Frank A. Keeney entered into an agreement wherein the Keeney Corporation and Frank A. Keeney agreed to refrain from engaging the services of the plaintiff pending the determination of the rights of the respective parties, and the Fox Company agreed to indemnify and save harmless the Keeney Corporation and Keeney himself from any damage they might suffer by reason of any action the plaintiff might bring against them.

The plaintiff in her complaint alleged that the contracts with the defendants were signed, executed, and delivered to the plaintiff by the defendant in the city and state of New York. The answer does not deny this allegation. But the defendants claim that in fact the contracts were executed in California, and that under the law of that state they were binding upon her, as in California a young woman becomes of age at 18. Under the New York law a young woman does not become of age until she reaches 21. The court below, in view of the allegation in the complaint and the failure in the answer to deny it, has held that the contracts between the plaintiff and the defendants were New York contracts and governed by the New York law, and therefore voidable, as under New York law the plaintiff was not of age when she signed them. It is contended that this was error, and that the capacity of parties to contract is to be determined by the law of the domicile, or, according to some authorities, by the law of the place of performance. In the view we take of this case it is not

material whether the contract was binding and breached, or voidable and avoided. In either case the conduct of the plaintiff has been such as entitles her to no relief in this court. According to her own allegations in her complaint, she was a minor when she entered into the contract with Keeney, and she misled him into making the contract by representing that she was free to make it, when in fact she was morally not free to make the contract, and there was doubt whether she was legally free to make it. If the contracts with defendants were valid, she was under a legal and moral obligation not to make the contract with the Keeney corporation. And if the contracts were voidable because of her infancy, then, while she was under no legal obligation to recognize them, she was under a moral obligation to abide by them, and good faith required her to continue to render the services she had agreed to give. In either case her action in repudiating her pledged word was misconduct of which no person of honor and conscience would have been guilty. That no action could be brought against her at law because of what she did does not alter the moral character of her act. And when she comes into a court of conscience and asks its affirmative aid to assist her in carrying into effect the inequitable arrangement into which she unfaithfully entered, the appeal falls on deaf ears. One who comes into equity must come with clean hands, and her hands are not clean. The testimony discloses that reliance cannot be placed upon her agreements which the law does not oblige her to keep, and that for a money gain to herself she unscrupulously disregarded her express contracts.

In Story's Equity Jurisprudence (14th Ed.) vol. 1, § 99, the rule is laid down as follows:

"Equity imperatively demands of suitors in courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly 'within the law.' Misconduct which will bar relief in a court of equity need not necessarily be of such a nature as to be punishable as a crime or to constitute the basis of a legal action. Under this maxim, any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean. Both courts and text-writers have repeatedly spoken upon this subject in no uncertain language."

In Pomeroy's Equity Jurisprudence (3d Ed.) vol. 1, § 398, it is said:

"Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days that, while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction to those rules, while it could act upon the conscience of a defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial contro-

versies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies."

The maxim that one who comes into equity must come with clean hands expresses rather a principle of inaction than one of action. It means that equity will refuse its aid in any manner to one seeking its active interposition if he has been guilty either of unlawful or inequitable conduct respecting the subject-matter of the litigation.

An illustration of the maxim is found in the attitude of courts of equity in the matter of specific performance. A court of equity always refuses specific performance of a contract which has been obtained by the plaintiff by sharp and unscrupulous practices, by over-reaching, by concealment of important facts, even though not actually fraudulent. The contract may be a legal one, against which no defense could be set up at law, and one which a court of equity would not cancel. But if it has been procured by unconscientious means a court of equity refuses specific performance. Pomeroy's Equity Jurisprudence (3d Ed.) vol. 1, § 400.

The right which one seeks to enforce in a court of equity must be one which in and of itself appeals to the conscience of a chancellor. Mr. Justice Brewer, speaking for the court in Deweese v. Reinhard, 165 U. S. 386, 390, 17 Sup. Ct. 340, 341 (41 L. Ed. 757), said:

"A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."

In T. B. Harms & Francis, Day & Hunter v. Stern, 231 Fed. 645, 648, 145 C. C. A. 531, 534, this court said:

"The plaintiffs are in a court of equity, which is a court of conscience, which within the scope of its powers is governed by its own rules. It stays its hand and withholds its aid whenever it is asked to do that which it deems to be against conscience."

In Weeghan v. Killefer (D. C.) 215 Fed. 168, the complainants sought an injunction to restrain the defendant from playing baseball with any club other than their own. It was found by the court that he was a player of unique, exceptional, and extraordinary skill. But complainants, knowing that he had entered into an unenforceable agreement to play as a member of another club, had induced him by the offer of a larger salary to break his agreement and play with their own club. Then he was induced to repudiate the agreement with the complainants and to enter into a new agreement to play with the club with which he had originally contracted. An injunction was sought by complainants to restrain him from doing so. This was refused on the ground that complainants' conduct in inducing him to break his unenforceable agreement was such misconduct in regard to the matter in litigation as honest and fair-minded men would condemn and pronounce wrongful, and, although insufficient to constitute the basis of legal action, was quite sufficient to bar relief in equity. The complainants' hands were not clean. The case was appealed to the Circuit Court of Appeals for the Sixth Circuit and was affirmed, 215 Fed. 289, 131 C. C. A. 558, L. R. A. 1915A, 820.

In Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co., 111 Fed. 284, 49 C. C. A. 324, relief was refused because of bad faith, sharp practice, and unconscionable acts. It was said that a suit in equity is an appeal for relief to the moral sense of the chancellor, and that a court of equity is the forum of conscience.

"A court of equity," it was said, "will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit."

In 1859 in a case before the Court of Appeal in Chancery, Nelson v. Stocker, 4 De Gex & J., 458, 464, Lord Justice Turner, in commenting on the fact that the defendant had represented himself to be of age when he was not of age, said:

"It is too much to call upon the court to believe that this defendant could really have thought himself to be of age at the date of the settlement, when he was under 18 years of age; and if he did not so think, the representation he made to the solicitor was false and fraudulent. Infants are no more entitled than adults are to gain benefits to themselves by fraud. * * *"

In 1816 a case came before Vice Chancellor Plumer, Cory v. Gerteken, 2 Maddox, 40, in which an infant who was nearly of age prevailed upon his trustees to transfer to him certain stock to which he was entitled on coming of age, and represented to them that they ran no risk in doing it. After coming of age he assigned his rights to an assignee, and suit was brought against the trustees on the ground that payment to an infant was bad. The bill was dismissed and the Vice Chancellor said:

"The concealment of his infancy, under such circumstances, certainly was a fraud, and precludes him, or his assigns, who stand precisely in his situation, from calling for a repayment."

The fact that a contract has been dishonestly or dishonorably obtained is a bar to relief in equity.

Decree reversed.

FINKBINE LUMBER CO. v. GULF & S. I. R. CO.*

(Circuit Court of Appeals, Fifth Circuit. December 30, 1920.)

No. 3477.

1. Commerce ⇐85—Charges paid for switching done by shipper are subject to Commission's jurisdiction.

Under Interstate Commerce Act, § 15, as amended (Comp. St. § 8583), providing that a shipper rendering a service connected with the transportation can receive only a just allowance therefor, and authorizing the Commission to determine a reasonable charge as the maximum to be paid by the carrier for the services rendered, the amount which a lumber company is entitled to receive from a carrier for services in switching cars from its mill to the carrier's main line and in weighing them

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*Certiorari denied 254 U. S. —, 41 Sup. Ct. 377, 65 L. Ed. —.

is a question within the jurisdiction of the Commission, and on which its determination is conclusive, unless set aside on direct attack.

2. **Commerce ⊜88—Commission's dismissal of shipper's application for switching charges precludes suit for charges.**
The dismissal by the Interstate Commerce Commission of an application by a shipper against a carrier for allowances for switching and weighing services performed by the shipper involves a finding by the Commission that the shipper was not entitled to the charges fixed by an agreement with the carrier, if that agreement was still in effect, and precludes a subsequent suit by the shipper to recover from the carrier the agreed charges or a reasonable charge.

3. **Commerce ⊜91—Commission's order cannot be set aside in suit to recover charges disallowed by Commission.**
A suit by a shipper against a carrier to recover charges for switching and weighing services performed by the shipper, which charges had previously been disallowed by the Interstate Commerce Commission, is not one in which an order of the Commission can be set aside, in view of Comp. St. §§ 992, 994.

Appeal from the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Suit by the Finkbine Lumber Company against the Gulf & Ship Island Railroad Company to recover from the Railroad Company the agreed or reasonable charges for switching services rendered by the Lumber Company. From a decree dismissing the bill, complainant appeals. Affirmed.

W. A. White, of Gulfport, Miss. (E. J. Ford, of Pascogoula, Miss., and W. H. White, of Gulfport, Miss., on the brief), for appellant.

B. E. Eaton, of Gulfport, Miss., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. Prior to February, 1906, the appellant, Finkbine Lumber Company, had built a large sawmill for the manufacture of lumber, situated about 6,500 feet from the line of the appellee, Gulf & Ship Island Railroad Company, at its station in the town of Wiggins, in Harrison county, Miss., and had built, according to plans and specifications furnished by the appellee, a spur track or siding connecting its mill plant with appellee's tracks at the station in Wiggins. On February 15, 1906, the appellee in writing agreed to pay the appellant $5 per loaded car for the service rendered by the latter in moving or switching cars between the sawmill and the appellee's line, and in having the required weighing done. The appellee made payments according to the terms of that agreement, until it stopped doing so in pursuance of the statement contained in the following letter of its president:

"Gulfport, Miss., 8/23/06.

"Finkbine Lumber Company, Wiggins, Miss.—Gentlemen: Under the construction placed upon the Interstate Commerce Act by the general counsel of all the railroad companies, and especially by our general counsel, I write to say to you that the agreement made and entered into by and between the Gulf & Ship Island Railroad Company and the Finkbine Lumber Company, on the 15th day of February, 1906, with reference to switching cars, will have to be annulled and for naught held on and after the 27th day of August,

1906. The construction placed upon the Interstate Commerce Act by our general counsel leaves no other avenue open except to close out this agreement heretofore had between us. Of course, some other arrangement with reference to switching will have to be made.

"Very truly yours, [Signed] J. T. Jones, President."

So far as the record discloses, after August 27, 1906, the appellee did nothing indicating its recognition of the continued existence of a contract obligation on its part to pay to the appellant $5 per loaded car, or any other sum, for the above-mentioned services, which the appellant continued to perform. In pursuance of a petition filed by the appellee on September 11, 1916, the Interstate Commerce Commission, on December 6, 1916, approved an allowance by the appellee to the appellant of $2.50 per car for switching lumber from appellant's mill to the junction at Wiggins, such allowance to apply on lumber switched from and after September 11, 1916, the date of appellee's application. The appellee paid the allowance authorized by the just-mentioned order from September 11, 1916, until December 28, 1917, the date of the taking over of its railroad by the government, under the proclamation of the President. In 1917 the appellant filed with the Interstate Commerce Commission a petition, which, after alleging, among other things, the making of the above-mentioned agreement of February 15, 1906, the discontinuance of payments thereunder as above stated, and the appellant's continued performance of the switching and weighing services, prayed that an order be made commanding and requiring the appellee to pay to the appellant for those services, by way of reparation, such reasonable sum per car as may be fixed by the Commission as proper compensation therefor. The appellee resisted that application. After hearing and investigation the Commission dismissed the petition on February 9, 1918. The pending suit was brought on October 3, 1918. It was disclosed by the bill as amended that the above-mentioned agreement of February 15, 1906, was what was relied on as entitling the appellant to the relief sought. The appellant asserted the right to be paid $5 per car, "or such sum not less than $2.50 as the defendant [the appellee] should lawfully be required to pay," for each loaded car switched since the date of that agreement, for which payment has not been made, together with interest. The appeal is from a decree dismissing the amended bill.

In view of the facts and circumstances disclosed, it well might be inferred that the appellant assented to the statement in the letter of appellee's president of August 23, 1906, that the agreement of February 15, 1906, "will have to be annulled and held for naught on and after the 27th day of August, 1906," and that thereby a rescission or abandonment of that agreement was effected. 6 Ruling Case Law, 620. Its conduct indicated acquiescence. For more than 10 years following the date of that letter it rendered the services the agreement referred to without asserting any claim that it was entitled to be paid the price therefor stated in the agreement. For the switching and weighing done by it between September 11, 1916, and December 28, 1917, it accepted $2.50 per loaded car, without claiming that what it so received was less than it was entitled to. Its conduct cannot well be said to have been

consistent with the continued existence of the agreement now pleaded and relied on.

[1] Amended section 15 of the Interstate Commerce Act contains the following provision:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." U. S. Compiled Statutes Annotated, § 8583.

As the switching and weighing services rendered by the appellant included things the appellee, the carrier, would have had to do itself, as incidents of the transportation, if they had not been done by the shipper, it does not seem to be fairly open to dispute that those services, in part, at least, were such as were within the meaning of the words of the provision, "any service connected with such transportation." We understand it to be settled that an effect of the provision is to make charges for such services subject to the Commission; its determination of the maximum that may be allowed being conclusive unless set aside on direct attack. O'Keefe v. United States, 240 U. S. 294, 301, 302, 36 Sup. Ct. 313, 60 L. Ed. 651; Mitchell Coal Co. v. Penna. R. R. Co., 230 U. S. 247, 263, 264, 33 Sup. Ct. 916, 57 L. Ed. 1472; Ellis v. Int. Com. Comn., 237 U. S. 434, 445, 446, 35 Sup. Ct. 645, 59 L. Ed. 1036; Manufacturers' Ry. Co. v. United States, 246 U. S. 457, 479, 480, 38 Sup. Ct. 383, 62 L. Ed. 831.

It well may be inferred that agreements between carriers and shippers in reference to the former paying the latter for such services were made subject to review by the Commission because of the obvious fact that such agreements may be used as means of giving rebates, or of effecting other undue or unreasonable preferences, advantages, or discriminations. The allegations in the appellant's application to the Commission in 1917 as to the above-mentioned agreement of February 15, 1906, were in reference to a matter proper to be considered by the Commission in passing on that application, as that agreement, if it then was in existence, was subject to be reviewed by the Commission. Ellis v. Int. Com. Comn., supra; Manufacturers' Ry. Co. v. United States, supra.

[2] We are of opinion that the action of the Commission in dismissing that application amounted to a ruling against the asserted right of the appellant to be compensated by the appellee for the services in question. It is to be supposed that the Commission considered all the facts disclosed, including the agreement, if it was regarded as still in existence, and concluded that under all the circumstances appellant was not entitled to favorable action on its application. The relief sought in this case could not be granted, without denying effect to the action of the Commission in respect of a matter within its jurisdiction. The legislative purpose in empowering the Commission to pass on

charges and allowances for services of a shipper, or for his furnishing instrumentalities used in connection with transportation, including a review of agreements on those subjects, and to determine what, if any, allowance might be made therefor, would be defeated by recognizing a right of the courts to enforce such agreements, notwithstanding unfavorable action thereon by the Commission.

[3] This suit is not one in which an order of the Interstate Commerce Commission can be set aside. U. S. Compiled Statutes 1918, §§ 992, 994.

In argument the decree appealed from was sought to be supported on grounds in addition to those above mentioned, including the failure of any filed tariff to disclose the existence of such agreement, laches, and the statute of limitations. It is not deemed necessary to consider such other grounds. For reasons above indicated, the conclusion is that in dismissing the bill the court did not err.

The decree is affirmed.

WHITE v. NEW ORLEANS LAKE SHORE LAND CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 18, 1921.)

No. 3529.

1. **Trusts ⟸210—Trustee to convey title held not liable for breach of vendor's agreement.**
   Where a land company had conveyed its land to a trust company by recorded act of sale, expressly showing the conveyance to be in trust for the purposes specified in the resolutions of the land company, and the contract for selling the land to a purchaser showed that it was held by the trust company in trust, the purchaser had notice that the trust company was a trustee only, and cannot hold it liable for payments made on the contract before rescission for the land company's breach of its contract.
2. **Trusts ⟸210—Illegality of trust does not make trustee liable for breach of vendor's contract.**
   In a suit by a purchaser of land to recover from the trust company, which held the legal title to the land in trust for a land company, the payments made by the purchaser before rescission for the land company's breach of contract, it is immaterial whether the trust company was authorized to accept the trust in controversy, since, even if that trust were illegal, it could not make the trust company liable for the land company's breach.
3. **Trusts ⟸210—Evidence held not to show contract was for benefit of trustee.**
   In a suit by a purchaser of land, who had rescinded his contract for the vendor's breach of agreement to grow a commercial orange orchard thereon, evidence *held* insufficient to show that the trust company, which held legal title to the land, was making the sale for its own interest, so as to be liable for the sums already paid.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by Andrew D. White against the New Orleans Lake Shore Land Company, the Hibernia Bank & Trust Company, and others. Judgment for plaintiff against the Land Company, but not against the Bank & Trust Company, and plaintiff brings error. Affirmed.

Robert H. Marr, of New Orleans, La. (Hollett, Sauter & Hollett, of Chicago, Ill., on the brief), for plaintiff in error.

Abraham Goldberg, H. Generes Dufour, J. Blanc Monroe, Monte M. Lemann, and Percy S. Benedict, all of New Orleans, La., for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The petitioner, Andrew D. White, brought suit against the New Orleans Lake Shore Land Company (hereinafter styled the Land Company) and the Hibernia Bank & Trust Company (hereinafter styled the Trust Company), to annul a contract for the purchase of certain property, and to recover from said Trust Company the sum of $7,200, with interest, and for the surrender of $15,900 of unpaid notes given as a part of the purchase price of said land, or in the alternative to recover the sum of $15,900, with interest.

The Land Company originally owned a large tract of land near the city of New Orleans, which it was developing and selling in five-acre tracts, with orange groves planted thereon and a residence lot of 4,000 square feet. It had spent previously large sums of money in draining and improving said land, and had made an issue of $1,500,000 first-mortgage bonds secured by mortgages to said Trust Company as trustee. These bonds had been used as a pledge to secure a loan of $500,000 made by the Trust Company; said loan being also secured by the individual guaranty of a number of wealthy individuals.

To carry out the plan of selling off these five-acre groves, and said building sites, it was decided to put the title to said property in the name of said Trust Company as trustee. A resolution of the Land Company was passed, authorizing the conveyance of said property to said Trust Company, as trustee, reciting the desire to convey the property to the Trust Company by outright transfer, without the deed of record showing any condition or restrictions whatever, nevertheless the said property to be actually held in trust by said Trust Company, and authorized the president to convey said property and to arrange for the trusteeship, which should provide for the cancellation of the outstanding $1,500,000 mortgage, the Trust Company to hold the property now conveyed as security for existing and future debts; that the trustee would make titles without warranty, except against its own acts, but with subrogation of warranty against the Land Company and previous vendors to the purchasers of said groves and building sites, when the purchaser has fully paid his purchase price; that the Trust Company will accept purchase contracts as turned in and hold same as trustee, and at once indorse all checks and notes in its favor without recourse, and turn them over to the Land Company, except that $400 of each set of notes should be retained, and as paid should be applied to any indebtedness of the Land Company to the Trust Company. All payments made on each unit over and above the $400 shall become the property of the Land Company for its own uses, provided all payments shall be made to the Trust Company and utilized only for the development and benefit of the remaining property.

The act of sale was executed on March 24, 1914, and recited that

it was made under and by virtue of said resolutions, a copy of which was recited to be annexed to and made a part of said act of sale. It was made to said Trust Company as trustee:

"To have and to hold the above-described property unto the said Hibernia Bank & Trust Company, as trustee, under the terms of a trust agreement between the parties."

In reciting the existence of said mortgage securing said $1,500,000 of bonds, said act recites:

"Which mortgage the Hibernia Bank & Trust Company, trustee, is obligated by the trust agreement aforesaid to cancel and erase."

In the fall of 1914, said debt of $500,000 was, on demand of said Trust Company, paid by said individual guarantors. On July 31 and August 1, 1916, said White entered into six contracts to purchase six units (each unit consisting of five acres for a grove and a building site of 4,000 square feet). Said agreements were each in the form of a letter addressed to the New Orleans Lake Shore Land Company, the material parts of which are as follows:

"I hereby agree to purchase, and do purchase, subject to your acceptance: * * *

"1. Five acres of land already planted or to be planted by you during the planting season of 1916–17, comprising a five-acre commercial orange and grape fruit grove, planted seventy trees to the acre, which you are to take care of and cultivate for me for a period of five years without additional cost. You are to deliver to me at the expiration of five years, a five-acre commercial orange and grape fruit grove, each acre thereof containing not less than seventy trees. * * *

"2. One residence lot in size 4,000 square feet. * * *

"For value received and in consideration of your promise and agreement to have transferred and conveyed unto me by warranty deed all of the foregoing described property, such title to be conveyed to me upon full payment of the purchase price herein agreed, I hereby promise and agree to pay to the order of the trustee, namely, the Hibernia Bank & Trust Company of New Orleans, Louisiana, as full purchase price, the sum of thirty-eight hundred and fifty dollars.

"Herewith I hand you the first payment of three hundred and fifty dollars, payable to the Hibernia Bank & Trust Company of New Orleans, and the balance of the purchase price, namely, $3,500, I promise and agree to pay to the Hibernia Bank & Trust Company of New Orleans, and I herewith give my series of notes for the said balance, payable to the Hibernia Bank & Trust Company of New Orleans. * * *

"It is further hereby agreed and understood that the parties hereto shall not be bound by any statements, agreements, or representations not herein contained, and no representative of the New Orleans Lake Shore Land Company or of the Hibernia Bank & Trust Company is authorized to change or alter any of the terms of this agreement. * * *"

Said letters were indorsed:

"Accepted: New Orleans Lake Shore Land Company, M. L. Morrison, Acct."

"Accepted: Hibernia Bank & Trust Company, L. V. De Gruy, Asst. Trust Officer."

"Accepted: The Louisiana Company, C. W. Marsh, Gen'l Dir."

The sale had been negotiated by said Louisiana Company as agent, and it was entitled to a commission from said purchase price. The cash and notes called for by each contract were sent to the Trust Company, which acknowledged the same by letter, stating:

"We beg to acknowledge receipt through the Louisiana Company of agreement covering your purchase from the New Orleans Lake Shore Land Company of property in the Ninth ward of the city of New Orleans, which the Hibernia Bank & Trust Company holds as trustee, together with your check and notes to the amount of the purchase price, namely, $3,850.00.

"Inclosed please find a copy of the agreement, the original of which was signed by yourself, and fully accepted by the Louisiana Company, the New Orleans Lake Shore Land Company, and the Hibernia Bank & Trust Company. The original of said agreement is in the custody of this institution, as trustee, and the property will be conveyed to you by the Hibernia Bank & Trust Company when the terms of the agreement are fulfilled, as recited in said original agreement and the copy accompanying. * * *"

The evidence shows that all of said cash and notes were turned over to said Land Company, the trustee not retaining any part thereof. The Land Company appears to have planted said five-acre tract as provided by said letter and to have expended very large sums of money on the project. Very severe winters, which occurred in 1916, and thereafter, killed many trees and destroyed the project, and resulted in the receivership of the Land Company in 1918. The plaintiff had paid $7,200 in cash and has unpaid notes aggregating $15,900.

The suit against the Trust Company is based on the averments that, the Land Company being indebted to it in the sum of $500,000, and having no assets except this land, which was too large a tract to find a single purchaser, the Trust Company, in order to collect its debt, devised the plan of having the property cut up into five-acre groves, and, so that no sale might be made without the Trust Company's consent and participation in the deed of sale, said Land Company conveyed the title to the Trust Company; that it was beyond the powers of the Trust Company to deal in, and exploit, real estate, and that it became therefore legally necessary to continue the organization of the Land Company and hold itself out as trustee; that as the Trust Company cannot carry out its agreement to convey to petitioner a five-acre commercial orange and grape fruit grove, he is entitled to have the contract annulled and to have the Trust Company refund the money paid, and return the unpaid notes, or in the alternative he should have a judgment for the amount of said notes.

The proof failed to show that the plan was devised by the Trust Company, but appears to have been entirely a plan of the Land Company and prosecuted for its benefit. At the conclusion of the testimony counsel for each party moved the court to instruct a verdict for his client. After hearing argument the court overruled plaintiff's motion, so far as the Trust Company was concerned, and sustained the motion to instruct a verdict in its favor. He granted plaintiff's motion to direct a verdict in his favor against the Land Company and its receiver. Verdict and judgment were entered accordingly. The plaintiff has sued out this writ of error to set aside the judgment in favor of said Trust Company.

[1] It is urged in this case that the relation of the Trust Company to this property was such that by the contract, evidenced by the letter addressed by plaintiff to the Land Company, it is bound by the undertaking to produce and sell a commercial grove, and that, the same not

having been furnished, it is liable to reimburse the plaintiff on a rescission of the contract. The letters evidencing the contract are addressed to the Land Company alone. The agreements as to planting and caring for the groves are with the Land Company. The letter refers to the Trust Company as trustee, to whose order the purchaser promises and agrees to pay the purchase price.

The receipt of the Trust Company to the plaintiff of the contract so made recites that the contract of purchase is made by plaintiff with the Land Company of certain property which the Trust Company holds as trustee, that the original agreement is held by it as trustee, and the property will be conveyed by the Trust Company when the terms of the agreement are fulfilled as recited in said agreement. At that time the title to the land was in the Trust Company under a recorded act of sale reciting that it held it "as trustee under the terms of a trust agreement between the parties."

The terms of the trust were set out in the resolutions, which were referred to in the act of sale as a part thereof, and attached thereto, the original of said act of sale being among the records of the notary public who had passed the same in New Orleans, and the record in the conveyance office recited that the act of sale was authorized by the resolutions attached thereto as a part thereof. It also recited that the Trust Company held as trustee "under the terms of a trust agreement between the parties." This would seem to fully charge plaintiff with notice of the trust relation of the Trust Company, especially where the plaintiff dealt with it as a trustee of the property. Schneidau v. New Orleans Land Co., 132 La. 264, 61 South. 225.

[2] It is urged that the laws of Louisiana prohibit the creation of a trust such as is set forth in this act of sale. Whether this is or is not a sound position is not material in this case. The question here is simply: Did the Trust Company bind itself to perform the executory agreements evidenced by the letters from White to the Land Company as to planting and caring for the grove called for in said letters, or did it only agree to convey the land, the title to which it held, on account of the Land Company, and did it receive the consideration only for the purpose of transmission of the cash and notes to the Land Company?

We think it is quite evident, from the letters, that the entire contract was between White and the Land Company; that the Trust Company was understood to accept the agreement solely to signify that it would convey the land when the contract between the Land Company and White was fulfilled.

[3] The petition in the case avers that the contract was made with the Land Company, because it was recognized that the Trust Company had no power to enter into or bind itself to such an undertaking, and the theory of its liability is based on the allegation that the undertaking was devised by the Trust Company for its own benefit, using the Land Company only as its agency. This theory was demonstrated to be unfounded, the proof showing without dispute that the Land Company, through the Louisiana Company, had devised the plan for its own benefit, that it was carrying it out in good faith, and that the in-

debtedness to the Trust Company had been paid off by the individual guarantors before White agreed to purchase.

It appeared that sums in excess of the entire proceeds of the sales made had been invested in the improvement of the Land Company's property. It was conceded on the trial that no question of good faith was involved in the transaction, and the proof necessitates the concession.

We therefore agree with the court below that the Hibernia Bank & Trust Company was not liable, and the judgment in its favor is affirmed.

CONSOLIDATED TEXTILE CORPORATION v. DICKEY et al.

(Circuit Court of Appeals, Fifth Circuit. January 18, 1921.)

No. 3586.

1. **Courts ⇐405(5)—Case involving question additional to jurisdiction as federal court is reviewable by Circuit Court of Appeals.**
   Though, under Judicial Code, § 238 (Comp. St. § 1215), an appeal from the District Court lies only to the Supreme Court, if the jurisdiction of the District Court as a federal court is the sole question involved, an appeal may be taken to the Circuit Court of Appeals, even if the question of jurisdiction is presented, where another question also arises.
2. **Courts ⇐405(5)—Whether nonresident is indispensable party is reviewable by Circuit Court of Appeals.**
   Whether a nonresident of the district in which suit was brought is an indispensable party to the suit is a question of general jurisdiction, applicable alike to state and federal courts, and is reviewable by the Circuit Court of Appeals.
3. **Courts ⇐273—Nonresident of district cannot be made party to suit to cancel voting trust agreement.**
   A suit by a corporate stockholder to cancel a voting trust agreement, entered into by the majority stockholders as a violation of his rights, is not in the nature of a suit to remove cloud on title to stock, and is therefore not one in which a nonresident of the district can be made a party under Judicial Code, § 57 (Comp. St. § 1039).
4. **Courts ⇐273—Jurisdiction retained, if absent party is not indispensable to any relief.**
   If there is any part of the relief sought as to which a nonresident of the district is not an indispensable party, the bill will be retained for that purpose.
5. **Equity ⇐94—Nonresident trustee held not "indispensable party" to suit to dissolve voting trust.**
   Where a voting trust agreement between the majority stockholders of a corporation authorized the majority of the trustees to vote the stock held in trust as they decided, or to dissolve the trust agreement at any time, a trustee who was a nonresident of the district is not an indispensable party to a suit to cancel the trust agreement for illegality, since the majority of the trustees who were parties could exercise every power of the agreement without his consent, and an indispensable party is one who has such an interest in the controversy that a final decree cannot be made without either affecting that interest or leaving the controversy in such condition that its final determination may be inconsistent with equity.

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

Appeal from the District Court of the United States for the Northern District of Georgia; Samuel H. Sibley, Judge.

Suit by the Consolidated Textile Corporation against James L. Dickey and others. From a decree dismissing the bill for want of necessary parties (266 Fed. 587), complainant appeals. Motion to dismiss the appeal denied, decree reversed, and cause remanded.

Clifford L. Anderson, Daniel MacDougald, E. R. Black, Sanders McDaniel, and Daniel Rountree, all of Atlanta, Ga., for appellant.

R. R. Arnold, Morris Brandon, and John A. Hynds, all of Atlanta, Ga., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Appellant, a Delaware corporation, exhibited its bill against James L. Dickey, James S. Floyd, Edward C. Peters, Morris Brandon, James S. Akers, and Henry Durand, all residents within the Northern district and citizens of Georgia, and against Floyd W. Jefferson, a citizen of New Jersey.

The bill avers: That the Exposition Cotton Mills is a Georgia corporation, having an outstanding capital stock of $700,000, consisting of 7,000 shares, of the par value of $100 each; that appellant is a stockholder in said corporation, owning 499 shares, and interested in 2,590 additional shares, under options and contracts of purchase; that appellees are also large stockholders, and are seven of the nine members constituting the board of directors of said corporation; that on April 2, 1920, appellees, and other stockholders, together owning slightly more than a majority of the outstanding shares of the said Exposition Cotton Mills, entered into a voting trust agreement, which in substance provided: That said stockholders should transfer their shares of stock to the First Trust & Savings Corporation, also a Georgia corporation, as trustee of the legal title; that said trustee should execute and deliver to the stockholders trust certificates representing their shares of stock; that appellees should be constituted the irrevocable proxies of said stockholders to vote all stock so delivered to the trustee; that the trustee should sell all said stock, if directed in writing to do so by the holders of four-fifths in amount of the certificates; that the trustee should receive all dividends on said stock, and pay same out to the holders of certificates in proportion to the amount of stock represented thereby; that any vacancy caused by the death, resignation, or disqualification of any voting trustee should be filled by the remaining trustees; that during the life of the trust agreement the said stockholders would not sell their shares of stock, although they were at liberty to sell their voting certificates, in which event the voting trustees would represent the assignees of the certificates; that the voting trustees should vote as a majority thereof might direct; that Jefferson should vote with the majority of the voting trustees; that the trust agreement could be terminated at any time by six of the voting trustees; that the trust agreement should terminate December 31, 1922, unless a majority in amount of the holders of certificates should agree in writing to continue it, in which event it should terminate December

31, 1927; that upon the termination of the trust agreement, stock should be reissued in lieu of trust certificates. It was then averred that the voting trust agreement had been entered into for the purpose of making appellee Jefferson sales agent to handle the output of the Exposition Cotton Mills. The bill prayed, among other things, that the voting trust agreement be declared void and surrendered for cancellation, that appellees be enjoined from exercising any powers thereunder, and further that they be enjoined from making any sales contract with Jefferson.

Subpœnas were served upon the appellees, other than Jefferson, and he was required to appear by the terms of an order issued under the provisions of section 57 of the Judicial Code (Comp. St. § 1039). Jefferson moved to quash the service made upon him and to dismiss the bill, upon the grounds that said section 57 is inapplicable to the case stated, and that the court had not acquired jurisdiction over his person. The other appellees also filed a motion to dismiss upon similar grounds, and upon the further ground that the suit could not proceed against them, because Jefferson was an indispensable party. There was an additional reason assigned in the latter motion to dismiss, to the effect that the Exposition Cotton Mills and the First Trust & Savings Corporation were also indispensable parties. The District Court granted these motions for the reasons assigned, except as to the Exposition Cotton Mills and First Trust & Savings Corporation, and declined to permit an amendment making them parties, only because that would be a futile thing to do, inasmuch as, in the view of the court, the bill would have to be dismissed at all events because Jefferson could not be made a party. Appellees move to dismiss this appeal for lack of jurisdiction in this court, and insist, because the trial court dismissed the bill solely for want of jurisdiction, that the appeal lies exclusively to the Supreme Court of the United States.

[1, 2] If the jurisdiction of the District Court as a federal court were the sole question involved, an appeal would lie only to the Supreme Court under the very terms of section 238 of the Judicial Code (Comp. St. § 1215). However, where another question than that of jurisdiction arises, although the question of jurisdiction is also presented, an appeal is properly taken to the Circuit Court of Appeals. Whether Jefferson is an indispensable party is a question of general jurisdiction, applicable alike to state and federal courts, and is reviewable by this court. Bogart v. Southern Pacific Co., 228 U. S. 137, 33 Sup. Ct. 497, 57 L. Ed. 768; Geneva Furniture Manufacturing Co. v. Karpen, 238 U. S. 254, 35 Sup. Ct. 788, 59 L. Ed. 1295; Boston & Maine R. R. v. Gokey, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002. The motions to dismiss the appeal are therefore denied.

By the assignments of error it is insisted (1) that the case is of such a nature that Jefferson can be made a party defendant, though he resides in another state, under the provisions of section 57 of the Judicial Code; and (2) that Jefferson is not an indispensable party, and that the court could therefore grant the relief prayed, or at least a part of it, as against the other appellees.

[3] 1. We are of opinion that the court correctly held that the

averments of the bill did not bring the suit within the provisions of section 57 of the Judicial Code. Appellant's proposition is that the acts complained of constitute a cloud upon the title to its shares of stock. No one is disputing appellant's title, or asserting any claim to it. The real complaint is, not that appellees are asserting any claim against or right to appellant's stock, but that they are using their own stock in a manner which is alleged to be illegal, to the damage and injury of appellant.

[4] 2. As to the dismissal of the bill because of the inability to join Jefferson as a party defendant, if there is any part of the relief sought as to which he is not an indispensable party, the bill will be retained for that purpose. Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 45, 30 Sup. Ct. 10, 54 L. Ed. 80. In this case appellant seeks as a part of the relief an injunction to prevent the voting of the stock standing in the name of the First Trust & Savings Corporation by a majority of the voting trustees, in whom such right to vote is given by a proxy executed by such trust company to certain trustees, to be exercised by a majority.

The case of appellant is based on the theory that under the public policy of the state of Georgia, as claimed to be stated in the case of Morel v. Hoge, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. (N. S.) 1126, 14 Ann. Cas. 935, the voting trust agreement set out as an exhibit to the bill, under which the several stockholders divest themselves of the voting power of their stock while retaining the beneficial interest, and vest it by a pooling agreement in a majority of voting trustees, is a violation of the duty which the several shareholders owe to each other under the charter of the Exposition Cotton Mills, and that appellant as a shareholder has the right to an injunction to prevent the voting of such shares by such majority, or by the First Trust & Savings Corporation as the holder of the naked legal title under such an agreement. All of said trustees save one (Jefferson) being within the jurisdiction of the court, and the creator of the proxy, the First Trust & Savings Corporation, being within the jurisdiction, if the vesting of said title by the several stockholders in said trust company, and through it in said majority of said voting trustees, is contrary to the public policy of Georgia and illegal, and if appellant is entitled, on a bill to which all indispensable parties are made and served, to an injunction, we do not think that the nonresidence of one of the trustees, whose presence would not oust the jurisdiction of the court, should prevent the court from entertaining the bill for such injunction.

[5] It is evident that the injunction prayed for against the appellees, other than Jefferson, would not deprive him of any right which he can exercise under said voting trust agreement. He has no right to exercise the proxy thereby created; but such right is vested in the majority, who are parties to the bill. In Shields v. Barrow, 17 How. 130, 15 L. Ed. 158, indispensable parties are defined to be:

"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."

There cannot be much difficulty in applying this accepted rule of law to the facts pleaded in appellant's bill of complaint. Here the citizenship of appellant is diverse from that of any and all the appellees. If Jefferson were a party, the jurisdiction of the court would not be ousted. Suit could not be brought in New Jersey, of which state Jefferson is a citizen, without encountering the same, if not a greater, difficulty as to parties. If the suit cannot be maintained in Georgia, it cannot be in any state or federal court. The result would be that appellant would have no tribunal to which it might submit the question of whether the acts complained of are violative of the public policy of the state of Georgia as charged. The voting trust agreement is with the voting trustees as a body, and not as individuals. The six voting trustees of which the court has jurisdiction have the power and the right to terminate the trust agreement at any time. Jefferson has no individual interest to be affected, and cannot exercise any power by himself. The majority can exercise every power granted thereby over Jefferson's objections. If the appellees who are citizens of Georgia should determine to terminate the trust agreement, they would not be depriving Jefferson of any legal right.

The case is not before us upon its merits, and they have not been considered; but in our opinion appellant is entitled to a decision upon the merits, by the District Court, on the portions of the relief sought, above indicated.

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

HEYWARD v. GOLDSMITH.

In re APOLLO ELECTRIC STEEL CO.

(Circuit Court of Appeals, Third Circuit. January 17, 1921.)

No. 2606.

1. **Courts ⇐359—Law of state where case arose controls validity of claim against bankrupt.**
   In determining the validity of a claim against a bankrupt, the law of the state where the case arose must control.

2. **Damages ⇐40(2)—Anticipated profits may be recovered on breach of contract in Pennsylvania.**
   When profits are the direct and immediate fruit of a contract, they may be recovered as damages for the breach thereof in Pennsylvania.

3. **Bankruptcy ⇐318(2)—Purchaser held entitled to damages from bankrupt estate for breach of contract.**
   Where claimant negotiated for the purchase of 6,000 tons of steel ingots, and disclosed his customers when a question arose as to his financial responsibility, and an agreement was entered into directly with the customers for the sale of the ingots for $39 per ton, and the seller agreed to pay claimant the difference between $33 per ton, which he was in the first instance to pay the bankrupt, and $39 per ton, which he was to get from the customer, claimant fully performed, and was entitled to $6 per ton for ingots which seller was unable to deliver by reason of bankruptcy, unless precluded by the terms of the contract.

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

4. **Bankruptcy ⇐318(2)—Contract of sale held not to limit bankrupt's liability.**
Under a contract whereby a steel company, subsequently becoming bankrupt, agreed to pay claimant the difference per ton between the price "actually paid" by claimant's customer and received by the steel company, *held*, that there was no limitation on the liability of the steel company to claimant, but that the language of the contract was intended to limit the liability of the steel company against the possibility of the claimant's customer failing to perform its contract and pay for the steel delivered.

5. **Contracts ⇐310—Bankrupt cannot take advantage of own insolvency in contract.**
It must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to become unable to perform the contract.

6. **Bankruptcy ⇐318(2)—Adjudication equivalent of breach of executory agreement; "claim founded on a contract."**
Bankruptcy proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, and a claim for damages by reason of such a breach is founded on a contract, express or implied, within the meaning of Bankruptcy Act, § 63a4 (Comp. St. § 9647), and the damages may be liquidated under section 63b.

7. **Bankruptcy ⇐467—Matters of speculation not considered on appeal.**
On appeal from an order affirming an order of a referee disallowing claim in bankruptcy, a decision that claimant should not be allowed a certain specified amount per ton for steel ingots sold by bankrupt, where bankrupt failed to deliver, because molds to be furnished by claimant would be impaired, cannot be considered, where there is no testimony as to the extent of the impairment, and any impairment which the molds might have suffered is speculative.

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

In the matter of the bankruptcy of the Apollo Electric Steel Company; J. J. Goldsmith, trustee. From an order affirming an order of the referee disallowing his claim, Thomas Heyward, Jr., appeals. Order reversed, with direction to allow claim.

Ulysses G. Vogan and Charles F. Patterson, both of Pittsburgh, Pa., for appellant.

Edwin B. Goldsmith, of Pittsburgh, Pa., and Frank R. S. Kaplan, of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. This is an appeal by Thomas R. Heyward, Jr., from the District Court for the Western District of Pennsylvania, affirming an order of the referee disallowing his claim in bankruptcy. Heyward was negotiating with the bankrupt for the purchase of 6,000 tons of open hearth steel ingots. Some question arose as to his financial responsibility, whereupon he disclosed his customers, the receivers of the Central Iron & Steel Company, of Harrisburg, Pa., to the bankrupt, which, with the consent of Hayward, entered into an agreement with them directly for the sale of said ingots for $39 per gross ton, and also entered into an agreement with Heyward whereby it

agreed to pay Heyward $6 per ton, the difference between $33 per ton, which he in the first instance was to pay the bankrupt, and $39 per ton, which he was to get from the receivers.

The Apollo Electric Steel Company supplied, under the contract, ingots to the amount of 4,697 tons, leaving a balance of 1,303 tons, which it failed to furnish and deliver. The Apollo Electric Steel Company then became bankrupt, and Heyward filed his claim with the trustee in bankruptcy for $6 per ton on 1,303 tons, amounting to $7,818. The receivers of the Central Iron & Steel Company went into the open market and purchased 1,303 tons at a higher price than it was to pay the bankrupt, and filed its claim with the trustee in bankruptcy for the difference. This claim was allowed, but the claim of Heyward was disallowed, by the referee, and the District Court affirmed the referee's order. The case is here on appeal.

The referee held that the claimant was entitled to be compensated for his actual loss, which was measured by his actual expense in securing the contract for the sale of the ingots and in furnishing the molds, in accordance with the terms of the contract, together with reasonable compensation for his services therein. If the expenses thus incurred and the compensation due him for said services should exceed the amount which he had already received under the contract, this excess constitutes, in his opinion, Heyward's actual loss, for which his claim should be liquidated and allowed. If, however, what he had received equaled or exceeded said loss, he was not damaged, but disappointed, and in such case his claim resolves itself into the loss of anticipated profits, which may not be allowed.

The referee further held that the claim must be disallowed by reason of the terms of the contract between bankrupt and claimant, which, inter alia, provides that:

"The Apollo Electric Steel Company agrees to pay the said Thomas R. Heyward, Jr., the difference per ton between the price actually paid by said receivers and received by said Apollo Electric Company for said steel, under the terms of said contract, and the sum of thirty-three dollars ($33.00) per gross ton net."

In addition to the reasons contained in the opinion of the referee for disallowing the claim, the judge of the lower court added another, namely, the $6 per ton claimed by Heyward on every undelivered ton does not adequately express the amount of his loss, for the reason that the molds furnished by him under the contract would have been impaired in value in the manufacture of the 1,303 tons which the Apollo Electric Steel Company did not furnish, and therefore he did not lose that impairment.

[1, 2] This case arose in Pennsylvania, and must be controlled by the decisions of the courts of that state. If the $6 per ton claimed by Heyward be considered as anticipated profits, which seems to be the theory on which the claim was treated below, the decisions of the highest court of Pennsylvania abundantly support the proposition that, when profits are the direct and immediate fruit of the contract, they may be recovered as damages for the breach thereof. Imperial Coal Co. v. Port Royal Coal Co., 138 Pa. 45, 20 Atl. 937; Gallagher v.

Whitney, 147 Pa. 184, 23 Atl. 560; Puritan Coke Co. v. Clark, 204 Pa. 556, 54 Atl. 350; Wilson v. Wernwag, 217 Pa. 82, 66 Atl. 242, 10 Ann. Cas. 649; In re Duquesne Incandescent Light Co. (D. C.) 176 Fed. 785, and the cases there cited. This is the rule in the United States Supreme Court also. United States v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; Hinckley v. Pittsburgh Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967. If the amount in question be considered as profits, they were the direct and immediate fruit of the contract, and the claim on this theory should have been allowed.

[3] This claim, in our opinion, does not represent profits at all, but consideration. It was the full consideration which Heyward was to receive for performing the contract. The evidence shows that he fully performed, and is entitled to the consideration, unless precluded by the terms of the contract.

[4] The referee found that Heyward, having actually performed his part of the contract, had a right to the allowance of his claim to an amount sufficient to cover his actual loss, as above indicated, because of the failure of the bankrupt to perform its part of the contract, unless such allowance is precluded by the provision of the contract above quoted. The language of the contract, "actually paid by said receivers and received by said Apollo Electric Steel Company," he held, was "intended to limit the liability of the bankrupt to claimant, and the ingots actually delivered and paid for, as a protection against the possibility of the Central Steel Company failing to perform its contract and pay for all the steel delivered." This interpretation, we think, is exactly right. The Central Iron & Steel Company was in financial straits and was being operated by receivers. It was both natural and wise for the bankrupt to protect itself against liability to Heyward upon the failure of the receivers of the Central Iron & Steel Company to perform its contract in taking all of the ingots contracted for, or in not paying for those taken. The language did not contemplate the failure of the Apollo Electric Steel Company, and the trustee cannot take advantage of its failure.

[5, 6] In disallowing the claim, the referee lost sight of this construction of the provision, and treated it as though its purpose was to protect the Apollo Electric Steel Company against its own inability to perform. This was not its purpose. The bankrupt could not take advantage of its own insolvency, and the trustee may not hide behind the bankruptcy of the nonperforming company, and avail himself of a defense not open to it. It must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to become unable to perform the contract. Bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt in violation of his engagement in the contract, and bankruptcy proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executionary agreement. The claim for damages by reason of such a breach is founded upon a contract, express or implied, within the meaning of section 63a4 of the Bankruptcy Act of 1898 (Comp. St. § 9647), and the dam-

ages may be liquidated under section 63b. Central Trust Co. v. Chicago Auditorium, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580. There was an obligation on the part of the bankrupt to perform the contract with the Central Iron & Steel Company, which was made a part of the contract between the bankrupt and claimant. Since the claimant had fully performed, and was entitled to the consideration, the claim should have been liquidated and allowed.

[7] There is no testimony as to the extent of the impairment of the molds, which their use in manufacturing the ingots would have caused. In the absence of such testimony, any impairment which they might have suffered is speculative, and may not be considered by us.

The order of the lower court and the referee will be reversed, with direction to allow the claim.

CENTRAL WHARF TOWBOAT CO. v. FURNISS, WITHY & CO., Limited.

(Circuit Court of Appeals, First Circuit. January 4, 1921.)

No. 1474.

1. **Towage ⇐15(2)—Evidence held to show injury to steamer was by negligence of tug docking steamer.**
   Where claimant had contracted to dock libelant's steamers, and furnished a tug and a pilot, who had full charge of the docking operation and directed the movements of the tug, evidence *held* to show that the steamer struck the wharf nearly bow on because of the lack of ordinary care and skill which should have been exercised by the pilot in the use of the tug.

2. **Towage ⇐11(1)—Tug liable for failure to exercise reasonable care and skill.**
   While a steam tug is not a common carrier, nor an insurer, it is bound to exercise reasonable skill and care in everything relating to the work, until it is accomplished, and is liable for want of either to the extent of the damage sustained.

3. **Towage ⇐11(7)—Tug held liable for negligence of pilot furnished by tug owner and directing docking of steamer by tug.**
   Where claimant, which had contracted to dock libelant's steamers, furnished a tug and a pilot, and at the time of a collision with the wharf the steamer was not under her own steam, but was being docked by the assistance of the tug under direction of the pilot, who had charge of the whole operation of docking, the tug could be held liable for the negligence of the pilot in the use of the tug.

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Suit in admiralty by Furniss, Withy & Co., Limited, against a tug claimed by the Central Wharf Towboat Company. Decree for libelant (The Pejepscot, 217 Fed. 150), and claimant appeals. Affirmed.

Nathan W. Thompson, of Portland, Me., for appellant.

William H. Gulliver, of Portland, Me., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. [1] This is an appeal from a final decree in an admiralty case. The appellees made a contract with the appellant to dock its steamers upon their arrival at Portland, Me. The Daltonhall, one of its steamers, arrived at Portland on February 19, 1910, and anchored in the outer harbor, off the quarantine. She was to dock at Maine Central Wharf No. 3, to reach which it was necessary to pass through the draws of two bridges. Her captain went ashore and returned about 11:30 in the forenoon of that day aboard the tug Pejepscot, chartered and controlled by the appellant and in command of Capt. Swett. The appellant sent Capt. McDuffie with the captain of the Pejepscot to take charge of docking the Daltonhall, because of his longer experience in docking vessels at this particular wharf and his more intimate knowledge of the depth of water and the conditions to be encountered there.

It was a cold day, and when the chief officer attempted to weigh the port anchor of the steamer the windlass became unlocked because of the ice upon it, and the chain ran out until it was stopped by the compressor. After two attempts, he announced to the bridge that the anchor was "aweigh," and under Capt. McDuffie's order the steamer's engines were started "slow ahead" to hold her up to the wind, until the mate reported to the bridge that the anchor was "up." The engines then were started "half speed ahead," with the Pejepscot fast to the starboard side of the steamer, and both Capt. Anderson of the steamer and Capt. McDuffie were upon her bridge, and remained there constantly until the vessel was docked.

Immediately after passing through the draw of the second bridge it was necessary to turn the steamer sharply from a westerly to a north-northeasterly course. This was done by use of her own engines, with the assistance of the tug, and when she approached the wharf, in turning, her port anchor, whose shank had not been fully drawn up into the hawse pipe, collided with the cap log of the wharf and the hawse pipe was broken. This libel was brought to recover for the damage so sustained through the negligence, as it was claimed, of Capt. McDuffie, in charge of the tug and the docking of the steamer.

The contention of the appellant was that the steamer was negligent because its chief officer did not properly stow its anchor, but left it extending farther from the side of the bow than it would have extended if the shank of the anchor had been fully drawn into the hawse pipe, and that its position was unknown to Capt. McDuffie or the master of the tug, and also that, if Capt. McDuffie was negligent, the appellant was not liable for his negligence, although it admitted he had the sole charge of her docking.

Upon the question whether Capt. McDuffie knew the position in which the anchor was left or not, the testimony was conflicting. The chief officer of the steamer testified that, after he had reported "the anchor is up," he found difficulty in getting the shank of the anchor fully into the hawse pipe, so that its flukes would lie closely against the bow; that after he had been employed about 10 minutes in trying to get the anchor into this position, and had been unsuccessful, he was ordered by the captain of the steamer to leave it where it was.

The captain of the steamer testified that Capt. McDuffie said to him:

"'Is the anchor up?' He says, 'Keep the anchor where it is.' He said, 'We may want it; keep the anchors handy, we may want them.' So I hollered out to the chief officer and said, 'Never mind that anchor;' I said, 'We may require them.'"

The pilot denied that this conversation was had, or that he knew the shank of the anchor had not been fully drawn up into the hawse pipe. But, in view of the difficulty that the chief officer had been having in stowing the anchor, and that he had spent about 10 minutes in attempting to get its shank fully into the hawse pipe, and while doing this he was in full view of Capt. McDuffie, we think it more probable that such conversation occurred, and that Capt. McDuffie, from his long experience, knew that the anchor was not drawn up into the hawse pipe, so that its flukes would lie close against the bow of the steamer.

It was claimed by the appellant that the damage to the hawse pipe was caused by the anchor coming in contact with the cap log of the wharf as the steamer was being drawn alongside the wharf and nearly parallel to it, toward her berth, by means of a bowline operated by her own windlass.

The captain and the chief officer of the steamer, and also a stevedore who stood upon the wharf, testified that the anchor came in contact with the cap log of the wharf when the steamer was approaching it at an angle of from 40 to 45 degrees. The Daltonhall had a very bluff bow, and it is evident that she must have approached the wharf at about this angle to permit the anchor to come in contact with it. When the accident occurred, the Pejepscot was upon her starboard stern, pushing that toward the wharf. The chief officer testified that the bowline had not then been secured to the wharf, nor had the windlass been used to wind the steamer ahead; that a spring line had been thrown out, which had been made fast to the wharf, but the engines of the steamer had been stopped, and when the bowline was secured it was the intention to wind the steamer ahead by use of the windlass.

Stevedore Burns stood upon the wharf at this time, and he testified orally, so that the District Court had an opportunity to judge of his credibility. He was standing upon the wharf, he said, when the steamer approached it at an angle of about 40 degrees, and, seeing that the steamer would strike the wharf, he feared it would tear it up, and he might suffer some injury, and he stepped back to be out of the way.

We think, as did the District Court, that the accident must have happened by the steamer striking the wharf as she approached it at an angle of about 40 degrees, and we think, also, that her stern was then being pushed toward the wharf by the tug, which gave her a forward movement also.

It was not contradicted that the chief officer of the Daltonhall, who of stopping her, as might have been done at that distance from the wharf, and when she was moving very slowly, or should have been was standing on her bow, notified the pilot when the steamer was within 30 feet of the wharf, and that he replied, "All right;" but, instead moving slowly, if proper care had been exercised, and the tug was upon

her starboard quarter, she was allowed to forge ahead and strike the wharf. The steamer's engines were stopped at the time, and we think the accident happened because the Pejepscot, in attempting to push her stern around, imparted a forward movement to the steamer. Capt. McDuffie claimed that he did not know that the wharf had been struck, but testified that, as they approached the wharf, a man came out of the forecastle in an excited manner, and that Capt. Anderson of the steamer asked him what the man said, and that he replied:

"'I don't know; do you?' He says, 'She must have done some damage up forward there when she touched the wharf.' I says, 'When did she touch? I don't know it.'"

His attention was afterward directed to the testimony of Capt. Anderson, in which that officer stated that he felt the shock when the steamer hit the wharf, and that he called the pilot's attention to the man who rushed out of the forecastle, and asked the pilot what he said, as he didn't catch it, and that the pilot replied:

"'Oh,' he says, 'there can't be anything broken,' he said; 'We haven't touched hard enough.'"

And Capt. McDuffie admitted that he made this statement.

It was in evidence that Capt. McDuffie went out upon the wharf after the steamer was docked and looked at her bow to see what damage had been done. He himself testified that he did this, and that then he examined the scar which had been made on the cap log by the anchor striking it. There does not seem to have been any reason why Capt. McDuffie should have made his examination, if he was not aware that the steamer had struck the wharf.

In answer to the question, "Then why did you get out onto the wharf and make inquiries?" he replied:

"Because the captain asked me, and referred the accident to me. He said that we must have done some damage to the wharf, and I asked him, 'How and when?' He said, 'When she came bow on;' I said, 'When she came bow on?' Q. Go on. A. He says, 'While the tug was shifting.' I says, 'She went off 48 feet from the wharf; they wouldn't allow her to go bow on to the wharf.'"

Capt. McDuffie, who gave his testimony orally, testified that it would not have been good seamanship to allow the steamer to go bow on to the wharf. He was upon the bridge of the steamer, and had full charge of the whole operation of docking, and directed the movements of the tug.

[2] We are convinced from the testimony, as was the District Court, that the steamer did strike the wharf nearly bow on, because of the lack of the ordinary care and skill which should have been exercised by Capt. McDuffie in the use of the tug under the circumstances.

While a steam tug is "not a common carrier nor an insurer," it "is bound to exercise reasonable skill and care in everything relating to the work until it is accomplished, and she is liable for want of either to the extent of the damage sustained." The Margaret, 94 U. S. 494, 24 L. Ed. 146.

[3] But, if Capt. McDuffie did not exercise the ordinary care which he should have exercised under the circumstances, it is claimed by the

appellant that it is not liable for any errors committed by him, and cites in support The Sarnia (C. C. A.) 261 Fed. 900. But in that case the pilot, who was aboard the Sarnia, and on her bridge at the time of a collision, was managing that steamer under her own steam: while in this case the Daltonhall, at the time of the accident, was not proceeding under her own steam, but was being docked by the assistance of the tug, under direction of Capt. McDuffie. In the Sarnia the court said:

"The tug Palmer committed no fault, and when Barrett furnished the Sarnia with a pilot in the person of Capt. Slauer, he did not thereby promise a maritime lien on his tug for whatever errors Capt. Slauer might commit while standing on the Sarnia's bridge and managing that steamer with her own steam."

In the case of the Daltonhall, however, Capt. McDuffie had charge of the whole operation of docking her, and he was not acting as her pilot in managing her under her own steam at the time the accident occurred; but by his orders the tug Pejepscot was attempting to swing the stern of the Daltonhall in to the wharf. He also gave directions about putting out lines to the wharf; but, when the accident occurred, the movement of the steamer toward the dock was being effected solely by the use of the tug, and we think that the finding of the District Court was right that the tug must be held solely at fault.

The decree of the District Court is affirmed, with cost to the appellee in this court.

FRANCESCHI et al v. MERCADO.

(Circuit Court of Appeals, First Circuit. December 21, 1920.)

No. 1418.

1. **Bankruptcy ⇐372—Special order of abandonment of proceeding was necessary and must be made in same case.**
   Under Law of Civil Procedure of Porto Rico of 1886, arts. 410, 411, 412, 415, and 419, a special order of abandonment of bankruptcy proceedings was necessary, which order had to be made in the same proceeding, and not in another distinct action.

2. **Bankruptcy ⇐372—Proceeding not abandoned or extinguished for failure to prosecute when due to failure of court.**
   Under the law in force in Porto Rico in 1888 requiring the judge having cognizance of a bankruptcy proceeding to order a seizure of the property, name a receiver and trustee, and set a day for the meeting of creditors when making the order of adjudication and a royal decree of October 27, 1885, requiring the court to cite the parties to appear for the purpose of agreeing to proceed under a law which had recently gone into effect, where the court, after adjudging a partnership bankrupt and ordering a seizure of its property and appointing a receiver, never set a day for the appearance of the parties to choose the procedure, the proceeding was not abandoned or extinguished by the failure to prosecute it thereafter.

3. **Bankruptcy ⇐122—Court should have set new day for meeting of creditors when meeting not had.**
   Though the law in force in Porto Rico in 1888 only provided for two cases in which a meeting of creditors of a bankrupt was not held and made no provision for a third or subsequent meeting, the court having

cognizance of the proceeding was charged with the duty of setting a new day until the meeting was held.

4. **Bankruptcy ⇐51—Bankrupt partnership held incapacitated to exercise acts of ownership and heirs incapable to sue to set aside foreclosure.**
Where a partnership was adjudged a bankrupt under the laws of Porto Rico in 1888, and its property seized by receiver named by the court pending the appointment of a trustee at a meeting of creditors, the property was in custody of the law when subsequently levied on and sold at public auction to pay mortgagees, and the partners were incapacitated to perform acts of ownership, and could not recover the property, and their heirs had no legal capacity to sue to set aside the foreclosure and recover the property.

5. **Appeal and error ⇐78(4)—Judgment dismissing suit for want of capacity of plaintiffs is final and appealable.**
A judgment of the Supreme Court of Porto Rico dismissing a suit for want of capacity in plaintiffs to prosecute it was a final judgment from which an appeal would lie to the Circuit Court of Appeals.

6. **Appeal and error ⇐165—Right to appeal not waived by taking steps to obviate objection to maintenance and bringing new suit.**
The right of heirs of mortgagors to appeal from a decree, dismissing their suit to set aside the foreclosure of the mortgage and recover the property, for want of capacity to sue, because of bankruptcy proceedings, was not waived by obtaining an order extinguishing the bankruptcy proceedings and bringing a new suit for the same cause, as the order of extinguishment may not have been rightfully entered, and the second suit may be open to defenses not available in the first suit.

Appeal from the Supreme Court of Porto Rico.

Suit by Alejandro Franceschi and others against Mario Mercado e Hijos. From a decree of the Supreme Court of Porto Rico reversing a decree of the District Court in favor of plaintiffs, they appeal. Affirmed.

The opinion of the Supreme Court of Porto Rico, delivered by Mr. Justice Aldrey, was as follows:

In the year 1884 the partnership of Antonsanti & Franceschi, composed of Francisco Antonsanti and J. Angel Franceschi and doing business in the town of Guayanilla, mortgaged their "Rufina" plantation to Dionisio Torres Figueroa to secure the payment to him of $28,000 in the currency of that period, the last installment falling due in 1888.

A year later the said partnership filed a petition in bankruptcy, and on June 12, 1885, was adjudged a bankrupt by the court of first instance of Ponce, which ordered the judicial seizure of all the property, books, documents, and papers of the bankrupt firm, appointing Felix Tristani receiver, and set a day for the meeting of the creditors, at which meeting, pursuant to the law, the trustees in bankruptcy should be appointed. The referee and receiver appointed assumed charge of their offices and the latter took possession of the property of the bankrupt firm, including the Rufina plantation.

In the year 1895 the heirs of Dionisio Torres Figueroa brought suit to recover the amount owed on the mortgage by Antonsanti & Franceschi and summoned the receiver in bankruptcy, Felix Tristani, who, as such receiver, was in possession of the property. In that suit the Rufina property was ordered to be sold to pay the said heirs, and was sold at public auction to Mario Mercado as attorney in fact of Jose Trujillo Piza. Later the firm of Trujillo & Mercado became the owners of the property, and it now belongs to the firm of Mario Mercado & Sons.

Twenty years later the heirs of the two partners who composed the bankrupt firm brought suit to recover the said property together with the profits accruing from the time it was sold at public auction, amounting, as they al

lege, to some $400,000. They based their suit on the fact that the action which terminated in said sale was brought against the receiver in bankruptcy, Felix Tristani, who was not the lawful representative of the defendant firm. This action was disposed of by a judgment of the District Court of Ponce, which held that the suit brought by the heirs at Dionisio Torres Figueroa, the sale of the Rufina property, its record in the registry of property, and all subsequent records made were null and void, and ordered that the property be restored to the plaintiffs, but refused to adjudge that the profits accruing therefrom should be accounted for. The appeal now under consideration was taken by Mario Mercado & Sons from that judgment.

The first ground assigned by the appellants for the reversal of the judgment appealed from is that the lower court erred in holding that the plaintiffs had legal capacity to sue.

Although the appellants argue at length the proposition that, inasmuch as the firm of Antonsanti & Franceschi had been adjudged bankrupt the partners were incapacitated to manage the affairs of the partnership and to perform acts of ownership and that they never became and could not become capacitated, yet this is not the real issue in the case, for the plaintiffs neither allege nor claim that their parents were rehabilitated in the bankruptcy proceedings but that the petition became ineffective through failure to prosecute the bankruptcy proceedings since 1888, and that therefore the incapacity of their parents was removed, for which reasons they can sue for the Rufina property, as the heirs. In opposition to these averments by the appellees, the appellants contend:

(a) That it has not been proved that the bankruptcy proceedings were abandoned since November, 1888, or any other date prior to the institution of the foreclosure proceeding.

(b) That it has been shown that the bankruptcy proceeding was being prosecuted when the foreclosure proceeding was initiated.

(c) That a special order of abatement was necessary, that such order was never made by the court, and that it would have had to be made in the bankruptcy proceeding itself.

(d) That such order of abatement could not be made.

(e) That such abatement does not produce rehabilitation.

In order to dispose of these questions we must first set forth some facts which were shown from the admissions and the evidence in this action.

For different reasons the meeting of creditors called by the court at which the trustees in bankruptcy were to be appointed was not held on any of the three occasions set therefor, the last meeting having been set for May 1, 1886, This being the state of facts, and certain property belonging to the bankrupt estate having been sold to meet the expenses of the proceeding, the bankrupts moved to set aside such sales, and on February 18, 1888, the court granted a hearing on the motion with the understanding that when it had been disposed of a meeting of the bankrupts and the creditors should be convened in order to agree upon the procedure to be followed in the future. On January 1, 1886, a new law of procedure had gone into effect, and the royal decree of October 27, 1885, required the courts to call a meeting of the parties for the purpose of adopting a unanimous agreement in case they desired that the cases pending should be governed by the new law. The motion to set aside the sales was overruled on March 3, 1888, but no day was set for the meeting of the parties. On February 20, 1886, acting on the motion of the bankrupts that a new day be set for the meeting, the court decided that their motion should be disposed of when the parties appeared to elect the procedure to be followed.

By that time some of the personal property had been sold, as stated, the properties Faro and Colombano had been eliminated from the bankrupt estate by foreclosure proceedings in 1885, and the Rufina property, which was the only property remaining, was mortgaged. In point of fact, the junior mortgagees and the general creditors could not collect their claims, since all the real property had been taken from the estate, and this the plaintiffs acknowledge in the fourteenth count of the first complaint filed by them in this action.

No steps were taken in the bankruptcy proceeding subsequent to 1888, although the Rufina property continued in the possession of the receiver Felix Tristani until the year 1895, when it was attached and seized in the action brought by the heirs of Dionisio Torres.

The parties discuss at length the question of whether all of the record in the bankruptcy proceeding was produced at the trial, since the clerk of the court in which the record was filed testified that there was besides a mass of records which were not indexed, and that, although they relate to criminal matters, he could not swear that there were not some civil records among them, also regarding whether it is to be understood that, by reason of the continuation of the property Rufina in the possession of the receiver in bankruptcy until 1895, the bankruptcy proceeding was being prosecuted when the foreclosure proceeding against the Rufina property was instituted. We are of the opinion, however, that the fundamental issues are not these, but whether, considering that the last act approved was in 1888, it can be concluded in this case that the petition in the bankruptcy proceeding became ineffective four years later, and also that for that reason the incapacity of the partners of the firm which was adjudged bankrupt disappeared.

[1] According to article 410 of the Law of Civil Procedure, which went into effect in 1886, all actions at first instance shall be extinguished if not prosecuted within four years, unless (article 411) due to force majeure or to any other cause independent of the will of the parties, and the clerks (article 412) should give notice in order that the proper order may be officially issued. If the records were in the clerk's office, as was the case with the bankruptcy proceeding, since it has not been shown that they were filed, a special order of abandonment was necessary according to articles 412 and 419, which order had to be made in the same proceeding, and not in another distinct action, because a rehearing might be requested (article 415), because it affected the parties to the same, and because it produced the effect of terminating the action. 2 Manresa, Commentaries on the Law of Civil Procedure, pp. 274, 275. Judgments of the Supreme Court of Spain of April 3, 1903, 95 J. C. 152.

[2] But although the plaintiff appellees may be right in their contention that the abandonment of the bankruptcy proceeding could be declared in this action, to which the bankruptcy creditors are not parties, nevertheless such proceeding could not be held to be abandoned because the failure to prosecute was due to a cause independent of the will of the parties, inasmuch as the royal decree of October 27, 1885, charged the courts with the duty of citing the parties to appear to make their choice of procedure, and the court having jurisdiction of the bankruptcy proceeding never set a day therefor; this being the cause of the suspension of the proceeding as shown by the fact that the setting of another day for the meeting of the creditors was refused until after the said appearance for the election of procedure. Moreover, the judge having cognizance of said proceeding was required by article 1044 of the Code of Commerce of 1829, in force at the time, to order the seizure of the property, books, papers, and documents, to name a receiver and trustee in bankruptcy, and to set a day for the meeting of creditors, when making the order of adjudication of bankruptcy, which order the court made pursuant to the provisions of article 1028, although the bankrupts asked for a rehearing. These formalities are of such a nature that, being imposed upon the court by law, they do not cause the extinction of the proceedings if the action were suspended. Therefore in a case of bankruptcy in which, like the present, the first meeting of creditors, at which trustees were to be appointed, was pending, the Supreme Court of Spain held that, according to the text and spirit of article 412 of the Code of Civil Procedure, the cause of the abandonment must be chargeable to the negligence of the parties to the action, for which reason, as also held by this court and alleged in support of the appeal, the conditions in support of the extinction of the proceeding do not hold in regard to the general property dependent upon the acts which have to be performed officially by process of law in the collective interests of the persons to whom the estate of inheritance, bankruptcy, or insolvency may belong, and it is therefore clear that in a case of bankruptcy, the action being ex-

clusively confided to the court, although its exercise be not demanded by any of the parties, as well as the adoption of adequate means to secure the property of the bankrupt and to cite the creditors until the trustees who are to represent the collectivity are appointed at the first meeting held, there are no lawful grounds for attributing the abandonment to those who are entitled to await the citation, or, consequently, to hold that the proceeding has been extinguished to their prejudice. 96 Civ. Jur. 822.

[3] The fact that the judge complied with the requirements by calling the meeting on three occasions and that the law only provides for two cases in which the meeting was not held and makes no provision for a third or subsequent meeting is no answer to the foregoing, for, since it is the aim of the law that the meeting of creditors shall be held as soon as possible, and the court having cognizance of the bankruptcy proceeding is charged with that duty, it is to be supposed that, if for any reason the meetings should not be held, the judge is required to set a new day therefor until it is held.

There is also discussion as to whether the extinction of the proceeding carries with it the rehabilitation of the bankrupts, but we need not consider that question here, since, as there was no extinction, it is not necessary to determine whether it produced rehabilitation.

[4] By the adjudication of bankruptcy of Antonsanti & Franceschi their property was seized by the receiver named by the court for that purpose, as required by law, pending the appointment of the trustee in bankruptcy at the first meeting of creditors, and from the time of such seizure the property of the bankrupts was in custodia legis, and was so considered by all, and the property "Rufina" so remained until 10 years later, when it was levied on and sold at public auction to pay the mortgagees. Moreover, Antonsanti & Franceschi could not recover that property, because they were incapacitated to perform acts of ownership and because the property was in the custody of the court, and their heirs as such cannot now claim what their predecessors in interest had no right to demand. The demurrer by the defendants that the plaintiffs had no legal capacity to sue should have been sustained.

In view of this conclusion we need not consider the other questions raised, and the judgment appealed from should be reversed on said ground.

Asa P. French, of Boston, Mass. (Frank Antonsanti and José Tous Soto, both of San Juan, Porto Rico, on the brief, and José R. F. Savage, of San Juan, Porto Rico, of counsel), for appellants.

Hollis R. Bailey, of Boston, Mass., and Jose A. Poventud, of Ponce, Porto Rico (Antonio Castro, of Ponce, Porto Rico, on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

PER CURIAM. [5, 6] We think the motion to dismiss the appeal should be denied for the reason that the judgment of the Supreme Court of Porto Rico dismissing the suit for want of capacity in the plaintiffs to prosecute it was a final judgment from which an appeal would lie to this court. We also think the right to prosecute the appeal was not waived, even though the plaintiffs, appellants, after taking the appeal, may have applied to the District Court of Ponce and obtained an order extinguishing the bankruptcy proceeding for want of prosecution and have since brought a second suit against the defendants, appellees, for the same cause, in which they allege that the order of extinguishment in the bankruptcy proceeding restored their capacity to sue: (1) Because the order extinguishing the bankruptcy proceeding may not have been rightfully entered; and (2) because the prose-

cution of the second suit may be open to defenses which could not be availed of in the present suit.

Furthermore, a careful study of the record, of the opinions of the District and Supreme Courts, and of the extended arguments and briefs of counsel convinces us that the conclusion reached by the Supreme Court on the question of the legal capacity of the plaintiffs, the appellants, to prosecute the suit and the subsidiary questions relating thereto which it passed upon was right, and that, in view of the careful and painstaking way in which the matter was considered by that court, nothing would be added by a restatement of the case and a discussion of the points decided.

The judgment of the Supreme Court of Porto Rico is affirmed, with costs to the appellees.

DOHERTY v. PENNSYLVANIA R. CO.

DOHERTY et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

Nos. 73, 74.

1. **Towage ⇐11(1)—Tug's responsibility continuous, until barges return to starting point.**
   Where defendant railroad's tugs towed barges to South Amboy, loaded them with coal, and returned them to New York, without the barge owner intervening during the voyage, the tug's liability is continuous until the barges were returned to New York, and includes liability for injuries sustained while moored at South Amboy.
2. **Towage ⇐11(1)—Tug must exercise reasonable care to avoid injuring barge.**
   Ordinarily a tug is neither a common carrier nor an insurer, but must exercise reasonable skill and diligence to avoid injury to its tow.
3. **Towage ⇐11(10)—Tug held liable for injuries sustained by moored barges.**
   Evidence that a tug, in mooring barges, disregarded Weather Bureau storm signals, and was dilatory in furnishing assistance to the barges, etc., *held* to establish the tug's negligence, rendering it liable for injuries sustained by the barges pounding against each other.

Hough, Circuit Judge, dissenting.

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

Libels by Mary F. Doherty, owner of the barge Hercules, and by Mary F. Doherty and William Doherty, against the Pennsylvania Railroad Company. Decrees for libelants (261 Fed. 529), and respondent appeals. Affirmed.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Charles E. Wythe, both of New York City, of counsel), for appellant.

Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. These cases were tried together, and on appeal were heard together in this court, and now will be determined together in one opinion.

The libelant Mary F. Doherty was and is the owner of the barge Hercules, and the respondent was and is the owner of various steam tugs engaged in towing vessels between New York and South Amboy, N. J. It is complained that in April, 1917, the respondent agreed to safely tow the Hercules from New York to South Amboy, there to load the barge with a cargo of coal and then tow the same back to New York City, and that all shiftings of the barge were to be performed by the respondent; that pursuant to the contract one of the respondent's tugs, on April 4, 1917, took the Hercules in tow with other boats, at New York, the tow being made up in tiers of several boats abreast, and started for South Amboy; that on account of the condition of the weather the tug tied up the tow at Bayonne Stakes and remained there for a time, and then resumed the trip to South Amboy; that the wind was blowing very strong, from the eastward, and that storm signals were displayed from 10 a. m. of April 5, and on the arrival of the tow at South Amboy at 8 p. m. on that day; that the wind blew a gale for hours, and that the tug placed the Hercules at what is known as the Stakes, and that the rough sea caused the barge to pound against the other boats and barges lying at the stakes; that the tug left the Hercules pounding and unprotected in the heavy sea and wind that prevailed.

The following excerpt from the testimony shows how the Hercules was placed:

"Q. When you got to South Amboy, where was your boat placed? A. Over in the stakes.

"Q. Do you know how many boats were in the tow with you going down? A. There were about 25 or 30 boats.

"Q. They were all light, were they? A. They were all light boats.

"Q. They were placed at the light stakes at South Amboy? A. Yes; there were some more boats laying along there before we arrived there.

"Q. How were these boats placed along the stakes? A. In a tier.

"Q. Then next to the stakes were your boats lengthwise, or head on? A. No; side on.

"Q. There was a line of boats against the stakes, and other boats were made fast outside of them? A. Sure.

"Q. How many boats were made fast outside of the stakes and between your boat and the stakes? A. 10 or 12 boats.

"Q. Do you mean 10 or 12 tiers? A. Yes, sir.

"Q. Were there 10 or 12 rows of boats between the stakes and your boat? A. 10 or 12 boats in one tier right across the river.

"Q. Were those boats all evenly spaced, one outside of the other, or were tney mixed up? A. They were laying in one tier, and they were even in there then, one outside of the other.

"Q. That was the first row of boats? A. That was the first row of boats.

"Q. Then there were boats outside of them? A. Yes; they were laying about 10 feet ahead of us; 10 or 12 feet between the tiers."

It is alleged that as a result of this pounding against the other boats the Hercules was damaged, the lines parted, and the fenders on the barge were carried away. It is claimed that the damages which followed were due to the respondent's negligence. Damages were

asked in the amount of $1,700. A decree has been entered in favor of the libelant in the amount of $1,724.87.

The libelants Mary F. Doherty and William Doherty, who were and are the owners of the barge Frances Doherty, complain that the respondent towed her from New York to South Amboy, where she arrived on April 4, 1917, and she was moored about in the center of Pier B. It appears that the respondent then began to load her with coal, and that on April 5, about two o'clock in the afternoon when she had received on board about 622 tons of coal, the respondent towed her to the end of the pier and there made her fast. At that time there were various other boats and barges lying across the face or end of the dock; one barge lying under the stern of the Doherty, the barges lying stern to stern. The respondent placed another barge outside the Doherty, so that it lapped on the Doherty and the barge under the Doherty's stern. At the time the wind was blowing very strong creating quite a sea, which caused the barges and boats to pound one another and against the face of the dock.

On the same evening of April 5, at 5 o'clock and again at 7:30 o'clock, the master in charge of the Doherty informed the respondent that harm was likely to result from the situation in which the barges were placed, and was informed that a tug would be telephoned for to remove the barge from her mooring; but no tug came and as the storm increased in intensity the master again, at 10:30 o'clock, protested and requested that his barge should be removed to a place of safety, and was again promised that it would be done. It was done that night, but not until after 11 o'clock, and not until after the Doherty had suffered extensive damage from the pounding she had received, and in the act of removing her she was struck a violent blow, which broke her rail. A decree has been entered in favor of the libelants in this case for $1,487.89.

It is said that, when the respondent safely towed the Hercules and the Doherty to their destination at South Amboy and furnished them with a usual mooring place, safe at the time of their mooring, the mutual relations existing between tug and barge ended then and there. Such an argument it is thought finds support in the dissenting opinion in The William Guinan Howard, 252 Fed. 85, 87, 164 C. C. A. 197. But there is a plain distinction between this case and that, as assumed in the dissenting opinion. In these cases the respondent was to take barges to South Amboy, load them with coal, and return them to New York City. The master of the Doherty and the master of the Hercules had nothing whatever to do with the movements of their respective boats from the time when respondent took them in tow until they were returned to New York. The movements of both barges during the whole intervening period were controlled by the respondent alone.

William H. Doherty, who, with his mother owns the Doherty, and whose mother is the owner of the Hercules, and who makes the arrangements with the respondent for taking these boats to South Amboy and for their return to New York with coal, testified as follows on the direct examination:

"Q. How did you make those arrangements, in order to get these boats down there and back again? A. I simply call up the Pennsylvania towing office and report the boats; I give the name of the boat and the location, where she is lying, and they take it to South Amboy for coal.

"Q. Is that all you have to do from the time the boat is reported until they return to New York? (Objected to.)

"Q. Well, is that all you did on this occasion? A. Yes; that is all I did on this occasion.

"Q. What is the method of paying for the towing of the boats down there and the return to New York? A. That is charged against the bill of lading, and it is deducted out of our freight bill then.

"Q. That is, it eventually comes out of you. It is paid by the Pennsylvania, and deducted from your bill of lading, and is taken out of your freight money? A. Yes.

"Q. Who does the trimming and loading of the boats down at the coal yard? A. The railroad company.

"Q. You have nothing to do with that? A. No, sir.

"Q. Do you have anything to do with the trimming of the boat while she is around the coal docks? A. No, sir; we report her in New York, and that is the last we do with her until she gets back here.

"Q. Until she gets back here? A. Yes."

And on cross-examination he testified as follows:

"Q. Do I understand that in these particular instances of the Doherty and the Hercules that the only thing you did was to telephone the Pennsylvania omce that these boats were to be towed to South Amboy? A. Yes.

"Q. And do you mean to say that that is all the information or instruction that you gave to the Pennsylvania until these boats got back? A. Yes; that is all we ever do.

"Q. That is all you ever do? A. Yes.

"Q. Did these two boats come back with coal? A. Yes.

"Q. Whose coal was it? A. I don't remember that right now; I didn't look that up.

"Q. Was it your coal? A. No; we just transport it; that is all.

"Q. You transport coal for the owners of the coal? A. For the owners of the coal.

"Q. Do you mean to say that all you do is to tell the Pennsylvania people that you have a boat that wants to be taken to South Amboy, and they automatically put their coal in that boat and send it back? A. Yes."

[1] Under such circumstances the liability resting upon the respondent would be continuous from the time they were taken in tow at New York until they were returned to New York. If the respondent was negligent in its exercise of ordinary care over the barges during the period of its responsibility it must answer in damages. The dissenting opinion in the Howard Case took the position that at the time the barge went adrift she was not in charge of the corporation held responsible for her injuries. The distinction is vital.

[2] In the ordinary contract of towage, a tug is neither a common carrier nor an insurer. Therefore the highest possible degree of skill and care is not required. But the owners of a tug are bailees for hire. Bust v. Cornell Steamboat Co. (C. C.) 24 Fed. 188; The D. Newcomb (D. C.) 16 Fed. 274; The Merrimac, 17 Fed. Cas. 126, No. 9,478; The Princeton, 19 Fed. Cas. 1342, No. 11,433a, affirmed in 19 Fed. Cas. 1344, No. 11,434. As such they must exercise reasonable skill, care, and diligence in all that relates to the work until it is accomplished. Eastern Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477; The Margaret v. Bliss, 94 U. S. 494, 24 L. Ed. 146; The Printer, 164

Fed. 314, 90 C. C. A. 246. In the instant cases, as the respondent was under contract of bailment to take the barges to South Amboy, to load them there with coal, and to return them so loaded to New York, it is evident that the contract did not end when the boats were moored at South Amboy. The duty to exercise reasonable skill, care, and diligence continued as long as the barges were in the respondent's possession, and the services contracted for remained unperformed.

[3] That the respondent was negligent in the instant cases, and failed to exercise the care which a man of ordinary prudence would use under like conditions, seems to us evident from the record. The negligence appears from the following considerations:

1. In Nicholson v. Erie Railroad Co., 255 Fed. 54, 166 C. C. A. 382, we held it to be some evidence of negligence that the navigators of the respondent paid no attention to the official warnings of the storm which was the cause of the libelant's damages. In the present cases there is such evidence in the record. The man who was in charge for the respondent's wharf at South Amboy, and who said that he could have seen the storm signal which was displayed at Perth Amboy, if he had looked, testified that he did not know whether, on April 5th, a storm signal was displayed or not:

"Q. You didn't pay any attention one way or the other, did you? A. No, because I was busy."

And from 2 o'clock in the afternoon on until 8 o'clock that night, when the storm began, it was evident to the captains of the boats that a bad storm was coming up. It was not until 8 o'clock at night that it broke in full force. The respondent's agents paid no attention to the signals of the Weather Bureau, and they took no notice hours afterwards of the weather indications, which the ordinary seamen had no difficulty in discerning.

2. In the Nicholson Case we also said it was further evidence of negligence that, at a time when danger was imminent, the railroad company did not more swiftly furnish assistance to any boat in its charge. And we held that a delay of two hours in sending a tug to render assistance, when a high wind was known to be injuring vessels in an exposed position, was not excused by anything in the record. In the present case for five hours ordinary seamen foresaw the storm and the respondent had repeated calls for assistance.

3. To leave these boats at the light stakes all the afternoon and early evening, with knowledge that a severe storm was approaching, without removing them, or as many as could be removed, to a place of safety inside the slip, was negligence.

The decrees in both cases are affirmed.

HOUGH, Circuit Judge (dissenting). This is an action for breach of contract, and, if the contract were as stated in the majority opinion, the rest follows as matter of course.

The agreement as found is one for the assumption by respondent of a towboat's liability for the round trip from New York to South Amboy and return, including any and all periods of waiting at the latter place. No such contract is alleged in the libel, and the proof

is of a bargain as familiar in this harbor as is the towboat itself. That the well-known "coal order" long used in forms substantially alike by all the towing lines hauling coal from Raritan Bay and the Arthur Kill to New York, imports an agreement to bring into the shelter of a slip all the boats awaiting loading or towing whenever the weather is bad, is the result of this decision.

To this result I cannot agree—not because I differ as to any point of law stated, but because I do not think any such bargain was ever made.

DE BAUR v. LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 54.

1. **Master and servant ⟸180(1), 204(1)—Federal Employers' Liability Act abrogates fellow-servant doctrine, but saves defense of assumption of risk.**
   The federal Employers' Liability Act (Comp. St. §§ 8657–8665) abrogates the common-law fellow-servant doctrine, by placing the negligence of a coemployé on the same basis as the negligence of employer; but it saves the defense of assumption of risk in cases other than those where the violation of a statute enacted for the safety of employés may contribute to the injury.

2. **Master and servant ⟸137(4)—Engineer required to use ordinary care to stop on discovering employé's peril.**
   Under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), if an engineer of a train discovered an employé on the track in a position of peril, it was incumbent on him to exercise ordinary care to stop his train and prevent the accident.

3. **Master and servant ⟸286(31)—Evidence of engineer's negligence as to flagman sitting on track held insufficient to go to jury.**
   In an action for death of a flagman, struck by a train drawn by an engine with the tender first, *held*, that the court properly refused to submit the case to the jury on the ground of plaintiff's failure to sustain the burden of proof of establishing negligence, in that the engineer should have seen the deceased, who was sitting on the track apparently unconscious of danger.

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

Action by Esther De Baur, as administratrix, etc., against the Lehigh Valley Railroad Company. From a judgment dismissing the complaint, plaintiff brings error. Affirmed.

The proofs in this case established that the defendant below operated a railroad running into Buffalo, with two main tracks running east and west, the southerly one of which is the east-bound main track, and the northerly one of which is the west-bound main track. West of Rush Street station, on this railroad, there is the Haslop railroad crossing. On August 16, 1919, at about 4:30 p. m. on a bright, sunny day, the husband of the plaintiff below was struck at a distance of about 18 or 20 car lengths distant from this crossing, and while on the east-bound track. Just west of this point the tracks curve sharply to the southwest. The deceased was a member of a crew of a work train which was engaged at the time, in grading for an extension of a siding between Rush station and Rochester Junction, both of

which were on this main line of the defendant below. The crew were engaged in operating a steam shovel in loading earth on the work train. The train was on the east-bound main track, and it became necessary, from time to time, to move it out of the way to let the east-bound trains go by. For this convenience, the work train was either backed into a siding located at Rush station, or a siding at Rochester Junction, whichever one happened to be nearer to the location of the work train.

The deceased was assigned to duty as a flagman. He was furnished with a red flag, and at the time in question was instructed by his conductor to take a position to flag the rear end of this work train. The conductor says: "The order I gave him was when we were coming back to get around on that curve far enough to protect us if there was anything coming this way." The deceased was located, when struck, on the curve or about 1500 feet nearer the train than the position which it is claimed he should have assumed in order to have a clear view of the straightaway track on which the east-bound trains would approach before reaching the curve. When seen, just before he was struck by the engine, he was seated on a rail of the track, with his arms on his knees and his head bent, as if asleep; at least, apparently unconscious of the approaching danger. A train, with an engine tender first, approached the west around the curve. It was a local, and ran from Manchester to the P. & L. Junction. There were no turntables there, and it became necessary to run the train back (on the return trip) with the tender first. The train was made up of about 38 cars. In this position, the engineer was stationed on the left-hand side, facing the east, instead of the right-hand side. The fireman was on the right-hand side, except when firing his engine. This made the view of the engineer in approaching the Rush station considerably limited because of the curve of the track.

The head brakeman sat on the tender, not because he was ordered to do so by a superior, but for reasons of his own. He said it was a hot summer day, he had been sweating, and he wished to cool off. The train stopped at the Hall signal west of Rush station. This signal was located about half or three-quarters of a mile from the point where the deceased was subsequently struck. It was around the curve on the straight track. The signal at Hall showed red, which was an indication that there was something in the block ahead. The train, then, after stopping, started up and passed the signal. It did, however, stop long enough to honor the signal, and then went ahead in accordance with the rules of the company, proceeding at about 15 or 16 miles an hour. The brakeman, seated on the tender, testified that he could see but 7 or 8 cars ahead, as he came to the curve. He said he saw the work train near Rush, but saw no one on the track around the curve. The bank and treetops obstructed his view. His first sight of the deceased was about 6 or 7 car lengths away. He testified that as he came near he saw the deceased sitting on the track, with his feet inside the rail and his elbows resting on his knees, and head down on his arms. He at once called out to him, and when the deceased did not move he gave a signal to the engineer, who responded by blowing his whistle twice. The deceased did not move, and then a signal was given to stop; but it was too late, and the deceased was struck.

At the time the signal to stop was given the train was about one car length away. The brakes were applied when 3 or 4 car lengths away, but before the train stopped about 18 cars had passed over the spot where the deceased was struck. At the time the fireman was engaged in attending to his fire, and was stationed on the deck of the engine as the train rounded the curve. He was not in a position to, and therefore did not, see the deceased. It is also testified that whistles were blown for the Haslop crossing, two long and two short blasts, at the whistling post 800 feet from the point of accident; also that a whistle was blown when the train stopped at the Hall signal, about half a mile away from the point of accident.

The plaintiff below called as witnesses the conductor of the freight train which ran over the deceased, the conductor of the train to which the deceased was attached, the brakeman, who sat on the tender, and an employé in the office of her attorney, who testified to making certain observations at

the point of the accident about a year later. After this proof was submitted, the District Judge granted a motion for a nonsuit.

There was no evidence offered to show that the engineer saw the deceased at the time, or could have seen him, exercising due care, in time to have prevented the accident. All that is offered as to this is the testimony of an investigator, who said that he made certain observations, about a year later, while in a standing position at the point where the deceased was struck. There was no evidence to indicate in what space a train, made up of cars as the train in question was, with the kind of brakes and condition of the track, could have been stopped. Counsel for the plaintiff below contends that the jury should have been permitted to conclude from the foregoing facts that the deceased was ill and unable to take care of himself at the time of his death, and that by the exercise of ordinary care and due diligence those in charge of the train could and should have observed the deceased in his predicament and have stopped the train in time to have avoided his death.

There was no evidence to determine whether the deceased was asleep or unconscious at the time. He reported to work in the morning, apparently in good health, and assumed his duties. There was evidence, however, that of his widow, who said that he suffered from cramps of the stomach for a period of a year before the accident, and that at such times, when suffering from these attacks, he would bend up and place his hands upon his stomach.

Hamilton Ward, of Buffalo, N. Y. (Irving W. Cole, of Buffalo, N. Y., of counsel), for plaintiff in error.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y. (James McCormick Mitchell, of Buffalo, N. Y., of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge (after stating the facts as above). [1] The action is brought under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), and it is conceded that the plaintiff below is entitled to the benefit of the provisions of this act. If the defendant below was negligent, it must be predicated upon fault or neglect on the part of the engineer in charge of the train which struck the deceased. The statute permits a recovery against the carrier for death resulting in whole or in part from the negligence of its officers, agents, or employés. It abrogates the common-law rule, known as the fellow-servant doctrine, by placing the negligence of a coemployé upon the same basis as the negligence of an employer. It, however, saves the defense of assumption of risk in cases other than those where the violation by the railroad company of the statute enacted for the safety of employés may contribute to the injury or death of the employé. Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

The negligent act of the coemployés stands to the question upon the same basis in predicating liability, as the employer's own negligence, and it will be noted that the act permits a recovery where the death results in or from the negligence of any of the employés of the road.

"We must look at the situation as a practical unit rather than inquire into a purely logical priority." Union Pac. R. R. v. Hadley, 246 U. S. 331, 38 Sup. Ct. 319, 62 L. Ed. 751.

[2] Upon what evidence here could negligent operation be predicated? The duty which was owed by those in charge of the train which

struck the deceased was that, when the deceased was first seen sitting on the track, the engineer was obliged to use all means at his command to stop the train. If he discovered the deceased in his position of peril, it was incumbent upon him to exercise ordinary care to stop his train and prevent the accident; but from the foregoing facts it is apparent that the engineer did all that could be expected of a reasonably prudent man under similar circumstances. He honored and obeyed the signals, blew his whistles at the customary points, and proceeded with a reduced speed of 16 to 18 miles an hour over the track in the block where the danger signal was shown. He did not know of the presence of the deceased in his position of peril until informed by the brakeman seated on the tender. His position in the cab was such that he could not see that far ahead on the track because of the embankment; also the curve. As soon as he was advised of the deceased's position, he did all that he could do to bring his train to a stop. But he received notice of the deceased's peril too late.

This testimony is offered solely as the plaintiff's evidence. There is no evidence to show that the deceased was, in fact, sick. We are only asked to infer that solely from his sitting, apparently unconscious of the approaching danger. Nor is there evidence to indicate that the engineer from his position, if exercising due care, could have seen the deceased in his position sooner than he did. The testimony of the employé of the attorney of plaintiff below, who says that he looked from the point where the deceased was sitting on the track and could see a mile, is not helpful; he was not in the position of the engineer, who was riding with the tender first, and thus his view obstructed. The witness' view was not the view that the engineer had, and therefore is not instructive. Nor is there evidence to show in what space the train, with a similar number of cars, brakes, and rail of like condition, could have been stopped.

The case differs very materially from Bragg v. New York Central R. Co., 228 N. Y. 56, 126 N. E. 253. In that case it appeared that the deceased worked 29 hours of continuous labor and fell asleep from exhaustion on the track. The track to the west of the deceased, from which the train which struck him came, was practically straight, with a slight grade, for nearly a mile, and on a bright sunny day, and with dry rails, the train came on and struck him. There was expert testimony indicating that the train could have been stopped, within the distance, in time to avoid the accident. These facts distinguish that case from the case at bar.

[3] The defendant below is liable if it could have avoided the death by the exercise of ordinary care after actually discovering his perilous situation. We think the engineer here did all that could be expected of him under the circumstances, and that the plaintiff below has failed to sustain the burden of proof of establishing negligence on the part of the defendant below, which would require the District Judge submitting this case to the jury.

Judgment affirmed.

NICOLL v. PITTSVEIN COAL CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 65.

1. **Customs and usages ⊂=7—Trade usage held reasonable and legal.**
A usage in the business or trade of mining and selling coal of apportioning the coal pro rata among buyers when sufficient cars cannot be obtained to ship all that has been sold complies with the requirements of reasonableness, legality, etc.

2. **Customs and usages ⊂=12(1)—Party's knowledge of particular trade usage immaterial.**
That a buyer of coal knew of a trade usage in the business or trade of mining and selling coal to apportion coal among buyers pro rata, when sufficient cars could not be obtained to deliver all contracted for, was immaterial.

3. **Customs and usages ⊂=1—Usage to apportion coal among buyers pro rata held not established custom, but trade usage.**
A so-called custom in the business or trade of mining and selling coal to apportion coal pro rata among buyers when sufficient cars could not be obtained to deliver all contracted for is not an established custom, but a trade usage.

4. **Customs and usages ⊂=1—Custom is part of common law, and usage is the law of the case.**
A lawful custom is itself part of the common law, while a lawful usage proved and shown to affect both parties is the law of their case.

5. **Contracts ⊂=152—Parties may employ words and phrases in particular sense.**
The individual parties to a transaction may employ words or whole phrases in a particular sense, irrespective of their ordinary sense.

6. **Customs and usages ⊂=21—Question is one of fact as to whether words were used in special sense.**
When the parties to a contract are claimed to have contracted with reference to a trade usage, there is only a question of fact as to whether the parties were using words in a special mutual sense.

7. **Customs and usages ⊂=19(2)—Ambiguity with respect to number, quantity, etc., unnecessary to admit evidence of usage.**
With respect to number, quantity, amount, or measurement, ambiguity in the language of a contract is not necessary to let in evidence of usage.

8. **Customs and usages ⊂=21—Notice on letter heads held to make incorporation of usage a question for the jury.**
Where a contract for the sale of coal was made by telephone and confirmed by letter, and the buyer's letter head bore a notice that all agreements were contingent upon delays of carriers and the seller's that contracts were subject to car supply, it was a question for the jury whether the parties intended to incorporate a trade custom to apportion coal among contract buyers pro rata, when sufficient cars could not be obtained for delivery of the full amount sold.

9. **Sales ⊂=88—Notice on letter head not part of contract as matter of law.**
Where a contract for the sale of coal was made by letter, notices on the letter heads of the parties that agreements were contingent upon delays of carriers and subject to car supply were not, as matter of law, incorporated in and made part of the contract.

10. **Customs and usages ⊂=12(1)—Evidence of acquiescence held admissible on question of whether usage was part of contract.**
On the question of whether the parties to a sale of coal intended to contract subject to a usage in the trade to apportion coal pro rata among

buyers, when sufficient cars could not be obtained, evidence that the buyer had acted as if in acquiescence to the custom was admissible, as showing the practical interpretation of the contract.

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

Action by the Pittsvein Coal Company against Benjamin Nicoll, doing business as B. Nicoll & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Plaintiff below (herein called Pittsvein Company) mines and sells coal. The defendant Nicoll is a wholesale dealer in that commodity.

On November 30, 1915, Nicoll wrot to Pittsvein Company:

"This will confirm telephonic conversation of this morning in which we have bought from you and you have sold to us 50,000 gross tons of your Pittsvein Fairmount gas coal * * * to be shipped in equal monthly instalments during twelve months beginning December 30, 1916. * * * We await your letter confirming this sale."

On the following day Pittsvein Company answered, agreeing (so far as is material to this case) to the above bargain.

Both of these letters were on the business letter paper of the respective parties, and Nicoll's paper contained the following, printed at the head thereof:

"All agreements are contingent upon strikes, accidents, delays of carriers and other causes beyond our control. Monthly settlements by actual railroad weights by scales nearest loading point."

The Pittsvein paper was headed by the following notice printed in red ink:

"Quotations subject to change without notice. All orders and contracts subject to car supply, strikes, accidents and causes beyond our control. Railroad initial weights the basis of all settlements."

A literal compliance with the written portion of the above paper writings would have meant the delivery to Nicoll of 4,166 tons of coal per month; but down to and including August, 1916, that amount of coal was never delivered in any month, but for what Nicoll did receive he paid.

During September-November, 1916, Pittsvein Company delivered to Nicoll, all told, no more than about 8,400 tons, and for somewhat more than one-half of that amount Nicoll refused to pay at all. Whereupon Pittsvein Company brought this action to recover the contract price of said coal so delivered and unpaid for.

The complaint states the matter as two causes of action: (1) Declaring simply as for goods sold and delivered; and (2) setting forth the delivery of the same coal at an agreed price and averring:

"That in the business or trade of mining and selling coal there is an established custom that all contracts or agreements for the sale or delivery of coal are subject to the contingency that the owner or operator of the mine or the seller upon the exercise of reasonable diligence can obtain sufficient railroad cars for the shipment of the full amount of the coal which he has contracted to deliver and that if sufficient cars cannot be obtained the coal shipped shall be apportioned pro rata among the holders of contracts with the owner or operator of the mine or the seller for delivery of coal so that each shall obtain a just and fair pro rata share of the coal shipped; that the said contract or agreement between the plaintiff and the defendant was intended by the parties to be and was subject to the said custom of the trade; that the said contract or agreement expressly provided that it was subject to car supply, delays of carriers and to causes beyond the control of the parties thereto."

The second cause of action then further alleges performance of all conditions by Pittsvein Company except that during September-November, 1916:

"It became and was impossible for the plaintiff to secure sufficient railroad cars to ship the full amount of coal which the plaintiff had contracted to deliver. That at all such times the plaintiff made every reasonable effort to

secure an adequate supply of cars, but during such period was unable to obtain an adequate supply of cars, and the plaintiff, in accordance with the said established custom of the business, apportioned the coal, shipped in the cars actually obtained, among the defendant and other holders of contracts for the plaintiff's coal, so that each should and did obtain his just and fair pro rata share of the coal which the plaintiff was able to ship from its mine."

The above-quoted allegations of the existence of a custom and of fair compliance therewith, Nicoll in his answer specifically denied and served a counterclaim demanding, in substance, damages for the failure of Pittsvein Company to ship his full monthly quota of 4,166 tons during the period September-November, 1916.

Pittsvein Company by its reply defended against the counterclaim by reason of the custom aforesaid, which it pleaded in the same manner as in its complaint. At trial there was no contention as to the amount or times of shipment, quantity delivered, or price.

The trial judge substantially sent to the jury as the sole contentious matter for their determination (in his own language), "What was really understood and entered upon between the parties as their contract?" To assist the jurors in answering this question the court in effect recommended them to consider the notices or headings printed at the top of the letters, confessedly constituting the written contract or the written portion thereof; it also admitted evidence tending to show the practical construction of this contract during the months prior to September, 1916, to the effect that Nicoll had during that period acted as if in acquiescence to the custom of delivering to customers only so much coal as was their monthly quota of the amount for which the miner could procure carriage; finally the court admitted direct evidence from the trade of the existence of the general custom as above pleaded by the plaintiff.

Nicoll (as the court instructed the jury), contending "that the written part only of the letters constituted entirely and wholly the contract between them," duly objected, and excepted to the admission of the foregoing evidence, and all of it.

The jury rendered a general verdict for the full amount claimed by the plaintiff, and to judgment accordingly defendant below took this writ.

Truesdale & Nicoll, of New York City (Courtlandt Nicoll, of New York City, of counsel), for plaintiff in error.

Allan McCulloh, of New York City (Clifton P. Williamson and James A. Stevenson, Jr., both of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). We are presented with 82 assignments of error, a number exceeding in uselessness any yet observed in a civil cause. Both in quality and quantity they are open to the criticisms of Fitter v. United States, 258 Fed. at page 569, 169 C. C. A. 507. We shall notice only such as have been referred to in briefs, and not all of them.

This case presents with an interesting fullness some parts of the large question as to how far and in what manner a written document commonly called a contract, entered into between persons engaged in substantially the same business, couched in simple English words, and relating to matters easy of comprehension by men far removed from the actors in the transaction, can or may be affected by words not written in the contract, or acts not described therein.

[1, 2] Some matters, judicially discussed in reported decisions, may

be laid aside, as either not material or concluded by verdict. There was nothing indistinct or hidden about the notices printed on the business paper of the parties; they were as plain and obvious to the eye as any script or typewriting on the sheet. The custom, or rather usage, exists, and plaintiff below lived up to it honestly and fairly; and in its nature it complies with the requirements of reasonableness, legality, etc., recently again enumerated in Eames v. Claflin, 239 Fed. 631, 152 C. C. A. 465; indeed its legality has before now been recognized, when stated in the body of a contract writing (McKeefrey v. Connellsville, etc., Co., 56 Fed. 212, 5 C. C. A. 482; Luhrig v. Jones, 141 Fed. 617, 72 C. C. A. 311). It may be added that defendant below knew of the custom asserted, though he heartily disapproved of it—at least when sought to be enforced against him on a rising market—but this is immaterial. Silverstein v. Michau, 221 Fed. 55, 137 C. C. A. 79; Neer v. Lang, 252 Fed. 575, 164 C. C. A. 491.

[3, 4] The distinction (usually disregarded) between usage and custom may be noted; what this pleading calls an "established custom" is really a trade usage (Williston, Contracts, § 648). As has often been said, a lawful custom is itself part of the common law, while a lawful usage, proved and shown to affect both parties, may be described as the law of their case.

Thus is reached the only point at bar: Was it lawful to permit the jury to find, in effect, that Nicoll's contract was not to get 4,166 tons of coal per month, but to get so much thereof as the pleaded usage allowed him, and to reach that conclusion after considering not only the evidence of usage, but the notices on the contract letters and Nicoll's acts (including letters) during the earlier months of the contract year? Plaintiff in error urges, in substance, that no one of these elements of defense was in itself lawful, and that conjointly they no more make a defense (to his counterclaim) than does the addition of zeros produce a finite quantity. The argument is fair, but it cannot be denied that if any one of the elements noted be admissible, the others are, or at least may be, regarded as legitimate corroboration. Interpretation of contracts is always said to be an endeavor to discover and enforce what the parties meant, but the rules produced by accumulated decisions as to how such discovery shall be conducted often overlap and sometimes produce hindrance rather than help, while reconciliation of all cases is a task neither possible nor worth the effort; and it is notable that the most helpful and authoritative modern writers on matters cognate to the question at bar (Messrs. Wigmore and Williston) do not attempt it.

[5, 6] Taking up the plea of usage, and considering it alone, we have to deal with the trade custom variant of the parol evidence rule. With Dean Wigmore (Evid. § 2465) we think that there is no reason in the nature of things why the individual parties to a transaction may not employ words or whole phrases in a particular sense irrespective of the ordinary sense. Indeed when tradesmen say or write anything, they are perhaps without present thought on the subject, writing on top of a mass of habits or usages which they take as matter of course. So (with Prof. Williston) we think that any one contracting with

knowledge of a usage will naturally say nothing about the matter unless desirous of excluding its operation; if he does wish to exclude, he will say so in express terms. Williston, Contracts, § 653. Courts for a long time have rightly been influenced by this belief, until a survey of decisions leads the same learned author to conclude, as we do, that usage has been more potent than any other collateral parol matter to affect, if not control, contractual interpretation. Section 654. In sound theory there is in each case only a question of fact, viz.: Were the parties using words in a special mutual sense? Rules are very apt to be stated dogmatically, and when torn from their environment of facts, apparently to swear at each other. Thus Hostetter v. Park, 137 U. S. at page 40, 11 Sup. Ct. at page 4, 34 L. Ed. 568, declares "it is well settled that parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary," and De Witt v. Berry, 134 U. S. at page 312, 10 Sup. Ct. at page 537, 33 L. Ed. 896, asserts:

"The principle is that, while parol evidence [of custom or usage] is sometimes admissible to explain such terms in the contract as are doubtful, it is not admissible to contradict what is plain, or to add new terms."

Such rules can be understood only from the context of facts, which are rarely quoted. Cf. Vanderbilt v. Ocean, etc., Co., 215 Fed. 886, 132 C. C. A. 226.

The most frequent regulatory statement is to say that in commercial transactions, incidents may be annexed to the written agreement by usage or custom (Williston, Contracts, § 652); but no man can confidently assert beforehand exactly what incident may be annexed, nor how deep it may cut into the meaning of words, as they would be read by an intelligent stranger.

We conclude (again with Prof. Williston) that the most philosophical statement or explanation of the rule is that of Lord Campbell in Humfrey v. Dale, 7 E. & B. 266, who said, in substance, that the moment usage does more than verbally define or explain the words used, it does in a certain sense vary the contract; the truth is that in trade agreements the parties oftentimes do not set down on paper the whole of their contract in all its terms; they set down only those necessary to be determined in the particular case by specific agreement, leaving to implication those general and unvarying incidents which a uniform usage would annex. The facts in the case whose words we have paraphrased are most instructive; for there brokers had sold goods specifically "to our principals," and were by usage held to personal responsibility on the "bought note" because they had not disclosed their principal's name.

[7] Further, however, the matter in which this contract is affected by usage is one of number, quantity, amount, or measurement, and on this point, while it is quite impossible to harmonize all decisions (see citations 27 Rul. Cas. Law, 188) there is no doubt at all that ambiguity in phrase is not necessary to let in evidence of usage (Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Smith v. Wilson, 3 B. & Ad. 728, and for other cases, Williston, Contracts, § 608, note).

[8, 9] Whether without the printed notices on letter heads, and the practical interpretation of the earlier contractual period, the plea and evidence of custom would have been enough to take the case to the jury, we are not required to decide. The usage annexed an incident of a nature which materially changed the possible, and as it turned out the actual, content of the agreement. Yet assuredly no more so than in Humfrey v. Dale, and Walls v. Bailey, supra, or in Lillard v. Kentucky, etc., Co., 134 Fed. 168, 67 C. C. A. 74, an opinion by Justice Lurton when Circuit Judge.

Taking up next the effect of printed notices, this court must recognize the saying of Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093, that "a printed billhead can have little or no influence in changing the clear and explicit language of the letters" constituting or evidencing a contract. But the citation is far from declaring that such notices cannot as matter of law have any influence over decision. How great that influence ought to be will depend on the facts of each case, and we think the rule (so far as such matters can be reduced to theorems) is well put in Sturtevant Co. v. Fireproof, etc., Co., 216 N. Y. 199, 110 N. E. 440, L. R. A. 1916D, 1069, viz. it "cannot be held, as matter of law, that [such notice] was incorporated in and made a part of" the proposal, acceptance or contract. But Pittsvein Company never rested on the notices; its plea in substance was that the usage was so incorporated, and the notice in effect called attention thereto. On this record we cannot dissociate the notice from the usage; whether without any such support the notice would have been enough to get to the jury is a query beyond the exigency of this case, but one on which Poel v. Brunswick, etc., Co., 216 N. Y. 310, 110 N. E. 619, and Ohio, etc., Co. v. Clarkson Co. (C. C. A.) 266 Fed. at page 189, are instructive.

Such notices, however, must mean something, no court can erase them altogether and when such obvious and close connection exists between the notice words "all contracts subject to car supply," or "all contracts contingent upon delays of carriers," and the proven usage, we may and do hold that it was for the jury to say, not that the notice became incorporated in the contract, but the usage was intended by the parties so to be incorporated, and the notices used by both parties were some evidence of such intent.

In so far as Menz v. McNeeley, etc., Co., 58 Wash. 225, 108 Pac. 621, 28 L. R. A. (N. S.) 1007 (much relied on by plaintiff in error) is inconsistent with the foregoing, we differ, preferring the authority of the cases cited above, some of which recognize the doctrine of that decision partially only.

[10] The remaining point seems to us clear, for assuming now that the jury question was whether the parties intended to contract subject to the usage, it was plainly competent and material to show such intent in what Nicoll wrote, by showing what Nicoll did; this is, or may be, that "practical interpretation," which is "always a consideration of great weight." Insurance Co. v. Dutcher, 95 U. S. at page 273, 24 L. Ed. 410.

When it was established that there was a contract running over a

year and an applicable usage, to which the notices might reasonably refer, and that for the earlier months of the year both parties conformed to the usage, the jury did not doubt, and we do not doubt, that the question put to them was in accord with the better doctrine of contractual interpretation.

Judgment affirmed with costs.

MERCHANTS' WAREHOUSE CO. v. REBER.

(Circuit Court of Appeals, Third Circuit. January 17, 1921.)

No. 2571.

Receivers ⇐74—Warehouse company, parting with property after service of order preserving status quo, held guilty of contempt.

A warehouse company, with which goods were stored by a railroad company when not called for by the consignee, and which, after claim by the shipper and demand by the consignee's receiver, and service of an order from the District Court appointing the receiver, forbidding disturbance of the status quo, returned the goods to the railroad company under advice of counsel, was guilty of contempt, whether the advice was correct or not, as it had no right to determine for itself the ownership of the goods.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Proceeding by J. Howard Reber, as receiver of the National Corporation, and as receiver of the Bartram Hotel Company, against the Merchants' Warehouse Company. From an order adjudging the Warehouse Company in contempt (263 Fed. 250), it appeals. Affirmed.

See, also, 265 Fed. 791.

M. Hampton Todd, of Philadelphia, Pa., for appellant.

Percival H. Granger, of Philadelphia, Pa., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and BODINE, District Judge.

BUFFINGTON, Circuit Judge. This case concerns the controverted ownership of personal property. A railroad company had transported it, and, on the consignee delaying taking it away, had placed it on storage with a warehousing company. The shipper claimed the goods under an alleged right of stoppage in transit and the receiver in equity of the consignee claimed it as an alleged purchaser. Pending a demand by such receiver and a served order from the District Court, which forbade disturbance of the status in quo, the warehouse company, under advice of counsel, returned the goods to the railroad company, which latter took the goods out of the jurisdiction of the court and returned them to the shipper. Thereupon the court, after hearing, adjudged the warehouse company in contempt and imposed a substantial fine therefor. The warehouse company then brought the matter to this court for review.

We find no reason to differ from or question that court's action. The question before it was not whether the advice under which the warehouse company acted was correct, but whether the warehouse company, in determining for itself the ownership of the goods, and acting on such determination, and permitting them to pass out of the jurisdiction of the court, was guilty of contempt. On this latter question we have no doubts. While the facts and circumstances, motive, and character of counsel in Re Star Spring Bed Co., 203 Fed. 640, 122 C. C. A. 36, are wholly different from those of the present case, yet the principle therein stated by this court, in the case of controverted ownership of property involved in bankruptcy administration, is applicable to and determinative of the present matter. In that case, referring to the holder of the property in controversy, we there said:

"When asked why he did not permit the court to decide the controverted question of the ownership of these notes, [he] said, 'I will take the responsibility for judging that.' If answer to such contention, or condemnation of such conduct, were required, it is found in Gompers v. Buck, 221 U. S. 450, * * * where the [Supreme Court of the United States] say: 'If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls "the judicial power of the United States" would be a mere mockery.'"

It will thus be seen that the duty of the warehouse company—a mere custodian—was clear, and when it undertook to decide the controverted question of ownership itself, allow the goods to go out of the court's jurisdiction, and make it impossible for that court to decide such ownership, it placed the process, power, and jurisdiction of the court in such contempt that, in ordering it to pay the moderate fine imposed, the contemned court exercised its punitive power with a sparing hand.

The order below is affirmed.

MORRIS et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 85.

Criminal law ⇐1114(1)—Question not raised by record not reviewable.
A question discussed in the appellate court, but not properly raised upon the record, cannot be considered.

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

Henry Morris and another were convicted of using the mails in a scheme to defraud, and they bring error. Affirmed.

Alexander H. Kaminsky, of New York City (Hyman J. Reit and Gilbert Ray Hawes, both of New York City, of counsel), for plaintiffs in error.

Francis G. Caffey, U. S. Atty., of New York City (Ben A. Matthews

and Albert C. Rothwell, Asst. U. S. Attys., both of New York City, of counsel), for the United States.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The plaintiffs in error are hereinafter referred to as the defendants. They have been convicted under section 215 of the Criminal Code (Comp. St. § 10385) for using the mails in a scheme to defraud. Each defendant has been sentenced to serve one year and three months in the United States Penitentiary at Atlanta, Ga.

The indictment contains two counts. The first count charges that defendants devised a scheme to defraud by obtaining merchandise on credit in the name of the Clairmont Silk & Manufacturing Company, by inducing various corporations and firms to believe that defendants were carrying on a legitimate business under that name and were financially responsible, whereas defendants intended, after procuring the merchandise on credit, to convert the proceeds to their own use and not to pay for the same, but to cheat the persons to be defrauded. It also contains the usual allegation that the defendants, having devised this scheme to defraud, for the purpose of executing it, unlawfully, willfully, and knowingly placed and caused to be placed, on a day specified, in a post office of the United States in the city of New York, to be sent and delivered by the post office establishment of the United States, a certain letter inclosed in a post paid envelope addressed to a certain individual naming him. The second count is identical with the first, except that another communication is alleged.

The validity of the indictment was not challenged in the court below, and is not questioned in this court. At the trial some objections were made to the admission of evidence, but no exceptions were taken, and there are no assignments of error as to the admission or exclusion of evidence. No requests to charge were made, and no exceptions were taken to the charge as given.

It appears, however, that at the close of the government's case a motion was made to instruct the jury to acquit, on the ground that the government had failed to establish guilt beyond a reasonable doubt. That motion was denied, and an exception was taken. The defense then called the two defendants, who testified at length on their own behalf, but called no other witnesses. At the close of the whole case, the motion was renewed that the jury be instructed to acquit, and it was again denied, and an exception was granted.

The denial of the defendants is unsupported and uncorroborated, and the verdict of the jury establishes the fact that their testimony was not believed. It would serve no good purpose to review in detail the testimony. It must suffice to say that we have read the record with care, and that it contains substantial and convincing evidence that these defendants were jointly engaged in a scheme to defraud, and that they used the mail in furtherance of their scheme.

In the argument in this court certain questions were discussed, which were not properly raised upon the record, and which we are therefore not at liberty to consider.

Judgment affirmed.

PRICE v. McGUINNESS, Warden.

(Circuit Court of Appeals, Third Circuit. December 23, 1920.)

No. 2635.

1. **Habeas corpus ⇐109—Recommitments under lawful sentence held legal.**
Where a prisoner had applied for habeas corpus, claiming his sentence to be illegal, and had been, by the court to which he applied, twice committed to different jails for specified terms, which were within the term of the original sentence, and the original sentence was in fact lawful, the subsequent commitments were only recommitments under that sentence, and were lawful.

2. **Criminal law ⇐1216(1)—Prisoner entitled to commutation for time served in county jail under sentence to penitentiary.**
The time spent by a prisoner in a county jail under commitments by the District Court, to which he had applied for habeas corpus, charging his sentence to the penitentiary to be illegal, entitles him to such commutation of time as he would have earned by serving unbroken his full term in the penitentiary.

Appeal from the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

Habeas corpus by Richard F. Price against Richard McGuinness, as Warden. Petition for writ denied, and petitioner appeals. Appeal dismissed.

Richard F. Price, of New York City, in pro. per.

David V. Cahill, Asst. U. S. Atty., of New York City, for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

PER CURIAM. On a plea of "guilty" Price was sentenced by the District Court of the United States for the Southern District of New York to a term of 2 years and 6 months, to be served in the United States Penitentiary at Atlanta, Ga. Representing that the sentence was imposed during his absence, and therefore invalid, Price, after commitment, succeeded by writ of habeas corpus, granted by the District Court of the United States for the Northern District of Georgia, in being returned to and having his case reviewed by the District Court of the United States for the Southern District of New York. The latter court, on September 13, 1920, imposed what Price calls "another sentence" for an additional term of 4 months to be served at Atlanta, and later, on September 22, 1920, without setting aside the prior sentence of the same month, it imposed still "another sentence" of 4 months, to be served in the Essex county jail at Newark, N. J.

In this situation Price petitioned the District Court of the United States for the District of New Jersey for writ of habeas corpus, on the ground that the sentence of April 30, 1919, was illegal, because imposed when he was not present in court, or, if legal, then the later sentence for 4 months, which he is now serving, was illegal. From the denial of his petition for a writ of habeas corpus the plaintiff took this appeal.

[1] We have given consideration to every aspect of this case, and

are satisfied that the sentence for 2 years and 6 months was legal, and that the subsequent acts of the court involving the appellant's imprisonment, and termed by him "additional sentences," were nothing more than recommitments under that sentence, and that in consequence Price is lawfully in prison.

[2] It follows, however, that, notwithstanding his commitment to Essex county jail for a part of his term, Price is entitled to such commutation of time as he would have earned under the law in serving unbroken his full term of 2 years and 6 months.

The appeal is dismissed.

THE SAN DIEGO.

THE PEERLESS.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1920.)

No. 1836.

Salvage ⟸51—Award of $6,000 for extinguishing fire on dredge sustained.

Where all the witnesses were examined in open court, and the issue was purely one of fact, on which the testimony was sharply conflicting, an award of $6,000 as salvage to a tug for extinguishing a fire on a dredge, which was amply sustained by libelant's proof, will be affirmed.

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

Libel on behalf of the steam tug Peerless, Joseph M. Clark and others, as owners, and on behalf of the master and crew thereof, against the dredge San Diego, James T. Fox, claimant, for salvage. From a decree awarding $6,000 as salvage, the claimant of the Dredge appeals. Affirmed.

Edward R. Baird, Jr., of Norfolk, Va. (Baird & White, of Norfolk, Va., on the brief), for appellant.

John W. Oast, Jr., of Norfolk, Va., for appellee.

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

KNAPP, Circuit Judge. This libel was filed on behalf of the tug Peerless against the dredge San Diego to recover for salvage services rendered on the morning of July 3, 1919, when fire broke out on the dredge while she was moored, bow inshore, near the United States Naval Operating Base at Hampton Roads. Four vessels came to her assistance, navy lighter No. 56, the tug Peerless, the steamer Riverside, operated by the government, and navy lighter No. 54, in the order named.

The libelants claim that the fire was put out and the dredge saved from destruction mainly by the efforts of the tug, which was equipped with powerful fire-fighting apparatus, and they sue for $15,000. The respondent says that the services of the tug were of comparatively

little value, were rendered without risk, and would be amply rewarded by the payment of $1,000 to $1,500. The government vessels have not asked for compensation. The value of the tug was something upwards of $100,000; the value of the salvaged dredge, about $125,000. The court below awarded the tug $6,000, and respondent appeals.

The case thus outlined requires no comment. It was tried by a judge of long experience, and all the witnesses were examined in open court. The issue was purely one of fact, and the testimony sharply conflicting. The libelants' proofs amply sustain the award, and there is no such contrary showing as would warrant us in setting it aside.

The decree will therefore be affirmed.

WINDOW GLASS MACH. CO. et al. v. NEW BETHLEHEM WINDOW GLASS CO. et al.

(Circuit Court of Appeals, Third Circuit. January 17, 1921.)

No. 2590.

Appeal and error ⇐1194(2)—Refusal to enjoin proceedings contemplated on affirmance of former denial of injunction held proper.

Where, on former appeal, the denial of an injunction to restrain further proceedings in the state court for dissolution of a corporation was affirmed, the court below properly refused thereafter to enjoin further proceedings in the state court, which had been contemplated at the time of the former appeal, though the particular steps sought to be restrained were not then before the court.

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

Suit for injunction by the Window Glass Machine Company and another against the New Bethlehem Window Glass Company. From an order refusing the injunction, complainants appeal. Affirmed.

Clarence P. Byrnes, Samuel McClay, George H. Parmelee, Bakewell & Byrnes, and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., for appellants.

John M. Freeman, of Pittsburgh, Pa., A. A. Geary, of Clarion, Pa., and Harry F. Stambaugh, Albert C. Hirsch and Watson & Freeman, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

PER CURIAM. The general course of procedure pursued by the court below in this matter was heretofore considered by this court in an opinion reported at 264 Fed. 822. While the particular steps that have since been taken in the cases in the state court were not then before us, the fact is that such steps are but the logical and to be expected sequence of the situation that was then before us, and the possibility of such events was considered by this court when it disposed of the matter.

In view of this situation, we find no error in the court below refusing to enjoin such further proceedings in the state court case. Its order is therefore affirmed.

Ex parte CROOKSHANK.

(District Court, S. D. California, S. D. February 3, 1921.)

No. 319.

1. **Intoxicating liquors ⇐13—Eighteenth Amendment did not affect state's right to prohibit.**
   The adoption of the Eighteenth Amendment to the United States Constitution conferred on the federal government the power to prohibit the liquor traffic and deprived the states of the power they had theretofore to permit such traffic, but it did not affect the previously existing power of the state to prohibit such traffic within its borders.

2. **Intoxicating liquors ⇐10(2), 13—State Constitution and city charter authorized prohibiting liquor sales after adoption of Eighteenth Amendment.**
   Under Const. Cal. art. 11, § 11, conferring upon cities the police power, subject only to control of the general laws, and the charter of Bakersfield, adopted under article 11, § 8, and ratified by the Legislature, St. Cal. 1915, p. 1552, art. 3, §§ 12, 13, the city council acquired full authority to exercise the police power of the state within its borders, and such power as might thereafter accrue to the state, which could be delegated to the city, so that it had power to prohibit the sale of intoxicating liquor after the adoption of the Eighteenth Amendment to the United States Constitution.

3. **Intoxicating liquors ⇐13—Action by state subsequent to Eighteenth Amendment unnecessary.**
   Action by a state, under the concurrent power given by Const. U. S. Amend. 18, § 2, after that amendment was adopted is not necessary to enable a city theretofore vested with the police power of the state to enact an ordinance prohibiting the sale of intoxicating liquors.

4. **Intoxicating liquors ⇐13—Federal legislation under Eighteenth Amendment is supreme over inconsistent state legislation.**
   Legislation enacted by Congress under the power granted it by Const. U. S. Amend. 18, is supreme over inconsistent state legislation relating to the liquor traffic.

5. **Intoxicating liquors ⇐13, 132—State act valid, unless directly conflicting with Eighteenth Amendment and federal act.**
   A state act prohibiting the liquor traffic, and containing provisions for the enforcement of such prohibition, is valid, notwithstanding the adoption of Const. U. S. Amend. 18, and the Volstead Act, unless there is such repugnancy or conflict between the two acts that they cannot be reconciled, or constitutionally stand together.

6. **Intoxicating liquors ⇐13—Any legislation tending to defeat prohibition is unconstitutional.**
   Under Const. U. S. Amend. 18, legislation regulating the liquor traffic, either by Congress or by state, to be valid, must be calculated to enforce the prohibition by appropriate means, and not to defeat or thwart it.

7. **Intoxicating liquors ⇐6—More drastic penalty under state law is not invalid.**
   A state can legislate more rigorously than Congress in furtherance of complete prohibition; but it cannot legislate more liberally, so that the fact that a state prohibition act imposes a more drastic penalty than the federal act does not invalidate it.

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8. Intoxicating liquors ⇐13—Second section of Eighteenth Amendment did not change powers.

Without the inclusion of the second section in the Eighteenth Amendment, either Congress under its implied powers to enforce the Constitution or the states under their general police powers, which they did not surrender, could have adopted legislation for prohibition of the liquor traffic, so that the only effect of that section, if any, was to enable the states to legislate in enforcement of the amendment as such.

9. Municipal corporations ⇐111(4)—Invalid regulations for possession and use of liquor do not invalidate separable state prohibition.

Provisions in a city ordinance adopted under the state's police power, which had been conferred on the city, permitting the use of liquor for nonbeverage purposes, even if invalid, because in conflict with the Volstead Act, do not prevent prosecutions under the city ordinance for the illegal sale of intoxicating liquor.

Habeas Corpus. Application by S. C. Crookshank for writ to secure release from custody of city marshal. Demurrer to petition sustained, and petitioner remanded to custody.

Jackson Mahon, Jr., and Emmons, Aldrich & Heck, all of Bakersfield, Cal., for petitioner.

W. P. Grijalva, of Bakersfield, Cal., for City of Bakersfield.

Jesse E. Stephens, City Atty., and J. H. O'Connor, Deputy City Atty., both of Los Angeles, Cal., amici curiæ.

BLEDSOE, District Judge. On the 20th day of September, 1920, the council of the city of Bakersfield, operating under a freeholders' charter authorized by the Constitution of the state of California, duly passed an ordinance prohibiting certain uses of intoxicating liquors. Relevant sections involved contain the following provisions:

Section 1: "This entire ordinance shall be deemed to be an exercise of the power granted by Article Eighteen of the Constitution of the United States and of the police power of the city of Bakersfield for the protection of the public health, peace, safety, and morals of the people of said city, and all of its provisions shall be liberally construed for the accomplishment of these purposes."

Section 2: "The words 'intoxicating liquors' or 'intoxicating liquor,' wherever used in this ordinance, shall be construed to include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor, which contains more than one-half of one per cent., by volume of alcohol, and all alcoholic liquids and compounds whether proprietary, patented or not, which are potable or capable of being used as a beverage, and which contain more than one-half of one per cent. by volume of alcohol. * * *"

Section 4: "It shall be unlawful for any person, directly or indirectly, to manufacture, receive, sell, serve, give away, transport, or otherwise dispose of any intoxicating liquor within the city of Bakersfield, or to import any such liquor into, or to export any such liquor from said city, except as provided herein."

Section 6: "It shall be unlawful for any person to have, keep or store any intoxicating liquor in any public or semipublic place within said city except as provided herein."

Numerous other provisions are in the ordinance respecting the manufacture and use, under permits, of intoxicating liquor "for non-

beverage purposes." Section 15 provides a penalty in the following language:

Section 15: "Any person who shall violate any of the provisions of this ordinance shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than two hundred and fifty ($250.00) dollars, nor more than five hundred ($500.00) dollars or imprisonment in the county jail for a period not to exceed one hundred eighty (180) days, or by both such fine and imprisonment."

On the 13th day of December last, a complaint in proper form was filed in the police court of the city of Bakersfield, charging the above-named petitioner with a violation of section 6 of the ordinance above referred to, and alleging specifically that he did on the 11th day of December, 1920, within the corporate limits of the said city—

"willfully and unlawfully have, keep and store intoxicating liquor in a semi-public place known and located at 615 Kern street in the city of Bakersfield, without having a permit so to do, in violation of the provisions of section 6 of said ordinance," etc.

Application for the writ herein is made on the ground that petitioner's present detention, pursuant to process issued upon said complaint, is illegal, in that—

"The said ordinance attempts to define and punish an offense which has been and is now solely within the jurisdiction of the United States to define and punish, saving and except as the power is declared in said amendment to lie within the state to concurrently legislate and punish for the violation of the said amendment and that the state of California has not, since the adoption of the said amendment, passed any law of any kind or nature concurrently punishing the acts referred to in the said Eighteenth Amendment."

It is also asserted that the ordinance is invalid, in that it is in conflict with the Volstead Act, in that the minimum fine provided for by said ordinance is $250.

The contentions of the petitioner, if I understand them aright, are that "the people of the United States, through their respective legislatures, have granted to the United States, all power that they may have had to regulate or prohibit the traffic in intoxicating liquors"; assuming that position to be unsustained, it is urged that no power exists in a municipality to enact or enforce legislation in restraint of the liquor traffic, under the Eighteenth Amendment or otherwise, until the state has, by appropriate enforcement legislation, *enacted subsequently to the ratification of the amendment,* actually authorized such municipality so to do. Admittedly no such "enforcement" legislation has been enacted by the state of California per se.

In addition it is contended that the "concurrent power" conferred upon the several states by section 2 of the amendment should be strictly construed, and that it permits of no prohibitory legislation by a state, except such as is limited to an express prohibition of the things specially mentioned in section 1 of the amendment, viz. the "manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from," the United States; that a state, through any instrumentality, may go no further; and that, in consequence, any legislation aimed at the mere

"possession" of intoxicating liquor is beyond the power of the state and therefore void. Finally, it is said that the provisions of the ordinance in question, assuming their validity otherwise, are in such conflict with the terms of the Volstead Law (41 Stat. 305) that they cannot stand.

[1] The circumstances leading up to and attending upon the submission and ratification of the Eighteenth Amendment to the federal Constitution are of such recent occurrence as to require no restatement at this time. Previous to the adoption of that amendment, it was the established law that the several states possessed the amplest authority, under the police power, to regulate and even absolutely prohibit the liquor traffic in any of its various forms or occurrences. Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Purity Extract Co. v. Lynch, 226 U. S. 192, 201, 33 Sup. Ct. 44, 57 L. Ed. 184. It may not, I think, be maintained with success that in the adoption and ratification of the Eighteenth Amendment the several states were surrendering any of the powers theretofore possessed by them, respecting their own jurisdiction to prescribe effective prohibition of that traffic. In all that was done, they were simply conferring upon the federal government the like power to prohibit, which theretofore, in virtue of its organization and the character of the powers reserved to the states, it had not possessed. Hamilton v. Distilleries Co., 251 U. S. 146, 156, 40 Sup. Ct. 106, 64 L. Ed. 194. In other words, there was a surrendering by the states of the power to permit the liquor traffic, but no diminution of their power to prohibit it; they accorded to the federal government the jurisdiction to enforce absolute prohibition of the traffic (Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260; Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946, decided June 7, 1920); but they still retained the same right to themselves (Commonwealth v. Nickerson [Mass.] 128 N. E. 273, 277).

As a consequence, in so far as Congress should fail successfully to provide for effective prohibition, the state under its retained right could legislate to accomplish that end. In addition, pursuant to the express terms of the "concurrent power" granted, the state might, "by appropriate legislation," in consonance with congressional action, itself legislate in enforcement of the Eighteenth Amendment within the limits of its own territory. Such I conceive to be the general effect of the situation created.

[2] The state of California, as a sovereign state of the Union, by its Constitution (section 11, art. 11) has heretofore conferred upon "any county, city, town, or township" the authority to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." This grant of power, it has been determined by the courts of California, is a "direct grant" (Denton v. Vann, 8 Cal. App. 677, 680, 97 Pac. 675), and authorizes the subordinate agencies mentioned, without permissive action on the part of the state Legislature, to exercise within their respective limits "the entire police power of the state, subject only to the control of the general laws" (Odd Fellows' Cemetery

Ass'n v. San Francisco, 140 Cal. 226, 230, 73 Pac. 987, 988). No general law of the state affecting the subject-matter involved herein has been called to my attention.

The charter of the city of Bakersfield, enacted pursuant to constitutional authority (section 8, art. 11, Constitution of California), and thereafter ratified by the Legislature of the state (Stats. Cal. 1915, p. 1552 et seq.), provides in section 14 of article 3 thereof that the legislative power of the city, except as reserved to the people, shall be vested in a council. Section 12 of the same article provides that the city—

"may make and enforce local police, sanitary and other regulations, and may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the city. The city shall have all powers that now are or hereafter may be granted to municipalities by the Constitution or laws of the state of California; * * * the enumeration of particular powers by this charter shall not be held or deemed to be exclusive, but, in addition to the powers enumerated herein, the city shall have and may exercise all other powers which, under the Constitution and laws of California, it would be competent for this charter specifically to enumerate."

[3] Apparently, therefore, by the Constitution of the state, plenary authority in the matter of the local exercise of the police power was vested in the city council of the city of Bakersfield; and, in addition, such power as might thereafter accrue to the state of California, if any, the exercise of which could be delegated to the city of Bakersfield, was thereby delegated to it by the charter thus adopted. If the state of California is in receipt of any "new" power, in virtue of the terms of section 2 of the Eighteenth Amendment, such power, it would seem, has already been appropriately conferred upon the city of Bakersfield. The city, at least, has acted subsequently to the ratification of the Eighteenth Amendment, though I discover no reason why "appropriate legislation," pursuant to that amendment, must needs have been enacted subsequently thereto. Commonwealth v. Nickerson, supra (Mass.) 128 N. E. 283.

[4] Whether entirely relevant or not, much of the argument herein centered around the meaning to be accorded the phrase "concurrent power" as the same appears in section 2 of the Eighteenth Amendment. Much possible debate on the question, however, has been set at rest by the conclusion announced by the Supreme Court of the United States in Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 488, 64 L. Ed. 946, decided June 7, 1920, and the cases accompanying it. After announcing that the "concurrent power" referred to does not imply joint power, as between the states and the national government, nor power divided between the states and the national government "along the lines which separate and distinguish foreign and interstate commerce from intrastate affairs," the court in paragraph 9 announces its conclusion as follows:

"The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

By the form of the decision handed down, being a mere statement of the conclusions of the court, we are deprived of the illuminating discussion that usually lends clarity to the ultimate conclusions announced. However, accepting the conclusion stated at its full face value, which conclusion seems to be in complete accord with the reason of the thing, the statement by the court, that the power confided to Congress by section 2 of the amendment is in no wise "affected by action or inaction on the part of the several states," can mean nothing less than that which it ought to mean, viz. that in a matter with respect to which, by proper constitutional grant, the federal government has been accorded the jurisdiction to act, its action once taken, its laws once constitutionally enacted, become the supreme law of the land; and no single state or group of states, or any subdivision thereof, may enact any law or ordinance in contravention of the law so promulgated by the supreme legislature. The act of the greater instrumentality is not "affected by" the action of the lesser in contravention thereof.

This results from the fact that, acting within its constitutional sphere, the United States is the supreme sovereign in this land. It is but a recognition of the obvious truism announced by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 405 (4 L. Ed. 579):

"The government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all."

[5, 6] In the practical exercise of the police power prohibiting the liquor traffic, any conflict between the exercise of such power by the federal government and that by a state government would have to amount to repugnancy or conflict of such a direct and positive nature as that "the two acts could not be reconciled or consistently stand together." Sinnot v. Davenport, 22 How. 227, 243, 16 L. Ed. 243. Such conflict appearing, the federal enactment would prevail, of course. Any legislation enacted by Congress, pursuant to the amendment, must be calculated to enforce it by appropriate means, and not to "defeat or thwart the prohibition" contained therein. Rhode Island v. Palmer, supra. For the same reason, any legislation enacted by the state, or any instrumentality exerting the power of the state, must be in aid of the enforcement of the amendment or in furtherance of the prohibition therein commanded; the several states have lost the power to do otherwise.

[7] As a necessary consequence, it would never be competent for a state, in a matter respecting the use of liquor, to enlarge upon rights limited by congressional action. It might legislate more rigorously than Congress, in furtherance of more complete prohibition; but, in view of the supremacy of Congress in the field, it could not legislate more liberally. Nor would the fact that different, particularly more drastic, penalties are prescribed by the inferior sovereignty, necessarily result in their invalidity. In re Hoffman,

155 Cal. 114, 119, 99 Pac. 517, 132 Am. St. Rep. 75; Ex parte Ramsey (D. C.) 265 Fed. 950, 954; Jones v. Hicks, 104 S. E. 771, 773.

[8] The truth is, in my judgment, that too much concern seems to have been manifested because of the incorporation of section 2 into the Eighteenth Amendment. The power thereby sought to be conferred upon Congress would have been conferred by the adoption and ratification of section 1 alone; a power being accorded to the federal government, Congress, even in the absence of an express grant, would be authorized to legislate in the exertion of such power. Paragraph 18 of section 8 of the first article of the federal Constitution specifically authorizes Congress—

"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or official thereof."

Obviously this section would authorize Congress to enforce, by appropriate legislation, the Constitution or any amendment thereof. As was said by Hamilton in the Thirty-First number of the Federalist, respecting the particular provision just quoted, together with the one contained in the second clause of article 6:

"* * * It may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers."

So, too, the authority of the several states was not materially changed by the inclusion of the second section. As heretofore shown, they never surrendered their power, originally possessed in virtue of their sovereignty, to prohibit effectually within their respective limits the traffic in intoxicants. They still have that power. They merely granted to the federal government the same right within its domain. In addition, by the positive terms of the grant to themselves of "concurrent power," they were authorized to legislate in enforcement of the amendment—a lesser power, strictly speaking, than they already possessed, in virtue of their own sovereignty—and, if they wished, to enforce in their own courts the prohibitions and penalties to be provided by Congress for enforcement in the federal courts.

A really interesting query, which, however, need not be determined in the instant case, is whether, under the terms of section 2 of the Eighteenth Amendment and the specific grant of concurrent power to the several states therein, a prior conviction or acquittal in a state or federal court, the one first obtaining jurisdiction, would not operate as a plea in bar in the other jurisdiction. Jones v. Hicks, supra, 104 S. E. 773, 774. It may be that Congress had that in mind, together with the fact of permitting the several states and the municipalities thereof to derive financial benefit from the collection of fines, etc., when the concurrent power to enforce the amendment was specifically delegated to the states. If the enforcement of prohibition on the part of the state is to be deemed merely an exercise of the power conferred by section 2, then it would seem as if there could not be

two prosecutions for the same offense in the different jurisdictions. In that sense, the state would be exerting a power conferred by the federal government, rather than a power originally belonging to it, and a conviction or acquittal under the federal law, irrespective of the court in which it might be had, would operate as a plea in bar. The plea of once in jeopardy—

"can surely never be successfully asserted in any instances but those in which jurisdiction is vested in the state courts by statutory provisions of the United States." Houston v. Moore, 5 Wheat. 1, 35 (5 L. Ed. 19).

[9] Detailed provisions are found in the ordinance in question relative to sales of liquor for nonbeverage purposes, pursuant to permits, etc., with respect to which, even assuming their invalidity, petitioner is in no wise concerned. It will be time enough to investigate those provisions when some one is brought before the court because of their existence. Seemingly they are separable, and, in light of what has been said hereinabove, can in no wise impinge upon the enforcement of the Eighteenth Amendment as provided for by Congress in the Volstead Act, nor result in obstructing or embarrassing the execution of the same. Ex parte Guerra (Vt.) 110 Atl. 224, 229.

Summarizing, then, my conclusions are that the ordinance in question is in no wise substantially inconsistent or in conflict with the Volstead Act, which is the announcement of the supreme legislature; that it is calculated to contribute to the proper, prompt, and expeditious enforcement of the Eighteenth Amendment; that it is a lawful exercise of the police power belonging to the state of California, both in virtue of the state's sovereignty and in virtue of the grant of power contained in section 2 of the Eighteenth Amendment; and, finally, that it operates adequately to justify the detention of the petitioner as for its asserted violation.

In consequence whereof, the demurrer to the petition for a writ of habeas corpus is sustained, and the prisoner is hereby remanded to the custody of the city marshal.

EQUITABLE TRUST CO. OF NEW YORK v. DENVER & R. G. R. CO.*

(District Court, D. Colorado. November 11, 1920.)

No. 6782.

1. **Judgment ⇐701—Stockholders concluded by judgment against corporation.**
A corporation represents its stockholders in litigation in which it is engaged, so that a judgment for or against the corporation is as conclusive against its stockholders as against itself.

2. **Judgment ⇐713(2)—Conclusive between parties as to all matters that could have been litigated.**
A judgment is conclusive in a subsequent action between the same parties on the same cause of action, in the absence of fraud or collusion in the conduct of the action on which it is founded, not only as to every defense that defendant made in that action, but also as to every defense that it might have made.

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

*Order affirmed 271 Fed. 49.

3. **Judgment ⟸386(7)—Right to avoid must be diligently pursued.**
The right to avoid a judgment or decree of the court for fraud is conditioned on diligence in discovering the fraud, and in presenting the proof of it to the proper tribunal and asking for relief.

4. **Judgment ⟸386(7)—Stockholders held not diligent in seeking to avoid judgment against corporation.**
Where a judgment was rendered against the crporation on a guaranty of the bonds of another corporation, and the opinion on which the judgment was based was published, as was also the opinion of the Circuit Court of Appeals affirming the judgment, and, after certiorari had been denied by the Supreme Court, property was sold to satisfy the judgment, and judgments were obtained thereon in other jurisdictions, and property seized for sale therein, a petition by the stockholders of defendant corporation for leave to intervene in proceedings for the sale under a subsequent judgment, more than three years after the original judgment, and to delay the sale until they could intervene in the original proceeding and attack the judgment for fraud, shows such want of diligence by petitioner as to bar the right to relief against the original judgment, and therefore the sale will not be further postponed.

5. **Notice ⟸6—Leading to inquiry is notice of facts inquiry would show.**
Notice of facts which would incite a person of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.

6. **Railroads ⟸25—Stockholders' petition held not to show fraud in guaranty of bonds of another company.**
A petition by a stockholder of a railroad corporation, attacking for fraud a judgment against the corporation on its guaranty of the bonds of another railroad company, which showed that the latter railroad was constructed for the benefit of the defendant corporation, which owned most of its stock, and which would thereby obtain an outlet to the Pacific Coast, not only fails to show fraud, but shows that there was no fraud in the guaranty.

7. **Corporations ⟸318—Interlocking directorates not fraud per se.**
Interlocking directorates of different corporations are not fraudulent per se, but are denounced only when used to accomplish a fraudulent end.

8. **Corporations ⟸211(6)—Petition of stockholders held not to show fraud in conduct of defense by corporation.**
A petition by stockholders to have a sale of corporation's property under judgment against it delayed until the stockholders could investigate suspected fraud by the corporation in failing to present a defense *held* not to show grounds for suspecting the fraud.

In Equity. Suit by the Equitable Trust Company of New York as trustee, intervener and substituted plaintiff, against the Denver & Rio Grande Railroad Company. On petition by Jefferson M. Levy and other stockholders of defendant company for postponement of the sale and for leave to intervene. Petition denied.

George Welwood Murray, of New York City, William V. Hodges, of Denver, Colo., and F. W. M. Cutcheon, of New York City, for plaintiff.

Arthur M. Wickwire, of New York City, and John L. Webster, of Omaha, Neb., for petitioners.

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

PER CURIAM. Mr. Jefferson M. Levy and others, stockholders and members of a committee for stockholders of the Denver & Rio

Grande Railroad Company, the judgment debtor herein, present a petition for leave to intervene in this suit, to become parties thereto, and for an adjournment of the sale of the property of the railroad company, which is set by the decree herein for November 20, 1920, to enable these petitioners to present and litigate in this suit or elsewhere their claim for an avoidance and injunction against the enforcement of the judgment of the United States District Court for the Southern District of New York, in favor of the Trust Company and against the Denver & Rio Grande Railroad Company, on its guaranty of the payment of the $50,000,000 mortgage bonds of the Western Pacific Railroad Company, rendered on June 14, 1917 (244 Fed. 485), and affirmed on appeal by the United States Circuit Court of Appeals of the Second Circuit on January 3, 1918 (250 Fed. 327, 162 C. C. A. 397). Reference is made to the statements and opinions in the cases just cited for the origin and history of the liability of the Denver Company on which that judgment rests, and of the litigation concerning it prior to 1918. These stockholders seek to avoid that judgment in order to secure a foundation on which to base a suit to set aside the judgment of this court upon the New York judgment in favor of the Trust Company and against the Denver Company for $36,515,038.18, which was rendered by this court on January 7, 1918. And they seek to avoid the latter judgment for the purpose of setting aside the decree in this suit for the sale of the property of the Denver Company and the application of its proceeds to the payment of the amount still remaining unpaid on the latter judgment, which was found and adjudged by the decree herein to have been $36,192,655.78 on September 25, 1920. These judgments and this decree are adjudications of these courts in litigated, carefully considered cases to the effect that the Denver Company was and is justly indebted to the Trust Company in the amounts above stated, that as against the Denver Company and its stockholders it was entitled to payment on June 14, 1917. It has already been delayed in obtaining this payment and this application is made more than three years since that date. The judgments which have been referred to may not be lightly regarded, and this delay ought not to be prolonged, unless these stockholders have shown that there is reasonable cause to believe that they are entitled to and will be able to secure an avoidance of the New York judgment and consequently of those founded upon it.

[1, 2] The parties to the New York judgment were the same as the parties to this suit. They were the Trust Company as trustee for the bondholders, and the Denver Company which guaranteed the payment of the bonds. The basic right or cause of action was the same, the liability of the Denver Company on its guaranty of the $50,000,000 of mortgage bonds in each of these cases. A judgment for or against a corporation is as conclusive against its stockholders as against itself, because a corporation is formed and empowered to sue and be sued for its stockholders and it represents them in the litigation in which it is engaged. Since, where two actions are brought between two parties upon the same cause of action, the first judgment, in the absence of fraud in the conduct of the action on which it is founded, estops the

defendant from maintaining, not only every defense that it made in that action, but also every defense that it might have made, the New York judgment estops the Denver Company and the petitioners, its stockholders, from maintaining in this suit, in the absence of fraud in the conduct of the suit which resulted in that judgment, not only every defense that it made, but also every defense that it or its stockholders might have made in that action. The right of a stockholder to avoid a judgment against his corporation is derived from it, rises no higher than the right of that corporation, and may be worked out only in the latter's right. So it is that these stockholders are estopped from maintaining any defense to the New York judgment, or any ground for its avoidance, and from intervening for that purpose on the ground that the guaranty was unfair, unreasonable, obtained by undue influence, interlocking directors, or pernicious collusion, until they first clearly show that there was fraud or pernicious collusion by the Trust Company or the bondholders it represents in the conduct of the action which resulted in that judgment. Forbes v. Memphis, E. P. & P. R. Co., 9 Fed. Cas. 408, 418, Case No. 4,926; Farmers' Loan & Trust Co. v. Kansas City, W. & N. R. Co. (C. C.) 53 Fed. 182, 186.

[3, 4] Another indispensable condition of the right to avoid a judgment or decree of a court for fraud is diligence in discovering it and in presenting the proof of it to the proper tribunal and asking relief from it. The alleged fraud on which these stockholders rely to avoid this New York judgment is the fraudulent failure of the Denver Company to interpose certain alleged defenses to the cause of action upon the guaranty upon which that judgment is founded. A long time has elapsed since the New York judgment was rendered on June 14, 1917, and it was not until within three months of this day that these stockholders made any complaint of the conduct of the defense of that action or gave any warning of any defect in that judgment. Conscious of their delay, they aver in their petition that they did not discover the alleged facts they now present until within these three months. They fail, however, to allege why they did not discover them, from what source they did discover them, why they did not discover them earlier, and they fail to plead any facts in this regard which persuade that they could not as easily have discovered and presented them to the New York court within three months of that judgment in 1917 as they could after the 1st of September, 1920. The excuse they plead for the failure to make the discovery and present the alleged grounds for the avoidance of the New York judgment does not appeal with persuasive force to the conscience of a chancellor.

The appropriate time and place for these petitioners to have assailed that judgment on the grounds they now urge was in the court that entered it, by motion or petition to set it aside and to permit the stockholders to defend against the cause of action there stated, or by a bill in equity in that court to avoid the judgment and enjoin its enforcement. The guaranty upon which that judgment is founded was assumed by the Denver Company in the year 1908. On May 17, 1917 (244 Fed. 485), in a suit to which the Equitable Trust Company, as trustee for the bondholders, was the plaintiff, and the Denver Company

was the defendant and in which it answered and strenuously contended for various reasons that it was not liable on the guaranty, the United States District Court for the Southern District of New York, in an elaborate opinion which was published to the world, adjudged that it was so liable. 244 Fed. 506. A judgment was rendered on June 14, 1917, in favor of the Trust Company and against the Denver Company for $38,270,343.17 in that suit. An appeal was taken therefrom, briefs and arguments of eminent counsel were submitted to the Court of Appeals of the Second Circuit, and in an elaborate opinion, which was also published, it affirmed that judgment on January 3, 1918. 250 Fed. 327, 162 C. C. A. 397. The Denver Company petitioned the Supreme Court for a writ of certiorari to reverse that decision, and that petition was denied on April 15, 1918. 246 U. S. 672, 38 Sup. Ct. 423, 62 L. Ed. 932. Under a writ of execution on the judgment in this New York court property of the Denver Company was seized, and on October 4, 1917, was sold for $3,032,400, and the proceeds applied to the payment of the judgment.

On December 17, 1917, the Trust Company commenced an action upon that judgment against the Denver Company in the Supreme Court of the state of New York and on March 13, 1918, a judgment was rendered in that court in favor of the Trust Company and against the Denver Company for $36,908,529.14. Property of the Denver Company in New York was sold under writs of execution upon that judgment in June, 1918, and on May 26, 1920, and the proceeds of those sales were applied to the payment of that judgment. On August 23, 1917, the Trust Company, as trustee for the bondholders, brought an action in this court against the Denver Company upon the judgment against it in the United States District Court in New York, and on January 7, 1918, recovered a judgment against the Denver Company for $36,515,038.16. An execution was issued on that judgment and returned unsatisfied. On January 17, 1918, this suit in equity was instituted against the Denver Company to secure the application of all the remainder of its property to the payment of its debt. The Trust Company, as trustee for the bondholders, intervened and set up the New York judgment and its claims thereunder, a receiver was immediately appointed and is now in possession of the property of the Denver Company subject to the mortgages and liens upon it. Later the Trust Company was substituted for the original plaintiff and the decree in this suit was rendered in September, 1920, for the sale of the equity of the Denver Company in its property on November 20, 1920. During all these proceedings from 1908 down to September, 1920, the stockholders, who now ask to have this sale postponed and to intervene in this suit to set aside and enjoin the enforcement of the New York judgment, have made no objections to any of the proceedings and have presented none of the claims or defenses they have suggested for the first time since September 1, 1920. They now invoke the action of this court of equity to stay the sale and permit a retrial of the issue adjudged in the United States courts in New York more than three years ago.

But nothing but conscience, good faith, and reasonable diligence

can call a court of equity into action. "The strongest equity may be forfeited by laches, or abandoned by acquiescence." Peebles v. Railroad Co., 8 Serg. & R. (Pa.) 493; Sullivan v. Railroad Co., 94 U. S. 806, 811, 24 L. Ed. 324; Swift v. Smith, 79 Fed. 709, 712, 25 C. C. A. 154.

[5] Notice of facts which would incite a person of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop. Coder v. McPherson, 152 Fed. 951, 953, 82 C. C. A. 99; Wood v. Carpenter, 101 U. S. 135, 140, 25 L. Ed. 807; Parker v. Kuhn, 21 Neb. 414, 421, 426, 32 N. W. 74, 59 Am. Rep. 838; Rugan v. Sabin, 53 Fed. 415, 418, 3 C. C. A. 578.

The facts in Leavenworth v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688, 707, 709, 10 Sup. Ct. 708, 33 L. Ed. 1064, and (C. C.) 25 Fed. 219, 231, are very similar to those averred in this case. After a decree of foreclosure and sale had been made Leavenworth county, a creditor of the defendant brought a suit in equity to set aside the decree on substantially the same grounds asserted in this case. That suit was tried on its merits and dismissed by Mr. Justice Miller with these remarks, which were adopted and approved by the Supreme Court on appeal:

"Though it may be said that the Southwestern Company made no such defense because it was in the control of the Rock Island Directory, which is plausible, if not sound, it is to be observed that this suit was in the court for more than a year; that it is hardly possible that the authorities of the county of Leavenworth did not know of its pendency and who were the directors in its own company; and if it had at any time appeared in that court and sought to make the defense it now sets up it would have been permitted to do so. * * * The case is one not uncommon of a road completed, which in its first years did not earn enough money to pay its running expenses, its necessary repairs, and the interest on its bonded debt. Such roads have often been sold out under foreclosure proceedings, and passing into other hands have become successful and profitable. The original owners see then, when it is too late, that they permitted valuable property to pass from them which they would gladly retain. But courts of equity do not sit to restore opportunities or renew possibilities which have been permitted to pass by the neglect, the ignorance or even the want of means of those to whom they were once presented."

In Sanger v. Upton, Assignee, 91 U. S. 56, 59 (23 L. Ed. 220), Sanger was a stockholder in the Great Western Insurance Company. That corporation was adjudged a bankrupt on February 6, 1872; on April 11, 1872, the bankruptcy court made an order that on or before August 15, 1872, Sanger and other stockholders pay to the assignee in bankruptcy specified amounts which it adjudged to be the portions of their subscriptions unpaid. She failed to pay and the assignee brought an action for the amount the bankruptcy court found due from her. She sought to defend that action on the ground that she did not owe that amount. The Supreme Court said:

"She might have applied to the District Court to revoke or modify the order. Had she done so, she would have been entitled to be heard; but it does not appear that any such application was made. As a stockholder, she was an integral part of the corporation. In the view of the law, she was before the court in all the proceedings touching the body of which she was a member. In

point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case. A different rule would be pregnant with mischief and confusion."

To the same effect is Hutchinson v. Philadelphia G. S. S. Co. (D. C.) 216 Fed. 795.

There is no escape from the conclusion that, certainly as early as October, 1917, when sales of the property of the Denver Company under the New York judgment in the United States court commenced, these stockholders must be held to have had notice of the facts which would have incited a person of ordinary prudence under similar circumstances to an inquiry which, if pursued with reasonable diligence, would have developed the facts which these stockholders aver they discovered between September 1, 1920, and November 1, 1920. The failure and insolvency of the Western Pacific Company, the default in 1915 in payment of interest on the $50,000,000 mortgage bonds which their corporation had guaranteed, the foreclosure of the mortgage which secured them, and the sale of the property of the Western Pacific Company, the action of the Trust Company against their corporation and the judgment of $38,000,000 against it in the New York court in 1917, and its affirmance by the Circuit Court of Appeals in January, 1918, were matters of public notoriety, of which an ordinarily prudent stockholder of the Denver Company would not have been ignorant, and they were sufficient to incite such a person to an inquiry into the reasons for them which, if properly pursued, would have readily developed the personnel of the board of Directors of the Missouri Pacific, of the Western Pacific, and of the Denver Company, their relations and their acts, and the defenses, if any, now suggested to the action on the guaranty and the failure to present such defenses to the court. This and other courts have rendered judgments, sold and disposed of property of the Denver Company, and distributed its proceeds in reliance upon the justice and validity of that judgment, while these petitioners have stood by in silence and given no notice or warning that there was any defect or legal or equitable objection thereto until within two months of this date. The established principles and rules of equity, the decisions of the Supreme Court, and the long silence and delay of the petitioners so conclusively estopped them here that there is no reasonable cause to believe that either in the United States District Court of the Southern District of New York, where they now suggest they desire to present their petition or bill to avoid the judgment of June 14, 1917, nor in any other court of equity, can they succeed in their attempt to set it aside, and on this account it would be useless to permit them to intervene or to delay the sale.

But even if we were permitted to ignore the principles just stated and rested our conclusion on the facts set up in the petition and adduced at the hearing by affidavits and testimony, a like result must follow. These facts, some of which are asserted only on information and belief, fall into two classes: (a) Interlocking directorates of the Missouri

Pacific, Denver & Rio Grande, and Western Pacific Railways, each dominated by George J. Gould and associates; and (b) a personal interest of George J. Gould and associates in bonds of the Western Pacific secured by its mortgage, which caused them to bring about a foreclosure of that mortgage, resulting in a deficit for which the judgment against the Denver & Rio Grande Railroad Company was obtained.

[6] As to the first set of facts they may be summarized in this way: The Missouri Pacific extended from St. Louis to Pueblo, Colo., where it connected with the Denver & Rio Grande Railroad, which latter, with its subsidiary (Rio Grande Western, later consolidated with the Denver & Rio Grande), extended from Pueblo to Salt Lake City or Ogden, Utah. The two roads, while thus under the control of Gould and associates, decided that it was to their interest to extend to the Pacific Coast, and for that purpose Gould and associates organized or caused to be organized the Western Pacific Railroad Company, so that it might build and own the line from the connecting point in Utah to the coast, and the Denver & Rio Grande took substantially all of the Western Pacific's issued stock. In order to raise the necessary funds the Western Pacific issued $50,000,000 of its first mortgage bonds, payment of which and the interest thereon was in practical effect guaranteed by the Denver & Rio Grande; it also purchased $25,000,000 of the Western Pacific second mortgage bonds, and from time to time thereafter took Western Pacific notes for funds advanced to it as needed to the aggregate of several millions more. In 1914 the venture having become more costly and burdensome to the Denver & Rio Grande than had been anticipated, it was believed that something must be done to relieve the Denver & Rio Grande from the constant drain on its treasury. Reorganization of the Western Pacific was considered. The Denver & Rio Grande continued to keep its guaranty by the payment of the semiannual interest on the $50,000,000 Western Pacific bonds until March 1, 1915, when there was default, and foreclosure at once followed.

[7] It must be apparent to every one that these facts standing alone wholly fail to establish fraudulent conduct on the part of the Denver & Rio Grande directorate, or to even raise a strong suspicion of fraud. They are more consonant with uprightness of purpose than otherwise. Interlocking directorates are not fraudulent per se. They are denounced only when used as a means to the accomplishment of a fraudulent end, and it is not contended that the Western Pacific and its construction under the condition named and the extension of credit to it by the Denver & Rio Grande, under permissible statutes of both Utah and Colorado, was the accomplishment of a fraudulent end.

[8] As to the other set of facts it must be said in fairness to counsel for petitioners that they are not directly alleged. They are only intimated with a request that 60 days or so be given petitioners within which they may investigate and decide whether they can then make such allegations with the hope of establishing them by proof. But affidavits of those in a position to know have so completely met and swept away that ground that further pursuit and inquiries are hopeless, and the basis for the petition in that respect seems now groundless.

Another and different ground on which some reliance is placed is the claim mildly put in the petition that there was extraneous fraud in defense of the suit in which the judgment was had in the United States District Court for the Southern District of New York, which was affirmed by the Court of Appeals of the Second Circuit. Here again it is said that Gould induced the fraud by having his own personal counsel defend, and it is said in argument that a defense that would have defeated the cause of action and prevented a recovery against the Denver & Rio Grande on its contract of guaranty was purposely withheld. That defense was the claimed fraud which we have above discussed and think groundless. But, as to this, the petitioners offered no proof; whereas in opposition there is uncontradicted proof that the defense in that suit was under the direction and control of able and skilled counsel of the highest character and integrity who had no relation or connection with the Gould interests, were not his counsel in any respect, and who followed their own judgment in every particular in defending the cause, gave to it their very best effort and untiring attention, and were at all times aided by the defendant in every way and promptly that it could assist.

Our conclusion is that petitioners have failed to present any facts as a basis on which a court of equity would or could cancel and annul the New York judgment, that the facts necessary for that purpose do not exist and never occurred, and hence are not discoverable, and that now to put off the sale is only to defer the inevitable, without benefit to any one. This railroad has now been under receivership for almost three years and more than two-thirds of that time it has been operated by the government. Its physical condition has deteriorated both in rolling stock and safety of roadbeds, and we believe that the order of sale should stand.

The prayer of the petitioners in their petition must be and is denied.

THOME v. LYNCH, Collector of Internal Revenue, and thirty-three other cases.

(District Court, D. Minnesota, Third Division. February 17, 1921.)

Nos. 86–115, 118–121.

1. **Internal revenue ⇐28—Statute prohibiting injunction of tax collection is to prevent delay in obtaining revenue.**
   The object of Rev. St. § 3224 (Comp. St. § 5947), prohibiting a suit to restrain the assessment or collection of any tax, is that the government shall not be delayed or interfered with in the collection of its revenues.
2. **Internal revenue ⇐45—Specific "penalties" on dealers imposed by Prohibition Act are not "tax."**
   The exactions from liquor dealers by National Prohibition Act, § 35, in addition to double the amount of the previous tax on such dealers, are "penalties," since they are so named, are for the purpose of punishment, and are embodied in a penal statute, and not a "tax," which is defined as an enforced contribution for the payment of public expenses.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Penalty; Tax—Taxation.]

3. **Internal revenue ⊜45—Penalty for nonpayment of tax is not a tax.**
The 25 per cent., or 50 per cent., added under Rev. St. § 3176 (Comp. St. § 5899), for nonpayment of internal revenue taxes, is a penalty, rather than a tax, even when the principal amount was itself clearly a tax.

4. **Internal revenue ⊜45—Penalties under National Prohibition Act cannot be collected by distraint.**
Under Rev. St. § 3213 (Comp. St. § 5937), authorizing suit to collect a penalty, which procedure is recognized by National Prohibition Act, § 35, and, under Rev. St. § 3187 (Comp. St. § 5909), authorizing distraint to collect taxes, but not penalties in general, the penalties imposed by National Prohibition Act, § 35, on liquor dealers, in addition to double the existing revenue tax, should be collected either by criminal prosecution or by suit, but not by distraint.

5. **Internal revenue ⊜45—Exaction of former tax from illegal liquor dealers is penalty.**
Under National Prohibition Act, § 35, subjecting dealers in liquor for prohibited purposes to the special taxes prescribed by Rev. St. § 3244 (Comp. St. § 5971), in double the amount therein prescribed, the character of the special taxes was thereby changed from taxes, strictly so called, for the production of revenue, to penalties.

6. **Internal revenue ⊜45—Intention to collect revenue from crime not imputed to Congress.**
An intention to derive revenue from taxes on crime must not be imputed to Congress, if it can be avoided.

7. **Internal revenue ⊜45—Illegal collection of exactions under Prohibition Act can be enjoined; "proceeding for the collection of a tax."**
Since all of the exactions from illegal dealers in prohibited liquors under Prohibition Act, § 35, are penalties, and not strictly taxes for the purpose of revenue, distraint for collection thereof is not a proceeding for the collection of a tax, the restraining of which is prohibited by Rev. St. § 3224 (Comp. St. § 5947).

8. **Internal revenue ⊜45—Exactions under Prohibition Act cannot be collected by distraint.**
Since, before the adoption of the Eighteenth Amendment, the collector of internal revenue could distrain to collect only taxes and certain penalties expressly authorized by Rev. St. §§ 3176, 3187 (Comp. St. §§ 5899, 5909), and National Prohibition Act, § 28, merely confers on the Commissioner of Internal Revenue, for the enforcement thereof, the powers conferred by law for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquors, the exactions from dealers in prohibited liquors, prescribed by National Prohibition Act, § 35, which are penalties, cannot be collected by distraint, especially since the preliminary steps provided by Rev. St. § 3172 (Comp. St. § 5895), and the notice and demand required by section 3184 (section 5906) are not suitable as procedure for the collection of such penalties, and a civil suit may be maintained to recover them under the regulations of the Internal Revenue Department.

9. **Constitutional law ⊜303—Collection of penalties by distraint violates due process of law.**
The collection by distraint of the penalties imposed by National Prohibition Act, § 35, on dealers illegally selling intoxicating liquor, which is made a crime by section 29 of the act, would not be due process of law.

10. **Internal revenue ⊜45—Plaintiffs held entitled to preliminary injunctions against distraint for penalties.**
Bills alleging that the collector of internal revenue was threatening distraint of plaintiffs' property to enforce collection of the penalties prescribed by National Prohibition Act, § 35, that plaintiffs cannot pay the amounts demanded, and that seizure and sale would ruin their business, entitle the plaintiffs to preliminary injunctions, since Rev. St. § 3224 (Comp. St. § 5947), does not bar such relief, the remedies provided by

sections 3225 and 3226 (Comp. St. §§ 5948, 5949) have no application, and the remedy at law by payment of the exactions and suit for recovery is not adequate.

11. Internal revenue ⇐45—Under War-Time Prohibition Act special taxes could not be collected by distraint.

The War-Time Prohibition Act (Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f–3115¹¹/₁₂h), making sales of intoxicating liquor for beverages unlawful and prescribing penalties therefor, either suspended Rev. St. §§ 3176, 3244 (Comp. St. §§ 5899, 5971), and Act Feb. 24, 1919, § 1001 (Comp. St. Ann. Supp. 1919, § 5980o), for the payment of special taxes on retail liquor dealers, or changed the character of the exactions provided in those sections from special taxes to penalties, and in either event those exactions could not be collected by distraint.

12. Courts ⇐351½—Demurrers can be considered as motions to dismiss.

Though demurrers in equity have been abolished by new equity rule 29, demurrers interposed can be considered as motions to dismiss.

In Equity. Separate suits in equity, by Frank Thome, by Cecil A. Stone, by Jacob M. Goldman and Sam Yugend, by Louis B. Wiggen and Andrew Twomey, by Anton Pellowski, by W. J. Ueber, by Isadore Nemerovsky, by F. E. Brown, by Richard Boss, by Henry Weigel, by Martin Schnobrich, by August Beyer, by John Schneider, by John Zischka, by Arthur Schleif, by Joseph Frey, by John Gorecki, by Harry Korcal, by Frank Kudrna, by Clement J. Minor, by Carl F. Thomas, by Frank Carroll, by William Finn and others, by John Jance, by Christ Hellwig and others, by John Froehlingsdorf, by Mathew Laubach, by James C. Tillman, by Ernest E. Miller, by Fred M. Palmer, by Ben Golden, by J. H. Beagle, by Perl J. McCauliff, and by Patrick H. Courtney and others against E. J. Lynch, Collector of Internal Revenue, District of Minnesota. On motions by plaintiffs for preliminary injunctions. Injunctions issued in all of the cases except two, which were dismissed on motion for misjoinder of plaintiffs, without prejudice to the plaintiffs to file separate bills.

Warren Newcombe, of St. Paul, Minn., for plaintiff Thome.

Joel M. Dickey and George G. Chapin, both of St. Paul, Minn., for plaintiffs Stone, Goldman, Yugend, Wiggen, Twomey, Pellowski, Ueber, Brown, and Carroll.

Herbert P. Keller, of St. Paul, Minn., for plaintiff Nemerovsky.

Herbert P. Keller and George G. Chapin, both of St. Paul, Minn., for plaintiff Boss.

Alfred W. Mueller, of New Ulm, Minn., for plaintiffs Weigel, Schnobrich, Beyer, Schneider, Zischka, and Schleif.

Louis P. Johnson, of Ivanhoe, Minn., for plaintiffs Frey, Gorecki, Korcal, and Kudrna.

Gustavus Loevinger and Maurice W. Stoffer, both of St. Paul, Minn., for plaintiff Minor.

Patrick J. Ryan, of St. Paul, Minn., for plaintiffs Finn, Crockett, and O'Day.

Essling & Trost, of Eveleth, Minn., and George G. Chapin, of St. Paul, Minn., for plaintiff Jance.

T. W. McMeekin and Patrick J. Ryan, both of St. Paul, Minn., for plaintiffs Hellwig et al. and Courtney et al.

Gustavus Loevinger, of St. Paul, Minn., for plaintiff Froehlingsdorf.
Connolly & Langslow, for plaintiff Laubach.
Regan & Grogan, of Mankato, Minn., for plaintiff Tillman.
William J. Horrigan, of St. Paul, Minn., for plaintiffs Miller and Palmer.
Milton P. Firestone, of St. Paul, Minn., for plaintiff Golden.
Joel M. Dickey and George E. Ogilvie, both of St. Paul, Minn., for plaintiffs Beagle and McCauliff.
Alfred Jaques, U. S. Dist. Atty., of Duluth, Minn., for defendant.

BOOTH, District Judge. The above-entitled causes, 34 in number, have been heard together, upon motions made by the respective plaintiffs for preliminary injunctions against the defendant, as collector of internal revenue, to restrain him, pending the suits, from seizing and selling the property of the plaintiffs, respectively, under threatened warrants for distraint. The motions have been heard upon the complaints and affidavits, and in most cases upon answers also.

It would serve no useful purpose to set forth in detail the allegations of the various complaints, but the salient facts which appear in all the cases are briefly as follows: That shortly before the filing of the complaint plaintiff received from the defendant a notice in writing stating that certain amounts of "taxes and penalties," etc., had been assessed against the plaintiff, and demanding payment within 10 days; that failure to make payment would be followed by further penalty of 5 per cent. and interest. At the expiration of the period a second notice was received, sent from the defendant, demanding the original amount plus the penalty, 5 per cent., and containing a statement that failure to pay would be followed by seizure and sale of the property.

The complaints further allege that the so-called taxes and penalties are not taxes at all, but in fact penalties solely, sought to be collected from the plaintiffs for assumed or alleged infraction of the National Prohibition Act (41 Stat. 305), or War-Time Prohibition Act (Comp. St. Ann. Supp. 1919, §§ $3115^{11}/_{12}$f–$3115^{11}/_{12}$h); that there has been no adjudication that plaintiffs are liable for the payment of the exactions demanded, and that plaintiffs are not liable therefor; that plaintiffs are unable to pay the amounts demanded; that seizure and sale of plaintiff's property is threatened, unless payment is made, and that such seizure and sale will work irreparable injury; that plaintiffs have no adequate remedy at law; that the proceedings by the Commissioner of Internal Revenue, in assessing said so-called taxes and penalties, and by the collector of internal revenue in attempting to collect the same by warrant for distraint, are illegal and without authority in law, and violative of the Constitution of the United States, especially the Fifth, Sixth, Eighth, and Eighteenth Amendments.

In addition to the foregoing allegations in substance contained in all of the complaints, there are other allegations peculiar to the individual complaints. For example, in some cases, that the information on which the Commissioner of Internal Revenue proceeded to make the assessments of the alleged taxes and penalties was obtained by

persons representing themselves to be agents of the Commissioner; that by force and violence, and without warrant, they entered the residence of plaintiff, and seized and carried away certain personal property of plaintiff, in violation of plaintiff's rights under the Fourth and Fifth Amendments of the Constitution of the United States. In other cases, that plaintiff, prior to said assessment of the alleged taxes and penalties, had been charged with acts in violation of the National Prohibition Act, upon which same acts the assessment of the alleged taxes and penalties was based, and that plaintiff had been examined before the United States commissioner, and bound over to the grand jury; that his case had been considered by the grand jury, and no indictment found; and that the plaintiff had been discharged. In other cases, that prior to the assessment of the alleged taxes and penalties plaintiff had been charged with certain acts in violation of the National Prohibition Act, upon which same acts the said assessment of alleged taxes and penalties was based, and had pleaded guilty to an information or indictment charging said acts, had been fined, and had paid the fine and been discharged. In other cases, that prior to the assessment of the alleged taxes and penalties plaintiff had been charged with committing acts against the War-Time Prohibition Act, being the same acts upon which the assessment of the alleged taxes and penalties was based, had pleaded guilty to an information or indictment charging the commission of the acts, had been fined and paid the fine, and been discharged. In other cases, that prior to the assessment of alleged taxes and penalties plaintiff had been charged with certain acts in violation of the National Prohibition Act, upon which the assessment of the alleged taxes and penalties was based, had pleaded not guilty to the information or indictment charging said acts, and that the case was still pending in court and undetermined.

The answers of the defendant, collector of internal revenue, while admitting the assessment of the alleged taxes and penalties by the Commissioner of Internal Revenue, and the notices and demands and threats of seizure and sale by procedure under warrant for distraint, yet allege that plaintiffs have an adequate remedy at law, by appealing to the Commissioner from the assessment, or by payment of the amounts demanded, and suing for a refund, and, further, that injunction will not lie to restrain the assessment and collection of a federal tax.

Three broad questions arise: First, are these so-called taxes and penalties, which have been assessed by the Commissioner of Internal Revenue and sought to be collected by the collector of internal revenue, in fact taxes, within the meaning of that term as used in section 3224, R. S. (Comp. St. § 5947)? Second, though not a tax within said section, is the proceeding adopted by the Commissioner and collector nevertheless a proper method of collecting the amounts claimed? Third, do the cases at bar call for a preliminary injunction? If the exactions in question are taxes within the meaning of section 3224, R. S., then it is settled that injunction will not lie. Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557.

[1] Section 3224, R. S., reads as follows:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The broad reason underlying section 3224 is that the government shall not be delayed or interfered with in the collection of its revenues. This is clear from the decisions in the cases wherein the statute has been applied. They relate to exactions properly called taxes; that is, exactions for revenue for the uses of the government. Barnes v. Railroad, 17 Wall. 307, 310, 21 L. Ed. 544 (tax on dividends); Snyder v. Marks, 109 U. S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901 (internal revenue tax on tobacco); High v. Coyne, 178 U. S. 111, 20 Sup. Ct. 747, 44 L. Ed. 997 (tax on legacies); Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557 (tax on income).

The exactions for the collection of which proceedings by distraint are threatened in each of the instant cases are made up of various elements or items. For example, in case No. 107, the items are designated as follows:

(1)	$ 25.00,	taxes retail liquor dealer, under section 3244, R. S.;
(2)	25.00,	double tax, under section 35, N. P. A.;
(3)	12.50,	penalty, 25 per cent. on (1) and (2) under section 3176, R. S.;
(4)	1,000.00,	special tax, under section 1001, subd. 12, Act Feb. 24, 1919;
(5)	1,000.00,	double tax, under section 35 N. P. A.;
(6)	500.00,	penalty, 25 per cent. on (4) and (5), under section 3176, R. S.;
(7)	500.00,	specific penalty, under section 35, N. P. A.
	$3,062.50.	
(8)	153.13,	5 per cent. penalty under section 3184, R. S.
	$3,215.63.	

The authority for assessing these various items is supposed to be found in title 2, § 35, of the National Prohibition Act. That section reads as follows:

"Sec. 35. 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 any one 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.

"The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced."

The defendant claims that all of these items are taxes, are collectible as such, by proceedings under warrant for distraint, and are taxes within the meaning of that term as used in section 3224, R. S. The

plaintiffs claim that all of the items or elements are in fact penalties, though some of them are called taxes, that none of them are collectible by proceedings under a warrant for distraint, and they are not taxes within the purview of section 3224, R. S.

[2] A tax has been defined as:

"An enforced contribution for the payment of public expenses." Houck v. Little River Drainage District, 239 U. S. 254, 265, 36 Sup. Ct. 58, 61 (60 L. Ed. 266).

And again:

"Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government." New Jersey v. Anderson, 203 U. S. 483, 492, 27 Sup. Ct. 137, 140 (51 L. Ed. 284).

A penalty involves the idea of punishment. U. S. v. Reisinger, 128 U. S. 398, 402, 9 Sup. Ct. 99, 32 L. Ed. 480; Huntington v. Attrill, 146 U. S. 657, 667, 13 Sup. Ct. 224, 36 L. Ed. 1123. And its character is not changed by the mode in which it is inflicted, whether by suit or criminal prosecution. U. S. v. Chouteau, 102 U. S. 603, 611, 26 L. L. Ed. 246.

In view of the foregoing tests, and from a careful reading of section 35 of the National Prohibition Act, in connection with the other provisions of that act, it would seem clear that the $500 and the $1,000 items mentioned in that section, and one of which is included among the items in the several notices, are clearly penalties, and not taxes. First, they are so named, but this is not conclusive; second, they are for the purpose of punishment, and not for the purpose of revenue; third, they are embodied in a statute which in its most important features is highly penal in nature. That these items are penalties and not taxes, has been lately held by Judge Faris, in the District Court of the United States for the Eastern District of Missouri, in the case of Kausch v. Moore, 268 Fed. 668, and by Judge Foster, in the United States District Court for the Eastern District of Louisiana, New Orleans Division, in the case of Accardo et al. v. Fontenot, 269 Fed. 447. In their conclusions on this point I strongly concur.

[3] It has also been held that the 25 per cent. or 50 per cent. added under section 3176, R. S. (Comp. St. § 5899), is a penalty, rather than a tax, and this has been so held even when the principal amount to which the 25 per cent. or 50 per cent. was added was itself clearly a tax. 17 Ops. Attys. Gen. 433.

[4] It seems to me also clear that, as to the penalties of $500 and $1,000 provided in section 35 of the National Prohibition Act, the method of collection, in the absence of express direction, should be either by criminal prosecution, or by suit, as provided by section 3213, R. S. (Comp. St. § 5937).

In case of the taxes proper, the remedies by suit and by distraint are frequently held to be cumulative. Blacklock v. U. S., 208 U. S. 75, 28 Sup. Ct. 228, 52 L. Ed. 396. But the usual method of collecting a penalty, where the method is not specifically prescribed by statute, is by suit, or other appropriate proceeding in court. 22 Cyc. p. 1680; 30 Cyc. p. 1645; Stockwell v. U. S., 13 Wall. 531, 542, 20 L.

Ed. 491; Less v. U. S., 150 U. S. 479, 14 Sup. Ct. 163, 37 L. Ed. 1150; U. S. v. Stevenson, 215 U. S. 198, 30 Sup. Ct. 35, 54 L. Ed. 153.

Not only is this method expressly authorized and provided by statute (section 3213, R. S.), but the method of procedure by suit is also specifically recognized by the same section 35 of the National Prohibition Act. Furthermore, under section 3187, R. S. (Comp. St. § 5909), the collector of internal revenue, though authorized to collect taxes by distraint, was not authorized to collect penalties in general by that method, but only certain specified penalties, viz., the 5 per cent. penalty added under section 3184 (Comp. St. § 5906), and by express provision in section 3176 the penalty therein provided; both of these penalties being added to taxes, properly so called—that is, exactions for revenue for government use.

[5] The other items of the exactions assessed and demanded in the cases at bar purport to be special taxes under section 3244, R. S. (Comp. St. § 5971), and section 1001, Act Feb. 24, 1919 (40 Stat. 1126 [Comp. St. Ann. Supp. 1919, § 5980*o*]); with the double feature included of section 35 of the National Prohibition Act. These special taxes, under section 3244, R. S., date back to the Act of June 30, 1864 (13 Stat. 223), and the Act of July 13, 1866, 14 Stat. 98; the special taxes under section 1001 of the Act of February 24, 1919, purport to be, and doubtless are, of the same general character. They were all taxes for revenue purposes, and not police regulations. In re Heff, 197 U. S. 488, 505, 25 Sup. Ct. 506, 49 L. Ed. 848. The character of these special taxes (called amounts paid for "licenses" in the act of 1864) was discussed and passed upon by the Supreme Court in the License Tax Cases, 5 Wall. 462, 18 L. Ed. 497. It was held that the licenses "conveyed to the licensee no authority to carry on the licensed business within a state," and that "the requirement of payment for such licenses is only a mode of imposing taxes on the licensed business, and the prohibition, under penalties, against carrying on the business without license is only a mode of enforcing payment of such taxes." The court in its opinion said, referring to the statutes in question:

> "They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for nonpayment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it."

But the character and status of these special taxes, so far as they relate to the manufacture and sale of intoxicating liquor for beverage purposes, have been vitally changed since the adoption and taking effect of the Eighteenth Amendment. There may be serious question whether they have any application since the taking effect of that amendment, so far as concerns persons manufacturing or selling intoxicating liquor for beverage purposes. But, however that may be, these special taxes purport to have been adopted by section 35 of the National Prohibition Act, as part of the procedure of enforcement of the Eighteenth Amendment, and if their character was

changed by the Eighteenth Amendment, this changed character accompanied them into section 35 of the National Prohibition Act.

In other words, though some of the exactions under section 35 of the National Prohibition Act are to be measured by double the amounts which were formerly special taxes under section 3244, R. S., and section 1001, Act Feb. 24, 1919, yet these exactions under section 35, by reason of their new character and status under the Eighteenth Amendment, are no longer taxes, but penalties. As persuasive to this conclusion, note the present character and status of the so-called taxes in section 35.

[6] First. They are no longer exactions for revenue purposes. The whole meaning and aim of the Eighteenth Amendment forbids such construction; and intention to derive revenue from taxes on crime must not be imputed to Congress, if it can be avoided. As was said in the License Tax Cases, supra:

"It is not necessary to decide whether or not Congress may, in any case, draw revenue by law from taxes on crime. There are, undoubtedly, fundamental principles of morality and justice which no Legislature is at liberty to disregard; but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the Legislature."

Second. The character of these special taxes is vitally changed in another respect; they no longer imply "that the licensee shall be subject to no penalties under national law, if he pays." In fact, the contrary is expressly provided by the language of section 35 of the National Prohibition Act.

Third. These so-called special taxes are now in section 35, classed with the penalties of $500 and $1,000, and appear to partake of the character of these items. Indeed, the $500 and $1,000 penalties are called in section 35 "additional" penalties.

Fourth. These special taxes are to be collected with the $500 and $1,000 penalties.

Fifth. The "double the amount" feature provided in section 35 as to these special taxes smacks of penalties.

There is nothing in section 35, except the name "taxes," which indicates any difference in character or purpose between the so-called taxes and the penalties. Names are not controlling. While it may not always be easy to distinguish a tax from a penalty, yet where an exaction is made by governmental authority upon an occupation which is expressly prohibited as criminal by the same governmental authority, and where the exaction is not clearly shown to be made for revenue purposes, it would seem that such exaction must be classed as a penalty, if classification is to have any real meaning.

[7] In view of the foregoing considerations, I have reached the conclusion that all of the exactions provided in section 35, whether called taxes or penalties, so far as they apply to the manufacture or sale of intoxicating liquor for beverage purposes, stand on the same footing and have the same essential character. Also, and in view of the foregoing considerations, it appears more reasonable to hold that all of said exactions in section 35, so far as they apply to the manufacture and sale of intoxicating liquor for beverage purposes, are penalties,

rather than taxes. To hold these exactions to be taxes, and collectible by distraint, would, in the instant cases, be to hold that searches and seizures may be made in private residences upon suspicion, without warrant; that these plaintiffs may be compelled to give evidence against themselves as to the commission of a criminal offense; that they may be punished for alleged violation of law, without having had a day in court; that they may be deprived by administrative officers of a jury trial for an alleged criminal offense. Such results as these I do not believe were intended by Congress.

The answer, therefore, to the first main question, is that the exactions sought to be collected by the collector of internal revenue by distraint against the plaintiffs in the instant cases are penalties, and not taxes, within the meaning of section 3224, R. S., and that Dodge v. Osborn, supra, does not apply.

[8] The second question, whether distraint is the proper method of collecting the exactions demanded, has in effect been answered in the foregoing discussion. As shown above, before the Eighteenth Amendment went into effect, the power of the collector of internal revenue to proceed by distraint was a limited power, limited to taxes proper and certain specified penalties annexed to taxes proper. This limited power in the collector under the internal revenue laws to collect certain penalties by distraint is not enlarged by any provision of title 2 of the National Prohibition Act, but is, on the contrary, curtailed.

Title 2, § 28, of the National Prohibition Act, confers on the Internal Revenue Commissioner and subordinate officers, for the enforcement of the National Prohibition Act, the powers which are conferred by law for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquors. Section 28, therefore, simply gives to the Commissioner and subordinate officers the same powers of enforcement in reference to the National Prohibition Act as they had under existing laws relating to the manufacture and sale of intoxicating liquor. Those powers include the enforcement by distraint in cases of special taxes and certain penalties annexed to them under the internal revenue laws. But if, as we have seen, the exactions under section 35 of the National Prohibition Act are none of them taxes, but all of them penalties, so far as they relate to the manufacture or sale of intoxicating liquor for beverage purposes, then it follows that section 28 gives no power to collect these penalties by distraint.

It may be further observed that the preliminary steps provided in section 3172, R. S. (Comp. St. § 5895), and leading up to the notice and demand in section 3184, R. S., all relating to assessment and collection of internal revenue taxes proper, to wit: The canvassing by the collector; the returns by parties liable to the taxes; the call for such returns; the summons by the collector for examination; and, upon refusal, the making of a return by the collector—were never intended and are not suitable as procedure for collection of penalties such as are prescribed in section 35 of the National Prohibition Act. Nor, indeed, was the procedure under the sections above mentioned followed in the instant cases. Further, that a civil suit is a proper remedy for the collection of these exactions provided for in section 35 of the National

Prohibition Act is recognized by the Internal Revenue Department, but the attitude of that department is shown by the following extracts from Regulation No. 12, revised October 1, 1920, issued by the department. On page 42 is the following:

"In making reports in prohibition cases, a tax and assessable penalty imposed by section 35 of title 2 of the National Prohibition Act should not be overlooked. It will often prove more effective to suppress violations of the law than the actual criminal liabilities imposed."

And again, on page 19, is the following:

"Legal proceedings will not generally be commenced until after the remedy by distraint is exhausted."

[9] Finally, the procedure by distraint for the collection of penalties, as is now threatened in the present cases, is open to grave constitutional objections. As already noted, there has been no adjudication in court as to the liability of the plaintiffs; the liability is denied; there has been no hearing. In many of the cases alleged evidence has been obtained by illegal searches and seizures. Procedure by distraint under such circumstances would not be due process of law. See McBride v. State, 70 Miss. 716, 12 South. 699.

It is true that in the case of Oceanic Navigation Co. v. Stranahan, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013, it was held a valid exercise of congressional power over immigration to provide that a fine of $100 should be paid by persons or companies bringing into the country immigrants afflicted with certain diseases, and also to provide for the imposition of the fine by an administrative officer; but the court in its opinion pointed out that the act punishable was not declared to be an infamous crime, or a crime at all. The court in its opinion said:

"On the face of the section which authorizes the Secretary of Commerce and Labor to impose the exaction which is complained of, it is apparent that it does not purport to define and punish an infamous crime, or, indeed, any criminal offense whatever. Clear as is this conclusion from the text of section 9, when considered alone, it becomes, if possible, clearer when the section is enlightened by an analysis of the context of the act and by a consideration of the report of the Senate committee to which we have previously made reference. * * * Its various sections accurately distinguish between those cases where it was intended that particular violations of the act should be considered as criminal and be punished accordingly, and those where it was contemplated that violations should not constitute crime, but merely entail the infliction of a penalty, enforceable in some cases by purely administrative action and in others by civil suit."

The court for this reason distinguished the case of Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140, in which latter case the court held invalid an act of Congress providing for imprisonment at hard labor by judgment of a Commissioner, without trial, Chinese who had been adjudged by him subject to be deported. The provision of the statute was as follows:

"That any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be and remain in the United States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided."

The court in its opinion said:

"But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the Legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

In the instant cases the alleged acts for which the Commissioner assessed the exactions under section 35 of the National Prohibition Act are crimes, made so by said act, and punishable by fine and by imprisonment for a term of years, as provided in section 29 thereof. It would seem illogical to consider the same acts not criminal for the purpose of assessing and collecting exactions under section 35, and at the same time criminal for the purpose of punishment by imprisonment under section 29. It would therefore seem that the instant cases come within the rule laid down in the Wong Wing Case, and not within the rule laid down in the Oceanic Company Case.

[10] As to the third question, whether the cases at bar call for preliminary injunctions: If the foregoing conclusion as to the nature of the exactions be correct, then section 3224 is not a bar to the relief sought. And for the same reasons the remedies provided in sections 3225 and 3226, R. S. (Comp. St. §§ 5948, 5949), have no application to the instant cases. Nor is it an adequate remedy at law for the plaintiffs to pay the exactions demanded, and sue for recovery. In some cases it is alleged that it is impossible for plaintiffs to pay the amounts demanded, sums running as high as $6,500, and that seizure and sale would ruin plaintiffs' business and means of livelihood. The equities in favor of plaintiffs are strong and persuasive.

In the foregoing discussion I have assumed that section 35 of the National Prohibition Act applies to persons manufacturing or selling intoxicating liquor for beverage purposes. This assumption is strongly questioned by counsel for plaintiffs. I have also assumed that section 3244 and section 3176, R. S., and section 1001 of the Act of February 24, 1919, have not been wholly repealed, but that the exactions provided for in those sections have been properly adopted as a part of section 35 of the National Prohibition Act, and made applicable to parties manufacturing or selling intoxicating liquor for beverage purposes. This assumption, also, is strongly questioned by counsel for plaintiffs, it being claimed by them that those sections of the internal revenue laws since the Eighteenth Amendment went into effect, even if they still exist, have no application whatever to parties manufacturing or selling intoxicating liquor for beverage purposes.

The question also arises whether collection of these exactions provided in section 35 would not result in double punishment for the same offense in all those cases where fines have been already imposed and paid, and the further question whether this double punishment for the same offense is allowable. See Coffey v. U. S., 116 U. S. 436, 445, 6 Sup. Ct. 437, 29 L. Ed. 684; U. S. v. McKee, 1 Dill. 128, Fed. Cas. No. 15,687; U. S. v. Chouteau, 102 U. S. 603, 611, 26 L. Ed. 246.

It is not necessary at this stage of the cases at bar to decide these questions, but the serious character of the questions affords further reason for granting the preliminary injunctions.

There exist divergent views among the District Courts on the questions above discussed. The views which I have expressed are not, I regret, in accordance with those of the District Court for the Eastern District of Pennsylvania, as given in the case of Ketterer v. Lederer (No. 2071, June Session, 1920) 269 Fed. 153, nor with those of the District Court for the Western District of New York, as given in case of Pumilli v. Riordan (November 20, 1920) 271 Fed. —. They do agree, however, to a large extent with the views of the District Court for the Eastern District of Missouri, as given in Kausch v. Moore, 268 Fed. 668, and are, I think, in entire accord with those of the District Court for the Eastern District of Louisiana, as given in case of Accardo v. Fontenot (December 23, 1920) 269 Fed. 447. As bearing upon some of the questions involved, see, also, Frayser & Co. v. Russell, 3 Hughes, 227, Fed. Cas. No. 5,067; Bornio v. Stockdale, Fed. Cas. No. 1,662.

[11] Two of the cases at bar, Nos. 90 and 105, relate to alleged illegal sales of intoxicating liquor prior to the taking effect of the National Prohibition Act, but subsequent to the taking effect of the War-Time Prohibition Act; the assessment of the so-called taxes and penalties being made under sections 3244 and 3176, R. S., and section 1001 of the Act of February 24, 1919. The War-Time Prohibition Act made unlawful all sales of intoxicating liquor for beverage purposes (excepting for export) after June 30, 1919, and prescribed penalties for the violation of the law. The effect of the act was either to suspend, during its continuance as a law, the provisions in sections 3244 and 3176, R. S., and section 1001 of the Act of February 24, 1919, for the payment of special taxes upon the occupation of retail liquor dealers, or to change the character of the exactions provided for in those sections from special taxes to penalties. In either event there would be no authority for collecting the exactions by distraint. The same reasoning applies here as in the cases under the National Prohibition Act, heretofore considered.

[12] In two of the cases at bar, Nos. 110 and 121, demurrers have been interposed for misjoinder of parties plaintiff. Demurrers in equity have been abolished by new equity rule 29, but the demurrers will be considered as motions to dismiss.

The point raised as to misjoinder is well taken, and it is ordered that the motions be granted; the bills will stand dismissed, and the restraining orders be discharged 15 days from the date of filing of this order, without prejudice to the rights of the several plaintiffs meanwhile to file separate bills and to make application for new restraining orders, if they be so advised.

In the cases other than Nos. 110 and 121, the motions for preliminary injunctions are hereby granted, and the clerk of this court is hereby ordered and directed to issue preliminary injunctions in said cases, respectively, enjoining and restraining the defendant and all persons acting under his direction or control, pending the final determination

of said cases, respectively, or until the further order of this court, from seizing and selling any property of said plaintiffs, respectively, under and by virtue of warrants for distraint issued or threatened, as set forth in the complaints in said cases, respectively; said warrants for distraint purporting to be for the purpose of collecting certain alleged taxes and penalties from said plaintiffs, respectively, as set forth in their respective complaints.

The preliminary injunction hereby ordered shall issue on condition, and not otherwise, that within 15 days from the entry of this order each of the plaintiffs, respectively, in said cases, or some one in his behalf, shall make and file in this court a bond or undertaking to the United States, for the benefit of all persons interested, in the sum of $150, with security approved by the clerk of this court, conditioned that said plaintiff will pay such costs or actual damages as may be awarded by this court to such party interested, in case it shall be finally determined that said preliminary injunction was erroneously issued.

In re STELL.

(District Court, E. D. Texas, Paris Division. December 29, 1920.)

No. 387.

1. **Bankruptcy ⟸236—Court can order examination of alleged bankrupt before adjudication.**
   The bankruptcy court has power, under Bankruptcy Act, § 21a (Comp. St. § 9605), when considered with section 7, subd. 9 (section 9591), and under its general equity powers, to order examination of an alleged bankrupt before the adjudication.

2. **Bankruptcy ⟸234—Examination under Bankruptcy Act, § 21a, not ordered for evidence as to insolvency.**
   The examination of an alleged bankrupt, which can be ordered under Bankruptcy Act, § 21a (Comp. St. § 9605), is to show the condition of the estate, and enable the court to discover its extent and whereabouts, and get possession of it, and such examination cannot be employed to obtain evidence for use on the controverted issue of insolvency; examination for such purpose being authorized by section 3d (section 9587).

3. **Bankruptcy ⟸236—Examination before adjudication ordered only on showing of unusual condition of estate.**
   To warrant an order under Bankruptcy Act, § 21a (Comp. St. § 9605), for the examination of the bankrupt before adjudication, where no receiver has been appointed, the application must show some unusual situation with reference to the estate, which makes an examination necessary at that time for the purpose of securing or preserving the assets of the estate.

In Bankruptcy. Involuntary petition in bankruptcy against Lawrence E. Stell, alleged bankrupt. On application by petitioning creditors for an order authorizing the examination of the alleged bankrupt as a witness. Petition denied without prejudice.

William H. Atwell, of Dallas, Tex., for petitioning creditors.

Rasbury, Stennis, Adams & Harrell, of Dallas, Tex., for alleged bankrupt.

ESTES, District Judge. An involuntary petition in bankruptcy has been filed by creditors of the alleged bankrupt, and the allegations of insolvency have been denied by him after the manner provided in the statute. The issue of fact thus raised is to be tried, upon demand of the alleged bankrupt, by a jury. The case, during the October term of the Paris court, was continued by consent of both parties.

The petitioning creditors, since the adjournment of court, have filed an application for an order authorizing the examination, as a witness, of the bankrupt. It is obviously based upon section 21a of the Bankruptcy Law (Comp. St. § 9605); but there are no special circumstances alleged, or any reasons set forth, showing a necessity for this examination prior to an adjudication in the usual way. The alleged bankrupt is resisting the application, upon the grounds, first, that the court is, under the conditions, without authority to order such examination; and, second, that if the court has such authority, the request should be refused, because it does not appear that the examination is for the purpose of securing or preserving assets belonging to the estate.

[1] The Case of Cameron, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448, holds, it seems to me, that the court has authority to issue such order. While the facts in that case show that, before the application was made, a receiver had been appointed to take possession of the property, yet the basis of the decision was the fact that the property of the alleged bankrupt had been put in custodia legis by the filing of the petition in bankruptcy, with a view to its ultimate distribution among creditors.

The argument contained in the case of Fleischer (D. C.) 151 Fed. 81, referred to with approval in the Cameron opinion as illustrating the importance of examinations like this, would apply just as aptly to cases where the effort is to have the examination before adjudication, as afterward; and in the case of Rawlins v. Hall Co., 217 Fed. 884, 133 C. C. A. 596, the Circuit Court of Appeals of this circuit, referring to the Cameron Case, said:

"While the decision may not be broad enough to extend to an involuntary bankruptcy, and one in which there is no receivership, the reasoning of the court would indicate that the bankrupt court had authority to make such an order in an involuntary case in which no receiver had been appointed."

Then, too, I think that section 21a of the Bankruptcy Act itself, when considered with subdivision (9) of section 7 (Comp. St. § 9591), necessarily grants the authority in question, and, in addition, that the general equity powers with which bankruptcy courts are invested make it within the province of the court to authorize such procedure. U. S. v. Liberman (C. C.) 176 Fed. 162.

[2] But it is also clear that the purpose in permitting an examination of this sort is to "show the condition of the estate, to enable the court to discover its extent and whereabouts, and to get into possession of it, in order that the rights of creditors may be preserved." It cannot be employed to obtain evidence for use on the issue of insolvency. "It would be a perversion of the purpose of section 21a to exercise the power it confers to obtain evidence for use on the trial

of the issue of solvency or insolvency." Abbott v. Wauchula Co., 229 Fed. 680, 144 C. C. A. 91. Section 3d of the Bankruptcy Act (Comp. St. § 9587) relates to an examination of the bankrupt for such purposes, and in the Case of Rawlins, supra, the court said:

"The bankrupt court should not permit the examination provided for by section 21a to be perverted from the purpose it is intended to accomplish, viz. the recovery of assets of the estate for distribution, to that of aiding the petitioning creditors in establishing their case for adjudication. It can only happen in rare instances that an examination under section 21a can be useful before adjudication, and in the absence of a receivership, for the purpose of recovering assets, since in that situation there would be no officer of the bankrupt court authorized to seize the assets, when discovered."

[3] So I think it should appear from the application, or from evidence in support of it, that some extraordinary condition exists with reference to the assets of this estate which makes it necessary for an examination to be made at this time. The alleged bankrupt has the right to have the issue of insolvency tried by a jury, and it would be improper to use the authority of the court to require him to submit to an investigation and analysis of his affairs prior to the determination of that issue, unless an unusual condition is shown. Using the language employed in the Rawlins Case:

"We are not prepared to say that there might not be a case when the utility of such an examination for the purpose intended, even in the absence of a receivership, might not be shown."

But the parties applying for such should allege and show that such an examination is necessary to the rights of the parties interested.

The petition is denied, without prejudice to the right of the petitioning creditors to renew same at any time when it may appear that the protection of their interests requires such proceeding.

KETTERER v. LEDERER, Internal Revenue Collector.

(District Court, E. D. Pennsylvania. November 13, 1920.)

No. 2071.

1. **Constitutional law ⇐45—Courts cannot declare tax on unlawful liquor dealer was punishment.**
   The courts cannot declare that the provision of the Volstead Act directing the assessment, levy, and collection of an excise tax as a tax upon those engaged in the occupation or business of dealing in intoxicating liquors, which is made unlawful by the act, was not in fact a tax, but was a punishment for the unlawful act, so that its collection violated the due process of law provision of the Constitution.
2. **Constitutional law ⇐38—Purpose or effect of legislation within congressional powers does not make it unconstitutional.**
   Where the enactment of a statute was within the powers granted to Congress, the fact that its purpose or effect was to accomplish some result which Congress could not directly accomplish, does not invalidate the act, so that the tax on liquor dealers levied by the Volstead Act is not unconstitutional, though intended to aid in enforcing prohibition.

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

In Equity. Suit by Frederick Ketterer against Ephraim Lederer, Collector of Internal Revenue. Motion for temporary injunction denied, and bill dismissed for want of equity.

Lincoln L. Eyre and J. Washington Logue, both of Phildelphia, Pa., for plaintiff.

Webster S. Achey, Asst. U. S. Atty., and Chas. D. McAvoy, U. S. Atty., both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This cause has already been considered upon the motion for a preliminary injunction (269 Fed. 153), and a conclusion reached, which is decisive of the whole controversy between the parties, so far as concerns this court. There are, however, of record two features of the case of which no formal disposition has thus far been made. One is that a restraining order was issued pending the disposition of the motion for a preliminary injunction. This order should be vacated.

It appears that there is also a pending motion to dismiss the bill of complaint. No answer has been filed to the bill, but counsel have stipulated that the motion may be disposed of by the court upon the averments of the bill, interpreted to mean that the collector, acting upon the authority which the defendant asserts is vested in him by the acts of Congress in question, had in due form levied and assessed a tax, notice of the levy and assessment of which is set forth in the bill. The motion to dismiss, therefore, is a challenge of the cause of action set forth in the bill.

The basis of the cause of action which the plaintiff asserts is that a punishment is being inflicted upon him under the guise of the collection of a tax, and that this subjects him to the exercise of an unlawful power, and that it is none the less unlawful, although sanctioned by the language of the Volstead Act (41 Stat. 305), because this provision of that act is unconstitutional, in that it is prohibited by the "due process of law" provisions of the Constitution. We adhere to the views already expressed, which may be summarized as follows:

[1] 1. The act of Congress authorized and directed the defendant to make the assessment against the plaintiff, which was made upon the finding of facts as made. Congress has called this a tax, and directed it to be assessed and collected as such. If Congress had the power to impose this tax, it had the power to declare the occasion for the levy of the tax, and the mode of levy, and upon what fact conditions it should be levied. The bill of complaint calls upon us to make the finding that what Congress has solemnly declared it authorized to be done was not what it authorized to be done but something entirely different. In other and plain words, that although Congress declared it was levying and collecting a tax, it was in fact not levying a tax, but punishing the one who was called a taxpayer for an act which he had committed and which Congress had pronounced to be criminal. We decline to make this finding.

[2] 2. We are unable to grasp the thought intended to be conveyed by the phrase of unconstitutionality other than the thought of the power of Congress to do one thing under the guise of doing another.

If this is the thought, it does not involve any constitutional doctrine in the American sense. It is really no more than a criticism of legislation in the respect that it does violence to sound principles of legislation. A legislative act, which is intended to declare and enforce a police regulation under the guise of levying a tax, may be open to this criticism; but if the Legislature possesses the power to levy a tax, and does levy it, the fact that either the result or the motive of the legislation is to regulate, or indeed to prohibit some trade or occupation, does not in itself render the act unconstitutional. If there is a constitutional prohibition of the legislative power to do something, and the Legislature does the prohibited thing, seeking to usurp the power by calling the thing which it does by a false name, the doctrine of constitutionality may be invoked and applied. For illustration, it may be admitted that Congress is without power to enact a police regulation prohibiting promiscuous dealing in narcotic drugs. The Harrison Drug Act (Comp. St. §§ 6287g–6287q) has had the effect which a police regulation directed against the traffic in such drugs would have had, and the assertion of the fact that it was intended to have this effect, and that such was the motive for its passage, might not be denied, and yet this would not be an admission of its unconstitutionality.

The Fifth Amendment to the Constitution of the United States declares that no man shall "be deprived [among other things] of property without due process of law"; but yet a man's property may be seized to enforce the payment of a tax. This, it seems to us, makes it clear that the thought of the unconstitutionality of the Volstead Act is embraced in the other thought that Congress, when it said it was levying a tax, was not in fact levying a tax, which it had the power to do, but was taking from this plaintiff his property under the false pretense of collecting a tax. This finding of false pretense is the finding which we refuse to make.

In order to give definiteness of date to the decree now made, all orders and decrees heretofore made are vacated, and counsel have leave to submit a decree or decrees refusing the motion for preliminary injunction, and a decree dismissing the plaintiff's bill of complaint for want of equity, and this upon the ground that the acts of the defendant in levying and collecting the tax, the collection of which is asked to be enjoined, are lawful acts, which he is authorized to do by the several acts of Congress, including the Volstead Act, directing the assessment, levy, and collection of excise tax from those engaged in the occupation or business of dealing in intoxicating liquors.

TOPHAM v. TOPHAM et al.

(Court of Appeals of District of Columbia. Submitted October 13, 1920. Decided January 3, 1921.)

No. 3374.

1. **Divorce ⇐129(1)—Suspicion of adultery not sufficient proof.**
Proof to sustain the charge of adultery against the wife must be clear and satisfactory; strong suspicion or circumstance of suspicion not being sufficient.

2. **Divorce ⇐129(16)—Evidence held insufficient to show wife's adultery.**
In a suit for divorce, evidence of improper acts with a man not her husband *held* insufficient to establish adultery by the wife, though tending to create a strong suspicion thereof.

3. **Divorce ⇐229—Evidence held to show wife not entitled to further alimony.**
Where the wife's adultery was not sufficiently established to entitle the husband to the divorce, but it was shown she had been guilty of indiscretions with another man and that she left her husband, though he offered to overlook her conduct, *held*, the husband was entitled to be relieved from further payments of alimony under a prior order of the court.

Van Orsdel, Associate Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Suit for divorce by Richard C. Topham against Anna R. Topham and another. Decree for defendants, and plaintiff appeals. Affirmed.

See, also, 265 Fed. 458, 49 App. D. C. 308.

C. H. Merillat, of Washington, D. C., for appellant.

Edward Stafford, of Washington, D. C., for appellees.

ROBB, Associate Justice. This is a suit for divorce and the custody of an infant child, in which appellant, Richard C. Topham, charges his wife, Anna R. Topham, with adultery, naming defendant Whalen as co-respondent. When appellant, plaintiff below, submitted his evidence, the court, on motion of defendants, entered a decree dismissing the bill. From that decree this appeal was prosecuted.

It appears that plaintiff, at the time the difficulty arose, was employed in a clerical capacity, at the office of the Evening Star. On the evening of March 26, 1918, plaintiff told his wife that he would be downtown late. The wife replied that she intended to go to a dance which the Eastern Star was conducting for the entertainment of the soldiers. She said she had arranged with the people on the floor above to take care of the baby. The apartment occupied by the Tophams was the first floor above the basement. The owner occupied the basement, and the second floor was occupied by a tenant family. The entrance to the apartment was from the street by a flight of steps leading into a public hallway. Folding doors opened from the hallway into the front room. The hall extended back, opening into the bedroom, which was separated from the front room by curtains or portieres, and back of the bedroom was a kitchen and bathroom.

Plaintiff testified that on the evening in question he returned home before 11 o'clock, but on cross-examination he admitted that in his return to the rule to show cause, filed some six months earlier, he had fixed the hour at about 9:30. As he reached the house he noticed that the shades were drawn down and the folding doors leading to the public hall were closed, although he did not testify that either those doors or the door leading into the bedroom from the hall were locked, and it therefore is to be assumed they were not. He entered the bedroom from the hall and was surprised to see a light burning in the front room, and still more surprised to see his wife sitting across the lap of a man in a soldier's uniform, with one arm around him and kissing his ear. Plaintiff got his Savage automatic gun and entered the front room as his wife was getting up from the soldier's lap, whereupon he fired at the floor. The cap exploded, but the gun hung fire. His wife jumped between him and the soldier "and cried not to shoot." The baby was asleep in the bedroom, and the bed there was not disordered, nor did he observe anything disordered about the couch in the front room. His wife had on an evening dress and "the waist part at the bosom was crushed like," and he thought the skirt "did not hang as a skirt should." "When his wife jumped up they had some words, and she said that the soldier was Harry Hurley, was her cousin, and was about to go to the front. * * * He had never had the least suspicion of his wife" prior to that night. He did not deny, under cross-examination, that he had offered the soldier a cigar, although he did testify that he had no recollection of offering him one. Plaintiff took the baby and went to his father's house, a block or so away, where he spent the night. He ascertained the next morning that his wife had no cousin by the name of Hurley, and she then admitted she had deceived him and that the man's real name was Harry Whalen. On the day following he went to the apartment, where he found his wife "packing up things." For the sake of the child he offered to forget and forgive what had occurred, but his wife replied that she was through with him. In the presence of his father and mother he then asked his wife if she was leaving her home, and she replied, "Yes."

While other persons in the house testified that she had been attending dances with Whalen, they did not testify to any circumstances from which an inference of adultery could be drawn, and another witness who had seen them at dances admitted on cross-examination that she had never seen them come or go together.

[1] Twenty-six years ago this court, in Glennan v. Glennan, 3 App. D. C. 333, a similar case, said:

> "In order to sustain a charge which not only brings lasting shame and disgrace to the wife, but also to her innocent children, the proof must be clear and satisfactory. Strong suspicion, or circumstances of suspicion, are not sufficient."

The rule then enunciated has been the guide of the trial court and alluded to as the settled policy of this court. Krous v. Krous, 41 App.

D. C. 200; McKitrick v. McKitrick (Nov. 1919) 49 App. D. C. 109, 261 Fed. 451.

[2, 3] While the evidence in the present case shows that the wife was indiscreet and not sufficiently mindful of her position as a married woman, it goes no farther, in our view, than to create "strong suspicion or circumstances of suspicion," and therefore fails to sustain the burden imposed by the rule adhered to in this court. Even though adultery has not been established, however, the evidence does disclose such an utter lack of appreciation by the appellee of the duties and responsibilities of a wife and mother that we think her husband should be relieved from any further payments of alimony under the prior order of this court, and that order accordingly is set aside.

The decree is affirmed, with costs.

Affirmed.

VAN ORSDEL, Associate Justice, dissents.

HEALD et al. v. DISTRICT OF COLUMBIA.

(Court of Appeals of District of Columbia. Submitted June 5, 1920. Decided January 3, 1921.)

No. 3307.

1. **Constitutional law ⇐42—That act was invalid, as taxing foreign securities, cannot be urged by owner of domestic securities.**
   In an action for the repayment of a tax levied and collected under District of Columbia Appropriation Act March 3, 1917, § 9, on property located within the District, where plaintiffs were residents of the District, plaintiffs cannot raise the objection that that act imposes a similar tax on property outside the District, which is unconstitutional, since it does not follow that, if the act were unconstitutional in that respect, it would be void as to persons and property clearly subject to taxation.

2. **Constitutional law ⇐42—Contention that tax exemption was too indefinite cannot be raised by those not claiming under it.**
   The objection that District of Columbia Appropriation Act March 3, 1917, § 9, levying a tax was unconstitutional, because the exemption therein of certain stocks was too indefinite for intelligent application, cannot be raised by plaintiffs, who alleged no fact that would bring the shares of stock held by them within the exemption.

Appeal from the Supreme Court of the District of Columbia.

Action by John C. Heald and others, committee of the person and estate of Eugene Peters, against the District of Columbia, for the repayment of a tax. From a judgment sustaining a demurrer to the declaration, plaintiffs appeal. Affirmed.

A. S. Worthington and Vernon E. West, both of Washington, D. C., for appellants.

Conrad H. Syme and F. H. Stephens, both of Washington, D. C., for the District of Columbia.

ROBB, Associate Justice. Appeal from a judgment in the Supreme Court of the District sustaining a demurrer to the declaration, in which the plaintiffs, appellants here, residents of the District, sought the repayment of a tax levied on certain intangible personal property held by them as committee of the person and estate of Eugene Peters, also a resident of the District; the contention of plaintiffs being: (a) That the act under which the tax was levied is unconstitutional and wholly void; and (b) that the question whether the stocks, held by them in the several corporations named in their return to the District assessors, are taxable, can only be determined at a trial of the case.

Section 9 of the District of Columbia Appropriation Act of March 3, 1917, 39 Stat. 1004, 1046, amends section 6 of the District Appropriation Act of July 1, 1902, 32 Stat. 590, 617, by adding, after paragraph 2, the following provisions:

"The moneys and credits, including moneys loaned and invested, bonds and shares of stock (except the stock of banks and other corporations within the District of Columbia the taxation of which banks and corporations is herein provided for) of any person, firm, association, or corporation resident or engaged in business within said District shall be scheduled and appraised in the manner provided by paragraph one of said section six for listing and appraisal of tangible personal property and assessed at their fair cash value, and as taxes on said moneys and credits there shall be paid to the tax collector of said District three-tenths of one per centum of the value thereof."

Then follows an exemption of certain deposits of individuals not in excess of $500 in banks, trust companies or building associations. A further provision exempts bank notes or notes discounted by any bank or banking institution, savings institution or trust company, savings institutions having no capital stock, building associations, firms, relief associations, secret and beneficial societies, labor unions, labor union relief associations, beneficial organizations paying sick or death benefits from funds received from voluntary contributions or assessments, and life or fire insurance companies having no capital stock. It is then provided that the tax shall not apply—

"to the shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege, but all such corporations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed, and taxed."

[1] Appellants base their contention that the act is unconstitutional upon the ground, first, that it provides for the taxation of property situated outside the district; and, second, that the exemption list quoted is incapable of intelligent definition. While it appears, from appellants' brief, that the District authorities have construed the act as only authorizing the taxation of property within the District, thus following an established principle of construction (Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297; Petri v. Commercial Bank, 142 U. S. 644, 12 Sup. Ct. 325, 35 L. Ed. 1144), our first inquiry properly is whether appellants have brought themselves within the class as to which the act, if given one interpretation, is void. They are residents of the District and the property taxed is within the District, and hence clearly subject to the provisions of this law.

Should it ultimately be determined that Congress, disregarding the authoritative rulings of the Supreme Court of the United States, intended in this act to tax here property located elsewhere, it by no means would follow that as to persons and property clearly subject to taxation here the act would be void. El Paso v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106. Therefore the failure of appellants to bring themselves within the class as to which, under their contention, the act is void, deprives them of the right to maintain this suit. We shall do no more than cite the cases which, in our view, sustain our position. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 544, 545, 34 Sup. Ct. 359, 58 L. Ed. 713; Jeffery Mfg. Co. v. Blagg, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364; Arkadelphia Mill. Co. v. St. L. S. W. Ry. Co., 249 U. S. 134, 149, 39 Sup. Ct. 237, 63 L. Ed. 517.

[2] Appellants have alleged no facts that would bring the shares of stock held by them within the exception relative to stock of business companies, which by reason of or in addition to incorporation receive no special franchise or privilege, and we therefore do not discuss that phase of the case.

The judgment must be affirmed, with costs.

Affirmed.

FITTS v. DAVIS.

(Court of Appeals of District of Columbia. Submitted October 7, 1920. Decided January 3, 1921.)

No. 3347.

Libel and slander ⇐19—Statement plaintiff cast "aspersions" on another held not actionable; "reflecting."

In the minutes of a parish meeting, a statement that another spoke in defense of a former pastor as related to certain aspersions cast upon him by plaintiff, who immediately disclaimed any intention of reflecting upon the pastor, the word "aspersions," which may mean the making of calumnious report or may mean nothing more than criticism or censure, in view of its use in the same sentence with the word "reflecting," which connotes censure only, must be given its latter meaning; so that a declaration for libel, charging that the writer of the minutes thereby accused plaintiff of circulating slanderous reports against the pastor, stated no cause of action.

[Ed. Note.—For other definitions, see Words and Phrases, Reflect.]

Appeal from the Supreme Court of the District of Columbia.

Action for libel by Charles W. Fitts against Charles P. Davis. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

H. S. Barger, of Washington, D. C., for appellant.

J. H. Ralston, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment in the Supreme Court of the District in a libel suit, sustaining a demurrer to the declaration.

The declaration, after setting forth that plaintiff, appellant here, is a member of the bar of the District and a member in good standing of the parish of the Murray Universalist Society of this city, avers that the defendant, appellee here, composed and published a libel in the following words:

"Rising to a question of personal privilege, Mrs. L. G. Powers spoke in defense of Dr. Van Schaick as related to certain aspersions cast upon him by Mr. Fitts, who in reply disclaimed any intention of reflecting upon Dr. Van Schaick."

It then is averred that these words were—

"a part of the certain minutes by him [defendant] made and prepared of a certain meeting of the members of said parish held on, to wit, the 30th day of April, A. D. 1919, and reported and caused the same to be spread upon, and made a part of, the pursuant minutes of the said meeting of said parish. * * *"

It is further averred that defendant intended, by the words quoted, to charge plaintiff at this parish meeting with having publicly cast unlawful and slanderous aspersions upon Dr. Van Schaick, a former pastor of the parish, and that the result was to "create the impression in the minds of great numbers of persons, who have read and heard the same read from the said minutes of said parish, that the plaintiff

is guilty of having cast improper, unlawful, and slanderous aspersions upon the said John Van Schaick"; that defendant knew these words to be untrue, and that the plaintiff was injured thereby.

It is apparent from the averments of the declaration that at a meeting of this parish society plaintiff indulged in remarks concerning a former pastor of the parish, and that Mrs. Powers, presumably a member of the society, construing these remarks as a criticism of the former pastor, "spoke in defense of" him. Whereupon plaintiff "in reply disclaimed any intention of reflecting upon Dr. Van Schaick." While there is no direct averment that defendant was the secretary of the society, it is clear from the declaration that he must have been acting in that capacity, for no mere interloper would have had authority to keep the "minutes" of the meeting. That the words quoted formed a part of the official minutes of the society appears from subsequent averments of the declaration, wherein is stated the effect upon persons "who have read and heard the same read from the said minutes of said parish."

It now is insisted that, because of the use of the word "aspersions," in making up the minutes of the meeting, defendant intended to charge plaintiff with having slandered the former pastor. We think this a tempest in a teapot. The former pastor is not complaining, and the minutes themselves credit the plaintiff with an immediate disclaimer of anv intention of reflecting upon him. While "aspersions" may mean the making of a calumnious report, the word may imply nothing more than criticism or censure. In view of the context, it is apparent to us that the word was here used in the latter sense. That defendant used the word in the sense of mere criticism is apparent from his subsequent use of the word "reflecting" in the same sentence. "Reflecting," as so used, connotes "censure," and, as the word was used synonymously with "aspersions," no greater scope should be given to the former expression in the minutes than to the one used later. Any possible doubt, therefore, as to the meaning the defendant intended to convey by the use of the word "aspersions," was immediately removed by his characterization of the same language as "reflecting." The demurrer, then, admits nothing more than that defendant, while acting secretary of the society, reported in his minutes that, after plaintiff had made certain criticisms of the former pastor, another member spoke in defense of the latter, and that plaintiff then stated that no reflection had been intended. The averments of the declaration present no cause of action, and the judgment must be affirmed. Caldwell v. Hayden, 42 App. D. C. 166.

Affirmed, with costs.

MEMORANDUM DECISIONS

COPEMAN v. EMERSON. (Court of Appeals of District of Columbia. Submitted November 9, 1920. Decided January 3, 1921.) No. 1321. Appeal from the Commissioner of Patents. Interference proceeding between Lloyd G. Copeman and William F. Emerson. From a decision of the Commissioner of Patents, awarding priority of invention to Emerson, Copeman appeals. Affirmed. Milans & Milans and C. J. O'Neill, all of Washington, D. C., for appellant. C. W. Fairbank, of New York City, for appellee.

PER CURIAM. This appeal is from the decision of the Commissioner of Patents awarding priority of invention to appellee. We have examined the record, and find no error. The decisions of all the tribunals below are in accord. No novel questions of law are presented. We find it unnecessary, therefore, to enter into a review of the facts, which are carefully considered in the opinions below. The decision is affirmed. Affirmed.

In re KUHN. (Court of Appeals of District of Columbia. Submitted November 15, 1920. Decided January 3, 1921.) No. 1334. Appeal from the Commissioner of Patents. In the matter of the application of Harry A. Kuhn for a patent. From a decision of the Commissioner of Patents, refusing six claims, the applicant appeals. Affirmed. R. D. Totten, of Pittsburgh, Pa., for appellant. T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

ROBB, Associate Justice. Appeal from a decision of the Commissioner of Patents, refusing six claims for a patent on a machine for mining coal; the ground of the decision being that no patentable advance has been made over the prior art. We have carefully considered the points made in appellant's brief, as elucidated by his argument at the hearing of the case, and, being convinced that the decision of the Patent Office tribunals was right, we affirm it upon the grounds stated by them. Affirmed.

In re MURRAY. (Court of Appeals of District of Columbia. Submitted November 10, 1920. Decided December 6, 1920.) No. 1332. Appeal from the Commissioner of Patents. Application by C. Edward Murray, Jr., for a patent for improvements in the construction of rubber tires. From a decision of the Commissioner of Patents, rejecting the application for lack of novelty, the applicant appeals. Affirmed. Alfred M. Houghton, of Washington, D. C. (D. V. Mahoney, of Oakland, Cal., on the brief), for appellant. T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

PER CURIAM. Appellant appeals from the decision of the Commissioner of Patents, denying him a patent for certain improvements in the construction of rubber tires. We agree with the unanimous opinions of the tribunals below in holding that nothing patentable is disclosed over the prior art. The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as by law required. Affirmed.

In re SCHWEINERT et al. (Court of Appeals of District of Columbia. Submitted November 8, 1920. Decided January 3, 1921.) No. 1323. Appeal from the Commissioner of Patents. In the matter of the application of Maximilian Charles Schweinert and another for the patent of a tire valve. From a decision of the Commissioner of Patents, refusing to grant the patent, applicants appeal. Affirmed. E. V. Myers and G. R. Thompson, both of New York City, and Milans & Milans, of Washington, D. C., for ap-

pellants. T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

PER CURIAM. Appeal from the refusal of the Commissioner of Patents to grant a patent for a tire valve. We agree with the Commissioner that the applicant has made no patentable advance over the prior art. The decision is affirmed. Affirmed.

ANDERSON, Internal Revenue Collector, v. NEW YORK LIFE INS. CO.* (Circuit Court of Appeals, Second Circuit. December 20, 1920.) No. 148. In Error to the District Court of the United States for the Southern District of New York. Action by the New York Life Insurance Company against Charles W. Anderson, Collector of Internal Revenue, to recover an excise tax paid under protest. The case was tried on an agreed statement of facts, resulting in judgment for plaintiff, and defendant brings error. Affirmed. See, also, 257 Fed. 576; 262 Fed. 215; 263 Fed. 576. Addison S. Pratt, Sp. Asst. U. S. Atty., of New York City, for plaintiff in error. James H. McIntosh, of New York City, for defendant in error. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed in open court.

BARNHART et al. v. BARNHART. (Circuit Court of Appeals, Sixth Circuit. January 14, 1921.) No. 3456. Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge. Interpleader between Carrie F. Barnhart and Orville F. Barnhart and others to determine the right to the proceeds of an insurance policy. Decree awarding the proceeds to Carrie F. Barnhart, and Orville F. Barnhart and others appeal. Affirmed. Fred L. Carhart, of Marion, Ohio (Carhart & Warner, of Marion, Ohio, on the brief), for appellants. Thomas L. Gifford, of Toledo, Ohio, for appellee.

PER CURIAM. An insurance benefit certificate which had been payable to appellee as beneficiary, was transferred by the assured, so as to make the appellants beneficiaries. Upon the assured's death, the money was paid into court, and the old and the new beneficiaries were caused to interplead. The court below set aside the transfer, upon the ground that the insured was mentally incompetent and was unduly influenced. Appellants now insist that the burden of proof rested strongly on appellee and was not met; but, quite regardless of the burden of proof, the record creates no such belief of error by the trial court, who saw and heard many of the witnesses, as will justify a reversal. The decree is affirmed.

BERWIND-WHITE COAL MINING CO. v. PENNSYLVANIA R. CO. (Circuit Court of Appeals, Second Circuit. December 15, 1920.) No. 43. Appeal from the District Court of the United States for the Southern District of New York. Libel by the Berwind-White Coal Mining Company against the Pennsylvania Railroad Company. Decree for respondent, and libelant appeals. Affirmed. Macklin, Brown, Purdy & Van Wyck, of New York City (P. M. Brown, of New York City, of counsel), for appellant. Burlingham, Veeder, Masten & Fearey, of New York City (C. I. Clark and Frederick Pennel, both of New York City, of counsel), for appellee. Before WARD, ROGERS and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

BONNIE-B Co., Inc., v. GIGUET et al. (Circuit Court of Appeals, Second Circuit. November 10, 1920.) No. 57. Appeal from the District Court of the United States for the Southern District of New York. Suit in equity by Bonnie-B Company, Incorporated, against Julien Giguet and the F. W. Woolworth Company. Decree for defendants, and plaintiff appeals. Affirm-

*Certiorari granted 254 U. S. —, 41 Sup. Ct. 449, 65 L. Ed. —. Writ recalled and certiorari denied 254 U. S. —, 41 Sup. Ct. —, 65 L. Ed. —.

ed. For opinions below, see 269 Fed. 272, 275. Steuart & Perry, of New York City (J. L. Steuart and Sidney Perry, both of New York City, of counsel), for appellant. Rogers, Kennedy & Campbell, of New York City (D. Campbell and Martin A. Schenck, both of New York City, of counsel), for appellee Giguet. Davies, Auerbach & Cornell, of New York City, for appellee F. W. Woolworth Co. Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

The BROOKLYN. (Circuit Court of Appeals, Second Circuit. November 10, 1920.) No. 8. Appeal from the District Court of the United States for the Eastern District of New York. Suit in admiralty by Walter Clyde against the ferryboat Brooklyn; the Union Ferry Company of New York & Brooklyn, claimant. Decree for respondent, and libelant appeals. Affirmed. Foley & Martin, of New York City (G. V. A. McCloskey and James A. Martin, both of New York City, of counsel), for appellant. Macklin, Brown, Purdy & Van Wyck, of New York City (P. M. Brown, of New York City, of counsel), for appellee. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

COMMERCIAL PACIFIC CABLE CO. v. PHILIPPINE NAT. BANK. (Circuit Court of Appeals, Second Circuit. December 8, 1920.) No. 34. Appeal from the District Court of the United States for the Southern District of New York. Bill by the Commercial Pacific Cable Company against the Philippine National Bank. From a decree granting an injunction (263 Fed. 218), defendant appeals. Affirmed. Giffin & Hannon, of New York City (N. F. Griffin and John W. Hannon, both of New York City, of counsel), for appellant. William W. Cook, of New York City (C. E. Hughes, of New York City, of counsel), for appellee. C. Marvin, of Washington, D. C., and Frederick M. Brown, of New York City, for the War Department, amici curiæ. Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. This is an appeal from a decree of Judge Mayer granting an injunction. 263 Fed. 218. In this court counsel for the government of the Philippine Islands and for the Bureau of Insular Affairs were heard as amici curiæ. The decree appealed from concerns only the privileges granted to the government under the Post Road Act in respect to rates and priority of transmission. It does not consider the right of the Bureau of Insular Affairs to transmit in the government code any cablegrams between the bank and the Governor General of the Philippine Islands, if it thinks it desirable to do so because of their governmental character, but at the ordinary rates and without priority. The decree is affirmed.

MANTON, Circuit Judge, concurs in result.

HASTORF v. LEONHARD MICHAEL BREWING CO. (Circuit Court of Appeals, Second Circuit. November 10, 1920.) No. 20. Appeal from the District Court of the United States for the Eastern District of New York. Suit in admiralty by Albert H. Hastorf against the Leonhard Michael Brewing Company. Decree for respondent, and libelant appeals. Affirmed. For opinion below, see 248 Fed. 835. Foley & Martin, of New York City (G. V. A. McCloskey and James A. Martin, both of New York City, of counsel), for appellant. Macklin, Brown, Purdy & Van Wyck, of New York City (P. M. Brown, of New York City, of counsel), for appellee. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

HINES, Director General of Railroads, et al. v. VISCOSE CO. (Circuit Court of Appeals, Third Circuit. January 20, 1921.) No. 2579. Appeal

from the District Court of the United States for the Eastern District of Pennsylvania; Thompson, Judge. Suit for injunction by the Viscose Company against Walker D. Hines, Director General of Railroads, and others. Decree for complainant, and defendants appeal. Reversed, in conformity to answer by the Supreme Court to certified question whether the District Court had jurisdiction, which question the Supreme Court answered in the negative. 254 U. S. —, 41 Sup. Ct. 151, 65 L. Ed. —. See, also, 263 Fed. 726. Charles Myers, F. Markoe Rivinus, Henry Wolf Bikle, and Theodore W. Reath, all of Philadelphia, Pa. (John Hampton Barnes, of Philadelphia, Pa., of counsel), for appellants. Harold Shertz, of Philadelphia, Pa., for appellee. Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

PER CURIAM. The Viscose Company filed in the District Court a bill of complaint against Walker D. Hines, Director General of Railroads, L. W. Baldwin, Regional Director, and certain carriers, reciting the act of the Director General of Railroads in supplementing and amending a certain freight classification, and praying (1) that they be enjoined from putting into effect and enforcing the provisions of the same, being Supplement No. 2 to Consolidated Freight Classification No. 1, designed to cancel the existing classification of artificial silk as a commodity of freight; (2) that they, the carrier defendants, be enjoined from refusing to accept from the Viscose Company artificial or fibre silk for transportation under classifications which existed prior to the effective date of said Supplement No. 2, or under such other classification as may be put into effect thereafter; and (3) that the defendants be enjoined from amending rule 3 of the said classification that artificial or fibre silk shall no longer be acceptable for transportation by said defendant carriers as freight. The court issued a preliminary injunction as asked by the first and second prayers of the bill, and, on final hearing, made the same perpetual. The defendants appealed. In order to be guided to a proper decision of the controversy appearing from the record, this court certified to the Supreme Court of the United States, under section 239 of the Judicial Code (Comp. St. § 1216), the following question or proposition of law: Did the District Court have jurisdiction to decide the matter raised by the complainant's bill and thereupon to annul the said action of the Director General of Railroads and enjoin the carriers from complying therewith? The Supreme Court (254 U. S. —, 41 Sup Ct. 151, 65 L. Ed. —) has answered the question in the negative. Therefore we direct that the decree below be reversed.

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PER CURIAM. Decree affirmed.

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⇐2 **(U.S.D.C.Ohio)** Laws not repealed by National Prohibition Act.—U. S. v. Sacein Rouhana Farhat, 33.

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⇐2 **(U.S.D.C.Pa.)** Additional tax in case of violation of Liquor Law valid.—Ketterer v. Lederer, 153.

⇐6 **(U.S.C.C.A.Mich.)** Tax on testamentary transfers is not "direct tax."—Shwab v. Doyle, 321.

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⇐7 **(U.S.D.C.Tex.)** Creation of trust to lessen tax liability *held* legal.—Weeks v. Sibley, 155.

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